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REMOVAL JURISDICTION OVER MASS ACTIONS

Mallory A. Gitt

Abstract: The mass action provision in the Class Action Fairness Act of 2005 provides a federal forum for certain state court litigation that resembles class actions but otherwise could not be removed. The provision is triggered when state court plaintiffs propose a joint trial of common legal or factual issues. But defining what constitutes that triggering event has proved difficult for federal courts. They have not used a uniform framework to determine when they have subject matter jurisdiction over the purported mass action, and have lacked a common interpretation of the statutory language to begin the inquiry. That lack of coherence has created confusion for litigants and potentially upset the balance of power between federal and state courts. This Comment proposes a uniform framework for federal courts to use in construing their subject matter jurisdiction in mass action cases.

INTRODUCTION

Mass actions exist because Congress did not trust state courts to properly adjudicate aggregate litigation.¹ Mass actions were not a formal kind of litigation before Congress passed the Class Action Fairness Act of 2005² (“CAFA”), but were created to stanch the tide of abusive class action litigation—at least in Congress’ view.³ Legislation was necessary because, according to Congress, an out-of-control system of class action litigation had led to unfair results⁴ and large payouts to greedy plaintiffs’ attorneys.⁵ State courts in particular kept “cases of national importance out of Federal court”⁶ by applying their governing class action rules “inconsistently” and “inadequate[ly] supervis[ing]”⁷ aggregate litigation. And stringent diversity jurisdiction rules further kept many defendants from removing such suits to federal court.⁸ Through CAFA, Congress gave defendants a new avenue by which to federalize state court

1. Aggregate litigation “encompass[es] the various procedural techniques used to litigate civil claims on a mass or collective basis in such a way as to yield preclusion.” RICHARD A. NAGAREDA ET AL., *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* 25 (2d ed. 2013).

2. *See generally* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

3. S. REP. NO. 109-14, at 46 (2005).

4. *Id.* at 4.

5. *Id.*

6. Class Action Fairness Act of 2005, 119 Stat. at 5.

7. S. REP. NO. 109-14, at 4.

8. *See* Class Action Fairness Act of 2005, 119 Stat. at 5; S. REP. NO. 109-14, at 5.

litigation. Defendants could now remove state litigation that merely resembled a class action.

A mass action is a different procedural device than a class action.⁹ However, the mass action device aggregates litigation so that it generally operates the same way as a class action.¹⁰ A mass action is formed when plaintiffs bring together—or, in the words of the statute, propose a joint trial of common issues of fact or law¹¹—state court suits.¹² The joined suits must also meet CAFA's other jurisdictional requirements, including numerosity and amount in controversy.¹³ When plaintiffs make a "proposal," the defendant may remove the suits as one consolidated suit to federal court.¹⁴ It has been unclear, however, what is a proposal and how—if at all—federal courts should interpret the effects of the "proposal" the plaintiffs have made when the courts determine whether they have subject matter jurisdiction.¹⁵

Despite the contention that mass actions would be a rarely used procedure,¹⁶ the mass action provision has become the subject of intense litigation.¹⁷ As that litigation has wended its way through the courts, defining the contours of the mass action provision has been a challenging process. One court described the mass action provisions as "an opaque, baroque maze of interlocking cross-references that defy easy interpretation."¹⁸ Another called the provisions a "Gordian knot."¹⁹ Still another stated simply, "CAFA as a whole, and the mass action provision in particular, is confusing."²⁰

For their part, litigants—both plaintiffs and defendants—are litigating

9. Compare 28 U.S.C. § 1332(d)(11) (2012), with FED. R. CIV. P. 23.

10. However, mass actions are not subject to the Federal Rules of Civil Procedure—namely Rule 23—that govern class actions. See Rudy Perrino, *How CAFA Expands Federal Jurisdiction to Include Certain Mass Actions*, in THE CLASS ACTION FAIRNESS ACT: LAW AND STRATEGY 202 (Gregory C. Cook ed., 2013).

11. 28 U.S.C. § 1332(d)(11) (2012).

12. See *id.*

13. See generally 28 U.S.C. § 1332(d).

14. 28 U.S.C. § 1332(d)(11).

15. See, e.g., *Parson v. Johnson & Johnson*, 749 F.3d 879, 885 (10th Cir. 2014); *In re Abbott Labs., Inc.*, 698 F.3d 568, 570 (7th Cir. 2012); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009).

16. See, e.g., 2 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 6:24 (5th ed. 2013) [hereinafter *NEWBERG ON CLASS ACTIONS*].

17. See, e.g., *Mississippi ex rel. Hood v. AU Optronics Corp.*, ___ U.S. ___, 134 S. Ct. 736 (2014); *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc).

18. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1198 (11th Cir. 2007).

19. *Lowery v. Honeywell Intern., Inc.*, 460 F. Supp. 2d 1288, 1293 (N.D. Ala. 2006).

20. *Cooper v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312, 1314 (M.D. Fla. 2008).

to test the boundaries of federal court jurisdiction over mass actions. Plaintiffs have attempted to keep their suits in state court by structuring them to avoid CAFA's federal jurisdiction triggers.²¹ Defendants have removed to federal court on novel theories. For example, they have argued that the number of real parties in interest meets the 100-plaintiff threshold that CAFA requires²² and that a bellwether trial is in effect a "joint trial."²³ In 2013, the Supreme Court decided *Standard Fire Insurance Co. v. Knowles*,²⁴ which demonstrates the gamesmanship CAFA in general has engendered. A class action plaintiff in state court stipulated that the putative class would not seek damages above \$5 million.²⁵ In doing so, he sought to avoid CAFA's \$5 million amount-in-controversy threshold.²⁶ The district court found that damages would have exceeded that amount but for the putative class member's stipulation, but that because damages were below the threshold, there could be no federal court jurisdiction over the action.²⁷ The Supreme Court disagreed, holding that a plaintiff could not stipulate to any limit on the amount of damages it would pursue when there was a putative class because there was no class yet that could be legally bound.²⁸ Thus, the contours of CAFA jurisdiction—including under the mass action provision—are still being worked out in the federal courts.

It is against this backdrop that this Comment takes up CAFA's less well-understood mass action provision. Litigants have zeroed in on what constitutes a proposal for a joint trial of common legal and factual issues

21. See, e.g., *In re Abbott Labs., Inc.*, 698 F.3d 568, 572 (7th Cir. 2012) (describing plaintiffs' argument that using a bellwether trial would serve only to coordinate the cases for pre-trial purposes, not to fully adjudicate the issues and thereby circumvent federal court jurisdiction under CAFA).

Note that plaintiffs' attempts to avoid CAFA jurisdiction are consistent with the more general concept of forum-shopping, which occurs at the outset of every suit when the plaintiff chooses the initial forum. See Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 168–69 (2000) ("The plaintiff's privilege [of forum selection] is so ingrained in our jurisprudence, and so rarely challenged on its own terms, that it is seldom discussed."). What is particularly interesting about the CAFA context is that courts and litigants are adjudicating what kind of gamesmanship is permissible under this relatively new statute.

22. See, e.g., *AU Optronics Corp.*, 134 S. Ct. at 739 (deciding whether *parens patriae* suits by definition meet CAFA's mass action requirements).

23. *In re Abbott Labs., Inc.*, 698 F.3d at 572–73.

24. *Standard Fire Ins. Co. v. Knowles*, ___ U.S. ___, 133 S. Ct. 1345 (2013).

25. *Id.* at 1347.

26. *Id.* at 1347, 1350.

27. *Id.* at 1348.

28. *Id.* at 1348–50.

in the last several years,²⁹ and thus when a federal court has jurisdiction over a mass action. But the questions raised by the mass action provision do not only concern procedural matters. The questions also implicate fundamental values in our judicial system: the boundaries of power between the state and federal courts;³⁰ the relationship between plaintiffs, who are the masters of their complaints;³¹ and the rights of defendants, who may have a statutory right to have their cases heard in federal court.³²

This Comment addresses two fundamental problems that have emerged when federal courts have construed their jurisdiction under CAFA's mass action provision: (1) that there is no coherent interpretation of what it means to propose that multiple cases "be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact,"³³ and (2) that there is no principled framework for analyzing subject matter jurisdiction in a mass action case. Because the federal courts have not been consistent, there have been real consequences for litigants, as well as for the balance of power between state and federal courts. Thus, this Comment proposes solutions to both of these problems. This Comment builds on existing case law to put forth a coherent definition for what constitutes a proposal for a joint trial—the part of the mass action provision subject to much debate.³⁴ It then proposes a framework for federal courts to determine their subject matter jurisdiction when faced with a purported mass action.

Parts I through III provide necessary background to the interpretive issues that have arisen in mass action cases in federal court. Part I briefly traces the history of class action adjudication, discussing the limits that the Supreme Court imposed on the device in the late 1990s.³⁵ Part II

29. See, e.g., *Parson v. Johnson & Johnson*, 749 F.3d 879, 885 (10th Cir. 2014); *In re Abbott Labs., Inc.*, 698 F.3d 568, 570 (7th Cir. 2012); *Tanoh v. Dow Chem. Co.*, 561 U.S. 945, 952 (9th Cir. 2009).

30. Federalism is defined as "[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government." BLACK'S LAW DICTIONARY 687 (9th ed. 2009).

31. See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) ("[P]laintiff is 'the master of the complaint . . .'" (quoting *Caterpillar Inc. v. Williams*, 483 U.S. 386, 398–99 (1987))).

32. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3641 (3d ed. 2008) (discussing how a defendant may statutorily remove a case from state court to federal court, even though the state court is the plaintiff's preferred forum).

33. 28 U.S.C. § 1332(d)(11)(B)(1) (2012).

34. See, e.g., *Parson*, 749 F.3d at 887–89 (construing the statute's joint proposal language); *In re Abbott Labs., Inc.*, 698 F.3d at 572–73 (same); *Tanoh*, 561 U.S. at 953 (same).

35. See generally, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v.*

then addresses why litigation that merely resembled a class action became a political target and what Congress sought to achieve in passing CAFA. It particularly focuses on Congress' view of state courts in the run-up to CAFA's passage and why that led Congress to include mass actions in the statute. It also discusses at length CAFA's mass action provision.³⁶ Part III discusses underlying assumptions of federal court subject matter jurisdiction, including the federal courts' willingness to go beyond pleadings and investigate their jurisdiction,³⁷ using fraudulent joinder as an example. This Part provides useful context for understanding how some federal courts have deviated in the mass action context from their standard approach to construing subject matter jurisdiction.

Part IV reconciles the primary mass action decisions in the federal courts, concluding that the courts have developed two interpretive approaches: one that facilitates an expansive grant of federal court jurisdiction in mass action cases, and one that facilitates a narrow grant of jurisdiction. The approach that a court uses is important because it determines as a threshold matter whether a group of state court cases is a mass action and thus whether a federal forum is available to the litigants. This Part argues that neither approach is completely reconcilable with how federal courts interpret their diversity jurisdiction in other contexts, and argues that bringing coherence to this area of law would benefit both litigants and courts. It concludes by asserting that the Supreme Court's recent decision in *Mississippi ex rel Hood v. AU Optronics Corp.*,³⁸ although it squarely addresses CAFA's mass action provision, does not much affect mass action litigation beyond *parens patriae*³⁹ suits.

Part V proposes a framework that the federal courts should employ in construing their subject matter jurisdiction in mass action cases. It argues that this framework is contemplated by CAFA itself, and, in any case, adheres to traditional principles in subject matter jurisdiction doctrine and affords due deference to state courts. It calls for federal courts—on their own motion if necessary—to require factual evidence of removal jurisdiction if the parties themselves do not provide it, and

Fibreboard Corp., 527 U.S. 815 (1999).

36. 28 U.S.C. § 1332(d)(11).

37. See, e.g., *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-md-1871, MDL No. 1871, 2014 WL 2011597, at *1 (E.D. Penn. May 15, 2014).

38. *Mississippi ex rel. Hood v. AU Optronics*, ___ U.S. ___, 134 S. Ct. 736, 741 (2014).

39. *Parens patriae* is a “doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit.” BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

the evidence is not apparent from the face of the parties' pleadings that the federal court lacks jurisdiction. When assessing the factual evidence, the federal court should give the same effect to the underlying state court procedural motion that the state court would because existing CAFA case law supports it and federalism requires it. This Comment further grounds the proposed approach in traditional judicial principles in the subject matter jurisdiction context.

I. CAFA: CLASS AND MASS ACTIONS

CAFA's mass action provision concerns the federal courts' ability to hear state court suits.⁴⁰ But this jurisdictional question is not just about the courts' power. Rather, it is animated by the seemingly unfair results that arise from using class action-like litigation to solve large-scale problems.⁴¹ This Part discusses the development of class actions in federal courts before turning to CAFA and the new procedural mass action device that the statute created. The historical background provides context for understanding why litigation that resembled class actions—what became known as “mass actions”—became a political target.

A. *Class Actions in Federal Court*

In a legal system premised on individual rights,⁴² class actions, and litigation that produces similar effects, are an anomaly. They are an exception to the principle “that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”⁴³ The law

40. CAFA is a jurisdictional statute. *See* 28 U.S.C. § 1332(d).

41. *See, e.g.*, discussion of *Amchem* and *Ortiz* *infra* in Part I.A.

42. *See, e.g.*, Tatsuo Inoue, *The Poverty of Rights-Blind Communality: Looking Through the Window of Japan*, 1993 BYU L. REV. 517, 521 (1993) (“Individual liberties and freedoms have become the over-arching concern of the American legal system.”); Frank J. Macchiarola, *Finding the Truth in an American Criminal Trial: Some Observations*, 5 CARDOZO J. INT’L & COMP. LAW 97, 111 (1997) (noting “[t]he tendency of our American legal system to see rights in . . . individual terms”); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 980 (1996) (discussing First Amendment legal philosophy in the context of the “American legal system” and its “constitutional system of individual rights”).

43. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also* *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (quoting *Hansberry* for proposition that “[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 818 (1999) (citing *Hansberry* for the same proposition); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 795 (1996) (“In *Hansberry v. Lee*, we held that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to a judgment

therefore “treats class actions as justified only in limited circumstances.”⁴⁴ It does so with good reason because class actions create a number of tensions: between named and unnamed class members;⁴⁵ between class members and class counsel;⁴⁶ and between courts and litigants.⁴⁷

The 1966 makeover of Rule 23⁴⁸ expanded the scope of class actions and made them readily available to plaintiffs seeking monetary damages.⁴⁹ When the Rules Committee promulgated the new rule, commentators noted that class action devices were ill-suited to solving complex problems like those that arise in mass tort suits.⁵⁰ Despite this seeming limit, class action use expanded throughout the late 1960s and 1970s as parties employed class actions to litigate consumer products liability cases and other mass torts.⁵¹ As the device evolved, class actions and aggregate litigation more generally were employed in a

rendered in an earlier litigation to which they were not parties and in which they were not adequately represented.” (internal citation omitted)); 1 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 1.1 (quoting *Hansberry* for the proposition that “one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by service of process”).

44. GEOFFREY C. HAZARD, JR., ET AL., PLEADING AND PROCEDURE 795 (10th ed. 2009).

45. See 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 9.1 (describing the expectation that an absent class member will sit back and do nothing, while the named party represents the interests of the entire class). Indeed, Federal Rule of Civil Procedure 23(a)(4) requires as a prerequisite that the representative parties fairly and adequately represent the class. FED. R. CIV. P. 23(a)(4) (“(a) One or more members of a class may sue or be sued as representative parties on behalf of all members only if: . . . (4) the representative parties will fairly and adequately protect the interests of the class.”).

46. Class counsel may collude with the represented parties or the defendant, for example, in a way that undermines the unnamed class members’ interests. See, e.g., *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 938 (9th Cir. 2011) (noting that class counsel would have received \$800,000 in putative class settlement, while unnamed parties would have received nothing and defendants would have contributed only \$100,000 under the *cy pres* doctrine to a newly created charity).

47. The court is tasked with protecting the interests of the unnamed class members, which may put it at odds with the litigants who may prefer a different outcome, for example, a universal settlement sought by both the named parties and the defendant. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (“Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests.” (emphasis added) (internal citation omitted))).

48. See FED. R. CIV. P. 23 advisory’s committee’s note to 1966 amendment.

49. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 357–58 (1967); Scott L. Nelson, *CAFA in the Congress: The Eight-Year Struggle*, in THE CLASS ACTION FAIRNESS ACT: LAW AND STRATEGY, *supra* note 10, at 24.

50. David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1252 (2007).

51. David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang 1953–1980*, 90 WASH. U. L. REV. 587, 609–14 (2013).

range of cases never contemplated.⁵² Indeed, aggregate litigation became a regulatory tool when captured government agencies⁵³ would not or could not act,⁵⁴ particularly in consumer protection, securities, antitrust, and employment discrimination cases.⁵⁵ As it did, the tensions inherent in aggregate litigation intensified and led to congressional and executive attempts to rewrite and cabin Rule 23 throughout the 1970s.⁵⁶ Business lobbyists weighed in during this time, arguing that class actions were a “grave economic hazard to business,”⁵⁷ which foreshadowed later arguments in the lead-up to CAFA’s passage.⁵⁸ These efforts were largely unsuccessful, however, and class action law occupied an almost extra-regulatory space throughout this period.⁵⁹

But in the late 1990s, in two class action settlement cases, the Supreme Court first signaled that there were significant concerns with expansively using class action litigation.⁶⁰ A class action settlement “is a judicially crafted procedure”⁶¹ and “is intended not to litigate contested issues but to implement a settlement.”⁶² And usually the parties “agree to settle . . . before the class certification decision is made.”⁶³ In the late 1990s, the Supreme Court determined that the mass tort settlements that came before it in *Amchem Products v. Windsor*⁶⁴ and *Ortiz v.*

52. *See id.* at 592–94.

53. Capture of a regulatory agency “occurs when a regulator becomes too closely connected with the industry that is to be regulated.” CCH International Encyclopaedia of Laws: Cyber Law § 2, 2013 WL 4296521 (C.C.H.) (2012).

54. Marcus, *supra* note 51, at 592–93.

55. *Id.* at 627–39.

56. *Id.* at 611–12.

57. *Id.* (quoting *Hearings on S. 2246, S. 3092, S. 3201 Before the Consumer Subcomm. of the S. Comm. on Commerce*, 91st Cong., 2d. Sess. iii (1970)).

58. *See* Nelson, *supra* note 49, at 40–42.

59. *See* Marcus, *supra* note 51, at 610–12.

60. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–21, 627 (1997) (“[S]pecifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“We hold that applicants for contested certification on [a Fed. R. Civ. P. 23(b)(1)(B)] rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.”).

61. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir. 1995).

62. JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 19 (1998).

63. *Id.* at 20.

64. *Amchem*, 521 U.S. at 629.

*Fibreboard Corp.*⁶⁵ violated due process principles. In both cases, the plaintiff classes sought to remedy a nationwide problem that Congress had not acted to fix—millions of people who had developed asbestos-related injuries during their careers.⁶⁶ The settlements that came before the Court were the culmination of decades of litigation: “plaintiffs’ lawyers” had “honed the litigation of asbestos claims to the point of almost mechanical regularity.”⁶⁷ But the proposed mass settlements troubled the Court because they did not provide an adequate recovery to many people affected by asbestos.⁶⁸ The procedural devices were not adequately constructed to provide sufficient relief and to protect absent class members.⁶⁹

In *Amchem*, a plaintiff class sought settlement certification to “achieve global settlement of current and future asbestos-related claims.”⁷⁰ It contained a “complex agreement designed to compensate certain types of asbestos injuries in a predictable fashion.”⁷¹ The Supreme Court, however, was concerned the settlement did not adequately compensate the plaintiff class.⁷² The class would have been bound by the settlement forever, while the defendants could withdraw after ten years.⁷³ And only a small number of class members could reject the settlement and pursue individual claims; even these plaintiffs, however, could not recover punitive damages.⁷⁴ In addition, the funding mechanism for the settlement did not account for inflation or for costs of

65. *Ortiz*, 527 U.S. at 865.

66. See *Amchem*, 521 U.S. at 597 (“The settlement-class certification we confront evolved in response to an asbestos-litigation crisis.”); *Ortiz*, 527 U.S. at 821 (“Like *Amchem Products, Inc. v. Windsor*, this case is a class action prompted by the elephantine mass of asbestos cases . . .” (internal citation omitted)).

67. *Ortiz*, 527 U.S. at 822.

68. *Amchem*, 521 U.S. at 627 (“The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.”); *Ortiz*, 527 U.S. at 842 (“[T]he greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse.”).

69. See *Amchem*, 521 U.S. at 627 (“[T]he terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants’ liability.”); *Ortiz*, 527 U.S. at 842 (“[T]he greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse . . .”).

70. *Amchem*, 521 U.S. at 597.

71. TIDMARSH, *supra* note 62, at 51.

72. *Amchem*, 521 U.S. at 604 (“Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims.”).

73. *Id.* at 604–05 (“Class members, in the main, are bound by the settlement in perpetuity, while . . . defendants may choose to withdraw from the settlement after ten years.”).

74. *Id.* at 627 (describing how “only a few claimants per year can opt out at the back end”).

advancing medical treatment.⁷⁵ Although the Court rejected the settlement because of these concerns, it noted, “the text of the Rule does not categorically exclude mass tort cases from class certification.”⁷⁶ It did, however, establish that there were significant hurdles to overcome before certification for settlement purposes.⁷⁷

Similarly, in *Ortiz*, the parties sought to certify a class-wide settlement as a Rule 23(b)(1)(B) limited fund⁷⁸ to deal with “the elephantine mass of asbestos cases.”⁷⁹ The Court held that the parties could not show that the proposed fund was actually limited by the company’s financial circumstances, rather than merely by what the company was willing to pay to settle the claims.⁸⁰ The Court also found that the parties had not shown that the class members would be treated equitably in the distribution of the fund.⁸¹ These deficiencies meant the settlement could not proceed and, more importantly, raised questions about whether the device could ever be used to settle similar claims.⁸²

This pair of cases emphatically shows that by the late 1990s there were limits to the problems aggregate litigation could be used to solve.⁸³

75. *Id.* at 626 (“[N]amed parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned.”).

76. *Id.* at 625.

77. The hurdles include ensuring adequate provision for future claimants who might have latent diseases or perhaps allowing class members bound by the settlement to seek relief in court later in some instances, for example. *Amchem*, 521 U.S. at 620–21, 627.

78. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); see also FED. R. CIV. P. 23(b)(1)(B) (“A class action may be maintained if Rule 23(a) is satisfied and if: (1) prosecuting separate actions by or against individual class members would create a risk of: (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.”).

79. *Ortiz*, 527 U.S. at 821.

80. *Id.* at 860 (“With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members.”).

81. *Id.* at 848 (“[The proposed settlement] showed . . . allocations of assets at odds with the concept of limited fund treatment and the structural protections of Rule 23(a) explained in *Amchem*.”).

82. *Id.* at 821 (“We hold that applicants for contested certification on [a FED. R. CIV. P. 23(b)(1)(B)] rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.”).

83. At the time *Amchem* was being decided, the Standing Committee of the Rules of Practice and Procedure had proposed that Rule 23 be changed to “allow[] certification of settlement classes more easily than litigation classes.” HAZARD ET AL., *supra* note 44, at 879. But given the Court’s decisions in *Amchem* and *Ortiz*, the proposed rule change died in the Committee. *Id.* (“The Proposed Rule died in the wake of *Amchem* and *Ortiz*.”).

In both cases, the Court found that the litigation “defie[d] customary judicial administration and call[ed] for national legislation,”⁸⁴ even though Congress had failed to act after over thirty years of asbestos-related litigation.⁸⁵ When Congress also addressed class action reform during this time, the judiciary had signaled its own discomfort with aggregate litigation.

B. Congress Turns to Class Action (and Class Action-Like) Litigation

As the Supreme Court placed limits on settlements in class action practice in the mid- to late-1990s, Congress also targeted class action (and class action-like) litigation more generally. In the infamous *Bank of Boston* suit in the mid-1990s, at least one member of a class action settlement was charged a \$91.33 “miscellaneous deduction” for attorney fees from his escrow account without his knowledge in exchange for a \$2.19 recovery as a member of the class.⁸⁶ Class counsel received \$8.5 million in costs and fees.⁸⁷ An Alabama state court judge approved the settlement.⁸⁸ The case demonstrated what many people already thought of class actions: that they were egregiously unfair to both plaintiffs and defendants.⁸⁹ Class counsel earned a windfall at the

84. *Ortiz*, 527 U.S. at 821.

85. *Id.* (noting that the first suit for “personal asbestos injury” was filed in federal court in 1967).

86. See Barry Meier, *Math of a Class-Action Suit: ‘Winning’ \$2.19 Costs \$91.33*, N.Y. TIMES, Nov. 21, 1995, at D6; Kamilewicz v. Bank of Bos. Corp., 100 F.3d 1348 (7th Cir. 1996) (underlying suit at issue). The absent class members in the original suit who had recovered little or had to pay out-of-pocket more than their recovery was worth, filed their own class action, alleging that the earlier suit had led to fraud. Meier, *supra*, at D6.

87. Meier, *supra* note 86, at D6.

88. *Id.*

89. See, e.g., Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) (“The class action device, once considered a ‘revolutionary’ vehicle for achieving mass justice, has fallen into disfavor. Numerous courts have become skeptical about certifying class actions. Some have emphasized the pressures on defendants to settle after class certification is granted”); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 76 (2003) (noting the “occasional instances of egregious corruption on the part of attorneys who take advantage of class members and a perception that consumer class actions are not a public good, but a money making scheme for unscrupulous lawyers”); Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 TUL. L. REV. 1655, 1659 (2000) (“[T]he combination of a proplaintiff environment with ample actionable torts and the advent of entrepreneurial litigation in the hands of a well-funded, risk-taking plaintiffs’ bar have combined to create a favorable class action chemistry in the Gulf South.”). But see Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts: 1925–2011*, 3 WM. & MARY BUS. L. REV. 419, 458 (2012) (“[A]buse of judicial discretion is arguably the most egregious risk that defendants will face when defending against class

expense of unsuspecting class members, and provided little benefit to the class members.⁹⁰ This case in particular contributed to a political environment hostile to aggregate litigation.⁹¹

1. *Congress Introduces CAFA*

Congress first introduced CAFA in 1997.⁹² Because the bill was spurred in part by the *Bank of Boston* case,⁹³ the original bill was concerned primarily with class action settlements, and its proposed changes would have altered at the margins the processes for adjudicating those settlements.⁹⁴ Legislation was necessary because, according to Congress, an out-of-control system of class action litigation had led to unfair results for unnamed parties,⁹⁵ significant and unwarranted financial loss for defendants,⁹⁶ and large payouts to greedy plaintiffs' attorneys.⁹⁷ Class actions caused "irreparable injury" and "collusive" settlements,⁹⁸ and they "failed to benefit class members while enriching attorneys."⁹⁹

Members of Congress believed that state courts had enabled the problem. After the 1966 enactment of Rule 23, class action litigation expanded in state courts¹⁰⁰ as those courts followed the spirit of the new, expansive federal rule.¹⁰¹ In doing so, state courts kept "cases of national importance out of Federal court," showed "bias against out-of-State defendants," and made "judgments that impose[d] their view of the law on other States and [bound] the rights of the residents of those States."¹⁰² State courts also applied their governing rules "inconsistently" and

actions.").

90. See, e.g., Daniel Fisher, *Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little*, FORBES (Dec. 11, 2013, 8:46 AM), <http://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing/>.

91. See Nelson, *supra* note 49, at 27.

92. *Id.* at 26.

93. *Id.* at 27.

94. *Id.* ("[T]his earliest iteration of CAFA was limited in scope and contained none of the jurisdictional provisions that eventually became CAFA's primary legislative battleground.").

95. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 5.

96. *Id.*

97. *Id.*

98. Nelson, *supra* note 49, at 33 (quoting H. REP. NO. 105-702, at 6 (1998)).

99. *Id.* at 40.

100. *Id.*

101. *Id.* at 24.

102. Class Action Fairness Act of 2005, 119 Stat. at 5.

“inadequate[ly] supervis[ed]”¹⁰³ class actions. Some states had become “magnet jurisdictions,” where plaintiffs and their attorneys flocked for favorable class action treatment.¹⁰⁴

In addition to the favorable environment state courts created for plaintiffs, stringent diversity jurisdiction rules kept many suits in state court.¹⁰⁵ “[P]laintiffs who wished to avoid removal to a federal court . . . had only to choose at least one named class representative who was a citizen of the same state as a defendant, or add one defendant that was a citizen of the same state as the named class representatives.”¹⁰⁶ These suits would then stay in state court where they were more likely to be certified¹⁰⁷ and result in a plaintiff-friendly (and plaintiff *attorney*-friendly) outcome.¹⁰⁸

The 1997 version of CAFA did not contain any jurisdictional provision.¹⁰⁹ But, in short order, members of Congress sought larger-scale reform of class actions. By 1998, “the idea of expanding federal jurisdiction over class actions had already obtained at least a measure of bipartisan support.”¹¹⁰ The jurisdictional changes gained further traction as Congress came to specifically view states as enabling abusive class action litigation.¹¹¹

CAFA’s supporters wanted class actions litigated in a forum that would be more skeptical of frivolous claims and more reluctant to certify consumer classes than state courts were.¹¹² Interest groups in particular urged Congress to limit the state courts’ use of aggregate litigation for these reasons. For example, the Manhattan Institute, a research group

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

104. *Id.*

105. Before CAFA, litigants in federal court had to demonstrate complete diversity. See Cameron Fredman, *Plaintiffs’ Paradise Lost: Diversity of Citizenship and Amount in Controversy Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV., 1025, 1031 (2006). Complete diversity was difficult to meet in such cases because “jurisdiction-defeating tactics [we]re generally effective.” *Id.*

106. Nelson, *supra* note 49, at 25.

107. S. REP. NO. 109-14, at 5.

108. *Id.* at 13.

109. Nelson, *supra* note 49, at 27.

110. *Id.* at 28.

111. *Id.* at 29–57 (detailing the eight-year evolution of CAFA in Congress prior to its passage).

112. See, e.g., John H. Beisner & Jessica Davidson Miller, *They’re Making A Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL’Y 143, 145–46 (2001); AM. TORT REFORM ASS’N, BRINGING JUSTICE TO JUDICIAL HELLHOLES 2002 (2002), available at www.judicialhellholes.org/wp-content/uploads/2010/12/JH2002.pdf [hereinafter JUDICIAL HELLHOLES 2002].

that promotes “economic choice and individual responsibility,”¹¹³ commissioned a 2001 article calling for federalization of certain state court litigation, based on the experiences of three counties in Florida, Illinois, and Texas.¹¹⁴ The article boldly claimed that state court judges more often sided with plaintiffs because they received reelection contributions from members of the local bar.¹¹⁵

The American Tort Reform Association also joined in with its own report—*Bringing Justice to Judicial Hellholes 2002*.¹¹⁶ A “judicial hellhole” was a jurisdiction perceived as favorable to plaintiffs, and therefore “attract[ed] lawsuits from around the nation.”¹¹⁷ It relied on incendiary anecdotes from trial lawyers and state court judges in making its case that state courts unfairly certified and adjudicated class actions.¹¹⁸ It quoted one trial lawyer as saying that certain jurisdictions were “magic jurisdictions” “where what happens in court is irrelevant because the jury will return a verdict in favor of the plaintiff.”¹¹⁹ In its 2003 update to this report, the Association quoted a West Virginia State Supreme Court Justice as saying, “As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security.”¹²⁰ The United States Chamber of Commerce also urged Congress to reform class actions several times from when CAFA was introduced until it was passed.¹²¹ The pressure from interest groups helped CAFA’s primary

113. *About Manhattan Institute*, MANHATTAN INST., <http://www.manhattan-institute.org/about/> (last visited Oct. 28, 2014).

114. Beisner & Miller, *supra* note 112, at 159.

115. *Id.* at 205.

116. JUDICIAL HELLHOLES 2002, *supra* note 112. A similar report has been published every year since 2002. See *Report Archives*, JUDICIAL HELLHOLES, <http://www.judicialhellholes.org/archives/> (last visited Dec. 28, 2014).

117. JUDICIAL HELLHOLES 2002, *supra* note 112, at 2.

118. *Id.* at 3–5.

119. *Id.* at 3.

120. AM. TORT REFORM ASS’N, BRINGING JUSTICE TO JUDICIAL HELLHOLES 2003, at ix (2003), available at www.judicialhellholes.org/wp-content/uploads/2010/12/JH2003.pdf.

121. See, e.g., Press Release, U.S. Chamber of Commerce, Chamber of Commerce Endorses House Action on Class Action Reform (Sept. 22, 1999), available at www.instituteforlegalreform.com/resource/chamber-of-commerce-endorses-house-action-on-class-action-reform/; Press Release, U.S. Chamber of Commerce, Chamber Applauds Sen. Lincoln’s Co-Sponsorship of Class Action Bill (Apr. 10, 2003), available at www.instituteforlegalreform.com/resource/chamber-applauds-sen-lincolns-co-sponsorship-of-class-action-bill/; Gretchen Morgenson & Glen Justice, *Taking Care of Business, His Way*, N.Y. TIMES, Feb. 20, 2005, at BU1 (mentioning the president and CEO of the U.S. Chamber of Commerce’s role in CAFA’s passage).

supporters in Congress to push for its passage with expanded federal jurisdiction.

Mass actions were added to CAFA to address state court abuses of class action-like litigation.¹²² They were not part of the earliest versions of CAFA, only appearing in the proposed legislation in 2001.¹²³ At that point, mass actions were styled as “private attorney-general actions in which individuals seek relief on behalf of others.”¹²⁴ Commentators note that “Congress’ intent [in including the mass action provision] appears to have been to bring under CAFA large actions in states that do not have specific class action statutes.”¹²⁵ The Senate Committee Report stated that neither Mississippi nor West Virginia at the time had “rules or statutes authorizing class actions.”¹²⁶

With these two drastic additions—expanded jurisdiction and the federalization of state court suits that may have the same effect as class action suits—detractors of aggregate litigation were poised to enact sweeping change.

2. *Congress Passes CAFA*

After attempting to legislate class action reform for eight years in a row,¹²⁷ Congress passed CAFA in 2005.¹²⁸ The statute provided an avenue for more state court suits of “national importance”¹²⁹ to be adjudicated in federal court.¹³⁰ It did so by greatly relaxing the requirements for original diversity jurisdiction¹³¹ and removal from state court to federal court.¹³²

In giving federal courts control over more aggregate litigation,

122. S. REP. NO. 109-14, at 5 (2005). Some argue, however, that many state court practices that were abusive of the class action device had already been reformed by the time CAFA passed. See Sue-Yun Ahn, *CAFA, Choice-of-Law, and the Problem of Legal Maturity in Nationwide Class Actions*, 76 U. CIN. L. REV. 105, 116 (2007) (“Whether from external pressure or internal reform, by the time CAFA was enacted, many of the more egregious examples of class action abuse in state courts had been addressed to some extent by the states themselves.” (footnote omitted)).

123. Nelson, *supra* note 49, at 42.

124. *Id.* (footnote omitted).

125. 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 6:24.

126. S. REP. NO. 109-14, at 13–14.

127. Nelson, *supra* note 49, at 23.

128. See 28 U.S.C. § 1332(d) (2012).

129. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 5.

130. See generally 28 U.S.C. § 1332(d)(11) (2012).

131. See generally 28 U.S.C. § 1332(d).

132. See generally 28 U.S.C. § 1441.

Congress had three primary goals: “[1] to assure fair and prompt recoveries for class members with legitimate claims; [2] to restore the intent of the Framers by expanding federal jurisdiction over inter-state class actions; and [3] to benefit society by encouraging innovation and lowering consumer prices.”¹³³ To accomplish these goals, CAFA expanded federal jurisdiction over class actions, as well as mass actions—a new kind of device encompassing litigation not previously subject to federal court jurisdiction.¹³⁴

The statute fundamentally changed how diversity jurisdiction operates. Before CAFA, the party seeking federal jurisdiction in a diversity class action (whether a named plaintiff or a removing defendant) had to establish a claim for each plaintiff in excess of \$75,000 and the existence of complete diversity among all parties.¹³⁵ These previous requirements created a high barrier for entering federal court. Under CAFA, however, a class action may be adjudicated in federal court if the parties are minimally diverse,¹³⁶ the amount in controversy is in excess of \$5 million when all claims are aggregated,¹³⁷ and there are 100 or more plaintiffs.¹³⁸

In addition, a defendant seeking to remove a case from state to federal court is not subject to the usual—more strict—rules of removal.¹³⁹ CAFA relaxes the traditional removal rules¹⁴⁰ for aggregate litigation in four key ways: (1) it removes a suit from being subject to the one-year limitation in the general removal statute;¹⁴¹ (2) it requires only one defendant to agree to removal;¹⁴² (3) it allows a defendant to appeal a

133. S. REP. NO. 109-14, at 30 (2005).

134. *See, e.g.,* Mississippi. *ex rel. Hood v. AU Optronics Corp.*, __ U.S. __, 134 S. Ct. 736, 744 (2014) (describing the mass action’s role in the CAFA statutory scheme as a “backstop” that aids in effectuating Congress’ “overriding concern” with class actions).

135. *See* 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 6:6 (“The general rule for class actions is th[at] each class member’s claim must independently meet the amount in controversy requirement. This makes it difficult to maintain diversity class actions in federal court as class action cases are typically comprised of small claims.”).

136. 28 U.S.C. § 1332(d)(2)(A)–(C) (2012). Minimal diversity only requires that one plaintiff and one defendant are diverse from each other, *see* 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 6:6, in contrast to complete diversity, which in the class action context had required that every class representative be diverse from every defendant, *see id.* § 6:7.

137. 28 U.S.C. § 1332(d)(2).

138. *Id.* § 1332(d)(5)(B).

139. *See, e.g.,* 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 6:15.

140. *See* 28 U.S.C. § 1441.

141. *Id.* § 1453(b).

142. *Id.*

remand order;¹⁴³ and (4) it allows a defendant to remove even if he is a citizen of the state in which the case was filed.¹⁴⁴ The new rules dramatically skew jurisdiction in favor of federal courts, enabling the forum perceived to be more cautious about certifying and adjudicating class actions¹⁴⁵ to take the reins.

Federal court doors, therefore, have been thrown wide open to aggregate litigation that operates like class actions. And, as a result, “class actions are now more regularly filed in Federal court and defendants can now more easily remove” mass actions “from State to Federal court.”¹⁴⁶ After CAFA’s passage, even its detractors in Congress agree the statute has been successful in achieving its primary aim: “Seven years later, CAFA certainly appears to have achieved its core goal of removing class [and mass] actions from State to Federal courts.”¹⁴⁷

II. MASS ACTIONS: “CLASS ACTIONS IN DISGUISE”

CAFA also envelops state court litigation that otherwise would not be subject to federal court jurisdiction by creating a “backstop”¹⁴⁸—the mass action provision. This backstop ensures that state court suits that may have the same effect as class actions cannot easily escape federal court jurisdiction. That is because “mass actions are simply class actions in disguise”¹⁴⁹ and thus “often result in the same abuses as class actions.”¹⁵⁰

143. *Id.* § 1453(c).

144. *Id.* § 1453(b).

145. S. REP. NO. 109-14, at 5 (2005) (“Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court.”).

146. *Class Actions Seven Years After the Class Action Fairness Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 2 (2012) (statement of Rep. Franks, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary).

147. *Id.* at 3 (statement of Rep. Nadler, Ranking Member, Subcomm. on the Constitution of the H. Comm. on the Judiciary).

148. See *Mississippi, ex rel. Hood v. AU Optronics Corp.*, ___ U.S. ___, 134 S. Ct. 736, 744 (2014) (describing the mass action provision as a “backstop” that prevents litigation that resembles a class action from escaping federal court jurisdiction).

149. S. REP. NO. 109-14, at 47.

150. *Id.* at 46–47.

A. *Creating a Mass Action*

Mass actions simply did not exist before CAFA¹⁵¹ because their underlying substance is rooted in state court procedure. A mass action starts out in state court as multiple suits that involve the same subject matter.¹⁵² Sometimes the same attorneys represent different groups of plaintiffs that eventually end up coming together in the mass action. Similarly, the multiple suits are often against the same defendant. In state court, the plaintiffs or the court may move to consolidate the cases for various purposes before and during trial. At this point—when a state procedural mechanism joins the actions—they may become a mass action (assuming the suit meets CAFA’s other statutory provisions, described *infra* in Part II.A.). Unlike class actions, mass actions need not have been initiated as representative suits and are not subject to the rigorous requirements of Rule 23 once removed to federal court.¹⁵³ Thus, mass actions are unique because they are wholly created from federal statute.

Under the mass action provisions, CAFA allows a defendant to remove state court suits that involve 100 or more plaintiffs’ claims for monetary relief when the plaintiffs propose that the cases be tried jointly.¹⁵⁴ In addition to a proposal for joint trial that brings together at least 100 plaintiffs,¹⁵⁵ every plaintiff in a mass action must have a claim in excess of \$75,000,¹⁵⁶ and the amount of the claims as a whole must be

151. See, e.g., Gregory C. Cook & Jocelyn D. Larkin, *Introduction and Overview*, in *THE CLASS ACTION FAIRNESS ACT: LAW & STRATEGY*, *supra* note 10, at 11 (calling mass actions “the new vehicle” for aggregate adjudication).

152. See, e.g., *Parson v. Johnson & Johnson*, 749 F.3d 879, 885 (10th Cir. 2014) (“The controversy before us began when 702 plaintiffs from 26 different states and the Commonwealth of Puerto Rico filed twelve nearly identical product liability actions against the defendants in the District Court of Pottawatomie County, Oklahoma.”); *In re Abbott Labs., Inc.*, 698 F.3d 568, 570 (7th Cir. 2012) (“Between August 2010 and November 2011 several hundred plaintiffs filed ten lawsuits in Illinois state court . . .”).

153. Perrino, *supra* note 10, at 202.

154. See 28 U.S.C. § 1332(d)(11) (2012).

155. *Id.*

156. See, e.g., *AU Optronics Corp. v. South Carolina*, 699 U.S. 385, 390 (4th Cir. 2012); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1203–05 (11th Cir. 2007); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 678 (9th Cir. 2006). CAFA’s mass action provision thus preserves one of the elements of pre-CAFA diversity jurisdiction—that each plaintiff must have an amount in controversy in excess of \$75,000. For CAFA *class* actions, the amount in controversy is calculated solely by aggregation and no attention is paid to an individual plaintiff’s amount in controversy. Compare 28 U.S.C. § 1332(d)(6) (“In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.”), with *id.* § 1332(d)(11)(B)(i) (stating that “jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount

in excess of \$5 million.¹⁵⁷ CAFA also states that mass actions are defined as class actions for the purposes of removal,¹⁵⁸ so the relaxed requirements for removal also apply to mass actions.¹⁵⁹

Although the mass action provisions' requirements may seem straightforward, they are not. In particular, the requirement that plaintiffs propose a joint trial has created thorny interpretive challenges.¹⁶⁰ Thus, this Comment explores *infra* the proposal as a triggering event that may confer federal court jurisdiction.

B. *Mass Confusion*

Federal courts have been unclear about how they will interpret the mass action provision when they construe their subject matter jurisdiction. Congress directed that CAFA's principles, including those embodied in the mass action section, should be given broad expanse: "[T]he definition of 'class action' is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled 'class actions' . . . Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions."¹⁶¹ Given that the Senate Report accompanying CAFA states that mass actions should be defined as class actions are elsewhere in the statute,¹⁶² Congress presumably intended federal courts to also apply this broad interpretation to mass actions. However, these broad statements leave open many questions, especially because they call for interpreting jurisdiction in a way at odds with how federal courts typically interpret their subject matter jurisdiction. Thus, the battle over the full extent of mass action jurisdiction has been trained

requirements under subsection (a)," which requires an individual to demonstrate an amount in controversy in excess of \$75,000).

157. *See* 28 U.S.C. § 1332(d)(6).

158. *See* 28 U.S.C. § 1332(d)(11)(A).

159. *Id.*

160. *See, e.g.,* *Parson v. Johnson & Johnson*, 749 F.3d 879, 886 (10th Cir. 2014) ("[Defendants] . . . contended that jurisdiction was available under CAFA's 'mass action' provision because . . . plaintiffs had proposed a joint trial of claims involving more than 100 plaintiffs."); *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1222 (9th Cir. 2014) (en banc) ("The parties dispute only whether Plaintiffs' petitions for coordination constitute proposals for the cases 'to be tried jointly' under CAFA."); *In re Abbott Labs., Inc.*, 698 F.3d 568, 570 (7th Cir. 2012) ("The parties petition us to resolve two conflicting district court decisions and decide whether a motion to consolidate and transfer related state court cases to one circuit court through trial constitutes a proposal to try the cases jointly . . .").

161. S. REP. NO. 109-14, at 35 (2005).

162. *See* 28 U.S.C. § 1332(d)(11)(A).

on whether plaintiffs should be able to “game” the system by structuring state court suits to avoid federal jurisdiction.¹⁶³

Neither side has it quite right. Plaintiffs are not entitled in all respects to plead around federal court jurisdiction¹⁶⁴ nor are defendants in all respects entitled to invoke a federal forum.¹⁶⁵ The proper balance, however, is still in flux as different federal courts mark the boundaries differently.¹⁶⁶

Therefore, federal courts have struggled with interpreting the mass action provision, particularly in determining whether plaintiffs have proposed a joint trial and therefore created a mass action. Courts have used colorful language to illustrate their difficulty with this task. One court described the mass action provisions as “an opaque, baroque maze of interlocking cross-references that defy easy interpretation.”¹⁶⁷ Another called the provisions a “Gordian knot.”¹⁶⁸ Still another stated simply, “CAFA as a whole, and the mass action provision in particular, is confusing.”¹⁶⁹ The source of this confusion stems from the unclear language of the statutory triggering event—a proposal for joint trial of common law or fact¹⁷⁰—and how broadly or narrowly federal courts should construe their jurisdiction.¹⁷¹

Congress also recognizes that mass actions have created confusion for the courts.¹⁷² Congress recently noted that the mass action section of CAFA has led to unintended consequences because federal courts have

163. See, e.g., Glenn J. Pogust & Michael L. Gruver, *CAFA Mass Actions: Can Plaintiffs Continue to Game the System?*, PRACTICAL L.J., Dec. 2013–Jan. 2014, at 57 (“In the years since CAFA’s enactment, plaintiffs’ attorneys wishing to avoid federal jurisdiction under CAFA have experimented with various approaches to keep their cases in potentially friendlier state courts.”).

164. Defendants may also have a statutory right of removal. See, e.g., *Eufaula Drugs, Inc. v. Tmesys, Inc.*, 432 F. Supp. 2d 1240, 1241 (M.D. Ala. 2006) (“One statutory right of removal provided to the defendant[is] based on ‘complete’ diversity-of-citizenship jurisdiction. . . . Another statutory right of removal exists under the Class Action Fairness Act of 2005. . . .” (internal citations omitted)).

165. Defendants must demonstrate that there would have been federal court jurisdiction initially before invoking it on removal. See 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 6:15.

166. Compare *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014), with *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012).

167. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1198 (11th Cir. 2007).

168. *Lowery v. Honeywell Intern., Inc.*, 460 F. Supp. 2d 1288, 1293 (N.D. Ala. 2006).

169. *Cooper v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312, 1314 (M.D. Fla. 2008).

170. 28 U.S.C. § 1332(d)(11)(B)(i) (2012).

171. See, e.g., *Parson*, 749 F.3d at 887–89 (construing the statute’s joint proposal language); *In re Abbott Labs., Inc.*, 698 F.3d at 572–73 (same); *Tanoh v. Dow Chem. Co.*, 561 U.S. 945, 953 (9th Cir. 2009) (same).

172. *Class Actions Seven Years After the Class Action Fairness Act*, *supra* note 146.

not uniformly applied its preferred broad interpretation.¹⁷³ Litigants still try to game the system by forum-shopping in both state and federal court, and have been enabled to do so by a Circuit split.¹⁷⁴ Specifically, Congress found that some federal courts have permitted “plaintiffs’ attorneys . . . to avoid CAFA’s requirements by splitting mass actions into groups of 99 or fewer plaintiffs to avoid CAFA’s requirement that mass actions with 100 or more plaintiffs be tried in Federal court.”¹⁷⁵ This has led to forum-shopping in the federal courts, rather than state courts,¹⁷⁶ and demonstrates that federal law has not been uniformly applied as Congress intended.¹⁷⁷

C. Federalism Concerns

In addition to creating confusion about how its language should be interpreted in the courts, the mass action provisions also implicate federalism concerns. Federalism is “the legal relationship and distribution of power between the national and [state] governments.”¹⁷⁸ Federalism may require a federal court to refrain from hearing a constitutional challenge to a state action if federal adjudication would be considered an improper intrusion into the state’s right to enforce its own laws in its own courts.¹⁷⁹ Mass actions thus create questions about whether, as an empirical matter, federal and state courts are equally “fair” to litigants or are equally competent to adjudicate matters that come before them.¹⁸⁰ Although Congress appears to have been aware of the federalism implications of CAFA by including carve-outs for cases

173. *Id.*

174. *See id.* (“One of the problems that has emerged since CAFA’s enactment is a new form of forum shopping. Whereas prior to CAFA plaintiffs’ attorneys filed suit in what were perceived to be the most favorable State courts, after CAFA it appears that attorneys are choosing to file class actions in certain Federal appeals circuits due to a favorable circuit precedent. This is a troubling trend considering that Federal law is supposed to be applied uniformly throughout the country.”).

175. *Id.*

176. *Id.*

177. *Id.*

178. BLACK’S LAW DICTIONARY 687 (9th ed. 2009).

179. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (“Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism.”); *see also* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1049 (6th ed. 2009); Lynn N. Hughes, *Floating Back & Forth with Federalism: Removal and Remand for Proctors*, 18 HOUS. J. INT’L L. 803, 803 (1996) (“The friction of federalism is evident in the endless procedural haggling over which system of courts is the correct place for a suit.”).

180. *See, e.g.*, FALLON, JR. ET AL., *supra* note 179, at 278–83.

of truly local concern,¹⁸¹ the statute nonetheless profoundly reorganizes the balance of power between the federal government and state judiciaries.¹⁸² In doing so, Congress did not hide its belief that state courts were not up to the task of fairly and adequately adjudicating aggregate litigation in their courtrooms.¹⁸³

D. *The Need for Clarity*

While the mass action provisions are less understood,¹⁸⁴ they are increasingly relevant as litigants turn to them to define the limits of the statute's jurisdiction. As commentators have noted, parties who seek to avoid federal court jurisdiction have attempted to limit the number of plaintiffs in a suit to stay below the numerosity threshold.¹⁸⁵ And defendants continue to stretch the limits of the mass action definition to secure federal court jurisdiction.¹⁸⁶ A series of Forbes articles, for example, discussed the different approaches to mass action jurisdiction that have emerged in the Seventh, Eighth, Ninth, and Tenth Circuits.¹⁸⁷ One article noted that the key question was whether these courts were "willing to look beyond the . . . plaintiffs' literal statements and actions,

181. 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (2012).

182. The following cases are not removable to federal court under the mass action provision: claims that arise from a single event in the state in which the action is filed or in a "contiguous" state; the defendant moves to join the plaintiffs' claims; the claims are asserted on behalf of the general public; and claims that are consolidated for pre-trial purposes only. *Id.* § 1332(d)(11)(B)(ii)(I)–(IV).

183. *See* S. REP. NO. 109-14, at 5 (2005).

184. The mass action device is less understood than the class action device in part because it is simply a newer device. As discussed throughout this Comment, it came into existence only with CAFA's passage in 2005. *See, e.g.,* Cook & Larkin, *supra* note 151, at 11. In contrast, the class action device evolved from bills of peace at common-law in seventeenth century England. *See* ZECHARIAH CHAFEE, JR., *Representative Suits—1*, in *SOME PROBLEMS OF EQUITY: FIVE LECTURES DELIVERED AT THE UNIVERSITY OF MICHIGAN 199, 200–01* (1950). In addition, the way courts have described their experiences tackling the mass action provision also shows that the provision is less well understood than the class action device. *See supra* Part II.

185. *See* 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 6:17.

186. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 572–73 (7th Cir. 2012) (accepting defendant's argument that a motion for a bellwether trial is a proposal for a joint trial under CAFA).

187. Rich Samp, *Ninth Circuit Endorses Gaming of Class Action Fairness Act and Creates Circuit Split*, FORBES (Sept. 26, 2013, 11:08 AM), <http://www.forbes.com/sites/wlf/2013/09/26/ninth-circuit-endorses-gaming-of-class-action-fairness-act-and-creates-circuit-split/>; Rich Samp, *Plaintiffs' Bar Effort to Game Class Action Fairness Act Expands to Tenth Circuit*, FORBES (Oct. 31, 2013, 10:02 AM), <http://www.forbes.com/sites/wlf/2013/10/31/plaintiffs-bar-effort-to-game-class-action-fairness-act-expands-to-tenth-circuit/>; Rich Samp, *Eighth Circuit Ruling Deepens Circuit Split on Class Action Fairness Act Circumvention Tactic*, FORBES (Nov. 19, 2013, 1:54 PM), <http://www.forbes.com/sites/wlf/2013/11/19/eighth-circuit-ruling-deepens-circuit-split-on-class-action-fairness-act-circumvention-tactic/> [hereinafter Samp, *Eighth Circuit Ruling*].

expose what they were really up to, and uphold Congress's intent in passing CAFA."¹⁸⁸ And many lawyers have written pieces briefing clients and other practitioners on developments in mass action litigation,¹⁸⁹ to inform them about plaintiffs "manipulat[ing] their lawsuits to circumvent CAFA jurisdiction."¹⁹⁰ Thus, mass actions are increasingly relevant, despite commentators' assertions that they would not be.¹⁹¹ It is therefore important that the federal courts use a uniform framework to construe their jurisdiction under the provision.

This Comment seeks to clarify how federal courts should do that when presented with a purported mass action on removal. Part III discusses federal court subject matter jurisdiction in general to demonstrate that federal courts usually construe their jurisdiction narrowly. It describes some instances, however, in which federal courts will go beyond superficially examining the extent of their subject matter jurisdiction in order to balance the rights of plaintiffs as masters of the complaint and of defendants who are entitled to a statutory right of removal.

III. SUBJECT MATTER JURISDICTION IN THE FEDERAL COURTS

The mass action question is, at bottom, jurisdictional. Litigants have been testing the full expanse of that jurisdiction, and, in doing so, have raised important questions about the boundaries between state and federal courts;¹⁹² between the courts' role in interpreting the law and in

188. Samp, *Eighth Circuit Ruling*, *supra* note 187.

189. *See, e.g.*, Pogust & Gruver, *supra* note 163, at 58.

190. *Id.*

191. *But see* 2 NEWBERG ON CLASS ACTIONS, *supra* note 16, § 6:24 ("Because mass actions tend to occur in jurisdictions without class actions and cannot be called into being by a defendant's joinder motion, they do not arise that frequently.").

192. Removal of a case from state to federal court necessarily implicates the relationship between the state court and federal court systems. *See* *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004) ("[O]ur insistence that diversity removal, powerful as it is, remain within its congressionally marked traces is demanded by principles of comity and federalism—that a state court is to be trusted to handle the suit unless the suit satisfies the removal requirements."); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) ("Because removal jurisdiction raises significant federalism concerns, federal courts are directed to construe removal statutes strictly." (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941))); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 475, 480 (S.D.N.Y. 2013) ("Removal statutes are to be 'strictly construed . . . because removal of a case implicates significant federalism concerns.'" (quoting *In re NASDAQ Market Makers Antitrust Litig.*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996))).

Congress' ability to enact its will through legislation;¹⁹³ and between plaintiffs' role as masters of their complaints and defendants' statutory rights to a federal forum.¹⁹⁴ How federal courts should interpret and confine their jurisdiction underlies all of these inquiries, so this Comment next turns to subject matter jurisdiction in the federal courts.

A. *Carefully Bounding Subject Matter Jurisdiction*

It is a maxim every first-year law student learns: Federal courts are courts of limited subject matter jurisdiction.¹⁹⁵ Because of this limitation, “[f]ederal courts are presumed not to have jurisdiction,”¹⁹⁶ and the presumption prevails because parallel systems of state and national government co-exist in the United States' federal system of government.¹⁹⁷ Once the federal Constitution was enacted, federal courts were only given jurisdiction over limited areas of law as set out in Article III because of concern for existing state court systems.¹⁹⁸ In

193. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (“Article III, § 1, serves both to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’ and to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’” (internal citations omitted)).

194. A defendant may have a right to remove a case from state to federal court if it meets statutory requirements created by Congress. See *Eufaula Drugs, Inc. v. Tmesys, Inc.*, 432 F. Supp. 2d 1240, 1241 (M.D. Ala. 2006) (“One statutory right of removal provided to the defendant[is] based on ‘complete’ diversity-of-citizenship jurisdiction Another statutory right of removal exists under the Class Action Fairness Act of 2005.”) (internal citations omitted); *Feldman v. N.Y. Life Ins. Co.*, No. CIV. A. 97-4684, 1998 WL 94800, at *5 (E.D. Pa. Mar. 4, 1998) (forbidding plaintiffs to “manipulate federal jurisdiction and defeat the Defendant’s statutory right of removal”). However, the plaintiff is the acknowledged “master of the complaint.” See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (noting in the federal question context that “the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.”).

195. See, e.g., *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 (1981) (“Federal courts, unlike state courts, are not general common-law courts”); *Owen Equip. Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (“It is a fundamental precept that federal courts are courts of limited jurisdiction.”).

196. 1 FEDERAL PROCEDURE, L.ED. § 1:12 (2013).

197. “Federal: Of or relating to a system of associated governments with a vertical division of governments into national and regional components having different responsibilities.” BLACK’S LAW DICTIONARY 685 (9th ed. 2009).

198. See *South Carolina v. Regan*, 465 U.S. 367, 396 (1984) (Blackmun, J., concurring) (“The Framers obviously thought that the national government should have a judicial system of its own and that that system should have a Supreme Court. However, because the Framers believed the State courts would be adequate for resolving most disputes, they generally left Congress the power of determining what cases, if any, should be channelled to the federal courts.”); *Hulett v. McMain*, Civil Action No. 9:07cv223, 2008 WL 58971, at *1 (E.D. Tex. Jan. 2, 2008) (“If Congress has not conferred jurisdiction upon the federal courts, the state courts become the sole vehicle for obtaining initial review of some claims.”).

addition, the Framers left the decision whether to establish “inferior” tribunals to Congress—a body made up of individual legislators representing states.¹⁹⁹ It is against this history and structure that all questions of federal court jurisdiction must be examined.

Subject matter jurisdiction is not a purely academic matter because “[w]ithout jurisdiction [a] court cannot proceed at all.”²⁰⁰ Jurisdiction “is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”²⁰¹ It is “inflexible and without exception.”²⁰² Whether a federal court can hear a case involves complex questions of the relationship between the federal government and the states, and of the relationship between the three branches of federal government—executive, legislative, and judicial.

It does not matter that the jurisdictional question is complex and more difficult than a decision on the merits otherwise would be. In a particularly striking example, a unanimous Supreme Court struck down the doctrine of “hypothetical jurisdiction,” which had emerged in some Circuit Courts of Appeals.²⁰³ That doctrine allowed federal courts “to proceed immediately to the merits question, despite jurisdictional objections” when the merits question was easier to resolve and where the party that prevailed on the merits was the same party that would prevail if there was no jurisdiction.²⁰⁴ In this case, the Court was presented with both a jurisdictional issue and a merits question about whether the Emergency Planning and Community Right-To-Know Act of 1986 authorized a private enforcement action for “purely past violations.”²⁰⁵ The Court held that jurisdictional questions are a threshold matter.²⁰⁶ The Court “decline[d] to endorse [the hypothetical] approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.”²⁰⁷ It is unsurprising, then, that federal courts carefully protect the boundaries of their jurisdiction to ensure that they only adjudicate those matters properly before them.

199. See U.S. CONST. art. III.

200. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868).

201. *Id.*

202. *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

203. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

204. *Id.* at 93–94.

205. *Id.* at 86.

206. *Id.* at 94.

207. *Id.*

There are many examples of federal courts—either through their own construction or as directed by congressional mandate—construing their subject matter jurisdiction narrowly to confine the expanse of their power. For example, 28 U.S.C. § 1447(c), a removal statute, requires remand “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction.”²⁰⁸ It takes into account that additional parties might be added and cause jurisdictional defects.²⁰⁹ Once that happens, the court may either retain its jurisdiction by refusing to permit the joinder that would destroy jurisdiction, or allow joinder and then remand the case.²¹⁰ Congress does not direct the federal court to continue with the case if the court does not have jurisdiction.

Similarly, the subject matter jurisdiction issue may be raised for the first time on appeal,²¹¹ which is exceptional in litigation.²¹² It is best explained by the insistence that federal courts act only when they have subject matter jurisdiction. In *American Fire & Casualty Company v. Finn*,²¹³ a defendant removed to federal court and, at that time, resisted the plaintiff’s arguments that the federal court did not have subject matter jurisdiction.²¹⁴ However, the defendant later raised lack of jurisdiction as a ground for removal after the plaintiff won on the merits.²¹⁵ The Supreme Court found this maneuvering permissible because the federal court did not have the power to adjudicate a case improperly removed from state court.²¹⁶ To have found otherwise “would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.”²¹⁷ Thus, these examples show that federal courts carefully police

208. 28 U.S.C. § 1447(c) (2012).

209. *Id.*

210. *Id.* (“If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the state court.”).

211. 13 WRIGHT ET AL., *supra* note 32, § 3522.

212. *Id.*

213. 341 U.S. 6 (1951).

214. *Id.* at 8–9.

215. *Id.*

216. *Id.* at 18.

217. *Id.* However, where a jurisdictional defect is cured before the federal court notices the defect, it may nonetheless enter final judgment, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76–77 (1996) (“[N]o jurisdictional defect lingered through judgment in the District Court. To wipe out the adjudication postjudgment . . . would impose an exorbitant cost on our dual court system.”), and a federal court may rule on personal jurisdiction before it does so on subject matter jurisdiction, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (“Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a

their own jurisdiction to comport with values inherent in our federal system.

Diversity jurisdiction in particular requires federal courts to take special care to ensure the boundaries of their jurisdiction are properly drawn. Because diversity jurisdiction is an aggressive assertion of federal power over ostensibly state issues,²¹⁸ federal courts sitting in diversity employ a number of tools to deal with this tension and ensure proper respect for state courts in the federal system. For example, they may certify questions of state law to state courts to “build a cooperative judicial federalism.”²¹⁹ They also attempt to construe state law as state courts would because “[t]he task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.”²²⁰ When presented with a novel question of state law on which no state court has opined, the federal court will give the effect to the law that it believes the state court would have.²²¹ In doing so, the federal court uses “intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.”²²² These practices illustrate the concern federal courts have with adequately addressing the tension between their jurisdiction and a state’s prerogative to define and develop its own law.

B. *Beyond the Jurisdictional Pleadings*

Tension between plaintiffs and defendants always exists no matter the basis for subject matter jurisdiction. That is because the plaintiff is the

district court appropriately accords priority to a personal jurisdiction inquiry.”)

218. FALLON, JR., ET AL., *supra* note 179, at 1356.

219. *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974). Judicial federalism is “the separation of judicial authority between federal courts and state courts.” POLITICAL ENCYCLOPEDIA OF U.S. STATES AND REGIONS 819 (2009) (Donald P. Haider-Markel ed., 2009).

220. *Tate v. Trialco Scrap, Inc.*, 908 F.2d 974 (6th Cir. 1990) (“[W]e overturn a district court’s conclusions on questions of state law only if they are ‘clearly wrong.’”); *In re Air Crash Disaster Near Chi., Ill.* on May 25, 1979, 701 F.2d 1189, 1196 (7th Cir. 1983) (“Considered dicta of a state supreme court must be given weight by a federal court in ascertaining state law”); *Perkins v. Bd. of Dir. of Sch. Admin. Dist. No. 13*, 686 F.2d 49, 54 (1st Cir. 1982) (“[W]e should look to [state court] statements as indicia of how the state’s highest court might decide.”); *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980) (“The court below, sitting as a federal district court in a diversity action, was obliged to apply the substantive law of the state in which it sat”).

221. *See Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 560 (9th Cir. 2004) (“[W]hen interpreting state law, federal courts are bound by decisions of the state’s highest court.” (quoting *Nelson v. City of Irvine*, 143 F.3d 1196, 1206 (9th Cir. 1998))).

222. *Id.*

master of the complaint, but the defendant may have a statutory right of removal, assuming all of the requirements for jurisdiction are met, and therefore also has some basis for directing the litigation.²²³ The court then must also grapple with this tension when it intersects with the question of whether the court has subject matter jurisdiction. Federal courts have not always been willing to engage in this inquiry, but they started doing so in the modern era to balance these interests.

Because these tensions might have led courts to deviate from strictly construing subject matter jurisdiction, federal courts in the 1800s generally did not inquire into the litigants' tactics when determining whether they had subject matter jurisdiction.²²⁴ The adherence to the maxim that federal courts are courts of limited subject matter jurisdiction was nearly absolute.²²⁵ While this approach respected the powers of the federal and state courts, it did not take into account other concerns. It "ignore[d] the use of techniques that undermined a party's legitimate statutory right to choose a federal forum."²²⁶ Thus, the courts allowed "activities by the state court plaintiff obviously undertaken solely to prevent the federal courts from exercising diversity jurisdiction" through removal.²²⁷ In these instances, only state courts could address the effects of such maneuvers because no federal forum was available.²²⁸ But this rigidity has since been relaxed.²²⁹

Federal courts are now interested in "the whims and tactical concerns of the litigants"²³⁰ when they construe their subject matter jurisdiction. That is, federal courts realize that subject matter jurisdiction is so important that they must—at least to some degree—investigate the parties' claims of subject matter jurisdiction, rather than disposing of

223. 13 WRIGHT ET AL., *supra* note 32, § 3641 (3d ed. 2008) ("If the plaintiff's preference is for a state court, rather than a federal court, he or she simply may file suit in a state court. However, if [all of the requirements for diversity jurisdiction are met], the defendant . . . may thwart the plaintiff's choice of a state forum by removing the suit to the federal court . . .").

224. *See, e.g.*, *Oakley v. Goodnow*, 118 U.S. 43, 45 (1886) (stating that federal courts have "no authority . . . to take jurisdiction of a case by removal from a state court when a colorable assignment has been made to prevent such a removal"); 13 WRIGHT ET AL., *supra* note 32, § 3641.

225. 13 WRIGHT ET AL., *supra* note 32, § 3641.

226. *Id.*

227. *Id.*

228. *See Provident Sav. Life Assur. Soc. v. Ford*, 114 U.S. 635, 641 (1885) ("[It would] be a good defense to an action in a state court to show that a colorable assignment has been made to deprive the United States court of jurisdiction; but . . . it would be a defense to the action, and not a ground of removing that cause into the federal court.").

229. 13 WRIGHT ET AL., *supra* note 32, § 3641 (discussing the evolution of federal courts' inquiring into whether there were efforts by a party to defeat federal jurisdiction).

230. *Id.*

them on facial grounds in all instances. Doing so presents “the difficult question of when following the complex rules of diversity jurisdiction and removal crosses the line that divides permitted gamesmanship from prohibited conduct.”²³¹ Federal courts therefore are willing and able to investigate their jurisdiction in an effort to prevent gamesmanship that would lead the court to adjudicate a matter that it does not truly have jurisdiction over. It also does so when there are plausible allegations that a plaintiff is undermining a defendant’s ostensibly legitimate right to a federal forum.²³² To understand this, it is helpful to briefly discuss how the courts analyze jurisdiction.

The party seeking federal court jurisdiction has the burden of proving it by jurisdictional facts.²³³ Jurisdiction may be attacked by either the party opposing it or questioned by the court on facial or factual grounds.²³⁴ A facial inquiry into subject matter jurisdiction takes all allegations asserting jurisdiction as true because it is the allegations that are at issue, not a contention that jurisdiction cannot be proved.²³⁵ In a factual inquiry, however, the subject is the accuracy of the factual allegations, and the parties must demonstrate facts showing jurisdiction.²³⁶ In doing so, the courts may consider the pleadings and evidence outside of a complaint’s allegations submitted by the parties,²³⁷ including affidavits, declarations, and testimonial evidence.²³⁸ The court can even “conduct a limited evidentiary hearing if necessary.”²³⁹ Further, because the court’s power to hear the case is at issue, the court

231. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-MD-1871, MDL No. 1871, 2014 WL 2011597, at *1 (E.D. Pa. May 15, 2014).

232. *See id.*

233. *See, e.g.,* *Frederico v. Home Depot.*, 507 F.3d 188, 196 (3d Cir. 2007).

234. 5B WRIGHT ET AL., *supra* note 32, § 1350.

235. *Id.*

236. *Id.*

237. *Id.*

238. *See, e.g.,* *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 828 (7th Cir. 2013) (deposition testimony); *Harris v. Rand*, 682 F.3d 846, 851 (9th Cir. 2012) (stating that “a district court may require additional proof” of jurisdictional facts); *Green v. United States*, 630 F.3d 1245, 1248 n.3 (9th Cir. 2011) (“[P]roof of jurisdictional facts may be supplied by affidavit, declaration, or any other evidence properly before the court”); *Paper, Allied-Indus., Chem. & Energy Workers Int’l Union v. Cont’l Carbon Co.*, 428 F.3d 1285, 1292–93 (10th Cir. 2005) (noting that a motion to dismiss for lack of subject matter jurisdiction may take the form of either a facial or a factual attack and that, on a factual attack, “the court must look beyond the complaint and has wide discretion to allow documentary and even testimonial evidence”); 13 WRIGHT ET AL., *supra* note 32, § 3641 (discussing the evolution of federal courts’ inquiring into whether there were efforts by a party to defeat federal jurisdiction).

239. *Smith v. Bd. of Trs. Lakeland Cmty. Coll.*, 746 F. Supp. 2d 877, 888 (N.D. Ohio 2010).

is “entitled at any time *sua sponte* to delve into the issue of whether there is a factual basis to support the . . . exercise of subject matter jurisdiction.”²⁴⁰ This burden must be met by a preponderance of the evidence.²⁴¹

C. *Probing the Litigants’ Claims to Find Fraudulent Joinder*

Despite the fundamental concern with construing subject matter jurisdiction narrowly, federal courts attempt to balance competing interests and therefore do not so narrowly construe their jurisdiction as to ignore all other important litigation principles. Rather, federal courts will pierce the parties’ pleadings to learn about the parties’ litigation strategy. Fraudulent joinder is a particularly helpful guide in creating a jurisdictional framework under the mass action provisions, discussed *infra*.

Fraudulent joinder balances a plaintiff’s ability to plead around federal court jurisdiction,²⁴² the defendant’s statutory right to removal,²⁴³ and the power of the federal courts.²⁴⁴ A common technique to ensure

240. *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 108 (2d Cir. 1997); *see also* *Watson v. Bretz & Coven LLP*, No. 12 Civ. 1441 GBD KNF, 2013 WL 765361, at *3 (S.D.N.Y. Feb. 28, 2013) (“[T]he party invoking federal jurisdiction must support the basis for jurisdiction alleged in its pleadings ‘with competent proof if a party opposing jurisdiction . . . challenges [the allegation] or if the court *sua sponte* raises the question.’” (quoting *Linardos v. Fortuna*, 157 F.3d 945, 947 (2d Cir. 1998))); *Somboonmee v. Holder*, 3:100V167/MCR/EMT, 2011 WL 3625674, at *2 (N.D. Fla. July 18, 2011) (“[A] federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.”); *Cole v. Martin*, No. C-95-20373 RMW, 1995 WL 396844, at *1 (N.D. Cal. June 28, 1995) (“[A] district court may review the complaint and dismiss *sua sponte* those claims premised on meritless legal theories or that that clearly lack any factual basis.”).

241. *See, e.g.,* *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1244 (10th Cir. 2012) (stating a defendant seeking removal under CAFA’s class action provisions must establish the amount in controversy by a preponderance of the evidence); *Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009) (“[A] party seeking to remove under CAFA must establish the amount in controversy by a preponderance of the evidence. . . .”); *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 701 (9th Cir. 2007) (applying “the preponderance of the evidence burden of proof to the removing defendant”).

242. *See* *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (noting in the federal question context that “the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.”).

243. *See* *Eufaula Drugs, Inc. v. Tmesys, Inc.*, 432 F. Supp. 2d 1240, 1241 (M.D. Ala. 2006) (“One statutory right of removal provided to the defendant [is] based on ‘complete’ diversity-of-citizenship jurisdiction Another statutory right of removal exists under the Class Action Fairness Act of 2005.” (internal citations omitted)); *Feldman v. N.Y. Life Ins. Co.*, No. CIV. A. 97-4684, 1998 WL 94800, at *5 (E.D. Pa. Mar. 4, 1998) (forbidding plaintiffs to “manipulate federal jurisdiction and defeat the Defendant’s statutory right of removal”).

244. *See, e.g.,* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (“Article III, § 1, serves both to protect ‘the role of the independent judiciary within the constitutional scheme

that there is no basis for diversity jurisdiction and therefore to prevent a defendant from removing the state court suit to federal court is “to join a party whose presence in the case creates the prohibited cocitizenship on both sides of the litigation.”²⁴⁵ Federal courts developed the fraudulent joinder doctrine to root out gamesmanship that would go too far in the direction of destroying diversity jurisdiction.²⁴⁶ Indeed, pleading to avoid diversity jurisdiction—including under CAFA—“is permitted with some limitations; for example, the joinder must not be fraudulent.”²⁴⁷ It allows the federal court to inquire into the substantive or legal basis for a plaintiff’s claim if there are allegations that a party has been “fraudulently” joined to prevent diversity jurisdiction.²⁴⁸ However, the removing defendant need not show that “the joinder of a nondiverse party was motivated primarily by a desire to remain in state court or to prove that the state court plaintiff’s conduct constituted fraud in some legal sense.”²⁴⁹ But the defendant must show that there is no colorable basis for the plaintiff’s joinder.²⁵⁰

The doctrine came into existence in the early 1900s to respond to “attempts to wrongfully deprive parties entitled to sue in the Federal Courts of the protection of their rights in those tribunals.”²⁵¹ Under the fraudulent joinder doctrine, the question is whether the plaintiff had a reasonable basis for the claim against the non-diverse party: “A defendant is fraudulently joined ‘where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant’ *or* where there is ‘no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.’”²⁵² A federal court faced with the specter of fraudulent joinder “may look only to the contents of the pleadings or the court may choose to look ‘beyond the pleadings’ or to what has been referred to in some judicial opinions as summary-judgment-type evidence, as many district judges have chosen

of tripartite government,’ and to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’” (internal citations omitted)).

245. 13F WRIGHT ET AL., *supra* note 32, § 3641.1.

246. *Id.*

247. *In re Avandia Marketing, Sales Practices & Prods. Liab. Litig.*, No. 07-MD-1871, 2014 WL 2011597, at *1 (E.D. Pa. May 15, 2014).

248. 13F WRIGHT ET AL., *supra* note 32, § 3641.1.

249. *Id.*

250. *Id.*

251. *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 128 (1906).

252. *In re Avandia*, 2014 WL 2011597, at *3 (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990)).

to do.”²⁵³ Thus, the federal courts may engage in either a facial or factual inquiry. When courts do the latter, however, they are careful to note that they should not “pre-try the merits of the case.”²⁵⁴

Thus, federal courts, while concerned with the proper limits of their subject matter jurisdiction, sometimes balance that consideration with the litigants’ strategies. In that balancing, they will go beyond the pleadings and find out what the litigants’ strategy is, even though it may require extra administration on the courts’ part. It is important to the administration of the federal court system because it preserves the narrowness of the federal courts’ jurisdiction as the federal structure contemplates, but it also facilitates Congress’ decision to extend diversity jurisdiction to both plaintiffs and defendants. While some commentators have asserted that CAFA ends the problem of fraudulent joinder in mass and class actions,²⁵⁵ the framework in those cases endures in the mass action context as a helpful example of how federal courts should analyze their jurisdiction when presented with allegations that plaintiffs are gaming diversity jurisdiction. This Comment next turns to that framework.

IV. MASS ACTIONS IN THE FEDERAL COURTS

Congress extended subject matter jurisdiction to certain aggregate state court litigation when it enacted CAFA’s mass action section.²⁵⁶ Situated within the federal diversity statute, litigants—both plaintiffs and defendants— have used the mass action provisions to test the boundaries of federal court jurisdiction.²⁵⁷ Their litigation implicates to what extent plaintiffs may structure their suits to keep them in state court and how the plaintiffs’ procedural maneuvers in state court should be analyzed in determining whether there is federal court jurisdiction upon removal. Three considerations therefore are central to defining the mass action provisions’ contours: (1) the proper scope of federal court jurisdiction; (2) which forum litigants may invoke—state or federal; and (3) how courts should effectuate Congress’ intent.

253. 13F WRIGHT ET AL., *supra* note 32, § 3641.1.

254. *Id.*

255. *See id.* (“Congress’ enactment of the Class Action Fairness Act of 2005 . . . will have the effect of reducing the fraudulent joinder problem in class and mass actions.”).

256. *See* 28 U.S.C. § 1332(d)(11) (2012).

257. *See, e.g.,* Mississippi *ex rel.* Hood v. AU Optronics, __ U.S. __, 134 S. Ct. 736, 741 (2014) (addressing defendant’s argument that there are more than 100 real parties in interest when a state sues under the *parens patriae* doctrine).

The primary difficulty in interpreting the mass action provisions concerns when a group of plaintiffs have proposed a joint trial for common issues of law or fact.²⁵⁸ That is because the federal courts have employed different, and sometimes conflicting, approaches to determine whether there has been such a proposal.²⁵⁹ Indeed, it is difficult to draw strict lines around the different interpretations, which further demonstrates that there is a lack of interpretive coherence in the federal courts' mass action decisions. That lack of coherence has produced a jumbled doctrine and done a disservice to litigants. It has enabled creative attempts to circumvent or create federal court jurisdiction because no guiding principle or analysis has been announced. This Comment comprehensively identifies common threads in the federal courts' attempts so far to define their mass action jurisdiction and to reconcile those threads with the 2014 Supreme Court decision on mass action jurisdiction in *parens patriae* suits. With these fundamental elements in place, the Comment then proposes a framework for construing mass action jurisdiction.

A. *The Formalist Approach and the Expansive Approach*

This Comment proposes that the federal courts' interpretive approaches to the mass action provisions can be defined in two ways: (1) a formal view that is supported by taking the plaintiffs' state court procedural actions at face value and not inquiring into motives or effects; and (2) an expansive view of federal court jurisdiction enabled by piercing the parties' pleadings and assessing the plaintiff's litigation strategy. In reality, the courts' analyses are somewhat novel for each mass action jurisdiction question, but these categories present an analytically helpful starting point. This Part discusses some of the cases falling within these approaches. In doing so, however, the Comment highlights how the lack of coherence in the approaches makes it difficult

258. See, e.g., *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1222 (9th Cir. 2014) (en banc) (“The parties dispute only whether Plaintiffs’ petitions for coordination constitute proposals for the cases ‘to be tried jointly’ under CAFA.”); *Parson v. Johnson & Johnson*, 749 F.3d 879, 886 (10th Cir. 2014) (“[Defendants] . . . contended that jurisdiction was available under CAFA’s ‘mass action’ provision because . . . plaintiffs had proposed a joint trial of claims involving more than 100 plaintiffs.”); *In re Abbott Labs., Inc.*, 698 F.3d 568, 570 (7th Cir. 2012) (“The parties petition us to resolve two conflicting district court decisions and decide whether a motion to consolidate and transfer related state court cases to one circuit court through trial constitutes a proposal to try the cases jointly”); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (“By its plain terms, § 1332(d)(11) therefore does not apply to plaintiffs’ claims in this case, as . . . neither the parties nor the trial court has proposed consolidating the actions for trial.”).

259. See *infra* Part IV.A.

to predict how the outcome of one case will influence a later case.

Congress stated that CAFA's mass action provisions should be construed broadly to sweep as many aggregate state court suits as possible into federal court.²⁶⁰ The Senate Report "explicitly encourages courts to look past the labels used by the parties."²⁶¹ Congress' encouragement suggests that its preferred framework for determining whether plaintiffs have proposed a joint trial is a broad one.²⁶² But Congress' view does not exist in a vacuum. It must be reconciled with how federal courts interpret their subject matter jurisdiction. This is increasingly important because, "[t]o evade federal jurisdiction, counsel for mass actions commonly file multiple, identical state court actions, each proposing to try the claims of fewer than 100 plaintiffs."²⁶³ As mass action litigation is likely to become more prevalent,²⁶⁴ the need for a coherent standard to assess jurisdiction becomes greater.

In general, some courts have narrowly construed their jurisdiction by limiting their consideration of the proposal for joint trial to the plain language of the plaintiffs' motions,²⁶⁵ and do not look at what the underlying litigation strategy is.²⁶⁶ Usually, the court will not find a

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

261. Guyon Knight, Note, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 FORDHAM L. REV. 1875, 1894 (2010).

262. See, e.g., *id.*

263. Pogust & Gruver, *supra* note 163, at 58.

264. Because the class action device has been cut back to such a degree, litigants appear to be using more creative attempts to achieve global settlement of large-scale torts and other kinds of litigation. See, e.g., J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-District Litigation*, 5 J. TORT L. 1, 2 (2014) ("In the world of mass litigation, claimants, judges, and attorneys alike remain on a quest to achieve global peace of countless, but related, lawsuits. Yet the paradigmatic mechanism for achieving this elusive goal—the class action device—has been more enfeebled than ever, both by limitations inherent in the device itself and by limitations increasingly imposed by the courts."); accord Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 457 (2014) ("Class action litigation is in decline.") (citing Joel S. Feldman, et al., *Evidentiary and Burden of Proof Standards for Class Certification Rulings*, 11 CLASS ACTION LITIG. REP. 536, 541 (2010)).

265. See *Parson v. Johnson & Johnson*, 749 F.3d 879, 885 (10th Cir. 2014) (cataloging the plaintiffs' pleadings in the separate actions, which expressly disclaimed federal jurisdiction and consolidation for any purpose other than pre-trial activities, and which did not include more than 100 plaintiffs in any one suit); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (rejecting defendants' argument that there was a mass action because "Congress appears to have foreseen the situation presented in this case and specifically decided the issue in plaintiffs' favor").

266. *Parson*, 749 F.3d at 886 ("At the outset, we note that it seems clear that the plaintiffs' choice to file separate suits, each containing fewer than 100 plaintiffs, cannot simply be disregarded as procedural gamesmanship and their 'civil action' summarily treated as a single one containing 650 plaintiffs."); *Tanoh*, 561 F.3d at 953 ("Relying on both the Act's legislative history and two recent, out-of-circuit decisions interpreting a separate provision of the Act, Dow urges us to conclude that

removable mass action.²⁶⁷ Other courts have probed the plaintiffs' pleadings to determine whether the suits were originally brought as individual suits to avoid federal court jurisdiction.²⁶⁸ When engaging in this inquiry, courts will usually find that they have subject matter jurisdiction over the mass action.²⁶⁹ The rest of this Part addresses the two approaches.

1. *The Formal Approach*

Some federal courts will not look beyond the face of the plaintiffs' motion in state court and therefore will not find a mass action. The court will not impute to the plaintiffs intent to propose a joint trial where one is not clear.²⁷⁰ (And, in one instance, a court seemed not to find a proposal because the plaintiffs did not use the explicit language "propose to try claims jointly."²⁷¹) The court does not look at what effect the motion will actually have in state court nor does it investigate further whether plaintiffs have pled their cases in this particular way to avoid federal court jurisdiction.

In *Tanoh v. Dow Chemical*,²⁷² the defendants who removed the purported mass action argued that the plaintiffs had strategically structured their state court complaints to avoid federal jurisdiction.²⁷³

plaintiffs' seven actions, viewed together, constitute a single 'mass action' under CAFA. Dow's arguments are unpersuasive . . .").

267. *Tanoh*, 561 F.3d at 956 ("None of the seven state court actions removed to federal court by Dow involves the claims of one hundred or more persons proposed to be tried jointly . . ."); see also *Parson*, 749 F.3d at 886.

268. See *Atwell v. Bos. Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013) ("The answer to" the question of whether plaintiffs proposed a joint trial "requires careful review of the proceedings in the City of St. Louis Circuit Court."); *In re Abbott Labs., Inc.*, 698 F.3d 568, 572 (7th Cir. 2012) ("[A] proposal for a joint trial can be implicit.").

269. *Atwell*, 740 F.3d at 1166 ("We conclude that, at the time the cases were removed, the motions for assignment to a single judge filed by the three plaintiff groups to the same state circuit court, combined with plaintiffs' candid explanation of their objectives, required denial of the motions to remand."); *In re Abbott Labs., Inc.*, 698 F.3d at 573 ("Plaintiffs may not have explicitly asked that their claims be tried jointly, but the language in their motion comes very close.").

270. See *Parson*, 749 F.3d at 892 (collecting cases and determining that the court could not find a mass action "solely because the plaintiffs filed multiple cases each containing fewer than 100 claims"); *Tanoh*, 561 F.3d at 953 ("By its plain terms, § 1332(d)(11) therefore does not apply to plaintiffs' claims in this case, as . . . neither the parties nor the trial court has proposed consolidating the actions for trial.").

271. See, e.g., *Romo v. Teva Pharm. USA, Inc.*, 731 F.3d 918, 926 (9th Cir. 2013) (Gould, J., dissenting) ("The majority apparently would require an explicit request for a joint trial . . ."), *overruled by*, *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc).

272. 561 F.3d 945 (9th Cir. 2009).

273. *Id.* at 953 ("Dow contends that allowing plaintiffs to 'evade' CAFA by 'artificially

The Court of Appeals for the Ninth Circuit declined the defendants' invitation to investigate the plaintiffs' litigation strategy and find mass action jurisdiction.²⁷⁴ Instead, it determined it would look no further than the statute's "plain language,"²⁷⁵ which it found "consistent with both the well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and with the equally well-established presumption against federal removal jurisdiction."²⁷⁶

Similarly, defendants before the Court of Appeals for the Tenth Circuit argued that a mass action arose because the plaintiffs in eleven separate actions had filed suit in the same court and before the same judge.²⁷⁷ The defendants' theory was that filing all of the suits in the same court before the same judge was a proposal for joint trial.²⁷⁸ But the Tenth Circuit found that

[n]one of the individual actions contained 100 or more plaintiffs. Each of the actions included at least one . . . resident[ial] plaintiff. Each complaint specifically disclaimed federal question and federal diversity jurisdiction, and included provisions that admitted the claims had been joined for the purpose of pretrial discovery and proceedings but disclaimed joinder for trial purposes.²⁷⁹

Based on the face of the plaintiffs' pleadings, the Tenth Circuit was unwilling to go further and inquire into the plaintiffs' litigation strategy and find federal court jurisdiction.²⁸⁰ It further noted that "plaintiffs' choice to file separate suits . . . cannot simply be disregarded as procedural gamesmanship."²⁸¹ Therefore, where the requirements for federal jurisdiction under the mass action provision were not apparent on

structur[ing] their lawsuits to avoid removal to federal court would be inconsistent with congressional purpose.").

274. *Id.*

275. *Id.* at 956.

276. *Id.* at 953. Although the Court of Appeals for the Ninth Circuit's 2013 decision in *Romo*, 731 F.3d 918 was overturned *en banc*, the court followed a similar approach when it was originally presented with twenty-six cases pending in state court.

277. *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014).

278. *Id.* at 887 ("[T]he defendants urge us to disregard the plaintiffs' express statement that they have not joined their claims for trial. To hold otherwise, they claim, would be to exalt form over substance, sanction procedural gamesmanship, and thwart the Congressional intent behind CAFA.").

279. *Id.*

280. *Id.* at 886.

281. *Id.*

the face of the complaint, the court was unwilling to assert power over the state court suits, or even to inquire further about its jurisdiction.

And, in *Abrahamsen v. ConocoPhillips, Co.*²⁸² the defendants argued before the Court of Appeals for the Third Circuit that there was a mass action because there were four state court actions, which together totaled 123 former employees, contractors, families, and estates.²⁸³ Again, the court was unwilling to infer a mass action: “Despite the similarities of their claims, Plaintiffs did not propose to try their claims jointly.”²⁸⁴ Like the Ninth Circuit, the Third Circuit said that its reading was “consistent with the well-established rule of deference to plaintiffs’ choice of forum and the presumption against federal removal jurisdiction.”²⁸⁵

Another Ninth Circuit case illustrates the outer boundaries of the formalist approach,²⁸⁶ although it has since been overruled after an *en banc* hearing.²⁸⁷ In 2012, the court determined that a coordination motion could not be construed as a proposal for joint trial because the plaintiffs did not explicitly mention a joint trial in their motion.²⁸⁸ The case involved twenty-six cases pending before the district court for alleged injuries from use of propoxyphene, an ingredient in prescription painkillers.²⁸⁹ More than forty actions had been filed in California state court at the time this question was presented to the Ninth Circuit.²⁹⁰ Attorneys responsible for the pending state court actions petitioned the California Judicial Council to establish a coordinated proceeding for all of the California actions under California Code of Civil Procedure section 404.²⁹¹ Section 404 allowed for coordination of “all of the actions for all purposes,” but the court found that “the plaintiffs’ petition for coordination stopped far short of proposing a joint trial.”²⁹² In their submission to the California Judicial Council, the plaintiffs cited

282. 503 F. App’x 157 (3d Cir. 2012).

283. *Id.* at 159.

284. *Id.* at 160.

285. *Id.*

286. *Romo v. Teva Pharm. USA, Inc.*, 731 F.3d 918 (9th Cir. 2013).

287. *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*).

288. *Romo*, 731 F.3d at 922–23 (finding that “[o]ne would be hard pressed to parse a proposal for a joint trial” from the language of plaintiffs’ coordination motion, even though plaintiffs moved for coordination for “all purposes”).

289. *Id.* at 920.

290. *Id.*

291. *Id.* at 920–21.

292. *Id.* at 922.

concerns about “a significant likelihood of duplicative discovery, waste of judicial resources and possible inconsistent judicial rulings on legal issues.”²⁹³ The Ninth Circuit found that “one would be hard pressed to parse a proposal for a joint trial from this language.”²⁹⁴ This is the starkest example of the formalist approach, although it is no longer followed.²⁹⁵

The decisions in these three Circuits have several things in common. First, the courts were unwilling to inquire into the litigants’ strategies by requiring anything from the parties beyond the pleadings. They relied on the presumption against federal court jurisdiction as the basis for their truncated inquiry.²⁹⁶ But, in doing so, they failed to note that federal courts sometimes engage in a more searching inquiry, even against the backdrop of that presumption. The courts also stressed the importance of the plaintiffs’ right to their preferred forum,²⁹⁷ but did not mention anything about the defendant’s right to statutory removal. They failed to provide guidance as to what a proposal for a joint trial would be, focusing little on Congress’ preferred broad interpretation of CAFA jurisdiction.²⁹⁸

293. *Id.* at 922–23.

294. *Id.* at 923.

295. *See* *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1220 (9th Cir. 2014) (en banc) (“Because we conclude that all of the CAFA requirements for a removable mass action are met under the totality of the circumstances in these cases, we reverse the district court’s remand orders.”). *See infra* Part V.B for discussion of how the effect of the state law or rule should factor into the federal court’s assessment of whether a mass action has been created by the plaintiffs’ motion.

296. *Abrahamsen v. ConocoPhillips, Co.*, 503 F. App’x 157, 160 (3d Cir. 2012) (stating that the court’s decision not to construe a mass action was “consistent with the well-established . . . presumption against federal removal jurisdiction”); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (stating that the court’s decision not to find a mass action was “consistent with . . . the well-established presumption against federal removal jurisdiction”).

297. *Parson v. Johnson & Johnson*, 749 F.3d 879, 887 (10th Cir. 2014) (summarizing plaintiffs’ argument that “[t]hey are masters of their complaint, which they deliberately structured to avoid federal jurisdiction under CAFA”); *Abrahamsen*, 503 F. App’x at 160 (stating that the court’s decision not to construe a mass action was “consistent with the well-established rule of deference to plaintiffs’ choice of forum”); *Tanoh*, 561 F.3d at 953 (stating that the court’s decision not to construe a mass action was “consistent with . . . the well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court”).

298. *Parson*, 749 F.3d at 889–90 (discussing Congress’ intent in passing CAFA, but not discussing how Congress said it wanted CAFA’s provisions to be interpreted); *Abrahamsen*, 503 F. App’x at 159–60 (stating that CAFA’s text was plain and therefore not resorting to analyzing congressional intent); *Tanoh*, 561 F.3d at 954 n.5 (stating that the Senate Report that accompanied CAFA was “of minimal, if any, value in discerning congressional intent, as it was not before the Senate at the time of CAFA’s enactment”).

2. *The Expansive Approach*

Other courts, however, are willing to go beyond the face of the plaintiffs' pleadings and find federal court jurisdiction. Indeed, the Seventh Circuit has determined that a proposal for a joint trial can be made implicitly.²⁹⁹ In *In re Abbott Laboratories, Inc.*,³⁰⁰ the Seventh Circuit found that plaintiffs had attempted to thwart removal to federal court by dividing their claims among multiple state court suits.³⁰¹ The plaintiffs had filed ten state court consumer suits involving hundreds of plaintiffs, and then filed a motion to consolidate their cases and transfer them to one state circuit court, pursuant to Illinois Supreme Court Rule 384.³⁰² The plaintiffs argued that this request was not a proposal for a joint trial because they had asked for separate bellwether trials rather than one full trial, and their motion did not address how the trials would be adjudicated.³⁰³ Thus, the face of the motion did not propose a joint trial.³⁰⁴

But it did not matter to the court that the plaintiffs did not explicitly propose that the cases be tried jointly because the effect of their request was the same as that of a joint trial.³⁰⁵ What mattered to the court was that although "plaintiffs may not have explicitly asked that their claims be tried jointly . . . the language in their motion comes very close."³⁰⁶ Taking the approach that a court can imply subject matter jurisdiction when plaintiffs are "very close" to proposing a joint trial necessarily requires a court to look into what the effect of the plaintiff's motion will be.

The Eighth Circuit has also inferred a mass action by looking at the effect of the plaintiffs' litigation strategy.³⁰⁷ In *Atwell v. Boston Scientific Corp.*,³⁰⁸ the plaintiffs filed a motion asking for a single judge

299. *In re Abbott Labs., Inc.*, 698 F.3d 568, 572 (7th Cir. 2012) ("[A] proposal for a joint trial can be implicit.").

300. *Id.* at 570.

301. *Id.* at 570–71.

302. *Id.*

303. *Id.* at 572 ("Plaintiffs argue that they did not propose a joint trial because their motion to consolidate did not address how the trials of the various claims in the cases would be conducted, other than proposing that they all take place in the Circuit Court of St. Clair County.").

304. *Id.*

305. *Id.* at 573 ("Plaintiffs may not have explicitly asked that their claims be tried jointly, but the language in their motion comes very close.").

306. *Id.*

307. *Atwell v. Bos. Scientific Corp.*, 740 F.3d 1160 (8th Cir. 2013).

308. *Id.*

to handle the cases.³⁰⁹ To the court, this request was the same as proposing a joint trial.³¹⁰ Although counsel “disavow[ed] a desire to consolidate cases for trial,” counsel “nonetheless urged the state court to assign the claims . . . to a single judge who could ‘handle these cases for consistency of rulings, judicial economy, [and] administration of justice.’”³¹¹ The court refused to take the plaintiffs’ claims at face value,³¹² instead finding a joint trial had been proposed because the plaintiffs’ request would have had the same effect.³¹³

A couple of commonalities can be distilled from these Circuits’ treatment of mass actions. First, the courts looked at what effect the plaintiffs’ actions would have—if it is largely the same as a proposal for a joint trial, they will find a mass action has been created.³¹⁴ The Court of Appeals for the Eighth Circuit did not, however, look at what effect a state court would give to the outcome of the state procedural maneuver the plaintiffs used, and the Seventh Circuit did so in only a cursory manner.³¹⁵ Neither court discussed the plaintiffs’ role as masters of their complaints,³¹⁶ and, perhaps more surprisingly, neither court discussed Congress’ stated desire for CAFA to be broadly construed, even though the courts’ decisions reflect a more expansive view of mass action jurisdiction.³¹⁷

The practical effect of the two approaches emerges from these

309. *Id.* at 1161.

310. *Id.* at 1163–64 (“The [plaintiffs’] motion did not request a common assignment with other transvaginal mesh plaintiffs, but plaintiffs . . . noted that the issues in the transvaginal mesh cases ‘raise the potential for conflicted rulings through the discovery and motion process.’ . . . Both groups [of plaintiffs] cited ‘avoiding conflicting pretrial rulings,’ ‘providing consistency in the supervision of pretrial matters, and ‘judicial economy’ as reasons for the assignment.”).

311. *Id.* at 1165.

312. *Id.* at 1166.

313. *Id.*

314. *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012) (“Plaintiffs may not have explicitly asked that their claims be tried jointly, but the language in their motion comes very close.”); *Atwell*, 740 F.3d at 1166 (“We conclude that, at the time the cases were removed, the motions for assignment to a single judge filed by the three plaintiff groups to the same state circuit court, combined with plaintiffs’ candid explanation of their objectives, required denial of the motions to remand.”).

315. The Court of Appeals for the Seventh Circuit, in *In re Abbott Laboratories*, did address how the state law rule for consolidation may have played out in state court in making its determination that there was a removable mass action, but at the end of the opinion and without citing any state law. *In re Abbott Labs., Inc.*, 698 F.3d at 573 (“In all likelihood, the [Illinois State] Supreme Court would transfer these actions back to one of the judicial circuits in which the suits are currently pending. As a result, plaintiffs’ motion to consolidate was sufficient to create a mass action.”).

316. *See generally In re Abbott Labs., Inc.*, 698 F.3d 568; *Atwell*, 740 F.3d 1160.

317. *See generally In re Abbott Labs., Inc.*, 698 F.3d 568; *Atwell*, 740 F.3d 1160.

comparisons: The more formal approach will allow fewer state court suits into federal court, while the expansive approach may allow more state court cases to be defined as mass actions and to be removed to federal court.

B. The Supreme Court Looks at Mass Actions

In 2014, the Supreme Court issued an opinion in the only mass action case that it has decided.³¹⁸ Based on the particular procedural argument involved, however, the case likely has little relevance to mass action cases that are not brought by state attorneys general as *parens patriae* suits.

In *Mississippi ex rel. Hood v. AU Optronics Corp.*,³¹⁹ the Supreme Court decided a case involving a suit filed by Mississippi's attorney general against manufacturers, sellers, and distributors of LCD panels.³²⁰ The attorney general brought this suit in state court under the *parens patriae* doctrine—which gives a government standing to bring a lawsuit on behalf of its citizens³²¹—and alleged price-fixing in violation of state law.³²² The defendants removed the case to federal court, arguing that, even though there was ostensibly only one plaintiff in the case—the State of Mississippi—the federal courts should look instead at how many real parties in interest³²³ there were.³²⁴ Because those real parties in interest were the residents of Mississippi, the defendants argued that the 100-plaintiff threshold necessary to trigger CAFA's mass action provision was easily met.³²⁵

In its unanimous opinion, the Court declined the defendants' invitation.³²⁶ Although the Court noted that in certain contexts federal courts are required to “look behind the pleadings to ensure that parties

318. *Mississippi ex rel. Hood v. AU Optronics Corp.*, __ U.S. __, 134 S. Ct. 736 (2014) is the only mass action case decided by the Supreme Court at the date of this Comment's publication.

319. *Id.*

320. *Id.* at 741.

321. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

322. *AU Optronics Corp.*, 134 S. Ct. at 740.

323. A real party in interest is a party “entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome.” BLACK'S LAW DICTIONARY 1232 (9th ed. 2009).

324. *AU Optronics Corp.*, 134 S. Ct. at 741–42.

325. *Id.* at 742 (“Respondents argue that the [mass action] provision covers [*parens patriae*] suits because ‘claims of 100 or more persons’ refers to ‘the persons to whom the claim belongs, *i.e.*, the real parties in interest to the claims,’ regardless of whether those persons are named or unnamed.” (emphasis in original)).

326. *Id.* (summarizing respondents' argument and stating that “[w]e disagree.”).

are not improperly creating or destroying diversity jurisdiction,”³²⁷ Congress did not intend a “background principle of analyzing the real parties in interest to a suit” to be conducted in mass action cases.³²⁸ Critical to the Court’s decision was Congress’ use of the word “plaintiff” in CAFA, rather than person.³²⁹ Thus, the Court found that the numerosity requirement can only be met by adding up all of the *plaintiffs*, not merely any party who has some remote interest in the litigation.³³⁰ The Court was also concerned with the administrative difficulties that would arise if federal courts had to inquire into whom the real parties in interest were for each suit before it.³³¹

While this case might suggest that the Supreme Court would analyze mass action jurisdiction using a narrow approach, much of the Court’s analysis appears to be limited to the context of *parens patriae* suits. For example, the Court noted that, in passing CAFA, Congress “focus[ed] on the persons who are actually proposing to join together as named plaintiffs in the suit.”³³² It therefore acknowledged that courts in mass action cases would focus on who is involved in the lawsuit.³³³ This inquiry is distinct from the question of when plaintiffs have proposed a joint trial and created a mass action on that ground.

But the Court also states that the mass action device is designed to prevent some level of gamesmanship and that courts sometimes need to look beyond pleadings. The Court described the “mass action provision” as “function[ing] largely as a backstop to ensure that CAFA’s relaxed jurisdictional rules for class actions cannot be evaded by a suit that names a host of plaintiffs rather than using the class device.”³³⁴ This language suggests that the federal courts should look at what the plaintiffs are actually proposing because the purpose of the mass action provision is to prevent evasion by plaintiffs. In addition, the Court notes that it has “interpreted the diversity jurisdiction statute to require courts in certain contexts to look behind the pleadings to ensure that parties are

327. *Id.* at 745.

328. *Id.*

329. *Id.* at 743–44 (discussing how “plaintiffs” should be construed in the context of CAFA’s text).

330. *Id.* at 744.

331. *Id.* (“We think it unlikely that Congress intended that federal district courts engage in these unwieldy inquiries.”).

332. *Id.* at 746.

333. *See id.* (“Requiring district courts to pierce the pleadings to identify *unnamed persons* interested in the suit would run afoul of [congressional] intent.” (emphasis added)).

334. *Id.* at 744.

not improperly creating or destroying diversity jurisdiction.”³³⁵ It then specifically mentions doing so in the fraudulent joinder context.³³⁶ Even though the Court did not construe the number of plaintiffs to be over 100 by looking beyond the face of the complaint to the number of real parties in interest, it acknowledges that there are instances in which doing so is appropriate.³³⁷ Thus, the Court’s determination that only plaintiffs are to be counted in a mass action case provides little guidance to determining whether a joint trial has been proposed. The opinion does, however, support the notion that federal courts should look at the actual proposal to give it full effect.

V. CONSTRUING MASS ACTION JURISDICTION

This Part lays out an approach for federal courts to employ when they are presented with a question of whether they have subject matter jurisdiction over a purported mass action. Given the increasing relevance of such adjudication, the need for direction is clear. It is true that cases involving CAFA are “necessarily fact-specific” because the court has “to apply CAFA’s statutory principles to the particular jurisdictional facts involved.”³³⁸ However, the federal courts should employ some guiding principles in a coherent framework when construing mass action jurisdiction. This Comment therefore eschews the adoption of either a narrow or a broad approach to construing mass action jurisdiction; rather, it offers a new and more nuanced framework for determining whether federal jurisdiction has been created.

This Comment proposes that courts look beyond the face of the plaintiff’s pleadings to determine the effect of the joinder in state court only when the removing defendant meets an initial burden of showing that plaintiffs have engaged in jurisdiction-circumventing behavior. The defendant would have to do so by affidavits and other evidence, which would lead the federal court to engage in a factual analysis of its subject matter jurisdiction. The court would then focus on the effect that the state court would give to the plaintiffs’ procedural motion that has arguably constituted a proposal for a joint trial, including presenting a certified question to the state supreme court if it is unclear to the federal

335. *Id.* at 745.

336. *Id.* (“We have held, for example, that a plaintiff may not keep a case out of federal court by fraudulently naming a nondiverse defendant.” (citing *Wecker v. Nat’l Enamel & Stamping Co.*, 204 U.S. 176, 185–86 (1907))).

337. One such example is in the fraudulent joinder context. *See id.*

338. *Parson v. Johnson & Johnson*, 749 F.3d 879, 890 (10th Cir. 2014).

court what that effect would be. This approach provides coherence and guidance for federal courts' jurisdictional inquiry. It also best balances several values underlying the federal court system: the boundaries between federal and state courts; the ability of plaintiffs to choose their preferred forum; and defendants' statutory rights of removal.

A. *Proposing a Joint Trial*

The first step is to distill a workable definition of a proposal for a joint trial by which the court can measure whether it has jurisdiction. Existing case law does not provide that definition, so this Comment proposes that it be interpreted as an affirmative action taken by plaintiffs that effectively aggregates the state court suits such that they will be resolved through the same proceeding. In short, two elements will have to be satisfied: (1) that the plaintiffs take some action, and (2) that the aggregation will lead to all of the state court cases being resolved through the same proceeding. This definition evolves from cases that have already grappled with determining what the statutory language means, and creates a clear starting point for federal courts construing their subject matter jurisdiction.

The first part of this definition requires that the plaintiffs affirmatively do something to bring together the cases. This requirement is consistent with existing case law and with CAFA's prohibition on federal court jurisdiction for mass actions created only by a defendant's motion. For example, in *Abrahamsen*, the Third Circuit Court of Appeals did not find a mass action where four state court actions together totaled 123 plaintiffs.³³⁹ The plaintiffs did not actually do anything in state court to bring together the suits; instead, they merely filed four separate suits.³⁴⁰ An affirmative action to bring lawsuits together could be filing a motion for consolidation,³⁴¹ for example, or proposing a bellwether trial that would likely result in settlement.³⁴²

CAFA itself appears to call for this definition. It expressly forbids federal court jurisdiction over a "mass action" created by a defendant's motion.³⁴³ It contemplated that only plaintiffs—and perhaps state

339. *Abrahamsen v. ConocoPhillips*, 503 F. App'x 157, 159 (3d Cir. 2012).

340. *Id.*

341. *See Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1218 (9th Cir. 2014) (en banc).

342. *See In re Abbott Labs., Inc.*, 698 F.3d 568, 570 (7th Cir. 2012).

343. 28 U.S.C. § 1332(d)(11)(B)(ii)(II) (2012) ("[T]he term 'mass action' shall not include any civil action in which . . . the claims are joined upon motion of a defendant.").

courts—could create a mass action.³⁴⁴ And by stating that plaintiffs must “propose” a mass action, it seems to require an act by the plaintiffs, not just that they bring into court any number of suits.³⁴⁵ Rather, the plaintiffs must later “propose”—that is, take some affirmative action—to bring the suits together where they were once separate. Although it remains unclear whether a state court may on its own create a removable mass action, it seems that the most appropriate interpretation is that a state court cannot itself create the mass action that a defendant may later remove. The statute explicitly says that a mass action comes into existence when the plaintiffs propose a joint trial.³⁴⁶ Thus, Congress seems to have thought that only plaintiffs could create a mass action, not state courts or defendants, at least within the meaning of CAFA.

Existing case law also appears to recognize this. For example, in *Anderson v. Bayer*³⁴⁷ in the Seventh Circuit, Bayer removed several state cases to federal court on the ground that they constituted a mass action. Before removal, the plaintiffs had added a total of 111 plaintiffs to four existing lawsuits, so that—after the addition—the first suit was comprised of 100 plaintiffs, the second suit had five plaintiffs, the third suit had forty-five plaintiffs, and the fourth suit had eighteen plaintiffs.³⁴⁸ On appeal, Bayer urged the court not to put “too much weight on form.”³⁴⁹ The court, however, did not follow Bayer’s suggestion. It determined that the suits could be viewed as a mass action only because the *defendants* proposed that they be tried jointly, not because the *plaintiffs* did.³⁵⁰ The court found that Bayer’s removal was essentially a motion for consolidation, which does not trigger CAFA’s mass action provision.³⁵¹ When plaintiffs do not take action to consolidate cases or otherwise try cases jointly, there is no mass action, even though the plaintiffs still may have structured their lawsuits to avoid federal court jurisdiction.

The second part of this definition requires that the plaintiffs’

344. *See id.*

345. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (“[T]he term ‘mass action’ means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact . . .”).

346. *Id.*

347. 610 F.3d 390 (7th Cir. 2010).

348. *Id.* at 392.

349. *Id.* at 393.

350. *Id.* at 393–94 (“Bayer’s argument that these separate lawsuits be treated as one action is tantamount to a request to consolidate them—a request that Congress has explicitly stated cannot become a basis for removal as a mass action.”).

351. *Id.*

“proposal” result in a full resolution of the joined cases because of the proposed procedure. The statute itself says that a “joint trial” will trigger the mass action provision,³⁵² but it should be the effect of the procedure, rather than the form, that is important. This means that procedures for disposing of all the cases—beyond just a trial—could satisfy this requirement. A bellwether trial, for example, could constitute full resolution of all of the cases. Thus, a joint trial should be interpreted as a procedural device that brings together all of the cases in such a way that they will be resolved together if it would have that effect in state court. The Seventh Circuit in *In Re Abbott Laboratories, Inc.* concluded similarly.³⁵³ It will not be enough that there have been multiple similar suits filed in state court. And because the court will be directed to look for two things, it will have a coherent approach for doing so and not have to devolve into saying that plaintiffs have done something “very close” to what CAFA requires and thereby imply a mass action.

In sum, the federal courts should interpret CAFA’s statutory requirement that plaintiffs propose a joint trial to create a mass action as requiring an affirmative act by the plaintiffs that will lead to a full resolution of the cases as a result of that procedure. CAFA’s plain language supports this interpretation, as do parts of several mass action cases already decided in federal court. Applying this interpretation to the particular facts of a case would be the starting point for determining federal court jurisdiction. If there has been no affirmative act by the plaintiffs, the federal court’s inquiry will stop. If there has been, but the procedure that the plaintiffs have affirmatively sought would not feasibly lead to a full resolution of the case, the federal court’s inquiry will also stop. Only when these two criteria are met will the federal court go further in its inquiry and look to the effect of the state law. In taking that next step, the court should look at the effects of the litigants’ strategy to determine whether it has subject matter jurisdiction.

B. *Giving Effect to the State Court Procedure*

There is no mass action until the plaintiffs attempt to bring multiple suits together in a way that would lead to their resolution. There are—and will continue to be—easy jurisdictional questions about CAFA’s

352. 28 U.S.C. § 1332(d)(11)(B)(1) (2012).

353. *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012) (stating that the plaintiffs motion came “very close” to a proposal for a joint trial and determining that the Illinois State Supreme Court likely would have “transfer[ed] these actions back to one of the judicial circuits in which the suits [we]re currently pending”).

mass action provisions that come before federal courts. Where that is the case, the federal courts need go no further than the face of the pleadings to discern whether they have jurisdiction. For example, when the plaintiffs have taken no affirmative action or have taken action that would not lead to complete resolution, a federal court would remand the case to state court because it would not have subject matter jurisdiction.³⁵⁴

But where courts must go further in their inquiry, they should adhere to the requirement that the removing party bear the burden of proving federal court jurisdiction.³⁵⁵ The court should require factual evidence—either because the party that opposes jurisdiction has brought a factual attack against federal court jurisdiction or on the federal court’s own motion—that establishes or disproves its jurisdiction.³⁵⁶

This approach fits well within established judicial inquiry because of the highly fact-specific nature of the requirements for a proposal for a joint trial. For example, information about what the plaintiffs said in their motion or at a hearing in state court can provide insight into whether the plaintiffs took affirmative action. Similarly, it will be important to know the facts surrounding the motion. As described *supra* in Part III, the federal courts are entitled to receive and weigh factual evidence in assessing their subject matter jurisdiction. And, when presented with tough mass action jurisdiction questions, the courts of their own motion should require such evidence. Doing so will mitigate against overly formalistic assessments of jurisdiction that interfere with a defendant’s statutory right of removal and Congress’ intent to create a federal forum for aggregated state court litigation. It will also enable a court to broadly construe its federal court jurisdiction on a factual record

354. See, e.g., *Anderson*, 610 F.3d at 393.

355. See, e.g., *Frederico v. Home Depot*, 507 F.3d 188, 196 (3d Cir. 2007).

356. See, e.g., *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105 (2d Cir. 1997); see also *Watson v. Bretz & Coven LLP*, No. 12 Civ. 1441(GBD)(KNF), 2013 WL 765361, at *3 (S.D.N.Y. Feb. 28, 2013) (“[T]he party invoking federal jurisdiction must support the basis for jurisdiction alleged in its pleadings ‘with competent proof if a party opposing jurisdiction . . . challenges [the allegation] or if the court *sua sponte* raises the question.’” (quoting *Linardos v. Fortuna*, 157 F.3d 945, 947 (2d Cir. 1998))); *Somboonmee v. Holder*, No. 3:100V167/MCR/EMT, 2011 WL 3625674, at *2 (N.D. Fla. July 18, 2011) (“[A] federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.”); *Cole v. Martin*, No. C-95-20373 RMW, 1995 WL 396844, at *1 (N.D. Cal. June 28, 1995) (“[A] district court may review the complaint and dismiss *sua sponte* those claims premised on meritless legal theories or that clearly lack any factual basis.”).

Such facts could include information about how the appropriate state court addresses such motions or facts gleaned about the plaintiffs’ litigation strategy, such as a plan to file a motion, but attempt to use language to circumvent federal court jurisdiction.

rather than based on how the aggregated litigation appears on the limited pleadings before the court.

In assessing the defendant's evidence of jurisdiction, the federal court should give appropriate consideration to the effect of the state court procedure. CAFA once again seems to require this outcome,³⁵⁷ and giving effect to state law is part of the well-developed doctrine federal courts use when they construe their subject matter jurisdiction in diversity cases. This inquiry should occur because the federal court's jurisdiction is triggered only when there is a proposal for joint trial in state court, so the critical question will be what constitutes a joint trial in the state court. To properly respect the balance between federal and state courts, the federal court should give effect to how the state interprets its rule. When it is unclear how the state interprets such a procedural motion, the federal court should give the effect to the rule that it believes the state court would, as the federal courts do in other diversity cases.³⁵⁸

First, CAFA's mass action provision states that a mass action will not be created where "the claims have been consolidated solely for pretrial proceedings."³⁵⁹ Some ostensibly identical state court procedural rules allow consolidation only for pretrial purposes, while others allow for consolidation through trial. For example, at least fifteen states have their own version of a multi-district litigation (MDL) statute³⁶⁰ that mirrors the federal MDL statute.³⁶¹ But these statutes operate differently. For instance, Texas's statute only allows consolidation or coordination for pretrial purposes, including summary judgment and other dispositive motions.³⁶² It does not allow consolidation through trial.³⁶³ Thus, if a group of plaintiffs brought together multiple state court suits in Texas

357. See *Infra* Part IV.B.

358. See, e.g., *Tate v. Trialco Scrap, Inc.*, No. 89-5837, 1990 U.S. App. LEXIS 11999, at *2 (6th Cir. July 16, 1990) ("[W]e overturn a district court's conclusions on questions of state law only if they are 'clearly wrong.'" (quoting *Gee*, 615 F.2d at 861 (9th Cir. 1980)); *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980); *In re Air Crash Disaster Near Chi., Ill.* on May 25, 1979, 701 F.2d 1189, 1196 (7th Cir. 1983) ("Considered dicta of a state supreme court must be given weight by a federal court in ascertaining state law . . ."); *Perkins v. Bd. of Dir. of Sch. Admin. Dist. No. 13*, 686 F.2d 49, 54 (1st Cir. 1982) ("[W]e should look to [state court] statements as indicia of how the state's highest court might decide.").

359. 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (2012).

360. Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 69–75 (2007) (discussing multidistrict litigation rules at the state level).

361. *Id.*

362. TEX. GOV'T CODE ANN. § 74.161–164 (West, Westlaw through 2013 3d Called Sess. of 83rd Legis.); see also TEX. GOV'T CODE R. 13.

363. *Id.*

via this statute, mass action jurisdiction would be improper because there would be no proposal for a “joint trial.”³⁶⁴ California, on the other hand (discussed *supra*), allows consolidation for “all purposes” through its statute.³⁶⁵ Thus, the consolidated cases would be able to proceed through trial.³⁶⁶ Because state laws operate differently even if they appear to have the same effect, Congress seems to have contemplated that federal courts would take into account the effect of the state court procedural rule when construing federal mass action jurisdiction.

Indeed, this is the approach that the Ninth Circuit seems to have adopted in its *en banc* rehearing of *Romo v. Teva Pharmaceutical*.³⁶⁷ In that case, a group of attorneys for the forty separately filed actions in turn filed a single action asking for a coordinated proceeding to be established.³⁶⁸ It specifically asked for the proceeding to be coordinated “for all purposes.”³⁶⁹ The parties disputed whether the coordination petition was a proposal for a joint trial.³⁷⁰ In construing the petition as one for a joint trial in the rehearing, the Ninth Circuit looked to the “factor-based test [in California’s Code of Civil Procedure] to determine whether coordination [was] appropriate.”³⁷¹ The court also stated that “[i]t is not clear whether the California Judicial Council would grant coordination for less than ‘all purposes.’”³⁷² The Ninth Circuit Court of Appeals recent *en banc* opinion supports the idea that federal courts should look at how the state procedural law operates in construing the plaintiffs’ proposal—especially because it recognizes that the state law may not support finding a mass action in every instance. But where the state law supports finding a joint trial—as California’s test did in this case—the federal court should find a joint trial. The court should not, as the Ninth Circuit correctly did not, make this determination without looking at the effect of the state procedural law.

Second, federal courts have developed doctrines to guide when and how they may go beyond the parties’ pleadings to construe their jurisdiction.³⁷³ As discussed earlier, federal courts may make factual

364. *Id.*

365. CAL. R. CIV. P. 404.

366. *Id.*

367. 731 F.3d 918 (9th Cir. 2013).

368. *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1221 (9th Cir. 2014) (*en banc*).

369. *Id.* at 1221–22.

370. *Id.*

371. *Id.* at 1223.

372. *Id.* at 1224.

373. *See supra* Part III (discussing federal court construction of subject matter jurisdiction).

inquiries when they are assessing their subject matter jurisdiction, and they may require certain kinds of evidence to do so.³⁷⁴ Not only do federal courts engage in this inquiry, one of the two CAFA jurisdiction cases to come before the Supreme Court implicitly contemplates this approach.³⁷⁵ In *Standard Fire v. Knowles*, the Supreme Court noted that the district court looked at Knowles' affidavit stipulating to seek damages below the amount in controversy.³⁷⁶ And the district court found from that evidence that the amount in controversy was below \$5 million only because the plaintiff had stipulated to it.³⁷⁷ Thus, this approach is familiar to federal courts.

This approach may pose additional administrative burdens for already over-worked federal courts.³⁷⁸ However, the courts have tools to require litigants to assist them in this administration. For example, district courts could impose local court rules that require a brief statement of relevant state procedural law when a defendant removes a purported mass action. Even if, however, this approach does impose some additional work, that may just be the trade-off required given the complexity of mass action litigation. In *AU Optronics*, the Court determined that a court could not construe *parens patriae* suits as having over 100 real parties in interest because CAFA was concerned only with counting the number of *plaintiffs*.³⁷⁹ But the Court did not preclude federal courts from inquiring beyond the face of the plaintiffs' pleadings when they were presented with a question of how many plaintiffs would be joined together.³⁸⁰ In addition, the Court also recognized the doctrine of fraudulent joinder, which directs federal courts to look beyond the face of the pleadings.³⁸¹ It is therefore not out of the ordinary for federal courts to probe further than the face of pleadings in jurisdictional inquiries.

While the Supreme Court has found in the class action context that giving effect to state procedural rules would be too onerous, it would be unlikely to do so in the mass action context. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*,³⁸² the Supreme Court did not allow

374. *See id.* (discussing same).

375. *Standard Fire Ins. Co. v. Knowles*, __ U.S. __, 133 S. Ct. 1345, 1348–50 (2013).

376. *Id.*

377. *Id.*

378. *See, e.g.*, Alexander Bickel, *The Overworked Court*, NEW REPUBLIC (Nov. 17, 2011), <http://www.newrepublic.com/book/review/the-overworked-court>.

379. *Mississippi ex rel. Hood v. AU Optronics Corp.*, __ U.S. __, 134 S. Ct. 736, 746 (2014).

380. *Id.*

381. *Id.* at 744; *see also supra* Part III (discussing fraudulent joinder doctrine).

382. 559 U.S. 393 (2010).

federal courts to engage in the additional inquiry of whether “state and federal rules conflict based on the subjective intentions of the state legislature.”³⁸³ It did not do so because it would create “an enterprise destined to produce ‘confusion worse confounded.’”³⁸⁴ Administrative problems would become overwhelming for federal courts because the courts “would have to discern, in every diversity case, the purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law.”³⁸⁵ But there is a key distinction between this case and one involving a mass action: *Shady Grove* concerned Federal Rule of Civil Procedure 23,³⁸⁶ while mass action cases concern the federal court’s statutory jurisdiction. Thus, we should look not to administrative problems generated by an inquiry into conflicting federal rules and state procedural rules, but into how the federal courts typically construe their subject matter jurisdiction and how they generally operate in diversity cases. As discussed earlier in Part III, federal courts sitting in diversity may inquire into the parties’ litigation strategy to see whether they are improperly circumventing or creating federal court jurisdiction.³⁸⁷ Federal courts also—as a matter of course—give effect to state law when adjudicating diversity suits. Thus, this Comment proposes that the federal courts use these familiar tools when confronted with difficult questions of mass action jurisdiction. Doing so may cause some additional administrative burdens, but those burdens may be necessary to properly respect the role of state courts in the federal system and to balance the rights of plaintiffs and defendants.

CONCLUSION

Congress passed CAFA in 2005 to provide a federal forum for aggregate litigation of “national importance.” In doing so, it created the mass action, which had previously been solely a creature of state court.

Federal courts have had difficulty construing their subject matter jurisdiction under CAFA’s mass action provisions. Some federal courts have interpreted their mass action jurisdiction expansively, while others have interpreted it narrowly. But there has been no principled approach. This Comment takes the important step of proposing such an approach, one that is rooted in traditional constructions of federal court subject

383. *Id.* at 404.

384. *Id.* (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

385. *Id.*

386. *Id.*

387. *See supra* Part III.C.

matter jurisdiction. First, it proposed that the federal courts uniformly interpret the proposal for a joint trial to require some affirmative procedural act by the state court plaintiffs that would lead to the final disposition of the newly aggregated cases. The federal court would then pierce the parties' pleadings if the court's subject matter jurisdiction was not clear on the face of the pleadings, giving the same effect to the underlying state court procedural mechanism that the state court would. This proposal provides stability for both litigants and the courts, and balances a number of important judicial principles, primarily that federal courts are courts of limited subject matter jurisdiction and the right of the plaintiff to choose the forum and the defendant's statutory right of federal jurisdiction.

The need for a coherent and principled framework is not merely academic. Given that litigants are routinely invoking or trying to avoid mass action jurisdiction, it is time for the federal courts to provide a consistent framework for working with this thorny jurisdictional issue.