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**IV. ONCE MORE INTO THE BREACH,  
DEAR FRIENDS: THE CASE FOR  
CONGRESSIONAL REVISION OF THE MASS  
ACTION PROVISIONS IN THE CLASS ACTION  
FAIRNESS ACT OF 2005**

*S. Amy Spencer\**

A.	<i>What Is a Mass Action?</i> .....	1071
1.	The Plain Language Definition of Mass Action.....	1072
2.	Legislative Intent Shapes Nebulous Mass Action Cloud.....	1073
a.	<i>Is “mass action” really a euphemism for mass tort?</i> .....	1074
b.	<i>Defining “mass action” in light of Congressional intent</i> .....	1078
B.	<i>What Do CAFA’s Provisions Actually Require?</i> .....	1082
1.	CAFA requires each plaintiff in a mass action to meet the jurisdictional amount-in- controversy requirement of § 1332(a), but <i>Exxon</i> suggests § 1367 should apply.....	1083
a.	<i>Supplemental jurisdiction in light of CAFA’s plain language and Congressional intent</i> .....	1085
b.	<i>Judicial efficiency may support applying § 1367</i> .....	1086

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\* J.D. Candidate, May 2007, Loyola Law School; B.A., English, Columbia College. I thank Professor Georgene Vairo for her thoughtful guidance and Professor Allan Ides for his invaluable recommendations. My gratitude also goes out to the Loyola of Los Angeles Law Review, Developments Editors Shannon Curreri and Leah Romano and Articles Editor Ethan Cohen in particular, for all their time and effort spent on this Article. Most importantly, thank you Mom, Dad, and PJ for your unconditional support in all I do, and Robby for your undying patience. This Article is dedicated to my grandfather, Col. Philip P. Thivierge, for his strength and inspiration when he says, “Put it to ’em.”

2. If courts do not apply § 1367 to mass actions, other pitfalls await .....	1087
<i>a. Fractionated cases may clog state and federal court dockets .....</i>	1087
<i>b. Split cases make counting plaintiffs much more difficult than 1-2-3 .....</i>	1089
<i>c. Fewer plaintiffs with large claims may not add up to \$5 million.....</i>	1091
<i>d. Counting 1/3 or 2/3 of plaintiffs is difficult when they are not in the same forum .....</i>	1092
C. <i>Do CAFA's Carve-Outs Alleviate Any Problems?.....</i>	1093
1. The local event or occurrence exception.....	1094
2. A defendant cannot unilaterally remove the case to federal court .....	1095
3. A case filed on behalf of the general public is not a mass action .....	1095
4. State court <i>sue sponte</i> consolidation .....	1096
D. <i>Conclusion and Recommendations.....</i>	1097
1. Conclusion.....	1097
2. CAFA applied as presently written and with possible interpretation or revision.....	1098
<i>a. The case under CAFA's mass action provision "as is" .....</i>	1099
<i>b. The case if Congress eliminates the \$75,000 threshold .....</i>	1100
<i>c. The case if Congress or the courts rewrite or construe CAFA to permit supplemental jurisdiction .....</i>	1101

In passing the Class Action Fairness Act (“CAFA”), Congress’s purposes were to: “(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the Framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction;<sup>[1]</sup> and (3) benefit society by encouraging

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1. S. REP. NO. 109-14, at 6 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 7 (“As set forth in Article III of the Constitution, the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving

innovation and lowering consumer prices.”<sup>2</sup> Congress attempted to achieve these goals by expanding diversity jurisdiction over class action cases,<sup>3</sup> allowing for concomitant removal,<sup>4</sup> and preventing plaintiffs from circumventing the first two with mass action provisions.<sup>5</sup> As written, these mass action provisions fail to achieve Congress’s stated purposes because they do not prevent plaintiffs from averting the expanded scope of CAFA’s diversity jurisdiction.

For a federal court to assert proper jurisdiction, each mass action plaintiff must meet the restrictive amount in controversy requirement of § 1332(a),<sup>6</sup> instead of the \$5 million aggregate amount required

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persons from multiple jurisdictions, particularly cases in which defendants from one state are sued in the local courts of another state. Interstate class actions—which often involve millions of parties from numerous states—present the precise concerns that diversity jurisdiction was designed to prevent: frequently in such cases, there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation.”).

2. 28 U.S.C. § 1711 note (2006) (Findings and Purposes).

3. § 1332(d)(2) (“The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.”).

4. § 1453(b) (“IN GENERAL. A class action may be removed to a district court of the United States in accordance with section 1446 . . . (except that the 1-year limitation under section 1446(b) . . . shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.”).

5. § 1332(d)(11) (“(A) For purposes of this subsection and section 1453 . . . a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs. (B)(i) As used in subparagraph (A), the term ‘mass action’ means any civil action (except a civil action within the scope of section 1711(2) . . .) 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).”).

6. Presently, the amount in controversy of each individual claim must exceed \$75,000. § 1332(a).

for class actions.<sup>7</sup> By crafting this rule, Congress has created a potential loophole that could thwart its purpose of providing federal jurisdiction for “cases of national importance.”<sup>8</sup> Currently, plaintiffs can avoid federal jurisdiction by joining many smaller claims that together exceed \$5 million aggregate amount in controversy simply because the claims were joined as a mass action, rather than a class action. In essence, these provisions allow plaintiffs to make the very end-run Congress feared they would make.<sup>9</sup> As long as no single plaintiff suffers an alleged loss in excess of \$75,000, a group of plaintiffs may decide not to file a class action under Rule 23<sup>10</sup> because they can file a mass action using Rule 20 and remain in state court. Even if a few plaintiffs exceed \$75,000, the group only risks losing those individuals; the rest remain in state court.

In conjunction with some of CAFA’s other provisions, this end-run causes additional problems. For example, nearly every mass action removed results in at least two separate cases: one in state court, consisting of the plaintiffs with smaller claims, and one in federal court with those plaintiffs who meet the threshold amount in controversy. Further, once the case is divided, there may no longer be one hundred plaintiffs in federal court, as required by CAFA’s mass action definition. Finally, determining which claims count toward the \$5 million aggregate amount in controversy and trigger the discretionary and mandatory remand provisions also becomes more complicated. This Article, while not a comprehensive discussion of the mass action provisions, endeavors to define “mass action” using tools of statutory interpretation.<sup>11</sup> This Article then examines what the provisions actually require, points out anomalies in the statute, and finally, suggests possible solutions to the problems raised by the mass action amount in controversy requirement.

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7. § 1332(d)(2).

8. See § 1711 note (Findings and Purposes).

9. See 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

10. Unless otherwise noted, all references are to the Federal Rules of Civil Procedure.

11. The two manners of statutory interpretation employed in this Article are plain language interpretation and reference to congressional intent in enacting the statute. See R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37, 37–41 (1997).

A. *What Is a Mass Action?*

With CAFA,<sup>12</sup> Congress sweeps somewhat broader than the popular name of the statute suggests and addresses a separate set of suits not within the realm of traditional class actions.<sup>13</sup> Known as mass actions,<sup>14</sup> these suits combine large numbers of plaintiffs and present the same problems CAFA is meant to address, such as forum shopping, settlements exacted from defendants wary of placing the entire company on the line, and attorney compensation disproportionate to the recovery plaintiffs actually receive.<sup>15</sup> In some ways, mass actions “really are class actions in disguise.”<sup>16</sup> However, they are not subject to the procedural constraints of Rule 23 or similar state procedural rules, and thus may be more susceptible to forum shopping than class actions. In mass actions, the claims joined are often substantively unrelated and can mislead juries who do not realize that each plaintiff must prove every element of each individual claim.<sup>17</sup> For these reasons, CAFA treats mass actions as class actions<sup>18</sup> when they fit requirements outlined in the diversity jurisdiction<sup>19</sup> and removal provisions.<sup>20</sup> But, the question still remains, what is a mass action?

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

13. See 28 U.S.C. § 1711(2) (2006) (defining class action as covered by CAFA).

14. § 1332(d)(11).

15. 151 CONG. REC. S1109 (daily ed. Feb. 8, 2005) (statement of Sen. Brownback).

16. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner). Mass actions create the potential for abuse:

The mass action provision was included in the bill because mass actions are really class actions in disguise. They involve an element of people who want their claims adjudicated together, and they often result in the same abuses as class actions. In fact, sometimes the abuses are even worse because the lawyers seek to join claims that have little to do with each other and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury.

*Id.*

17. *Id.*

18. § 1332(d)(11)(A) (“For purposes of this subsection and section 1453 . . . a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.”).

19. See *supra* Part III.

20. See *supra* Part I for an analysis of CAFA’s removal provisions.

### 1. The Plain Language Definition of Mass Action

CAFA defines a mass action as:

any civil action (except a civil action within the scope of section 1711(2)) . . . 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, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).<sup>21</sup>

As a practical matter, this definition does little to clarify the types of cases subject to federal courts' original or removal jurisdiction.

First, CAFA's plain language specifies that any civil action covered by § 1711(2), or a class action filed under Rule 23, is *not* a mass action. To constitute such an action, the claims of at least one hundred persons, involving common questions of law or fact, must be joined for trial.<sup>22</sup> The statute places an important limit on these plaintiffs: only those whose claims exceed the \$75,000 requirement of § 1332(a) fall within the scope of federal jurisdiction.<sup>23</sup>

The plain language of CAFA further delineates what a mass action is *not*. The statute carves out four types of cases which do not qualify as mass actions removable to federal district court:

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State; (II) the claims are joined upon motion of a defendant; (III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or (IV) the claims have been consolidated or

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21. § 1332(d)(11)(B)(i).

22. *Id.*

23. *Id.* This limitation may be affected, however, by the United States Supreme Court's decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, which extends supplemental jurisdiction to plaintiffs whose claims are part of the same constitutional case, but do not exceed the jurisdictional amount in controversy of section 1332(a). 125 S. Ct. 2611, 2625 (2005).

coordinated solely for pretrial proceedings.<sup>24</sup>

CAFA also places transfer restrictions on mass actions (at the possible expense of judicial efficiency and scarce resources)<sup>25</sup> and suspends the statute of limitations<sup>26</sup> for all claims removed as a mass action to federal court.

CAFA's plain language by no means provides clear guidelines for attorneys or the judiciary. Congress left many terms undefined and many issues unaddressed. Nevertheless, Congress did conduct extensive hearings and debates—about the mass action provision in particular—prior to CAFA's enactment.<sup>27</sup> These legislative explanations may “shed a reliable light on the enacting Legislature's understanding”<sup>28</sup> of the mass action provision and may assist those responsible for implementing CAFA to flesh out the statute's complicated provision.<sup>29</sup>

## 2. Legislative Intent Shapes Nebulous Mass Action Cloud

Congress included CAFA's mass action section to prevent plaintiffs from creatively circumventing the class action provisions by filing a mass action of identical proportions without using Rule 23.<sup>30</sup> Senator Lott, in hearings prior to CAFA's passage, explained

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24. § 1332(d)(11)(B)(ii).

25. *See* § 1332(d)(11)(C)(i) (“Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407 or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.”).

26. *See* § 1332(d)(11)(D) (“The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.”).

27. *E.g.*, 151 CONG. REC. H723 (daily ed. Feb. 17, 2005); 151 CONG. REC. S1076 (daily ed. Feb. 8, 2005); 151 CONG. REC. S1225 (daily ed. Feb. 10, 2005).

28. *Exxon Mobil Corp.*, 125 S. Ct. at 2626.

29. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861 (1992). Legislative history is not only relevant to determining the legislative purpose in enacting legislation, but also to assist in determining the meaning of specialized terms. *See id.*

30. 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott). This type of argument is often referred to as a “substance over form” debate and is used in other legal contexts. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp. 2d 236, 244, (S.D.N.Y. 2004) (requiring that courts “examine the complaint to determine whether the *substantive* requirements [of SLUSA] have been satisfied”); *Arlia ex rel. Massey Energy Co. v. Blankenship*, 234 F. Supp.

that “[t]he mass action section was specifically included to prevent plaintiffs’ lawyers from making this end run. It will ensure that class action-like cases are covered by the bill’s jurisdictional provisions even if the cases are not pleaded as class actions.”<sup>31</sup> While some fear that this section includes “large-scale personal injury cases resulting from accidents, environmental disasters, or dangerous drugs that are widely sold,”<sup>32</sup> Congress assured that mass actions are separate from such “mass torts” and included this provision primarily to capture states where class action certification does not exist.<sup>33</sup>

*a. “Mass action” is not synonymous with mass tort*

Critics in the Senate feared that the mass action provision was merely a tool to shift all personal injury cases to federal court, thereby increasing the cost and burden of these actions and ultimately delaying or denying plaintiffs their day in court.<sup>34</sup> Senator Durbin expressed his personal concern with the provision:

I have tried to take a close look at the mass actions section of this class action bill and ask how it would apply to a mass tort situation. Mass torts are large-scale personal injury cases resulting from accidents, environmental disasters, or dangerous drugs that are widely sold. The asbestos exposure situation we will be considering this year is another example of a mass tort . . . . The supporters of the bill claim that mass actions are not the same as mass torts and that they have no desire to affect mass tort cases. I know that is their position, but it is not what their bill says. If the goal is to federalize all State personal injury cases,

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2d 606, 608–09 (S.D.W. Va. 2002) (illustrating a defendant who urges the court to find that the plaintiff attempted to disguise his claim as a shareholder derivative suit when it was actually a securities fraud class action so that it would not be removable to federal court under the Securities Litigation Uniform Act (SLUSA)); *Lander v. Hartford Life & Amity Ins. Co.*, 251 F.3d 101, 111 (2d Cir. 2001) (finding that Congress meant for courts to look to the substance of the claim rather than relying wholly on the form the lawsuit takes).

31. 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

32. *Id.* at S1099 (statement of Sen. Durbin).

33. *Id.*

34. 151 CONG. REC. S1243 (daily ed. Feb. 10, 2005) (statement of Sen. Leahy) (“Federalizing these individual cases will no doubt delay, and possibly deny, justice for victims suffering real injuries.”).

supporters should be open about it and say it publicly.<sup>35</sup>

Critics also feared that suits alleging serious harm or death due to the drug Vioxx would be automatically removable by defendant Merck to federal court, where the company could defend its case to a more sympathetic ear.<sup>36</sup>

In light of critics' fears, Senator Durbin proposed an amendment to the bill that would permit state courts to consolidate mass tort cases for their convenience and efficiency without the possibility of losing jurisdiction to a federal court.<sup>37</sup> This amendment would have added "or by the court sua sponte" to the exemption for claims consolidated by a defendant.<sup>38</sup> Senator Durbin's proposal prompted speedy clarification from the bill's proponents.<sup>39</sup> As Senator Lott explained, mass actions are not the same as mass torts:

Some of my colleagues will oppose this mass actions provision and will want to gut it by making an effort to confuse mass actions with mass torts. I realize we are kind of getting into a legalese discussion, but words make a difference when you are considering a bill such as this. I am very concerned that the real motive is to render this provision meaningless, thereby creating a loophole for the trial lawyers to basically get a class action by another name.

Mass torts and mass actions are not the same. The phrase "mass torts" refers to a situation in which many persons are injured by the same underlying cause, such as a single explosion, a series of events, or exposure to a particular product. In contrast, the phrase "mass action" refers to a specific type of lawsuit in which a large number of plaintiffs seek to have all their claims adjudicated in one

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35. 151 CONG. REC. S1099-100 (daily ed. Feb. 8, 2005) (statement of Sen. Durbin).

36. *Id.* at S1100 (describing some individual Vioxx cases and the New Jersey, Merck's headquarters, mass tort court system that Senator Durbin fears would lose jurisdiction over all mass tort claims consolidated by the New Jersey court system for efficiency).

37. *Id.* at S1101 (proposing to add "or by the court sua sponte" to § 1332(d)(11)(B)(ii)(II), providing "the claims are joined upon motion of a defendant or by the court sua sponte").

38. *Id.*

39. 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

combined trial. Mass actions are basically disguised class actions.<sup>40</sup>

More specifically, the provision was intended to ensure that in states without class action certification, suits joining many plaintiffs' claims for adjudication in one trial, essentially class actions without such status, would be treated the same as actions in states with procedural rules akin to Rule 23.<sup>41</sup> Senator Lott continued:

There are a few States, such as my State—[Mississippi], which do not provide a class action device. In those States, plaintiffs' lawyers often bring together hundreds, sometimes thousands of plaintiffs to try their claims jointly without having to meet the class action requirements, and often the claims of the multiple plaintiffs have little to do with each other. There was an instance in my State where you had more plaintiffs in one of these mass actions than you had people in the county, more than the residents in the county. Under the mass action provision, defendants will be able to remove these mass actions to Federal court under the same circumstances in which they will be able to remove class actions. However, a Federal court would only exercise jurisdiction over those claims meeting the \$75,000 minimum threshold. To be clear, in order for a Federal court to take jurisdiction over a mass action, under this bill there must be more than 100 plaintiffs, minimal diversity must exist, and the total amount in controversy must exceed \$5 million. In other words, the same safeguards that apply to removal of class actions would apply to mass actions.<sup>42</sup>

Satisfied with this explanation, Senator Durbin withdrew his amendment<sup>43</sup> and signaled to critics that the mass action provision would indeed be narrowly read:<sup>44</sup>

I heard from proponents . . . that the bill is designed to affect only mass actions and not mass torts . . . . I am glad that the proponents of this bill agree with me that there is a

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40. *Id.*

41. *Id.*

42. *Id.*

43. 151 CONG. REC. S1236 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin).

44. *Id.* at S1235–36.

very significant difference between these two types of cases. Mass torts are large scale personal injury cases that result from accidents, environmental disasters, or dangerous drugs that are widely sold.

Cases like Vioxx . . . and cases arising from asbestos exposure, are examples of mass torts. These personal injury claims are usually based on State laws, and almost every State has well established rules of procedure to allow their State courts to customize the needs of their litigants in these complex cases. . . .

So, it seems to me that the authors of this bill are trying to include only these so-called mass actions and not mass torts.

And I understand from the statements made by Senator Lott, the U.S. Chamber of Commerce, and many other proponents of the bill, that these so-called mass actions are currently filed only in Mississippi and West Virginia. In other words, this provision of S. 5 will have no impact on mass torts cases filed in the other 48 States . . . .

I agree with the proponents that the scope of this language is limited.

It is my understanding . . . that a mass action, as used in this section of the bill, is simply a procedural device designed to aggregate for trial numerous claims. If that is the case, I believe my amendment would not be necessary.<sup>45</sup>

But if CAFA's mass action provision encompasses only a single procedural device in two states that do not provide class action certification, it does not seem to have much bite, especially in light of recent Mississippi "tort reform" legislation and Mississippi Supreme Court decisions limiting the use of state joinder and consolidation operations.<sup>46</sup>

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45. *Id.*

46. *See* MISS. CODE ANN. § 11-1-64 (2002) (repealed 2004); *MS Life Ins. Co. v. Baker*, 905 So. 2d 1179 (Miss. 2005) (calling for stricter interpretation and application of permissive joinder rule); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004) (calling for severance of an asbestos mass tort litigation because the plaintiffs' attorney failed to allege sufficient facts as to each plaintiff to establish proper joinder).

*b. Defining “mass action” in light of congressional intent*

How courts interpret “mass action” will depend largely on the degree to which they adhere to the plain language of the statute and incorporate congressional intent. Courts regularly attempt to discern legislative intent and look beyond the four corners of the statute to find it.<sup>47</sup> In particular, courts look to the “plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage.”<sup>48</sup> Courts generally will not turn to legislative intent when statutory language is unambiguous.<sup>49</sup> However, if the legislature’s purpose is particularly compelling, “the legislative history may make the obvious unwarranted and might require another construction.”<sup>50</sup> Some courts have gone even further and declared that “one may resort to explanatory legislative history ‘no matter how clear the words’ of a statute may appear on a superficial examination.”<sup>51</sup>

If courts use the textualist method and rely solely on the language of the statute, then CAFA’s mass action section may apply to actions joined by the court *sua sponte* for trial purposes. The plain language does not preclude removal of such actions to federal court. On the contrary, it may suggest that these types of actions *should* be removed. For instance, § 1332(b)(11)(B)(ii)(IV) states that cases consolidated for *pretrial* purposes may not be removed, but it says nothing about consolidation by court *sua sponte* for trial purposes.<sup>52</sup>

However, if courts also consider congressional intent, they may read the mass action provision to exclude all but a very narrow class of cases. As CAFA is relatively new, and courts have not reviewed a single case involving the interpretation of its mass action provisions, it is not clear which approach the courts will adopt. In other words, predicting how the courts will interpret CAFA and its mass action

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47. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2734 (2005) (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004)) (interpreting the statute in light of its “text, structure, purpose, and history”).

48. *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987)).

49. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

50. *Rota v. Bhd. of Ry., Airline & S.S. Clerks*, 338 F. Supp. 1176, 1180 (E.D. Pa. 1972) (citing *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928)).

51. *Id.* (citing *Harrison v. N. Trust Co.*, 317 U.S. 476, 479 (1943)).

52. 28 U.S.C. § 1332(d)(11)(B)(ii)(I–IV) (2006).

provisions is difficult at best, and amounts to predicting the World Series champion during spring training at worst. Nevertheless, there are a few distinct possibilities.

When courts interpret a new statute, their goal is to elucidate the meaning of the legislature's words. Following the Supreme Court's lead, they look first to the plain language and "presume that [the] legislature says in a statute what it means and means in a statute what it says there."<sup>53</sup> If the language is unambiguous, that is often where the "inquiry begins . . . and ends."<sup>54</sup> However, further analysis of legislative intent is not entirely precluded.<sup>55</sup>

To decide whether to consult the Congressional Record for direction, courts may use a sliding scale method of statutory interpretation: "[T]he plainer the language of the statute, the more convincing contrary legislative history must be" to interpret the statute in such a contrary manner.<sup>56</sup> Because mass action provisions are less than clear, and the legislative history is particularly illuminating, the record seems to warrant courts' consideration.

The limiting language comes not from the removal exceptions, but rather from the narrow definition of "mass action" introduced in both the Senate and the House of Representatives.<sup>57</sup> The day before CAFA became law, Representative Sensenbrenner clarified the scope of the mass action provisions:

New subsection 1332(d)(11) expands Federal jurisdiction over mass actions—suits that are brought on behalf of numerous named plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status . . . . Under subsection 1332(d)(11), any civil action in which 100 or more named parties seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes. The Sponsors wish to stress that a complaint in which 100 or more plaintiffs

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53. *Bedroc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

54. *Id.* (citing *Lamie*, 540 U.S. at 534).

55. *See Rota*, 338 F. Supp. at 1180.

56. *Ganz v. Alaska Airlines Inc.*, 963 P.2d 1015, 1019 (Alaska 1998) (quoting *Chokwak v. Worley*, 912 P.2d 1248, 1251 (Alaska 1996)).

57. 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

are named fits the criteria of seeking to try their claims together, because there would be no other apparent reason to include all of those claimants in a single action unless the intent was to secure a joint trial of the claims asserted in the action.<sup>58</sup>

This indicates that plaintiffs' attorneys must file mass actions as such and include at least one hundred or more names in the complaint.<sup>59</sup> In addition, the most logical reading of "proposed to be tried jointly,"<sup>60</sup> leads to the conclusion that Congress meant only for claims joined willfully by the plaintiff under Rule 20(a)<sup>61</sup> or a state equivalent<sup>62</sup> to be treated as a class action subject to § 1332(d)(2)–(10). In other words, only those actions that most closely resemble a Rule 23 class action should be subject to CAFA. While this language may broaden the scope of "mass actions" beyond cases filed in Mississippi and West Virginia, it excludes from federal jurisdiction suits filed by independent plaintiffs or smaller mass actions with less than one hundred individuals. It would also exclude actions consolidated for pretrial and trial purposes by state courts for efficient adjudication.<sup>63</sup>

This interpretation of CAFA is most logical because joinder and consolidation are distinct procedures. If Congress intended to encompass "class actions in disguise"<sup>64</sup> and prevent plaintiffs from making an end run on the class action provisions,<sup>65</sup> interpreting "proposed to be tried jointly," to mean joined by the plaintiffs—not a court—would accomplish Congress's goal. Concerns of "artful pleading" might still arise if plaintiffs' attorneys file numerous mass tort complaints, each naming ninety-nine plaintiffs, and thus force a state judge to consolidate the cases for adjudication. Such pleading resembles willful joinder by the plaintiffs. In this event, defendants

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58. *Id.*

59. *Id.*

60. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

61. FED. R. CIV. P. 20(a).

62. *E.g.*, MISS. R. CIV. P. 20(a) (West 2005).

63. 151 CONG. REC. S1100 (daily ed. Feb. 8, 2005) (statement of Sen. Durbin).

64. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

65. 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

could invoke the policy statement in CAFA's Official Senate Report to persuade federal judges to accept consolidated mass tort cases removed from state court.<sup>66</sup>

If courts use the Congressional Record to construe the term "mass action" most narrowly, encompassing only cases with claims joined under liberal West Virginia or Mississippi statutes, defendants likely will not invoke the mass action provision as a means to remove a suit to federal court. Given these narrow parameters of legislative purpose, the opportunity to do so would not often arise. However, should courts include suits with claims joined under other state joinder rules, but exclude cases consolidated by state judges, defense attorneys might invoke CAFA's mass action provisions more often as a means to prevent plaintiffs from circumventing its class action provisions. As a variation of this, a judge may also allow removal of a consolidated case if she finds that the plaintiffs' attorney intended to overwhelm the court with multiple smaller mass tort actions.

Finally, if courts interpret "mass action" according to the plain language of the statute, when a plaintiffs' attorney files a complaint naming one hundred or more plaintiffs and alleging more than \$5 million in damages, a defendant can invoke CAFA and remove the entire case to federal court. This interpretation protects smaller groups of plaintiffs who file mass tort actions in good faith after suffering real injuries; it does not include cases consolidated by judges for convenience's sake. Overall, the simplest interpretation would be that "proposed to be tried jointly" is synonymous with "joined" under joinder rules. This gives effect to the legislative intent, but does so without venturing outside the language of the statute. It also quells Senator Durbin's fears that mass torts will be swept into CAFA's grasp.

Proponents and defendants may be frustrated by the narrow scope of CAFA's mass action provisions. By construing the term narrowly, but consistently with the plain language of the statute,

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66. S. REP. NO. 109-14, at 43 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 41. Senator Specter asserted the following, "Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Id.*

courts may ensure that only those cases that are truly class actions in sheep's clothing are subject to CAFA. From the Congressional Record, one can infer that Senator Durbin would not have removed his amendment from consideration if he feared that judicially consolidated actions, such as those in New Jersey, would not be given continued effect.<sup>67</sup>

On the other hand, the overarching goal of the mass action provisions is to prevent plaintiffs' attorneys from circumventing CAFA's class action requirements.<sup>68</sup> To that end, courts should interpret the statute to give district court judges discretion to permit removal of consolidated actions if it appears the plaintiffs' attorney filed many smaller mass actions to force the state trial court judge to consolidate. In this way, courts will heed both the statutory language and legislative intent and will fulfill CAFA's overarching policy of ensuring that federal courts adjudicate "class actions in disguise."<sup>69</sup>

#### *B. What Do CAFA's Provisions Actually Require?*

For a federal court to assert jurisdiction under CAFA's mass action provision, the claims of one hundred or more persons seeking monetary relief must be joined for trial because they share common questions of law or fact.<sup>70</sup> Individual claims, however, must meet the amount in controversy requirement of § 1332(a).<sup>71</sup> If these requirements are met, and the case does not fall within an exception under § 1332(d)(11)(B)(ii), then the jurisdictional and removal sections applicable to class actions also apply to qualifying mass actions.<sup>72</sup> This means that the \$5 million aggregate amount in controversy provision as well as the discretionary and mandatory remand provisions,<sup>73</sup> would apply to mass actions.

On its face, the mass action provision may seem simple enough, but when read in the context of the entire statute as the Supreme

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67. 151 CONG. REC. S1235 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin).

68. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

69. *Id.*

70. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

71. *Id.*

72. § 1332(d)(11)(A). For a detailed analysis of the jurisdictional and removal sections, see *supra* Parts I & II.

73. § 1332(d)(3), (4)(A)(i)(I).

Court requires,<sup>74</sup> simple phrases give way to anomalous and complicated, although not ambiguous, applications.

1. CAFA requires each plaintiff in a mass action to meet the jurisdictional amount-in-controversy requirement of § 1332(a), but *Exxon* suggests § 1367 should apply

The plain language of CAFA suggests that Congress intended federal courts to assert jurisdiction over only those plaintiffs named in the mass action whose monetary claims exceed the \$75,000 minimum required by § 1332(a),<sup>75</sup> without aggregation or supplemental jurisdiction.<sup>76</sup> Senator Dodd affirmed Congress's intent to treat mass action plaintiffs more like individual plaintiffs, and via the compromise bill, to subject their claims to federal jurisdiction only if those claims exceed \$75,000.<sup>77</sup> As noted in the Congressional Record, "[t]he compromise changes the jurisdictional amount requirement. Federal jurisdiction shall only exist over those persons whose claims satisfy the normal diversity jurisdictional amount requirement for individual actions under current law (presently \$75,000)."<sup>78</sup> However, if a federal court interprets the absence of § 1367 from the mass action provisions as an ambiguity, the Congressional Record may provide an answer contrary to what the plain language suggests. For instance, Representative Sensenbrenner posited that a court *could* apply supplemental jurisdiction to smaller claims in the mass action context.<sup>79</sup>

Even if CAFA's plain language interpretation prevails, timing might be critical to a court's analysis: Senator Dodd's statement and key congressional compromises occurred prior to the Supreme Court's clarification of § 1367(b) in *Exxon*.<sup>80</sup> When Senator Dodd explained that "[f]ederal jurisdiction shall only exist over those

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74. *See* *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35–36 (1998).

75. § 1332(d)(11)(B).

76. § 1367.

77. 151 CONG. REC. S1078 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd).

78. *Id.*

79. 151 CONG. REC. H723, H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

80. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2620–21 (2005).

persons whose claims satisfy the normal diversity jurisdictional amount requirement for individual actions under current law,”<sup>81</sup> he was operating in a pre-*Exxon* world, when the law required each plaintiff to individually meet the \$75,000 amount in controversy requirement.

In *Exxon*, the Supreme Court clarified the traditional § 1332(a) amount in controversy requirement and its application to supplemental jurisdiction.<sup>82</sup> Specifically, the Court held that in both class actions and product liability cases, federal courts may exercise supplemental jurisdiction over claims arising out of the same case or controversy, but which fall below \$75,000, as long as one plaintiff meets the threshold requirement and sufficient diversity exists among the parties.<sup>83</sup> If such “traditional” claims are subject to § 1367, then under CAFA’s policy, the claims of mass action plaintiffs should also be subject to supplemental jurisdiction.

*Exxon* did not change the § 1332(a) complete diversity requirement, and the Court deferred to Congress to determine the “other elements of jurisdiction,”<sup>84</sup> within the parameters of Article III.<sup>85</sup> With CAFA, Congress decided that for qualifying class actions and mass actions, federal courts may exercise original jurisdiction over an entire case or controversy, provided the aggregate amount in controversy exceeds \$5 million and minimal diversity exists.<sup>86</sup>

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81. 151 CONG. REC. S1078 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd).

82. *Exxon Mobil Corp.*, 125 S. Ct. at 2620–21.

83. *See id.*

84. *Id.* at 2615.

85. U.S. CONST. art. III, § 2, cl. 1 states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

86. 28 U.S.C. § 1332(d)(2) (2006) states:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in

Under post-*Exxon* law then, a federal court should be able to exercise jurisdiction over *all* claims in a class action, as long as one monetary claim exceeds \$75,000, the total amount in controversy exceeds \$5 million, and minimal diversity exists. Likewise, as long as mass actions qualify under CAFA as “class actions in disguise,”<sup>87</sup> they too should be subject to the same rules, and § 1367 should apply to § 1332(d)(11). Yet, this conclusion conflicts with the plain language of the statute, congressional intent, and pre-*Exxon* jurisprudence.

*a. Supplemental jurisdiction in light of CAFA’s plain language and congressional intent*

CAFA’s text and legislative history suggest that Congress did not intend supplemental jurisdiction to apply to mass actions, Representative Sensenbrenner’s opinion notwithstanding.<sup>88</sup> In contrast to CAFA’s \$5 million aggregation requirement,<sup>89</sup> the mass action provision seems to codify the Supreme Court’s holding in *Zahn v. International Paper Co.*<sup>90</sup> Yet, as with many of CAFA’s other provisions, further analysis reveals a potential problem. *Zahn* required each plaintiff in a class action to satisfy the amount in controversy and thus prohibited aggregation of claims and the application of supplemental jurisdiction to claims below the \$75,000 threshold.<sup>91</sup> In *Exxon*, the Supreme Court held that Congress’s enactment of § 1367<sup>92</sup> in 1990 effectively overruled *Zahn*.<sup>93</sup> The

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which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State any defendant is a foreign state or a citizen or subject of a foreign state.

87. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

88. *Id.* (“I would like to stress that this [mass action] provision in no way is intended to abrogate [2]8 United States Code [1367] to narrow current jurisdictional rules. Thus, if a Federal court believed it to be appropriate, the court could apply supplemental jurisdiction in the mass action context as well.”).

89. § 1332(d)(2).

90. 414 U.S. 291, 294–95 (1973).

91. *See id.*

92. § 1367.

93. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2627 (2005).

Court also went on to state that CAFA played no role in this decision,<sup>94</sup> leaving Congress free to restrict the application of § 1367 through its legislative powers. The question remains whether Congress has the power to explicitly limit the application of § 1367 to traditional diversity actions. Because § 1367 is a creature of statute, and because Congress is vested with “[a]ll legislative Powers,”<sup>95</sup> it would seem Congress has the authority to exclude CAFA mass actions from the ambit of § 1367.<sup>96</sup>

On the other hand, preventing federal jurisdiction over individual mass action claims that do not satisfy the § 1332(a) amount in controversy requirement may fly in the face of Congress’s purpose for enacting CAFA: “[To] restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction . . . .”<sup>97</sup> Congress may have consciously contradicted this policy by providing that each mass action plaintiff must meet the § 1332(a) amount in controversy requirement. Consequently, courts cannot apply *Exxon* to mass actions filed in or removed to federal court under CAFA and must remand any claims that do not exceed \$75,000 to state court.

*b. Judicial efficiency may support applying § 1367*

For the sake of judicial efficiency, district courts might instead follow *Exxon* and Representative Sensenbrenner’s position<sup>98</sup> in the mass action context and permit supplemental jurisdiction as a logical extension of § 1332(a). Supplemental jurisdiction would alleviate judicial headaches caused by retaining some claims in federal court and remanding others to state court. For instance, courts might avoid complications associated with adjudicating nearly identical claims and facts in multiple venues or determining which claims count toward the aggregate \$5 million and which plaintiffs count toward

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94. *Id.* at 2627–28.

95. U.S. CONST. art. I, § 1.

96. *Exxon*, 125 S. Ct. at 2619 (citing *Finley v. U.S.*, 490 U.S. 545, 556 (1989) (stating that “[w]hatever we [the Court] say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress”)).

97. 28 U.S.C. § 1711 note (2006) (Findings and Purposes).

98. 151 CONG. REC. H723, H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner); *see also supra* note 88.

the 1/3 or 2/3 remand thresholds.<sup>99</sup>

To simplify an already complicated landscape, courts may decide that conserving judicial resources is a sufficiently sound reason for applying § 1367 to mass actions. This would permit federal courts to assert supplemental jurisdiction over mass action claims that do not exceed \$75,000 when at least one plaintiff satisfies the § 1332(a) amount in controversy requirement, minimal diversity exists, and claims in the aggregate exceed \$5 million. However, while applying § 1367 seems logical, the unambiguous language of the mass action provision does not coincide with the Court's decision in *Exxon*. There, the Court determined that once a district court has original jurisdiction over one claim, it can exercise supplemental jurisdiction over plaintiffs' claims joined under Rule 20 or 23, even though those claims do not exceed the amount in controversy requirement.<sup>100</sup> Adhering to the Court's reasoning in *Exxon* might allow a district court to avoid this conflict; however, it may also encroach on the constitutional mandate that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ."<sup>101</sup> Thus, a court may reject the *Exxon* analysis in an effort to avoid a constitutional conflict, but in doing so, may nevertheless cause substantial delay and waste of judicial resources.

2. If courts do not apply § 1367 to mass actions, other pitfalls await

*a. Fractionated cases may clog state and federal court dockets*

If CAFA, as written, precludes application of § 1367 to mass action claims, large mass actions will likely be split among at least one federal court and several state courts.<sup>102</sup> This would occur whenever one hundred or more plaintiffs join their claims for the purposes of trial, all monetary claims together exceed \$5 million, minimal diversity exists, and one or more claims fail to exceed \$75,000. A federal court would remand the individual "small" claims to state court, and two or more cases with virtually identical facts would be litigated in state and federal courts simultaneously—a

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99. See GEORGENE M. VAIRO, *THE CLASS ACTION FAIRNESS ACT OF 2005: A REVIEW AND PRELIMINARY ANALYSIS* 34–35 (2005).

100. *Exxon*, 125 S. Ct. at 2620–21.

101. U.S. CONST. art. I, § 1.

102. VAIRO, *supra* note 99, at 34.

result counter to goals of efficiency and uniformity.

The expense and inconvenience of litigating in multiple fora may discourage defendants from using CAFA to remove mass actions in the first place. This reluctance would frustrate Congress's intent if cases or claims of national importance remain in state court. More importantly, with courts powerless to apply § 1367 to supplemental claims, the mass action provision allows plaintiffs' attorneys to do exactly what Congress feared they might do—an end-run around CAFA's class action provisions. In a suit against a national corporation, such as Walmart, with a retail location in the forum state, an attorney could join 1,000 plaintiffs from across the country, each alleging \$5,000 in damages, and one plaintiff claiming \$75,001. This scenario is not difficult to imagine.

Under these circumstances, *Exxon* and CAFA accomplish nothing. The plaintiffs, far more than one hundred, were joined for the purpose of trial, and as long as one defendant and one plaintiff are from the forum state, the case will remain in state court, thereby frustrating CAFA's overarching policies. If, however, only the class action provisions apply, the result is different. As long as one plaintiff is from a different state than any one defendant, and the one-third and two-third provisions are satisfied, a federal district court may assert jurisdiction because the aggregate damages are \$6,075,001, well above the \$5 million requirement. If § 1367 applies, as it would for class actions *not* filed under CAFA or for ordinary diversity cases, the court may assert supplemental jurisdiction over 999 plaintiffs, as long as the one plaintiff with a claim exceeding \$75,000 is diverse in citizenship from all defendants. Because only minimal diversity is required for original jurisdiction under CAFA, a federal court could exercise jurisdiction over all 1,000 claims.

This avoids the illogical result of the district court exerting jurisdiction over only one plaintiff who suffered \$75,001 in damages. Because they may exclude anyone who suffered more than \$75,000 worth of damage and remain in state court, attorneys may deliberately select their plaintiffs to avoid those with the greatest harm. Selecting plaintiffs in this way would not only circumvent CAFA's jurisdictional provisions, but would also neglect plaintiffs with perhaps the greatest need for relief. These individuals would have to seek out other counsel and file separately, thereby

contributing to the expense and inefficiency of litigating several similar claims in multiple fora. This too undermines CAFA's purpose and encourages litigation tactics which may stymie—rather than improve—access to the courts. Logic and public policy should not permit this result.

*b. Split cases make counting plaintiffs  
much more difficult than 1-2-3*

For a defendant to remove a mass action to federal court, the complaint must include one hundred or more plaintiffs, and the aggregate amount in controversy must exceed \$5 million. The federal judge must then examine the case to make sure it satisfies all the elements of a CAFA mass action. Suppose, in a case like the Walmart hypothetical above, the claims of only twenty out of 1,000 plaintiffs exceed \$75,000. CAFA requires the federal court to retain jurisdiction over those claims and remand the claims of the remaining 980 plaintiffs to state court. Suddenly, the case that remains in federal court no longer includes at least one hundred plaintiffs, and unless the individual amounts in controversy of the twenty plaintiffs exceed \$250,000, the \$5 million aggregate would not be met either. This result begs the question, is the case in federal court with less than one hundred plaintiffs still a mass action?<sup>103</sup> Representative Sensenbrenner addressed this problem, and commented that the federal court should not be divested of jurisdiction if losing the remanded claims brings the case below either the one hundred plaintiff requirement or the \$5 million aggregate.<sup>104</sup> However, as this issue has not yet been litigated, no one can say for sure whether courts will follow Representative Sensenbrenner's reasoning. It does seem inefficient for courts to consider whether they should retain jurisdiction under these circumstances, especially if both the policy of CAFA and the Supreme Court decision in *Exxon* weigh in favor of supplemental jurisdiction over the remanded claims.

If the amount in controversy requirement remains written “as

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103. 28 U.S.C. § 1332(d)(11)(B)(i) (2006). This section specifies that, to be a mass action, a suit must include the “monetary relief claims of 100 or more persons.” *Id.*

104. 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

is,” further problems may arise in counting plaintiffs. CAFA requires that the count be determined on the date that the plaintiff filed the original complaint or when plaintiffs amend the complaint.<sup>105</sup> This means that with every recount, the federal court could gain or lose jurisdiction, and the jurisdictional battle could continue until there is a final judgment or settlement in the case.<sup>106</sup> Extensive jurisdictional battles may actually encourage parties to reach premature settlements without due consideration of plaintiffs’ best interests. In fact, this was a major concern of CAFA’s<sup>107</sup> drafters, who included a consumer bill of rights among the statute’s detailed provisions.<sup>108</sup> If federal courts cannot assert jurisdiction over the claims of all plaintiffs named in the complaint, then the case that remains in federal court looks nothing like the mass action that the plaintiff originally filed, or the large, multi-state mass action Congress believed ought to be heard in a neutral forum.<sup>109</sup>

The inclusion of the \$75,000 minimum defeats the dual aims of CAFA. First, lawyers can easily keep large cases with national implications in state court by choosing only, or primarily, small-claims plaintiffs. Second, even if a part of the case remains in federal court, it may be inefficient, split between at least two fora, and lacking national implications. The effect of splitting cases among multiple fora, with federal courts able to assert jurisdiction over only outlier plaintiffs, strays far from CAFA’s goal of ensuring that federal courts adjudicate mass actions and class actions under the same circumstances.<sup>110</sup> If federal courts treat qualifying mass actions as class actions, requiring only the \$5 million aggregate amount in controversy,<sup>111</sup> or if courts apply § 1367 as required by *Exxon*, this problem will vanish, along with the time and money

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105. 151 CONG. REC. S1105 (daily ed. Feb. 8, 2005) (statement of Sen. Grassley).

106. VAIRO, *supra* note 99, at 35.

107. *See* 151 CONG. REC. S1081 (daily ed. Feb. 8, 2005) (statement of Sen. Lott) (“[CAFA] places limitations on contingency awards for attorneys in coupon settlement cases.”).

108. *See* §§ 1711–15. For a detailed analysis of these provisions, see *infra* Part V.

109. *See* 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

110. *See id.*

111. *See* § 1332(d)(2).

spent litigating this complex, yet ancillary, issue.

*c. Fewer plaintiffs with large claims may not add up to \$5 million*

Questions also arise as to CAFA's amount in controversy requirement.<sup>112</sup> For a case to qualify as either a class action or a mass action, the aggregate amount in controversy must exceed \$5 million.<sup>113</sup> The reason for such a high threshold is two-fold. First, because Congress abandoned complete diversity with CAFA, this new requirement ensures that enough is at stake to justify the expansion of diversity jurisdiction. Second, Congress sought to ensure that only the largest, bet-the-company cases could be heard in federal court, thus allocating scarce judicial resources to cases with the greatest national significance.<sup>114</sup> Notably, the statute is silent as to whether the federal court can assert jurisdiction over the claims of fewer than one hundred plaintiffs when the aggregate amount in controversy is less than \$5 million. The absence of any language reconciling the \$5 million aggregate with the \$75,000 mass action provision is further evidence of the anomalies that are exposed when a litigant or a judge attempts to read the statute as a whole.

In the Walmart hypothetical, if the federal court exercises jurisdiction over the claims of only twenty plaintiffs, whose average individual claim for damages is \$80,000, their aggregate \$1.6 million is far from the threshold amount required by CAFA. Should the federal court remand to state court claims exceeding \$75,000? The language of CAFA does not provide a clear answer to this question.

Likewise, it is not clear what would happen if remand of the smaller claims to state court created complete diversity among the remaining plaintiffs and defendants. Should CAFA no longer be the basis for removal if the defendants could simply remove under § 1441?<sup>115</sup> If so, under *Exxon*, some of the smaller claims already remanded to state courts could re-enter federal court by virtue of § 1367, if the plaintiffs are completely diverse from all defendants. This would be possible without courts relying on CAFA for federal

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112. *Id.*

113. *Id.*

114. § 1711 note (Findings and Purposes).

115. § 1441; *see supra* Part II (discussing why CAFA's removal statute § 1453 quite possibly applies to cases not meeting § 1332(d)(2) but that meet the "traditional" diversity requirements of § 1332(a) as now impacted by *Exxon*).

jurisdiction. Again, CAFA would fail to achieve the goal Congress set out to accomplish: to bring large cases of national significance before federal courts.

Moreover, even if courts interpreted CAFA to permit federal jurisdiction over claims exceeding \$75,000 but not piercing the \$5 million threshold, courts would controvert Congress's intent to keep federal fora open to defendants only in cases of potentially large-scale impact. A case involving far fewer than one hundred plaintiffs with individual damages greater than \$75,000, but whose aggregate damage does not exceed \$5 million, does not embody Congress's vision of a mass action.<sup>116</sup> In this sense, the \$75,000 mass action requirement is incongruous with the \$5 million aggregate requirement. Either the courts or the legislature must iron out these inconsistencies, and due to possible separation of powers concerns, Congress may be best suited for this task.<sup>117</sup> Regardless, these issues must be addressed.

*d. Counting 1/3 or 2/3 of plaintiffs  
is difficult when they are not in the same forum*

Once a defendant removes a mass action to federal court, the court must still decide whether jurisdiction is proper under the mandatory and discretionary tests set out in CAFA.<sup>118</sup> These tests depend largely on the citizenship of the defendants and the plaintiffs.<sup>119</sup> Specifically, the language "members of all proposed plaintiff classes in the aggregate"<sup>120</sup> presents problems in the mass action context. Who are the "members of all proposed plaintiff classes in the aggregate"?<sup>121</sup>

In the Walmart hypothetical, the relevant plaintiffs may be the twenty plaintiffs whose claims remain under federal jurisdiction. Greater than one-third would be seven or more plaintiffs, and greater than two-thirds would be fourteen plaintiffs. On the other hand, the relevant plaintiffs may be *all* of the plaintiffs named in the original

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116. § 1332(d)(11)(B)(i).

117. *Cf.* *N.Y. Times v. United States*, 403 U.S. 713, 742 (1971) (emphasizing the importance of separation of powers).

118. § 1332(d)(3)–(4). For a detailed analysis of the implications of these discretionary and mandatory remand provisions, see *supra* Part III.

119. § 1332(d)(3)–(4).

120. § 1332(d)(3)–(4)(A)(i)(I).

121. *Id.*

complaint, which, in the Walmart hypothetical, would total 1,000.

If the members of all proposed plaintiff classes include plaintiffs named in the original complaint, but whose claims are subsequently remanded to state court for failure to exceed \$75,000, then attorneys have a powerful tool to make a complete end-run around CAFA. They could easily circumvent CAFA by gathering numerous local plaintiffs who suffered very little harm and include them in the complaint. Plaintiffs could amend the complaint this way at any time while the suit is pending, and the federal court would then have to re-count plaintiffs.<sup>122</sup> If, at any point prior to judgment or settlement, the case includes the requisite number of local plaintiffs, the federal court could be divested of jurisdiction.<sup>123</sup> Because of these potential jurisdictional inconsistencies, scholars predict that courts are unlikely to interpret the statutory language to include local plaintiffs whose claims are remanded to state court.<sup>124</sup> However, this question has yet to be litigated. Thus, it is not clear whether courts would include these plaintiffs in the original count, or in any subsequent count (*i.e.*, after plaintiffs amend the complaint).<sup>125</sup>

Plaintiffs' attorneys may make a strong argument that state plaintiffs should count based on the plain language of the statute. The possibility that courts might interpret CAFA in this way would encourage attorneys to include many smaller claims of local plaintiffs and thereby ensure remand to state court. This single issue could clog federal court dockets and ultimately, keep mass actions in state court. As a result, the mass action provisions fail to ensure without doubt that cases with national significance, implicating the rights of parties from many different states, are adjudicated in federal courts, as Article III of the Constitution intends.

### *C. Do CAFA's Carve-Outs Alleviate Any Problems?*

As part of the Senate compromise,<sup>126</sup> CAFA includes four limitations on the definition of "mass action."<sup>127</sup> In particular, mass

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122. VAIRO, *supra* note 99, at 35.

123. *Id.*

124. *Id.*

125. § 1332(d)(7).

126. 151 CONG. REC. S1077-78 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd) (compromise proposed to Senator Frist by Senators Landrieu, Schumer, Dodd, and Bingham).

127. § 1332(d)(11)(B)(ii).

actions do not include claims (1) arising from an event or occurrence which allegedly resulted in injuries in the State where the action was filed or in contiguous States; (2) joined by the defendant; (3) filed on behalf of the general public pursuant to a State statute specifically authorizing such action; and (4) consolidated or coordinated solely for pretrial proceedings.<sup>128</sup> While some of these exceptions are fairly self-explanatory, others benefit from further explanation found in the Congressional Record. That is, Congress made clear that these exceptions should be construed narrowly, to prevent gaping loopholes in the mass action context.<sup>129</sup>

### 1. The local event or occurrence exception

“A local event or occurrence” is one that takes place wholly within the confines of one state, with its effects felt in that state and possibly adjacent states.<sup>130</sup> Representative Sensenbrenner referenced a toxic spill case as an example of a “local event or occurrence”:

[T]he first exception would apply only in a . . . truly local single event with no substantial interstate effects. The purpose of this exception is to allow cases involving environmental torts, such as a chemical spill, to remain in State court if both the event and the injuries were truly local, even though there are some out-of-state defendants. By contrast, this exception would not apply to a product liability or insurance case. The sale of a product to different people does not qualify as an event, and the alleged injuries in such a case would be spread out over more than one State or contiguous States even if all of the plaintiffs in a particular case came from one single State.<sup>131</sup>

This exception seems aimed at geographically and temporally isolated events, like a toxic spill or a plane crash. It would not apply to cases involving the claims of one hundred or more plaintiffs harmed in significantly similar, yet independent events, such as an adverse drug reaction among different patients.

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128. § 1332(d)(11)(B)(ii)(I)–(IV).

129. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

130. § 1332(d)(11)(B)(ii)(I).

131. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

2. A defendant cannot unilaterally remove the case to federal court

Under the second exception, claims joined by a defendant do not qualify as mass actions.<sup>132</sup> Senator Durbin sought to amend this exception to include claims joined by the court *sua sponte*.<sup>133</sup> Scholars point out that this exception would severely limit the circumstances under which parties could invoke CAFA's mass action provisions:<sup>134</sup> only if plaintiffs affirmatively joined their claims federal rules or a state mass action rule (such as that in West Virginia), or if a court took it upon itself to consolidate claims. If defendants could remove a case to federal court after state courts consolidated claims for judicial efficiency, it is unlikely Senator Durbin would have removed his amendment from the Senate floor.<sup>135</sup>

Senator Lott suggested that the mass action provision should extend only to claims joined by plaintiffs under Mississippi and West Virginia mass action rules,<sup>136</sup> or claims consolidated by courts "forced" to do so when one attorney filed suit for many plaintiffs. He did not intend to include cases filed according to a particular procedural rule of consolidation, such as that of New Jersey.<sup>137</sup> Interpreted narrowly, to apply only to cases filed by plaintiffs, CAFA's mass action provisions would achieve Congress's larger goal of ensuring that cases presenting the same problems as class actions are susceptible to similar rules.<sup>138</sup>

3. A case filed on behalf of the general public is not a mass action

Mass actions do *not* include claims "asserted on behalf of the general public . . . pursuant to a State statute specifically authorizing such action."<sup>139</sup> This exception applies to a very narrow class of cases, such as those filed under the California Unfair Competition

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132. § 1332(d)(11)(B)(ii)(II).

133. 151 CONG. REC. S1101 (daily ed. Feb. 8, 2005) (statement of Sen. Durbin).

134. See VAIRO, *supra* note 99, at 36.

135. 151 CONG. REC. S1236 (daily ed. Feb. 10, 2005) (statement by Sen. Durbin).

136. MISS. R. CIV. P. 20 (West 2005); W. VA. R. CIV. P. 20 (LexisNexis 2005).

137. 151 CONG. REC. S1235-36 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin).

138. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

139. 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006).

Law.<sup>140</sup> In these cases, there are no individual or purported “class” claims, and because this exception applies only when a statute specifically authorizes claims on behalf of the general public, cases filed under general state consumer fraud laws do not qualify. The Congressional Record also supports this narrow reading. Representative Sensenbrenner pointed out that if an action is brought under a state consumer fraud statute, and that state does not have a provision parallel to California’s statute, the defendant could still remove the case to federal court.<sup>141</sup> Thus, this exception should be read narrowly to include only those statutes, like California’s, that specifically delineate procedures for public officials to bring suit on behalf of the general public. The majority of consumer fraud cases, if qualified under CAFA, would be subject to federal jurisdiction.

#### 4. State court sua sponte consolidation

The final mass action exception excludes claims consolidated or coordinated only for pretrial purposes.<sup>142</sup> This exception permits state courts to consolidate claims for the convenience of discovery, pretrial motions, and other procedural measures, without losing jurisdiction to a federal court. However, some states, including California,<sup>143</sup> do not permit consolidation purely for pretrial purposes. In these states, courts that consolidate claims for efficiency risk defendant’s removal of the entire case to federal court under the theory that cases consolidated by courts—not just those joined intentionally by plaintiffs—can be removed. If courts construe the phrase “proposed to be tried jointly” to include only claims joined by the plaintiff, this problem disappears—a result arguably intended by Senator Durbin who removed the words “or sua sponte” after Senator Lott clarified the meaning of “mass action.”<sup>144</sup> Thus, while this exception alleviates some potential judicial inefficiency, it cannot eliminate the jurisdictional nightmare that results when the claims of federal plaintiffs must exceed the \$75,000

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140. CAL. BUS. & PROF. CODE § 17206 (West 2006).

141. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

142. § 1332(d)(11)(B)(ii)(IV).

143. See CAL. CIV. PROC. CODE § 1048 (West 2006).

144. 151 CONG. REC. S1235–36 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin).

amount in controversy requirement.

#### *D. Conclusion and Recommendations*

##### 1. Conclusion

CAFA's drafters began with a noble goal: to permit federal jurisdiction of cases of national importance.<sup>145</sup> Somewhere in the legislative process, among partisan politics and compromises,<sup>146</sup> the mass action provision became an outlet for the give-and-take that accompanies any controversial measure. In the name of compromise, Congress determined that the § 1332(a) amount in controversy requirement would cause mass actions to resemble individual actions. But, in light of the *Exxon* decision, the additional amount in controversy requirement needlessly complicates the mass action provision.

Federal courts could simplify CAFA's mass action provision if they interpret its language to permit supplemental jurisdiction over claims that do not exceed the \$75,000 threshold. Although it may be unorthodox for courts to rely on congressional intent when the statute's plain language is unambiguous, Representative Sensenbrenner explained that "this provision [the \$75,000 threshold] in no way is intended . . . to narrow current jurisdictional rules. Thus, if a Federal court believed it to be appropriate, the court could apply supplemental jurisdiction in the mass action context as well."<sup>147</sup> Taking him at his word, a federal court could simply interpret the problem away.

Yet, it might be more appropriate for Congress to take action. Granted, CAFA was a heavily debated piece of legislation that appeared in many incarnations,<sup>148</sup> and it might be politically difficult to make additional changes to the statute. However, to simplify the jurisdictional issues, Congress could either (1) eliminate the \$75,000 requirement and treat mass actions like class actions (with the

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145. § 1711 note (Findings and Purposes); *see* U.S. CONST. art. III, § 2.

146. *See* 151 CONG. REC. S1078–79 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd).

147. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

148. S. REP. NO. 109-14, at 1–2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 3–5.

safeguard that defendants may only remove claims joined by plaintiffs) or less drastically, (2) rewrite the \$75,000 requirement to incorporate *Exxon* and specify that minimal diversity does not offend the jurisdictional principles of § 1332(a).<sup>149</sup>

While these proposed changes do not address all of CAFA's mass action pitfalls, they could help simplify the one hundred plaintiff requirement,<sup>150</sup> the \$5 million aggregation requirement,<sup>151</sup> or the mandatory and discretionary remand provisions.<sup>152</sup> Sometimes, especially in the statutory context, simplicity is its own greatest reward.<sup>153</sup>

## 2. CAFA applied as presently written and with possible interpretation or revision

To demonstrate the various inconsistencies in CAFA's mass action provisions and proposed clarifications, this section borrows facts from *Connerwood Healthcare, Inc. v. Estate of Herron*,<sup>154</sup> and applies the mass action provision in its different incarnations.

In 1997, the estate of an elderly woman who died of salmonella poisoning filed suit in an Indiana state court against a nursing home.<sup>155</sup> The plaintiff claimed wrongful death and sought class action status for herself and two other nursing home residents who succumbed to salmonella, as well as seventy other residents who suffered lesser harm. Together, the plaintiffs sought damages for negligence, emotional distress, and pain and suffering.<sup>156</sup> For the purposes of this analysis, assume one hundred plaintiffs were joined in a mass action<sup>157</sup> (instead of seventy in a class action), and only three plaintiffs claimed wrongful death.

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149. § 1332.

150. § 1332(d)(11)(B)(i).

151. § 1332(d)(6).

152. § 1332(d)(3), (4).

153. In the words of Mark Twain, "Plain question and plain answer make the shortest road out of most perplexities." MARK TWAIN, *LIFE ON THE MISSISSIPPI* (1883), reprinted in 2 *THE UNABRIDGED MARK TWAIN* 358 (Lawrence Teacher ed., 1997).

154. 683 N.E.2d 1322 (Ind. Ct. App. 1997).

155. *Id.* at 1325.

156. *Id.*

157. See IND. TRIAL R. 20.

*a. The case under CAFA's mass action provision "as is"*

To remove the case to federal court, the defendant would first have to show that the plaintiff sought to join one hundred or more monetary claims involving common questions of law or fact. In this case, an issue may arise as to whether all the claims involve common questions of law or fact: the facts could be significantly more damaging for the wrongful death claims than the other ninety-seven plaintiffs claiming mere negligence. The trier of fact could impute the more damaging facts to the lesser claims and thus award greater damages to those plaintiffs. However, assuming the court found the claims joinable, the defendant could then remove the entire case to federal court.

The federal judge would then have to closely examine each plaintiff's alleged amount in controversy. The court could assert jurisdiction over only those plaintiffs whose claims in good faith exceed \$75,000. Based on the facts above, it is likely that only the three plaintiffs who allege wrongful death would meet the amount in controversy requirement, and thus the federal court could only exercise jurisdiction over these three. The court must remand the claims of the remaining ninety-seven plaintiffs to state court. Three plaintiffs are a far cry from the one hundred originally required to constitute a CAFA mass action or a large class action with national significance.

The next question is whether the federal court should aggregate the claims of all one hundred plaintiffs, or only those remaining in federal court. Logic suggests that only the court should aggregate the remaining federal claims because they represent the only amount in controversy before the court. However, some scholars suggest that neither dipping below the one hundred plaintiff requirement nor the \$5 million aggregate amount in controversy *after* remand would divest the federal court of jurisdiction.<sup>158</sup> Federal courts have yet to resolve this issue.

Next, the court must examine the citizenship of plaintiffs and defendants and determine whether minimal diversity is satisfied and whether the mandatory or discretionary remand provisions apply. In this determination, should the federal court include the ninety-seven plaintiffs whose claims it remanded to state court? Scholars do not

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158. VAIRO, *supra* note 99, at 33–35.

believe so,<sup>159</sup> but if local plaintiffs with small claims remanded to state court count for citizenship purposes, attorneys may be able to join several small claims of local plaintiffs and defeat CAFA entirely. This issue, too, remains unresolved.

Finally, the court must determine whether any of the carve-outs apply. Under the local event or occurrence exception, plaintiffs may have a strong argument because the harm occurred in a single location and injured many people simultaneously, similar to a plane crash or toxic spill. If the court determines that the local event exception does not apply, and CAFA's preliminary requirements are met, the court should assert jurisdiction over the three wrongful death claims. This would be the correct result because the defendant did not join the claims, they were not filed on behalf of the general public by the Attorney General, and they were not consolidated merely for pretrial purposes.

Yet, this result begs the question whether the defendant actually achieved anything by removing the case to federal court. Instead of one case, the defendant would now have to defend in two separate fora. In addition, the parties could waste much time and money litigating these jurisdictional issues, even before the court has an opportunity to address the merits of the case. This result-inefficient, anomalous, and expensive-hardly seems consistent with CAFA's purpose of expanding federal jurisdiction over cases that resemble class actions where there is presumably less in-state bias. This same counterproductive outcome would occur again and again, each time a defendant attempts to remove a case under the mass action provision of CAFA. Congress, or the federal courts, should take steps to ensure a different, and perhaps better, result.

*b. The case if Congress eliminates the \$75,000 threshold*

As the branch of government vested with legislative power,<sup>160</sup> Congress should ensure that federal courts do not spend scarce judicial resources on preliminary jurisdictional issues. By redrafting CAFA's mass action provision, Congress could give federal courts jurisdiction over all one hundred claims, including the wrongful death claims exceeding \$75,000 and the smaller negligence claims

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159. *Id.* at 34–35.

160. U.S. CONST. art. I, § 1.

joined under Rule 20.

By removing the § 1332(a) amount in controversy requirement, Congress could achieve the goal of treating mass actions, “class actions in disguise,”<sup>161</sup> the same as true class actions. For the *Herron* case, and others like it, obviating the additional amount in controversy requirement would permit the federal court to assert jurisdiction over all one hundred plaintiffs, and eliminate all questions as to whether the case is still a mass action, which claims to aggregate, and which plaintiffs to count for citizenship purposes. Eliminating this requirement also prevents plaintiffs from joining numerous small claims in an effort to circumvent CAFA. While removing the \$75,000 requirement may sound easy on paper, after years of negotiation in the halls of Congress, it might not be practicable. There are other, less politically charged means of achieving similar ends.

*c. The case if Congress or the courts  
rewrite or construe CAFA to permit supplemental jurisdiction*

Congress could incorporate *Exxon*'s holding and rewrite the mass action provision to permit § 1367 supplemental jurisdiction over smaller claims joined by plaintiffs for the purposes of trial. In the *Herron* case, the federal court could assert jurisdiction over those smaller claims properly joined with the wrongful death claims. The problems associated with the \$75,000 requirement would cease to exist, as they would if Congress entirely eliminated the requirement. The only caveat here is that Congress should include a provision that supplemental jurisdiction in conjunction with minimal diversity does *not* violate the underlying principles of § 1332.

Finally, if Congress fails to take any action to remedy these impending problems, the federal courts could look to Representative Sensenbrenner's statement and find it appropriate, in the name of judicial efficiency, to apply supplemental jurisdiction to smaller claims in the mass action context.<sup>162</sup> This would require the least political maneuvering, but it could inspire criticism that the federal courts, instead of the legislature, reshaped CAFA's mass action

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161. 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

162. See 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

provisions. In the *Herron* case, judicial reconfiguration of the mass action provision would have the same result as a sweep of the congressional pen. The problems associated with numerosity, aggregation, citizenship, and policy would vanish. In light of this, Congress, or the courts, should be proactive and resolve the issues associated with CAFA's mass action provisions before they tie up state and federal courts for time on end.