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DUELING GRANTS: REIMAGINING CAFA'S JURISDICTIONAL PROVISIONS

Tanya Pierce*

INTRODUCTION

More than a decade after Congress passed the Class Action Fairness Act of 2005 (CAFA),¹ courts continue to disagree as to its application and meaning in a variety of situations, many of which have wide-ranging effects.² This article considers a fundamental issue that arises after a certification decision is reached: whether a court's subject matter jurisdiction under CAFA depends on a class being certified. Specifically, the article considers what happens when a federal court's subject matter jurisdiction derives solely from CAFA's minimal diversity jurisdiction provision and a request for class certification under Federal Rule of Civil Procedure 23 (Rule 23) is denied. The statute's ambiguity on this point has resulted in numerous inefficiencies and opportunities to manipulate jurisdiction.

Before introducing the statute's jurisdictional provisions, it is helpful to briefly outline some of the concerns underlying the availability of class treatment and motivating CAFA's passage.⁴ In the right cases, class treatment furthers judicial economy and increases efficiency.⁵ It allows plaintiffs opportunities for recovery

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1. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C. § 1332(d) (2011) and other sections of 28 U.S.C.) (authorizing federal courts to hear many alleged nationwide state law based class actions in which the aggregate value of the claims exceeds \$5 million and diversity of citizenship exists between any member of the alleged class and any defendant).

2. *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 862 (11th Cir. 2012); *Metz v. Unizan Bank*, 649 F.3d 492, 501 (6th Cir. 2011).

3. See discussion and citations *infra* Section III.A.1.d.

4. See discussion and citations *infra* Part I.

5. Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1599 (2008).

where they might otherwise have none, and it deters wrongdoing that might otherwise go unpunished.⁶ It enables cost sharing and prevents duplicative, potentially conflicting judgments.⁷ While these goals are commendable, the class treatment device can also provide opportunities for abuse.⁸ By alleging a class action, plaintiffs can transform cases involving little harm into ones that have the ability to bankrupt defendants.⁹ And in some states, courts that routinely certified classes became known as “judicial hellholes” that enabled “drive by certifications.”¹⁰ By providing federal courts jurisdiction over the largest of alleged, nationwide class actions, proponents of CAFA sought to eliminate the incentives for filing such actions.¹¹ After all, given the difficulty of meeting Rule 23’s requirements,¹² most alleged classes would fail, and plaintiffs, whose claims could not independently exceed the \$75,000 threshold for jurisdiction under the general diversity statute, would lack the incentive and resources to pursue their remaining individual claims.¹³

But time has proven not all plaintiffs act reasonably, nor do they always act in their own economic interests.¹⁴ In addition, while most class action plaintiffs would prefer to avoid litigating in federal court, it is not completely unheard of for some plaintiffs to seek to litigate there.¹⁵ Take for example, a plaintiff who alleged he overpaid for a

6. See, e.g., Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J. L. REFORM 1097, 1104 n.30 (2013); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 735, 735 n.20 (2013).

7. Klonoff, *supra* note 6, at 735.

8. Erichson, *supra* note 5, at 1598–1600.

9. See *id.* at 1601; Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1855 (2008).

10. Purcell, *supra* note 9, at 1872, 1886 n.249. See Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1823, 1854–55 (2008).

11. Purcell, *supra* note 9, at 1854.

12. For discussions of the challenges to certifying a class action in federal courts, see, e.g., Bone, *supra* note 6, at 1098–99, n.3 (describing recent Supreme Court decisions limiting the use of the class action device in federal courts (citing Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011))); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627, 658 (2012); Klonoff, *supra* note 6, at 732; Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 708–09, 720, n.85 (2012).

13. See *Walewski v. Zenimax Media, Inc.*, 502 F. App’x 857, 862 (11th Cir. 2012).

14. See discussion and citations *infra* Part III.

15. *Karhu v. Vital Pharmaceuticals, Inc.*, No. 13-60768-CIV, 2014 WL 1274119, at *1 (S.D. Fla.

roughly \$24.00 diet supplement¹⁶ and another who alleged he overpaid for a video game.¹⁷ These claims, because they were styled as nationwide class actions of the kind covered by CAFA, conferred subject matter jurisdiction on federal courts until certification in each was denied.¹⁸ If one were to conclude CAFA jurisdiction always continues over individual claims after a class fails, plaintiffs could force federal courts to try even the most trivial cases to their ultimate conclusions. That is exactly what the plaintiffs in the diet supplement and video game cases tried to do, even though the cases could not have satisfied the relatively generous jurisdictional requirements to be litigated in state courts.¹⁹ Unsurprisingly, the federal courts in both cases rejected plaintiffs' attempts to manipulate jurisdiction and instead held jurisdiction under CAFA expired when the class actions failed.²⁰

Such a conclusion is not a panacea, however, nor would it necessarily result in increased efficiency in every case.²¹ For example, consider a hypothetical plaintiff who files a qualifying putative class action in state court. Relying on CAFA's expansion of federal court jurisdiction, defendants remove. After significant time and resources are spent, the court rejects class treatment under Rule 23. If the court retained jurisdiction, an unreasonable plaintiff could continue to pursue the case in federal court, but in all likelihood, the case would quickly come to an end once class treatment was no longer a possibility. If jurisdiction ceased when the certification failed, however, the case would be remanded to state court.²² The state court could then certify the class under the state's class action rules, which would undermine one of CAFA's primary goals.²³ CAFA's provisions then could be read to suggest if a state court

Mar. 27, 2014); *Walewski*, 502 F. App'x at 859.

16. *Karhu*, 2014 WL 1274119 at *1.

17. *Walewski*, 502 F. App'x at 859.

18. *Karhu*, 2014 WL 1274119 at *1; *Walewski*, 502 F. App'x at 859.

19. *Karhu*, 2014 WL 1274119 at *4; *Walewski*, 502 F. App'x at 859.

20. *Karhu*, 2014 WL 1274119 at *2; *Walewski*, 502 F. App'x at 862.

21. See discussion and citations *infra* Part III; see also *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806–07 (7th Cir. 2010).

22. See *Cunningham Charter Corp.*, 592 F.3d at 806.

23. See *id.* at 807.

certified any aspect of the case for class treatment, the defendants could again remove the action to federal court, which would have authority to revisit certification decisions and the obligation to ensure Rule 23's requirements are met. Decertifying the class, however, would again divest the court of subject matter jurisdiction, and despite the apparent irrationality, the process could be repeated.

Recognizing this type of situation could render litigation a game of jurisdictional "ping-pong," the trend in circuit courts is to hold that jurisdiction continues after a denial of class certification.²⁴ But not all courts agree.²⁵ Likewise, scholars who have analyzed this problem have reached opposing determinations.²⁶ This article concludes CAFA's language and statutory scheme require courts to consider jurisdiction at two points: before a certification decision is reached and after such a decision. While CAFA's jurisdictional provisions clearly provide federal courts with jurisdiction as soon as plaintiffs allege the kind of putative class covered by CAFA, some courts reason that jurisdiction must continue post denial of certification or it must be treated as never having existed from the beginning.²⁷ That reasoning is flawed. Despite the potential that cases could move back and forth between federal and state courts, given the way CAFA was drafted, this article concludes a denial of certification should cause jurisdiction to cease, such that dismissal or remand is required. If a reasonable possibility exists that a deficiency in the alleged class can be fixed, perhaps the class representatives' claims are not typical of the absent class members' claims,²⁸ for example, courts should delay the certification decision and encourage the parties to explain how the alleged class might be remedied to allow certification. If the court remains unconvinced, however, it should deny certification and

24. See discussion *infra* Part III.

25. G. Shaun Richardson, *Class Dismissed, Now What? Exploring the Exercise of CAFA Jurisdiction After the Denial of Class Certification*, 39 N.M. L. REV. 121, 121 (2009).

26. *Id.*; Kevin Lampone, *Class Certification as a Prerequisite for CAFA Jurisdiction*, 96 MINN. L. REV. 1151, 1151–52 (2012).

27. Richardson, *supra* note 25, at 121.

28. See Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 855 (2006).

dismiss or remand the case, unless an alternative basis for federal jurisdiction exists.

Approaching CAFA's jurisdictional provisions in this way would allow courts to avoid ignoring some of the statute's more problematic, but nevertheless, existing jurisdictional provisions. In addition, to the extent possible, it would further the primary articulated purposes underlying Congress's passage of CAFA, ensuring, on the one hand, that class actions of national importance are heard in federal courts and preventing, on the other hand, *de minimis* or meritless claims that do not further substantive legal policies and could never qualify for class treatment from taking up limited judicial resources merely because plaintiffs allege a qualifying putative class.²⁹ It would also promote predictable and logically consistent answers to the question of continuing jurisdiction, even though in some cases characteristics of a given class weigh in favor of delaying a class certification decisions, whereas in others they do not.

Part I of the article discusses the relevant policies underlying CAFA and Rule 23. Part II briefly outlines the more straightforward operation of CAFA jurisdiction in pre-certification and post-successful certification situations before explaining the provisions in CAFA that have given rise to considerable confusion after courts deny class certification. Part III critiques the arguments made by courts and scholars in support of and against continuing jurisdiction. It then suggests an approach that is most consistent with the statute, in light of all of its relevant provisions and their corresponding limitations, and that furthers prudential concerns underlying Rule 23 and CAFA as much as possible given the way the statute was drafted.

I. CAFA and Rule 23

While state courts enjoy broad subject matter jurisdiction, federal courts have limited jurisdiction and may hear only the kinds of cases

29. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d)(2) (2016)); Richardson, *supra* note 25, at 134.

that the Constitution permits and that Congress authorizes.³⁰ Determining whether a case falls within a court's jurisdiction is, of course, of critical importance because a court's lack of subject matter jurisdiction is a fatal defect that cannot be waived.³¹ Moreover, courts and parties do not have the power to create subject matter jurisdiction by agreement or by consent.³² Before Congress passed CAFA, federal courts could exercise jurisdiction over class actions only if the alleged class actions fell within one of the already existing jurisdictional statutes,³³ and most did not.³⁴

Through CAFA, Congress amended the federal diversity statute to incorporate a minimal diversity requirement that allows federal courts to preside over more interstate class actions, even when those class actions are based solely on state law claims.³⁵ Now, whenever a

30. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

31. *See id.* Even when federal courts have subject matter jurisdiction over a cause of action, unless Congress affirmatively acts to make that jurisdiction exclusive, there exists a "deeply rooted presumption in favor of concurrent" state and federal court jurisdiction. *Taffin v. Levitt*, 493 U.S. 455, 459 (1990). Absent "explicit statutory directive," "unmistakable implication from legislative history," or "clear incompatibility between state-court jurisdiction and federal interests," this presumption governs. *Id.* at 459–60.

32. *See Mansfield, C & L M Ry. Co. v. Swan*, 111 U.S. 379, 383 (1884).

33. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PENN. L. REV. 1439, 1452 (2008). For a helpful, detailed explanation of the pre-CAFA jurisdictional regime, or "default regime," that still applies to alleged class actions that are not covered by CAFA, *see id.* at 1450–53. Importantly, prior to CAFA's passage, federal law lacked any provisions "that permitted the removal of overlapping state court class actions that were otherwise not removable." *Id.* at 1511.

34. *See id.* at 1450–52; *see also* Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 413 (2008); James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CA. L. REV. 1423, 1443–44 (2007).

35. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C. § 1332(d) and other sections of 28 U.S.C.); *see also, e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013); Burbank, *supra* note 33, at 1441 ("The scope of putative class actions that, at the end of the day, the [CAFA] statute brings within the subject matter jurisdiction of the federal courts is very broad."); Pfander, *supra* note 34, at 1443–44 ("Although CAFA includes few substantive provisions that regulate the fairness of class action litigation and settlement, jurisdictional provisions lie at the heart of the Act."); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 779 (2010). *Cf.* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 155 (2006) (considering, among other things, CAFA's non-jurisdictional provisions). Minimal diversity exists when the citizenship of any class member is diverse from that of any defendant. 28 U.S.C. § 1332(d)(2)(A) (2016); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1194 n. 24 (7th Cir. 2007). For diversity purposes, a corporation is deemed to be a citizen of all of the states in which it is incorporated and of the state in which it has its principle place of business. 28 U.S.C. § 1332(c)(1); *Hertz v. Friend*, 559 U.S. 77, 88 (2010). Under CAFA, unincorporated

plaintiff files a putative class action alleging sufficient damages, a large enough class, and at least one diverse party, federal courts may exercise original jurisdiction to hear the action, unless one of CAFA's narrow statutory exceptions applies.³⁶ CAFA also modified federal removal procedures so that any defendant can remove an action to federal court, even if not all defendants agree, and it eliminated the home-state defendant and one-year limitations on removal.³⁷ While CAFA addressed some legitimate problems, it did so by adopting jurisdictional provisions that "are detailed, complicated and replete with both undefined terms and ambiguous phrases."³⁸ By leaving "some questions implicating forum allocation unanswered," Congress "guaranteed years of work for lawyers and courts that is unrelated to the merits of the underlying dispute."³⁹ The question regarding what happens after certification is denied is just one of those questions.

A. Policies Underlying CAFA

Before CAFA, class plaintiffs, who had the power to transform small cases into ones with potentially grave consequences for defendants, could fairly readily avoid federal courts by joining a named plaintiff who was a citizen of the same state as one of the defendants, by suing a defendant who was a citizen of the same state as one of the plaintiffs—as long as the joinder was not fraudulent—or by alleging individual harms that failed to exceed \$75,000, exclusive of interests and costs.⁴⁰ Thus, plaintiffs "with state-law

associations' citizenship is determined in the same way that citizenship of corporations is determined. See 28 U.S.C. § 1332(d)(10). While CAFA established a "Consumer Class Action Bill of Rights" that limits certain kinds of settlements and increases certain notice requirements, CAFA's jurisdictional provisions are at the "heart" of the statute. See Pfander, *supra* note 34, at 1443–44.

36. 28 U.S.C. § 1332(d)(2), (d)(4)–(5), and (d)(9). For example, CAFA contains exceptions, for certain kinds of cases dealing with securities under various federal securities laws and for cases relating to certain claims concerning the governance of certain types of businesses under laws of states where such businesses are incorporated or organized. Hoffman, *supra* note 34. For a helpful summary of CAFA's exceptions, see *id.* Hoffman, *supra* note 34.

37. 28 U.S.C. § 1453 (2016).

38. Burbank, *supra* note 33, at 1444.

39. *Id.*

40. *Id.* at 1451, 1451 n.32 (citing Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 189 and Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005)).

claims often filed their cases in a relatively small number of pro-plaintiff state-court jurisdictions.⁴¹ The judges in those jurisdictions frequently were elected, inexperienced in class actions, and unsympathetic to large defendants from out of state.⁴² Meanwhile, federal courts lacked jurisdiction in cases based on state claims unless diversity of citizenship existed between the named plaintiffs and all of the defendants, and at least one of the plaintiffs satisfied the amount-in-controversy requirement.⁴³ As a result, cases involving essentially identical alleged classes were often brought concurrently in multiple states around the country.⁴⁴ Even when such cases could be brought in federal court, parallel state court class actions were also often filed.⁴⁵ The inability to bring alleged classes—especially those whose class definitions overlapped or were nearly identical—under one court system in which courts could limit duplication created enormous waste and inefficiency.⁴⁶ CAFA’s proponents argued it would improve efficiencies by granting federal court’s jurisdiction over the nation’s largest class actions.⁴⁷

41. Klonoff, *supra* note 6, at 732.

42. *Id.*

43. Burbank, *supra* note 33, at 1450-51; *cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005). A corporation is considered a citizen of its state of incorporation. *Carden v. Arkoma Associates*, 494 U.S. 185, 188 (1990) (citing *Marshall v. Baltimore & Ohio R. Co.*, 57 U.S. 314 (1854) and *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. 497 (1844)). A corporation is also treated as citizens of the state in which it has its principal place of business. *Hertz v. Friend*, 559 U.S. 77, 88 (2010). Other types of business entities, in contrast, are treated as citizens of every state in which their members are citizens. *Carden v. Arkoma Assocs.* 49 U.S. 185, 188–89 (1990).

44. See Edward F. Sherman, *The Multidistrict Litigation Model for Resolving Complex Litigation if a Class Action is not Possible*, *Proceedings of the Tulane Law Review Symposium: The Problem of Multidistrict Litigation*, 82 TUL. L. REV. 2205, 2223 (2008).

45. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719 (E.D. La. 2013) (involving conflicts between cases consolidated in federal court under the Multidistrict Litigation Statute and parallel state class actions).

46. Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1523 (2005); Tanya Pierce, *It's Not Over 'til It's Over: Mandating Federal Pretrial Jurisdiction and Oversight in Mass Torts*, 79 MO. L. REV. 27, 38 (2014) (citing Sherman, *supra* note 44). Some scholars, however, have questioned whether CAFA in fact exacerbated problems inherent in duplicative litigation. Sherman, *supra* note 44, at 2207–08 (concluding CAFA resulted in a “blow to the centrality” of “resolving mass complex litigation”).

47. See *Cunningham Charter Corp. v. Learjet, Inc.* 592 F.3d 805, 806-07 (7th Cir. 2010). Despite these stated goals in passing CAFA, an empirical study published five years later concluded that the number of personal-injury class actions filed in federal courts post-CAFA remained steady. Willging & Lee, *supra* note 35, at 780 (citing Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. KAN. L. REV. 845 (2010)); *cf.* Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical*

CAFA's supporters also made much of the existence of "judicial hellholes"—state courts in which class certification was such a matter of course that the certifications became known as "drive by certifications."⁴⁸ Proponents also argued federal courts should decide large interstate class actions because such actions have the potential for enormous ramifications on large numbers of people, involve more money, and implicate interstate commerce.⁴⁹ Thus, one of the statute's primary stated purposes was also 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."⁵⁰ The statute's supporters also articulated a desire to prevent alleged abuses of the class action system, including

Analysis of Class Action Activity in the Oklahoma State Courts, 58 U. KAN. L. REV. 809, 816 (2010) (interpreting data to suggest "CAFA may have shifted class actions from state courts to federal courts generally, but not evenly," because plaintiffs file class actions in what they perceived to be circuits with more plaintiff-friendly laws).

48. See Purcell, *supra* note 9, at 1872, 1886 n.249.

49. Natale v. Pfizer, Inc., 379 F. Supp. 2d 161, 167–68 (2005) (citing S. REP. 109-14, 2005 U.S.C.A.N. at 6, 7) (quoting Senator Spector). It is also helpful to note that in passing CAFA, Congress did not divest state courts of authority to hear such actions if none of the parties seek to invoke CAFA's federal court jurisdiction. See, e.g., Michael P. Daly and Jessica D. Khan, *We Got No Class and We Got No Principles: CAFA and the Denial of Class Certification*, 32 NO. 1 CLASS ACTION REPORTS ART 1, Volume 32, Issue 1 (Jan.-Feb. 2011). Indeed, CAFA did not federalize all class actions, and some still proceed in state courts. *Id.* Nothing in CAFA's statutory directives or legislative history suggests Congress intended federal courts to have exclusive jurisdiction over class actions. In fact, CAFA requires federal courts to decline to exercise CAFA jurisdiction in some kinds of alleged class actions. 28 U.S.C. § 1332(d)(4) (2016) (providing "[a] district court shall decline to exercise jurisdiction" when "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed" or when "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed," the "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed," and "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons," and at least one of the defendants meets one of three listed options). It also allows federal courts to exercise discretion to decline to exercise CAFA jurisdiction in other kinds of alleged class actions. *Id.* The exercise of concurrent jurisdiction in these cases does not create problems of incompatible federal and state court jurisdiction or otherwise undermine federal interests. Thus, none of the reasons to overcome the presumption in favor of concurrent jurisdiction exists that might help courts answer the question of whether jurisdiction solely under CAFA should continue in the face of a denial of class certification.

50. Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4 (2005); see also *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (noting "CAFA's primary objective" is to ensure interstate cases of national importance are tried in federal court).

preventing plaintiffs from engaging in forum shopping and judicially sanctioned “blackmail.”⁵¹

Even before the statute was finally enacted, however, some warned “no one should be fooled” by “talk about fairer procedures in federal courts, about how appropriate it is for national class actions to be in federal court before a single judge, and about how it would be much more efficient to hear disparate class actions that are filed in different states, but that involve very similar claims in one forum.”⁵² Instead, CAFA reflects an “unabashed effort” by defendants to forum shop in the hopes of improving “their chances of success markedly in class actions if they are in federal courts.”⁵³ Not only did defendants believe class certification would be more challenging to achieve in federal courts, they also believed that even where classes were certified, plaintiffs would prevail less often in federal courts than in state courts.⁵⁴ Proponents of CAFA, therefore, anticipated that these cases would perish in federal courts, and consequently, the motivation for plaintiffs to file these cases would diminish.⁵⁵

Given this backdrop, it is unsurprising that CAFA’s passage was highly political.⁵⁶ Passing CAFA took eight years, during which several political compromises were made.⁵⁷ Likewise, passing it required Republican majorities, and Republicans nearly unanimously supported it.⁵⁸ Predictably, serious apprehension existed about

51. S. REP. NO. 109–14, at 20 (2005 (“Judicial blackmail forces settlement of frivolous cases.” (quoting Senator Spector)).

52. See Morrison, *supra* note 46, at 1522–23 (analyzing provisions in CAFA’s predecessor statute, which were unchanged in the passed version of the statute).

53. *Id.* at 1523; see also, e.g., Georgene Vairo, *Why I Don’t Teach Federal Courts Anymore, but Maybe Am or Will Again*, 53 ST. LOUIS U. L. J. 843, 851 (characterizing CAFA as a “jurisdiction hogging” statute as much as a jurisdiction granting statute and identifying that its goal was to move these cases into federal court where a presumption existed that class certification would be denied).

54. Morrison, *supra* note 46, at 1861.

55. See *id.* The Supreme Court’s jurisprudence on class actions certainly posed challenges to those seeking to certify a class action under Rule 23. See, e.g., Bone, *supra* note 6, at 1098 (describing recent Supreme Court decisions limiting the use of the class action device in federal courts).

56. Purcell, *supra* note 9, at 1823. This fact is hardly surprising. As has been observed, “[n]o reform, however well intentioned, could alter federal jurisdiction in an entirely ‘neutral’ way, and not even the wisest reform could become law without the support of powerful political and social interests.” *Id.* at 1860–61.

57. *Id.* at 1823.

58. *Id.* at 1861.

whether the concern over alleged abuses of the class action device were warranted, and, even if they were, whether they justified such a broad expansion in federal courts' diversity jurisdiction.⁵⁹ Many cautioned that CAFA would severely limit access to state courts by the county's most vulnerable citizens who would no longer be able to seek redress in court for corporate wrongdoings.⁶⁰ For those who opposed the statute, its passage "symbolized a battle between the common man and corporate behemoths" in which the corporations won.⁶¹ They decried CAFA as granting corporations "immunity from misdeeds through tort reform."⁶²

Moreover, despite spending eight years drafting CAFA, Congress "did an especially poor job," resulting in many ways in a vague and ambiguous statute, as illustrated by the amount of litigation its passage has generated.⁶³ Some of the problems in the statute likely reflect compromises necessitated by the democratic process in which

59. See Burbank, *supra* note 33, at 1522–23 (predicting that the "phenomenon of 'drive-by class certification' was on the cutting edge of obsolescence" when CAFA was passed and the "phenomenon of ever-changing magnet courts ('judicial hellholes') might well have run its course if left, not its own devices, but to the political process"); Clermont & Eisenberg, *supra* note 10, at 1555 ("[N]either the cause of any malady nor the effectiveness of this cure [CAFA's passage] is beyond debate."); Purcell, *supra* note 9, at 1860–88 (describing arguments of proponents and opponents of CAFA regarding its goals and results).

60. See *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 164–65, n.4 (D. Mass., 2005) (citing 151 Cong. Rec. H643-01, H644 (daily ed. Feb. 16, 2005) (statement of Rep. McGovern stating, "it looks as though the Republican leadership has finally gamed the system to the point where it appears that they will succeed in severely limiting the rights of many of the most vulnerable citizens in this country" "[T]his bill . . . will limit fairness, it will limit justice, and it will ultimately hurt everyday Americans It closes the courthouse door in the face of people who need and deserve help" . . . and . . . "unduly limits the right of individuals to seek redress for corporate wrongdoing in their state courts").

61. *Id.* at 165–67 (citing, among others, 151 Cong. Rec. H723-01, H726 (daily ed. Feb. 17, 2001) (statement of Rep. Conyers noting that *vis a vis* the Act, the Republican "majority begins their assault on our Nation's civil justice system . . . [and] attempt[s] to preempt State class actions").

62. *Id.* (citing Mike France, *How to Fix the Tort System*, BUS. WEEK ONLINE (Mar. 14, 2005), http://www.businessweek.com/magazine/content/05_11/b3924601.htm (quoting Frederick M. Baron, former President of the Association of Trial Lawyers of America)). Some have even questioned the constitutionality of the statute. See, e.g., C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006). Indeed, some companies "boasted that CAFA's 'practical effect' would be 'that many cases will never be heard,'" while others "predicted approvingly that he bill would 'make it more difficult for plaintiffs to prevail.'" Clermont & Eisenberg, *supra* note 10, at 1862.

63. *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1181 (9th Cir. 2013) (noting "CAFA is poorly drafted" and characterizing its wording as "clumsy" and "bewildering"); see also Clermont & Eisenberg, *supra* note 10, at 1567.

laws are passed in this country.⁶⁴ But while some of CAFA's problems may not have been foreseen, it is clear from examining earlier versions of the act that from the first iteration, Congress was aware the question of continuing jurisdiction this article addresses would arise.⁶⁵ As early as 1998, a proposed version of CAFA contained a provision requiring remand to state court if class certification failed.⁶⁶ And, as late as 2003, the proposed version still contained such a provision.⁶⁷ Before Congress passed the statute, however, it dropped that provision, leaving the statute silent as to the effect of a failed class certification.⁶⁸ But as illustrated below, it left intact other ambiguous language that suggests Congress intended courts to dismiss or remand failed class actions if no other basis for subject matter jurisdiction remained.⁶⁹ Insofar as CAFA was meant to minimize "wasteful" class action litigation, the inclusion of this ambiguous language has occasioned wasteful side-litigation in direct contrast to the efficiency gains some argued justified the statute's enactment.⁷⁰

B. Policies Underlying Rule 23

Turning to Rule 23, several important policies underlie the availability of class action treatment, many of which depend on the kind of class action alleged.⁷¹ For example, where plaintiffs' alleged injuries are sufficiently sizable to justify individual lawsuits, the availability of class treatment fosters judicial economy and efficiency

64. *See id.*

65. *See* CLASS ACTION JURISDICTION ACT OF 1998, H.R. REP. NO. 105-702, § 3, at 3-4 (1998).

66. *Id.*

67. *See* Richardson, *supra* note 25, at 140 (citing Burbank, *supra* note 33).

68. *See id.*; Burbank, *supra* note 33, at 1444 n.12; Lowery v. Al. Power Co., 483 F.3d 1184, 1206 n.50 (11th Cir. 2007); Blockbuster, Inc. v. Galeno, 472 F.3d 53, 58 (2d Cir. 2006) (discussing the debate as to whether the Senate Report was issued prior to the vote on CAFA and thus as to whether courts should consider the report).

69. *See* Clermont & Eisenberg, *supra* note 10, at 1567

70. *Id.*

71. Wasserman, *supra* note 28, at 819 (identifying policies underlying Rule 23). Indeed, recently, a scholar convincingly observed that in attempting to limit aggregate damages class actions, "courts and lawmakers are imposing unwarranted constraints" that have resulted in unintended and unjustified negative consequences on the more traditional kinds of class actions. Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 845 (2016).

by preventing overlapping, duplicative litigation.⁷² Conversely, in situations where the plaintiffs' alleged injuries are small enough that suing would not make sense, class treatment affords an opportunity to vindicate plaintiffs' rights, when plaintiffs would otherwise have no means or incentive to do so.⁷³ That opportunity, in turn, deters wrongdoing by allowing plaintiffs to enforce the substantive law underlying their claims.⁷⁴ Class treatment also preserves resources by providing plaintiffs a vehicle through which to spread the costs of litigation among a large group of similarly situated individuals, rather than bearing the costs individually.⁷⁵ Likewise, treatment as a class can protect defendants from inefficiently having to defend multiple lawsuits.⁷⁶ And, it eliminates the possibility of inconsistent judgments being rendered against the same defendants.⁷⁷

II. CAFA's Jurisdictional Provisions

When interpreting statutes, the Supreme Court has consistently required statutory construction to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" of the statute.⁷⁸ In contrast to CAFA's ambiguities regarding jurisdiction in post-denial of certification scenarios, CAFA's grant of jurisdiction in two situations—before a certification decision is reached and after a class is certified—is straightforward.⁷⁹ By its ordinary language, CAFA plainly provides federal courts with jurisdiction before a court

72. Wasserman, *supra* note 28, at 819.

73. *Id.* (noting that in these cases, Rule 23 "does not conserve judicial resources at all but rather authorizes the filing of a class action, the prosecution of which may consume significant judicial resources" because in the rule's absence, "few if any lawsuits would be filed and few if any judicial resources would be expended").

74. *Id.*

75. *Id.* at 819–20 ("Typically the lawyer representing the class advances the costs of litigation and in the event the class recovers a monetary award, these costs and the attorney's fees are paid from the recovery.").

76. *Id.* at 820.

77. *Id.*

78. *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 175–76, (2009) (citation omitted); *cf.* *Household Credit Serv., Inc. v. Pfenning*, 541 U.S. 232, 239 (2004); *U.S. v. O'Brien*, 391 U.S. 367, 383 (1968) (warning that discerning congressional purpose is a hazardous matter).

79. Class Action Fairness Act, *supra* note 1.

decides certification and after a court grants certification; thus, little controversy should exist regarding the operation of jurisdiction in these scenarios.⁸⁰ Some courts, however, have rationalized their decisions to continue jurisdiction after a class fails, based on warnings that are contradicted by the statute's straightforward language.⁸¹ Therefore, the following discussion briefly illustrates how the statute's ordinary language makes clear how jurisdiction exists before a certification decision no matter what a court ultimately decides about the appropriateness of proceeding as a class and how such jurisdiction always continues after a positive decision.⁸²

A. Before Certification and After Positive Decision

Two sections of CAFA, read together, plainly provide federal courts with original jurisdiction over actions as soon as a qualifying class is alleged.⁸³ First, section 1332(d)(2) of the statute 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 which (A) any member of a class of plaintiffs is a citizen of a State different from any defendant⁸⁴

80. *Id.*

81. *Samuel v. Universal Health Serv.*, 805 F. Supp. 2d 284, 287 (E.D. La. 2011).

82. Some courts have stated that concluding jurisdiction ends with a negative class certification decision would mean jurisdiction did not exist from the beginning. *See* discussion, *infra*, at Part III.A.

83. Even if apparent from the face of the pleadings that the action cannot qualify as a class action, these provisions provide a federal court with jurisdiction to make that determination.

84. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d)(2) (2016)) (emphasis added). The diversity jurisdiction authorized by CAFA's jurisdictional provisions is not absolute. Indeed CAFA itself contains narrow exceptions to the grant of jurisdiction it otherwise provides. For example, section 1332(d)(4), which describes the local controversy exception, requires a district court to "decline to exercise jurisdiction" under CAFA if certain prerequisites are met. 28 U.S.C. § 1332(d)(4). CAFA also makes clear that its jurisdictional provisions do not apply to class actions in which "the primary defendants are States, State officials, or any governmental entities against whom the district court may be foreclosed from entering relief." 28 U.S.C. § 1332(d)(5). In addition, CAFA gives courts discretion to decline to exercise jurisdiction "in the interests of justice and looking at

Second, CAFA defines a “class action” as “any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.”⁸⁵ Applying ordinary meaning to the language in these provisions results in the understanding that as soon as a qualifying class is alleged, CAFA provides federal courts with original jurisdiction. No other sections of the statute create ambiguity in this situation because the statute goes on to state CAFA applies “to any class action . . . before . . . the entry of a class certification order by the court with respect to that action.”⁸⁶

If Congress had intended something else, for example, if it intended that this initial grant of jurisdiction under CAFA to be contingent on a class first being certified, it could have achieved this outcome in a number of ways. It could have defined a “class action” as “an action certified by a court to proceed as a class under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought . . . as a class action.”⁸⁷ Even simpler, it could have inserted the word “certified” in the jurisdictional grant language, so it would read, “[t]he district courts shall have original jurisdiction of any civil action that has been certified to proceed as a class action under any statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action.”⁸⁸

Instead, by its plain language, CAFA confers jurisdiction over qualifying class actions as soon as they are “filed” or “brought.”⁸⁹ The word “brought” should be interpreted to mean “filed.”⁹⁰ Indeed, Merriam-Webster’s defines the word “bring” in the context of a legal

the totality of the circumstances,” when greater than one-third but less than two-thirds of the plaintiff class members and the primary defendants are citizens of the state where the action is originally filed. 28 U.S.C. § 1332(d)(3).

85. 28 U.S.C. § 1332(d)(1)(B).

86. 28 U.S.C. § 1332(d)(8).

87. 28 U.S.C. § 1332(d)(1)(B).

88. 28 U.S.C. § 1332(d)(1)(B); 28 U.S.C. § 1332(d)(2).

89. *See generally* 28 U.S.C. § 1332.

90. 28 U.S.C. § 1332(d)(1)(B).

action to mean “institute.”⁹¹ Suggesting CAFA requires certification before federal courts may assert jurisdiction would directly conflict with the statute’s language, and any suggestion that jurisdiction must continue after a class fails to avoid finding jurisdiction never existed is flawed when considered in light of the statute’s ordinary language to the contrary.

CAFA also makes clear that jurisdiction continues after a court certifies a class under Rule 23.⁹² The relevant provision states, “[CAFA’s jurisdictional grant] shall apply to any class action . . . after the entry of a class certification order by the court with respect to that action.”⁹³ The statute defines “class certification order” to mean “an order issued by a court approving the treatment of some or all aspects of a civil action as a class action.”⁹⁴ For cases in which a court certifies a class action, this provision creates no ambiguity, and no controversy exists in this situation.

B. After Denial of Certification

If Congress had stopped at the original grant language in section 1332(d)(2) and the definition of class action in section 1332(d)(1)(c), it could have avoided much confusion. Whenever a plaintiff filed a class action that met CAFA’s numerosity, minimal diversity, and amount-in-controversy requirements, and the alleged class did not fall within one of the exceptions to CAFA, federal courts would have original subject matter jurisdiction under CAFA—end of story.⁹⁵ But, instead of stopping, Congress included language that “[CAFA] shall apply to any class action before or after entry of a class certification order”⁹⁶ And, it defined “class certification order” as “an order issued by a court approving the treatment of some or all aspects of a civil action as a class action.”⁹⁷ Read together with CAFA’s “before

91. *Bring*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2005).

92. 28 U.S.C. § 1332(d)(8).

93. *Id.*

94. 28 U.S.C. § 1332(d)(1)(C).

95. *See generally* 28 U.S.C. § 1332.

96. 28 U.S.C. § 1332(d)(8).

97. 28 U.S.C. § 1332(d)(1)(C).

or after” language, the definition of class certification order could be interpreted to mean that a federal court’s jurisdiction based on CAFA does not survive if a court denies a request for class certification without approving at least some aspects of the action for class treatment.⁹⁸ The definition of “class certification” does not include an order denying class treatment.⁹⁹ Unfortunately, the statute also does not say here or anywhere else what happens to a federal court’s jurisdiction after a court denies class treatment for all aspects of a case.¹⁰⁰ As a result, the Supreme Court’s admonition that statutory interpretation should “begin with the language employed by Congress”¹⁰¹ is not sufficient here.¹⁰² Confusion and conflicting interpretations abound.

III. Analyzing CAFA’s Relevant Provisions

Compounding the confusion, some courts cannot even agree about the existence or the extent of disagreement surrounding this critical question.¹⁰³ For example, in 2009, the First Circuit noted that “whether a later denial of class certification will divest the district court of CAFA jurisdiction” was an open question.¹⁰⁴ Then, in 2011,

98. 28 U.S.C. § 1332(d)(8), (d)(1)(C). *See also* Burbank, *supra* note 33, at 1455–56 (“The question arises, however, whether jurisdiction subsists when, in a case brought in or removed to federal court under CAFA, the court declines to certify a class.”); Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1015–16 (2006) (questioning what happens if a court denies certification and opining that “the denial will not oust jurisdiction, because the court reached a determination that the case was a class action for jurisdictional purposes under a different and lower standard of proof than the determination that the case was not a class action for certification purposes”).

99. 28 U.S.C. § 1332(d)(1)(C) (emphasis added).

100. *See generally* 28 U.S.C. § 1332.

101. *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 175–76, (2009) (citation omitted); *cf.* *Household Credit Serv., Inc. v. Pfenning*, 541 U.S. 232, 239 (2004) (citation omitted) (explaining that courts should consider the “particular statutory language at issue” and “the language and design of statute as a whole”); *U.S. v. O’Brien*, 391 U.S. 367, 383 (1968) (warning that discerning congressional purpose is a hazardous matter).

102. That the plain language of the statute does not answer the continuing jurisdiction question is aptly illustrated by comparing plain language arguments made by two commentators who analyzed the words “class action” and “filed under” in CAFA and reached opposite conclusions as to whether these words mean jurisdiction after a denial of class certification should continue. *Compare* Richardson, *supra* note 25, at 135 (stating they mean jurisdiction continues), *with* Lampone, *supra* note 26, at 1164–65 (stating they mean jurisdiction ends).

103. *See, e.g.*, cases cited *infra* notes 104–106.

104. *College of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 42 (1st Cir. 2009).

a district court in Louisiana opined that a “consensus has begun to emerge” that subject matter jurisdiction under the statute continues even after certification is denied.¹⁰⁵ But in 2014, a district court in Florida disagreed, declaring, “[d]escribing this area of law as ‘in flux’ would not capture the extent of discordant outcomes presented by the relevant authorities.”¹⁰⁶

A. *Conflicting Interpretations*

Though the law is “in flux,” recently, a number of circuit courts and scholars have concluded jurisdiction continues after certification fails.¹⁰⁷ Of course, that interpretation is not the only one,¹⁰⁸ nor is it the most likely correct one. Other courts conclude jurisdiction under CAFA ceases after a court denies certification,¹⁰⁹ and this article agrees. The following discussion summarizes arguments that have been made in favor of and against continuing jurisdiction, critiques the arguments where appropriate, illustrates why CAFA’s jurisdictional grant does not survive after a class fails, and explains how courts can limit the possibility of losing authority over cases that

105. *Samuel v. Universal Health Serv.*, 805 F. Supp. 2d 284, 287 (E.D. La. 2011).

106. *Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV, 2014 WL 1274119, at *3 (S.D. Fla. Mar. 27, 2014), *aff’d*, 621 F. App’x 945 (11th Cir. 2015).

107. *Louisiana v. Am. Nat’l Prop. & Cas. Co.*, 746 F.3d 633, 639 (5th Cir. 2014); *Metz v. Unizan Bank*, 649 F.3d 492, 501 (6th Cir. 2011); *Cunningham Charter Corp. v. Learjet, Inc.* 592 F.3d 805, 806 (7th Cir. 2010); *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 380 (7th Cir. 2010); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Shell Oil Co.*, 602 F.3d 1087, 1092 (9th Cir. 2010); *Rivers v. Chalmette Med. Ctr., Inc.*, 805 F. Supp. 2d 291, 295 (E.D. La. 2011); *Lewis v. Ford Motor Co.*, 685 F. Supp. 2d 557, 568 (W.D. Pa. 2010); WILLIAM RUBENSTEIN, ET AL., *NEWBERG ON CLASS ACTIONS* § 6:18 (5th ed. 2016). *But see* *Walewski v. Zenimax Media, Inc.*, 502 F. App’x 857, 862 (11th Cir. 2012) (*per curiam*) (recognizing but disagreeing with this trend).

108. *See, e.g.,* *Clermont, supra* note 98, at 1016 (pointing out the question of what to do with cases removed to federal court under CAFA after a denial of certification “bedeviled” the civil procedure listserv, and some found it illogical to apply a different meaning of “class action” for jurisdiction than for certification, which *Clermont* argued would reconcile CAFA’s jurisdictional provisions and provide for continuing federal subject matter jurisdiction in the event of a denial of class certification).

109. *See, e.g.,* *Walewski*, 502 F. App’x at 862; *Avritt v. Reliastar Life Ins. Co.*, No 07-1817, 2009 WL 1703224, at *2 (D. Minn. June 18, 2009); *Salazar v. Avis Budget Grp., Inc.*, No. 07-cv-0064, 2008 WL 5054108, at *5 (S.D. Cal. Nov. 20, 2008); *Jones v. Jeld-Wen, Inc.*, No. 07-22328-CIV, 2008 WL 4541016, at *3 (S.D. Fla. Oct. 2, 2008); *Clausnitzer v. Fed. Express Corp.*, 621 F. Supp. 2d 1266, 1270 (S.D. Fla. 2008); *Arabian v. Sony Elecs. Inc.*, No. 05CV1741, 2007 WL 2701340, at *5 (S.D. Cal. Sept. 13, 2007). However, it should be noted that some of these cases were decided before courts in their respective circuits declared that jurisdiction continues after the denial of class certification.

most directly implicate CAFA's goal of having federal courts exercise jurisdiction over the nation's largest class actions.

1. Jurisdiction Continues

The clear trend in circuit courts is to conclude that once a non-frivolous case is filed or removed to federal court under CAFA, the federal court continues to have subject matter jurisdiction no matter how certification is ultimately decided.¹¹⁰ Some scholars have agreed.¹¹¹ Those who conclude jurisdiction continues generally rely on a combination of the following factors: (1) *dicta* in an unrelated opinion, (2) the statute's placement in the general diversity statute, (3) the way the statute uses the terms "filed under," and (4) prudential concerns about efficiency and forum manipulation.¹¹²

a. Dicta in Vega

Beginning with the earliest circuit court decision adopting this interpretation, courts have relied heavily on *dicta* from the Eleventh Circuit in its 2009 opinion in the *Vega v. T-Mobile USA, Inc.* case.¹¹³ There, the court upheld the certification of a class action on other grounds but stated in a footnote, "jurisdictional facts are assessed at the time of removal; and post-removal events (including non-certification, de-certification, or severance) do not deprive federal courts of subject matter jurisdiction."¹¹⁴ Other courts seized on this statement and have consistently cited *Vega* in support of the position that continuing jurisdiction under CAFA is not conditioned on a class eventually being certified.¹¹⁵

110. *Wright Transp., Inc. v. Pilot Corp.*, 841 F.3d 1266, 1272–73 (11th Cir. 2016); *Am. Nat'l Prop. & Cas. Co.*, 746 F.3d at 635; *Metz*, 649 F.3d at 500; *Cunningham*, 592 F.3d at 807; *In re Burlington*, 606 F.3d at 380; *United Steel*, 602 F.3d at 1092. *See also* *Rivers v. Chalmette Med. Center, Inc.*, 805 F. Supp. 2d 291, 296 (E.D. La. 2011); *Lewis v. Ford Motor Co.*, 685 F. Supp. 2d 557, 563 (W.D. Pa. 2010).

111. *See, e.g.*, *Richardson*, *supra* note 25, at 121; *Clermont*, *supra* note 98, at 1016.

112. *See* discussion and citations *infra* Sections III.A.1.a., III.A.1.b., III.A.1.c., and III.A.1.d.

113. *See, e.g.*, *Cunningham*, 592 F.3d at 806.

114. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009).

115. *See, e.g.*, *Am. Nat'l Prop. & Cas. Co.*, 746 F.3d at 639; *Metz*, 649 F.3d at 500–01; *United Steel*, 602 F.3d at 1091; *Cunningham*, 592 F.3d at 806.

b. Placement in Diversity Statute

Certainly, however, those that conclude jurisdiction continues do not do so solely based on *Vega*.¹¹⁶ Because CAFA's jurisdictional provisions were included as amendments to the general diversity statute, and because CAFA has been characterized as "at base, an extension of diversity jurisdiction," many courts and scholars have examined interpretations of the general diversity statute for guidance.¹¹⁷ Of course, in regular cases filed in or removed to federal court on the basis of jurisdiction provided by the general diversity statute, courts examine jurisdictional facts that exist at the time the case is filed or removed.¹¹⁸ And the axiom "once jurisdiction, always jurisdiction," from *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, is nearly black letter law.¹¹⁹ Later events do not divest federal courts of jurisdiction under the general diversity statute.¹²⁰ Applying this "once jurisdiction, always jurisdiction" rule to CAFA cases just as they do to general diversity cases, some courts and commentators erroneously conclude CAFA jurisdiction continues regardless of any later decision regarding certification.¹²¹

116. *Am. Nat'l Prop. & Cas. Co.*, 746 F.3d at 635; *Metz*, 649 F.3d at 501; *Cunningham*, 592 F. 3d at 807; *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 381 (7th Cir. 2010); *United Steel*, 602 F.3d at 1091–92. *See also* *Rivers v. Chalmette Med. Center, Inc.*, 805 F. Supp. 2d 291, 296 (E.D. La. 2011); *Lewis v. Ford Motor Co.*, 685 F. Supp. 2d 557, 563 (W.D. Pa. 2010).

117. *See, e.g.*, *In re Burlington*, 606 F.3d at 381.

118. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570–71 (2004) (recognizing the general rule that "for purposes of determining the existence of diversity jurisdiction, the citizenship of the parties is to be determined with reference to the facts as they existed at the time of filing"); *Freeport-McMoRan, Inc. v. K N Energy, Inc.* 498 U.S. 426, 428 (1991) (per curiam) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events."); *Am. Nat'l Prop. & Cas. Co.*, 746 F.3d at 635; *Coury v. Prot*, 85 F.3d 244, 248–49 (5th Cir. 1996); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 265 (5th Cir. 1995) (recognizing that "removal jurisdiction is determined on the basis of the complaint at the time of removal").

119. RUBENSTEIN ET AL., *supra* note 107; Scott Dodson & Phillip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L. J. 1323, 1346 n.135 (2016) (citing CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3608 (3d ed. 2014) ("It has long been hornbook law . . . that whether federal diversity of citizenship jurisdiction exists is determined by examining the citizenship of the parties at the time the action is commenced by filing the complaint . . ." In the case of removal, "the majority of decisions typically require complete diversity to exist at the time the removal petition is filed.")).

120. *Metz*, 649 F.3d at 501; *In re Burlington*, 606 F.3d at 381; *United Steel*, 602 F.3d at 1091–92.

121. *See Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 862 (11th Cir. 2012) (per curiam) ("After it denied class certification, the district court dismissed Walewski's complaint for lack of standing.").

Supporters of this position view a later denial of a class certification request as the kind of change in a jurisdictional fact that does not affect continued jurisdiction.¹²² Rather than treating the failure of certification as an alleged jurisdictional fact that was “untrue” at the time of filing or removal, they treat the failure of certification as a fact that occurred at a later time—after jurisdiction had already attached.¹²³ These courts treat post-removal denial of class certification as “‘not meaningfully different’ from other post-removal changes,” like changes in a party’s domicile, and thus, they mistakenly conclude that the rule that jurisdiction, “once properly established, remains and is not affected by subsequent events in the litigation,” applies with equal force to class actions filed in or removed to federal court under CAFA.¹²⁴

These courts warn an alternate interpretation “would mean that prior to class certification, jurisdiction would neither exist nor not exist. Instead, the lawsuit would float in some kind of suspended animation.”¹²⁵ They insist that holding a court no longer has subject matter jurisdiction after a denial of certification would mean not only that the court would have “no jurisdiction going forward, but the court would be deemed to have never had jurisdiction. Everything that came before the court’s decision . . . would be wiped out.”¹²⁶ In addition, because determining class certification sometimes requires ruling on discovery issues and other motions, these courts warn that determining a court never had power to rule on those issues would

122. See, e.g., *id.* at 637 n.2.

123. See, e.g., *id.* at 636, 639.

124. *Louisiana v. AAA Ins.*, No. 07-5528, 2011 WL 5118859, at *7 (E.D. La. Oct. 28, 2011) (citing *Samuel v. Universal Health Servs.*, 805 F. Supp. 2d 284, 289 (E.D. La. 2011); *United Steel*, 602 F.3d at 1092; *Cunningham Charter Corp. v. Learjet, Inc.* 592 F.3d 805, 807 (7th Cir. 2010); and (improperly) *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009)). Other courts, however, disagree, holding jurisdiction could not have existed at the time of filing or removal because the later failure of class certification means no class actually existed when the case was filed or removed to federal court. See, e.g., *Avritt v. Reliastar Life Ins. Co.*, No. 07-1817, 2009 WL 1703224, at *2 (D. Minn. June 18, 2009) (collecting cases).

125. *Calvillo v. Siouxland Urology Assocs. P.C.*, No. CIV. 09-4051-KES, 2011 WL 5155093, at *5 (D.S.D. Oct. 28, 2011) (citing *Delsing v. Starbucks Coffee Corp.*, No. 08-cv-1154, 2010 WL 1507642 (D. Minn. Apr. 14, 2010)).

126. *Id.*

inefficiently render those earlier orders moot.¹²⁷ Thus, they reason policy considerations underlying the “once jurisdiction, always jurisdiction” rule, such as the desire to promote efficiency and avoid expense and delay, weigh in favor of interpreting federal courts’ jurisdiction under CAFA to continue even after a denial of class certification.¹²⁸ These arguments, however, ignore CAFA’s ordinary language that makes clear jurisdiction exists from the time a qualifying putative class action is alleged until a certification decision is reached, no matter what that certification decision turns out to be.

c. “Filed Under”

Supporters of continuing jurisdiction have also argued if an action meets the “class action” definition at the time of filing, “the key requirement of CAFA jurisdiction” would be met, and no other jurisdictional inquiry would be necessary.¹²⁹ The term “class action” as used in CAFA’s grant of jurisdiction requires only that an action must be filed as a class action of the kind described in the jurisdiction granting language in section 1332(d)(2).¹³⁰ That section reads, “The district court 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”¹³¹ The statute defines “class action,” as “any civil action filed under rule 23” or a state equivalent.¹³² Read together, the

127. See, e.g., *id.* at *5. These arguments are not exclusive to jurisdiction under CAFA, however. Indeed, the rule that a federal court that lacks subject matter jurisdiction lacks power to proceed, even if the case has been litigated productively for years, is in no way a new rule. See Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1455–56 (2011); Dodson & Pucillo, *supra* note 119, at 1326 (citing *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

128. *AAA Ins.*, 2011 WL 5118859, at *7.

129. Richardson, *supra* note 25, at 139. See also Clermont, *supra* note 98, at 1015–16 (opining that a denial of class certification should not oust jurisdiction over a case removed to federal court under CAFA because a court reached a determination that the case was a class action for jurisdictional purposes at that point employing a lower standard of proof than required to certify a class action).

130. Richardson, *supra* note 25, at 147 (citing 28 U.S.C. § 1332(d)(1)(B) (2016) and concluding overall that jurisdiction continues, but arguing federal courts should nevertheless abstain from retaining jurisdiction over these cases).

131. 28 U.S.C. § 1332(d)(2).

132. § 1332(d)(1)(B).

argument is these provisions reflect Congress's intent for courts to assess jurisdiction at the time a civil action is filed.¹³³

In addition, rather than viewing as problematic section 1332(d)(8)'s "before or after the entry of a class certification order" language together with CAFA's definition of a "class certification order" as "an order issued by a court approving the treatment of some or all aspects of a civil action as a class action," they construe the provisions to buttress their position that an action can be a "class action" for purposes of CAFA, even after a class is denied.¹³⁴ Because the statute does not indicate what consequences a denial of certification may have on continuing jurisdiction, proponents state the statute should not be interpreted to mean the eventual denial of class certification or a later decertification of a certified class "remove[s] an action from the ambit of the term 'class action,'" such that dismissal or remand would be required.¹³⁵ Potentially ignoring certain aspects of CAFA's removal provisions, they further contend the "before or after" and "class certification order" provisions should be understood to mean merely that putative class actions may be removed after a class certification order is signed.¹³⁶

d. Prudential Concerns

Those that conclude jurisdiction continues also warn that if jurisdiction were to be lost when class claims fail, plaintiffs could engage in forum shopping by withdrawing their class claims to create an opportunity for remand to state court or for dismissal without prejudice.¹³⁷ Retaining jurisdiction, they argue, properly avoids

133. Richardson, *supra* note 25, at 147 (concluding overall that jurisdiction continues and arguing the policies underlying CAFA nevertheless suggests federal courts should abstain from retaining jurisdiction over these cases).

134. *Id.* at 137 n.114.

135. *Id.* at 139.

136. *Id.* at 139; *see also* Clermont, *supra* note 98, at 1015–16.

137. *See, e.g.*, *Avritt v. Reliastar Life Ins. Co.*, No 07-1817, 2009 WL 1703224, at *1 (D. Minn. June 18, 2009) (citing *Garcia v. Boyar & Miller, P. C.*, Nos. 3:06-CV-1936-D, 3:06-CV-1937-D, 3:06-CV-1938-D, 3:06-CV-1939-D, 3:06-CV-2177-D, 3:06-CV-2206-D, 3:06-CV-2236-D, 3:06-CV-2241-D, 2007 WL 1556961, at *3 (N.D. Tex. May 30, 2007)); *Genenbacher v. Centurytel Fiber Co. II, LLC*, 500 F. Supp. 2d 1017, 1017 n.3. These concerns are not limited to decisions dealing with jurisdiction under CAFA; they exist when interpreting the general diversity statute as well. *See, e.g.*,

shunting cases between state and federal courts because “litigation is not ping-pong.”¹³⁸ They warn an alternative interpretation would undermine the policy that seeks to have class actions “within the scope of the Act” litigated in federal, rather than state, courts.¹³⁹ But like the attempts to minimize the effects of the “before or after” the entry of a “class certification” language outlined above, these arguments also fail to recognize that CAFA’s removal provisions incorporate certain limitations contained in the general diversity statute’s removal provisions.

Finally, proponents of continuing jurisdiction point out that allowing jurisdiction to end after a denial of class certification would frustrate certain provisions of Rule 23.¹⁴⁰ For example, Rule 23(c)(1)(C) states, “[a]n order that grants or denies class certification may be altered or amended before final judgment.”¹⁴¹ So, even if class certification were to be denied, Rule 23 provides a court with authority to revisit that certification decision later.¹⁴² Indeed, district courts retain discretion to modify certification orders if doing so would be appropriate in the light of subsequent developments in the litigation,¹⁴³ and they “can always alter, or indeed revoke, class certification at any time before final judgment is entered should a change in circumstances” render class treatment inappropriate.¹⁴⁴

Dodson & Pucillo, *supra* note 119 (“Diversity jurisdiction [is] both more complicated than federal-question jurisdiction and more susceptible to party gamesmanship,” and thus, “[c]ompliance with the diversity requirements can be difficult to determine.”); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011) (subject matter jurisdiction is anything but clear and simple, despite the fact that scholars and judges consistently promote the idea that jurisdictional rules should be clear and simple).

138. *Cunningham Charter Corp. v. Learjet, Inc.* 592 F.3d 805, 807 (7th Cir. 2010).

139. *Id.* See Part III, *infra*, discussing how this concern is overstated because it fails to recognize that CAFA’s removal provision incorporated certain limitations contained in the general removal provisions.

140. See RUBENSTEIN ET AL., *supra* note 107.

141. Fed. R. Civ. P. 23(c)(1)(C).

142. See, e.g., *Avritt v. Reliastar Life Ins. Co.*, No 07-1817, 2009 WL 1703224, at *1 (D. Minn. June 18, 2009) (citing *Allen-Wright v. Allstate Ins. Co.*, No. 07-cv-4087, 2009 WL 1285522, at *4 (E.D. Pa. May 5, 2009); *Genenbacher*, 500 F. Supp. 2d at 1017; *cf.* 28 U.S.C. § 1332(d)(8) (providing for jurisdiction “before . . . the entry of a class certification order”)); *J.S. v. Attica Cent. Sch.*, No. 00-CV-513S, 2011 WL 4498369, at *4 (W.D.N.Y. Sept. 27, 2011) (citing *Wu v. MAMSI Life & Health Ins. Co.*, 256 F.R.D. 158 (D. Md. 2008)).

143. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

144. *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 n.9 (2d Cir. 2007); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006) (explaining if the district court

Similarly, if a plaintiff were able to correct deficiencies in his or her alleged class action, a court could later certify the class, even though it had earlier rejected it.¹⁴⁵ But, if a denial of certification were to strip the district court of continuing jurisdiction, courts would not have the opportunity to revisit earlier certification decisions in the way that Rule 23 contemplates.¹⁴⁶ While these concerns are compelling, this article suggests the best way to address them is to allow the parties an occasion to provide briefing regarding the likelihood that an apparent class deficiency might be remedied later before denying certification if the court is inclined to reject class treatment.

2. *Jurisdiction Ends*

In contrast, some courts and commentators have relied on the same factors as courts reaching the opposite conclusion to conclude jurisdiction under CAFA ceases after a court denies certification.¹⁴⁷ Supporters of interpreting CAFA jurisdiction as ending tend to characterize CAFA's jurisdiction as either provisional, continuing after certification only if the decision is a positive one, on the one hand, or entirely dependent on certification, ceasing to have ever existed if the decision is a negative one, on the other hand.¹⁴⁸ While

determines that circumstances have changed such that class treatment is no longer appropriate, the court may at that point consider whether to modify or decertify the class); *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 354 F.3d 1246, 1261 (10th Cir. 2004) (“[A] trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment.”).

145. Fed. R. Civ. P. 23(c)(1)(C). Certain class deficiencies may be remedied. *Wasserman*, *supra* note 28, at 857–58. Examples of deficiencies that may be remedied include problems with the proposed class representative because his or her claims are not typical of the absent class members' claims, because his or her lawyer lacks sufficient experience in class action litigation, or because there exist conflicts of interests between the representative and the rest of the class. *Id.* at 855. Examples of problems inherent in a class action itself include a lack of numerosity or the failure of class issues to predominate over individual questions. *Id.*

146. See *Richardson*, *supra* note 25, at 139–140 (arguing resort to statutory history is inappropriate, however, given that the statutory language in his opinion was clear).

147. See e.g., *Clausnitzer v. Fed. Express Corp.*, 621 F. Supp. 2d 1266, 1267–70 (S.D. Fla. 2008); see *Lampone*, *supra* note 26, at 1151–52.

148. See e.g., *Rivera v. Wash. Mut. Bank*, 637 F. Supp. 2d 256, 263 (D.N.J. 2009) (CAFA jurisdiction is provisional); *Lampone*, *supra* note 26, at 1151–53 (CAFA jurisdiction is entirely dependent on certification).

the latter characterization and several of the arguments made to justify the conclusion that jurisdiction ends are flawed, many are not. Ultimately, an analysis of CAFA's jurisdictional provisions that is most consistent with the statute's language and that avoids ignoring certain relevant but problematic provisions reveals the conclusion is correct, despite the clear trend by circuit courts to reach the opposite conclusion.

a. Dicta in Vega

Reliance on *Vega* to support continuing jurisdiction is misplaced because the pertinent language was in fact "*dicta*" with no precedential value. In addition, the Eleventh Circuit has not treated consistently cases in which federal court jurisdiction is predicated on CAFA, but class claims later fail.¹⁴⁹ In 2012, the Eleventh Circuit appeared to unambiguously reject the way in which other courts interpreted its earlier *dicta* in *Vega*.¹⁵⁰ But more recently, the court reversed course.¹⁵¹ In an earlier case, *Walewski*, the Eleventh Circuit held CAFA jurisdiction expires when a request for certification is denied.¹⁵² There, the plaintiff was a gamer who alleged he had spent over 450 hours over a few months time playing the video game, *The Elder Scrolls IV: Oblivion*.¹⁵³ Relying on CAFA for federal court jurisdiction,¹⁵⁴ Plaintiff filed a putative class action against the companies that manufactured and marketed the game, alleging an

¹⁴⁹ *Gelfound v. Metlife Ins. Co. of Conn.*, 313 F.R.D. 674, 680 (S.D. Fla. 2016) (comparing *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 862 (11th Cir. 2012) (per curiam) with *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n. 12 (11th Cir. 2009), noting the Eleventh Circuit's "conflicting guidance on this issue," and recognizing the lack of precedential value of either opinion on the issue as one appears in an unpublished opinion and the other appears as mere dicta).

¹⁵⁰ See *Walewski*, 502 F. App'x at 862; *Karhu v. Vital Pharmaceuticals, Inc.*, No. 13-60768-CIV, 2014 WL 1274119, at *1, *3 (S.D. Fla. Mar. 27, 2014). "*Dicta*" refers to a court's comments that are not necessary to the decision and thus not precedential. *Obiter Dictum*, BLACK'S LAW DICTIONARY (10th ed. 2014). "*Dicta*" is the plural form of "*obiter dictum*," which is defined as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Id.*

¹⁵¹ *Wright Transp., Inc. v. Pilot Corp.*, 841 F.3d 1266, 1272-73 (11th Cir. 2016).

¹⁵² See *Walewski*, 502 F. App'x at 862.

¹⁵³ *Id.* at 859.

¹⁵⁴ Class Action Complaint at ¶4, *Walewski v. Zenimax Media, Inc.*, No. 6:11-cv-1178-Orl-28DAB (M.D. Fla. July 18, 2011), 2011 WL 2790627.

animation defect left him unable to trigger certain simulations needed to complete the game's main quest and numerous side quests.¹⁵⁵ He sued for alleged violations of various Maryland laws because he contended the defendants falsely represented that the game was open-ended and could go on indefinitely, but the animation defect caused that claim to be untrue and rendered the game less valuable than it would have been had the claim been true.¹⁵⁶ The district court denied class certification because plaintiff failed to adequately define the class, and dismissed the case for lack of standing due to complicated choice of law issues and for the overly broad class allegations.¹⁵⁷ The Eleventh Circuit upheld the dismissal.¹⁵⁸

Interestingly, although the opinion does not mention the conflict regarding whether jurisdiction under CAFA continues after the denial of a certification request, the Eleventh Circuit weighed in on the issue.¹⁵⁹ Because the district court dismissed the plaintiff's cause of action based on standing, as well as for problems with the alleged class, the Eleventh Circuit could have upheld the decision without confronting the jurisdictional issue.¹⁶⁰ In fact, in light of the uncertainty surrounding the issue, some courts have done exactly that—simply acknowledging the existence of a split of authority and then limiting their holdings to avoid entering the fray.¹⁶¹ In contrast, the Eleventh Circuit acknowledged it had authority to “affirm the district court’s judgment on any ground that appears in the record.”¹⁶² It then affirmed the dismissal on the expressed grounds that “absent

155. *Walewski*, 502 F. App'x at 859.

156. *Id.*

157. *Id.* at 860. Plaintiff's complaint alleged causes of action based on Maryland law, when Florida law should have applied. *Id.* Plaintiff argued that the district court should not have concluded Florida law applied before allowing discovery on the choice-of-law issue. *Id.*

158. *Id.* at 862.

159. *Walewski*, 502 F. App'x at 862.

160. *See id.*

161. *See, e.g.,* *Schraeder v. Demilec (USA) LLC*, No. 12-6074, 2014 WL 1391714, at *2-3 (D.N.J. Apr. 8, 2014) (noting that the Third Circuit has yet to answer the question, circuits are split, and serious questions thus existed about the court's subject matter jurisdiction before granting plaintiffs' request to dismiss the action without prejudice under Rule 41(a) (citing *Kaufman v. Liberty Mut. Ins. Co.*, 245 F.2d 918, 919 (3d Cir.1957)). But of course, that option is available when a court has other grounds on which to rest a dismissal, but not when such grounds do not exist.

162. *Walewski*, 502 F. App'x at 862 (citing *Powers v. United States*, 996 F.2d 1121, 1123-24 (11th Cir. 1993)).

certification as a class action, the district court lacks subject matter jurisdiction over [plaintiff's] individual claim."¹⁶³ Finding CAFA jurisdiction absent, the Eleventh Circuit considered whether the district court had jurisdiction over the plaintiff's case under the general diversity statute and determined to a legal certainty the plaintiff's alleged damages could not exceed \$75,000.¹⁶⁴

In *Karhu v. Vital Pharmaceuticals*, a district court confronted other courts' reliance on *Vega* more directly.¹⁶⁵ There, the district court, *sua sponte*, dismissed the case for lack of jurisdiction after it denied the plaintiff's request for class certification.¹⁶⁶ The plaintiff in *Karhu* had sued a dietary supplement maker for falsely advertising that its product would burn fat and cause rapid fat loss, alleging causes of action under various state and federal laws.¹⁶⁷ Because it denied class certification, the court held the plaintiff's claims fell "outside the circumstances in which subject-matter jurisdiction adheres" under the "before or after" provision of CAFA.¹⁶⁸ Thus, the court determined it lacked subject matter jurisdiction to hear the case.¹⁶⁹ After noting the plaintiff's remaining individual claims failed to qualify for jurisdiction under CAFA, the court concluded the plaintiff did not satisfy jurisdictional requirements under either the federal question statute or the general diversity statute.¹⁷⁰ While it recognized federal courts disagree about how a denial of class certification affects subject matter jurisdiction, the court rejected the assertion that "a denial of class certification does not impact CAFA subject-matter jurisdiction."¹⁷¹

In 2016, however, without reference to *Walewski* or *Karhu*, the Eleventh Circuit changed direction in *Wright Transportation, Inc. v.*

163. *Id.* ("We may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below.")

164. *Id.*

165. *Karhu v. Vital Pharmaceuticals, Inc.*, No. 13-60768-CIV, 2014 WL 1274119, at *3 (S.D. Fla. Mar. 27, 2014).

166. *Id.* at *1.

167. *Id.*

168. *Id.* at *2 (citing 28 U.S.C. § 1332(d)(8) (2016)).

169. *Id.* at *2 (citing 28 U.S.C. § 1332(d)(8)).

170. *Id.* at *1 (citing 28 U.S.C. § 1332(a), (d)).

171. *Karhu*, 2014 WL 1274119, at *2-3.

Pilot Corporation,¹⁷² when it joined the other circuit courts that have cited *Vega* to support the conclusion that jurisdiction is not ousted when plaintiffs' class action claims fail. In the *Wright* case, the Eleventh Circuit held CAFA conferred jurisdiction over all of the plaintiff's claims at the time plaintiff filed the alleged class action, and that jurisdiction continued after the dismissal of plaintiff's class allegations.¹⁷³ As to when jurisdiction would not continue, the court opined, "[c]lass-action claims filed in or removed to federal court under CAFA can be dismissed for lack of jurisdiction if those claims contain frivolous attempts to invoke CAFA jurisdiction or lack the expectation that a class may be eventually certified."¹⁷⁴ It characterized these types of dismissals as meaning "the federal court never had CAFA jurisdiction in the first place; they do not mean that jurisdiction existed and then was lost."¹⁷⁵ Where, however, a post-filing action—other than an amendment to the complaint—defeats the class allegations, the court concluded that "CAFA continues to confer original federal jurisdiction over the remaining state-law claims" ¹⁷⁶

b. Placement in Diversity Statute

Courts that view jurisdiction as ending characterize certification decisions as legal determinations of earlier, already existing facts.¹⁷⁷ As a result, these courts view *St. Paul Mercury* as inapposite.¹⁷⁸ In contrast to the facts there, the jurisdictional disqualifying facts in CAFA cases exist at the time of filing or removal, they just are not

172. 841 F.3d 1266, 1271 (11th Cir. 2016).

173. *Id.* at 1272–73.

174. *Id.* at 1271 (citing *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010)).

175. *Id.* (citing *Cunningham*, 592 F.3d at 806–07).

176. *Id.* at 1272.

177. *Avritt v. Reliastar Life Ins. Co.*, No. 07-1817, 2009 WL 1703224, at *2 (D. Minn. June 18, 2009) (citing *Muehlbauer v. Gen. Motors Corp.*, No. 05 C 2676, 2009 WL 874511, at *9 (N.D. Ill. Mar. 31, 2009); *Salazar v. Avis Budget Grp., Inc.*, No. 07-cv-0064, 2008 WL 5054108, at *5–6 (S.D. Cal. Nov. 20, 2008); *Jones v. Jeld-Wen, Inc.*, No. 07-22328-CIV, 2008 WL 4541016, at *3 (S.D. Fla. Oct. 2, 2008); *Clausnitzer v. Fed. Express Corp.*, 621 F. Supp. 2d 1266, 1270 (S.D. Fla. 2008); *Arabian v. Sony Elecs. Inc.*, No. 05CV1741, 2007 WL 2701340, at *5 (S.D. Cal. Sept. 13, 2007)).

178. *See Lampone, supra* note 26, at 1163–64.

discovered until after the certification decision.¹⁷⁹ Their prior existence means jurisdiction could not have attached in the first place because “a certifiable class does not—and never did—exist.”¹⁸⁰ Similar to the Eleventh Circuit’s reasoning in *Wright*, that CAFA jurisdiction does not attach when attempts to invoke CAFA jurisdiction are frivolous or clearly hopeless, these courts analogize a later failed class in a CAFA case to a mistaken understanding about where a party was domiciled at the time of filing or removal that was not discovered until later.¹⁸¹ There, the true domicile meant the parties lacked the requisite diversity of citizenship at the time of filing or removal, so jurisdiction never attached.¹⁸² In addition, it is well settled that a lack of subject matter jurisdiction strips a court of the power to proceed, no matter how long a case has been litigated and no matter how productive the litigation had been prior to the discovery of the jurisdictional defect.¹⁸³ Thus, the fact that certification decisions take time is not seen as requiring reading CAFA to provide continuing jurisdiction when the statute does not expressly state that jurisdiction continues. A better, more straightforward argument, however, would rely on the statute’s specific provisions that grant jurisdiction before a certification decision is reached. Thus, concerns related to the later certification decision’s effect on the jurisdiction of courts earlier in the case are misplaced.

Other courts that conclude jurisdiction ends interpret the nature of the statute’s jurisdictional grant differently. They view the statute as providing federal courts with provisional jurisdiction until a court can decide whether the case qualifies for class treatment.¹⁸⁴ Because it is impossible to know the validity of the class allegations until the

179. See, e.g., *id.*; *Salazar*, 2008 WL 5054108, at *6, *abrogated by United Steel*, 602 F.3d at 1092.

180. *Salazar*, 2008 WL 5054108, at *6.

181. *Id.*; Lampono, *supra* note 26, at 1164.

182. *Salazar*, 2008 WL 5054108, at *6.

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

184. See, e.g., *Walewski v. Zenimax Media, Inc.*, 502 F. App’x 857, 862 (11th Cir. 2012) (*per curiam*); *Amerifirst Bank v. TJX Cos. (In re TJX Cos. Retail Sec. Breach Litig.)*, 564 F.3d 489, 492–93 (1st Cir. 2009); *Rivera v. Wash. Mut. Bank*, 637 F. Supp. 2d 256, 263 (D.N.J. 2009); *Falcon v. Philips Elec. N. Am. Corp.*, 489 F. Supp. 2d 367, 368 (S.D.N.Y. 2007).

requirements of Rule 23 are analyzed, which often takes time and careful scrutiny, these courts contend jurisdiction before certification is limited.¹⁸⁵ Federal courts may decide issues “touching on the merits of the case” but only until the courts decide certification.¹⁸⁶

c. “Filed Under”

In contrast to scholars who interpreted CAFA’s use of the “filed under” language to mean jurisdiction continues, a later commentator analyzed the same terms and concluded they require the opposite.¹⁸⁷ He argued that the alternative conclusion misapplies CAFA’s plain language.¹⁸⁸ In his view, such a conclusion misconstrues CAFA’s definition of both the term “class action” and the term “filed under.”¹⁸⁹ He then offered three reasons the view that jurisdiction continues post-denial erroneously relies on the word “filed” in the phrase “filed under.”¹⁹⁰ First, the word “filed” does not mean only “to file”; instead, it also means “on file.”¹⁹¹ He then demonstrated that focusing on the act of filing, rather than the existence of a case that remains on file with a court, is inconsistent with word choices Congress made in other places in the statute.¹⁹² For example, in a note regarding CAFA’s effective date, Congress used the word “commenced” to express that meaning of “to file,” which would properly “narrowly focus on the moment of filing.”¹⁹³ In addition, the

185. See, e.g., *Rivera*, 637 F. Supp. 2d at 263 (concluding CAFA grants “provisional jurisdiction to decide issues bearing on class certification prior to the entry of a class certification order”); *Falcon*, 489 F. Supp. 2d at 368 (dismissing case where plaintiff’s counsel failed to proffer a suitable class representative, which rendered the case inappropriate for treatment as a class). Provisional is defined as “serving for the time being,” “temporary.” *Provisional*, MERRIAM-WEBSTER’S LEARNER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/provisional> (last visited Mar. 31, 2017).

186. *Rivera*, 637 F. Supp. 2d at 271.

187. *Lampone*, *supra* note 26, at 1165.

188. *Id.* That the language is not “plain,” however is aptly illustrated when one compares the arguments of these two scholars who analyze the same language and explain it in ways that reasonably support conflicting interpretations.

189. *Id.*

190. *Id.*

191. *Id.* (citing *Filed*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003)).

192. *Id.* at 1167.

193. *Lampone*, *supra* note 26, at 1165–66 (citing Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 14, while recognizing the existence of debate regarding the meaning of the word

use of certain language in one part of CAFA and the use of different language in another strongly suggests Congress intended different meanings.¹⁹⁴

Second, he pointed out that in several other places in CAFA, Congress used the phrase “originally filed” when referring to the act or moment of filing.¹⁹⁵ Thus, the use of the word “filed” as used in the statute’s definition of “class action”¹⁹⁶ without the word “originally” should be interpreted to mean something more than “originally filed.”¹⁹⁷ It should mean an action is “on file” or is “still pending” as a class action before a court.¹⁹⁸ Accordingly the argument is that CAFA’s grant of federal court jurisdiction for cases “filed under” Rule 23 or a similar state rule does not conflict with potentially problematic provisions that specify CAFA applies “before and after” a positive class certification decision because the phrase “filed under” should be interpreted to mean while a case continues to have status as a class action filed with a court.¹⁹⁹ This interpretation persuasively illustrates how CAFA’s jurisdictional provisions, while sloppily drafted, can be interpreted in a way that avoids reading them to conflict with each other. The provisions can be read to each suggest jurisdiction continues only as long as a case is on file with the court as a class action.

Finally, this commentator argued “CAFA’s reliance on Rule 23’s definition of a class action shows Congress did not intend for courts to measure jurisdiction solely at the instant of filing, but instead intended CAFA’s jurisdiction only to apply to a case that remains a class action filed under Rule 23.”²⁰⁰ To support the conclusion that until Rule 23’s prerequisites are met, a case in which class allegations

“commence,” citing, as an example, Lonny Sheinkopf Hoffman, *The “Commencement” Problem: Lessons from a Statute’s First Year*, 40 U.C. Davis L. Rev. 469, 474–509 (2006)).

194. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

195. *Id.* (citing, e.g., 28 U.S.C. § 1332(d)(3), (3)(B), (3)(E), (4)(A)(i)(I), (4)(A)(i)(II)(cc), (4)(A)(i)(III) (2016)).

196. 28 U.S.C. § 1332(d)(1)(B) (CAFA defines a “class action” as “any civil action filed under rule 23 . . . or [a] similar State statute.”).

197. Lampone, *supra* note 26, at 1167–68.

198. *Id.* at 1165.

199. *Id.* at 1166.

200. *Id.*

are made is not a class action at all, he points to the Supreme Court's declaration in *Shady Grove* that satisfying Rule 23's requirements are "preconditions for maintaining a class action" and that "[t]he line between eligibility and certifiability is entirely artificial."²⁰¹ Thus, he argued CAFA's incorporation of Rule 23 means "CAFA jurisdiction [is] not fully or properly invoked until certification."²⁰² To the extent this statement suggests a court's exercise of jurisdiction under CAFA before the court decides class action is somehow not properly invoked, however, the statute makes clear that exercise of jurisdiction is proper as soon as a qualifying putative class is alleged.²⁰³ The existence of jurisdiction before a certification decision should be treated as a separate inquiry from the existence of jurisdiction after a class fails.

d. Prudential Concerns

Prudential concerns have also driven the decisions to hold that jurisdiction ends when a class fails. Indeed, cases in which courts have held they lack jurisdiction when they deny certification have tended to involve claims of questionable merit in which the underlying claims were relatively unsympathetic and involved little tangible injury.²⁰⁴ For example, in the *Karhu* case discussed earlier, the plaintiff alleged he had overpaid for dietary supplements that cost \$23.34.²⁰⁵ After denying the plaintiff's request for class treatment, the court noted that if the plaintiff had asserted this claim as an individual action seeking recovery in Florida's state courts of general jurisdiction, he could not have satisfied the requisite amount-in-controversy.²⁰⁶ Rather, the claim would have been consigned to

201. *Id.* at 1169–70 (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010)).

202. *Id.* at 1170.

203. 28 U.S.C. § 1332(d)(8) (2016).

204. Examples include the alleged consumer classes in the *Walewski* and *Karhu* cases discussed above. *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 859 (11th Cir. 2012) (alleged overpayment of a video game); *Karhu v. Vital Pharmaceuticals, Inc.*, No. 13-60768-CIV, 2014 WL 1274119, at *5 (S.D. Fla. Mar. 27, 2014) (alleged overpayment of a diet supplement).

205. *Karhu*, 2014 WL 1274119, at *4.

206. *Id.*

small-claims court, which would have been better equipped to handle “such relatively minor disputes in an expedient, cost-effective manner.”²⁰⁷ Nevertheless, after the court denied class certification, the plaintiff sought to “move forward with a full-blown federal jury trial” and estimated the trial would take between a week and ten days and require testimony from numerous witnesses, including experts, which would have inflicted substantial costs in terms of time and expense on everyone involved.²⁰⁸

Given these facts, the court warned, “the mere inclusion of class allegations into a pleading cannot form a basis for perpetual [federal] subject-matter jurisdiction over an action.”²⁰⁹ Allowing the remaining individual action to be litigated in federal courts would frustrate both CAFA’s goal of moving the nation’s largest class actions to federal courts and Rule 23’s goal of improving judicial economy and efficiency. In such cases, the court explained, courts “may exercise CAFA jurisdiction over a putative class action prior to making a class certification ruling—presuming the plaintiff has satisfied CAFA’s other jurisdictional prerequisites—or after granting certification in a class certification order.”²¹⁰ But not after a court denies certification.²¹¹ Otherwise, the court reasoned, plaintiffs could include class allegations in complaints anytime they wished to avoid traditional jurisdictional requirements and pursue grievances, no matter how petty, in federal courts.²¹² When the possibility that a claim may qualify for class treatment ceases to exist, the justifications for continuing federal court jurisdiction also cease to exist.

Turning to the argument that jurisdiction must continue after a denial of class certification to avoid conflict with the provisions of Rule 23 that allow courts to revisit certification decisions, courts that disagree frequently make clear in the dismissal or remand decisions

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at *2 (citing 28 U.S.C. § 1332(d)(1)(B), (d)(2), (d)(5), (B), (d)(8), (d)(1)(C) (2016)).

211. *Karhu*, 2014 WL 1274119, at *2.

212. *Id.* at *5.

that their prior decisions on class certification were final.²¹³ That being the case, according to these courts, Rule 23's authorization to revisit certification decisions does not weigh against dismissal or remand because there exists no reasonably foreseeable possibility that they might later reconsider class certification.²¹⁴ Rather than analyzing the continuing jurisdiction issue in any great depth, however, these courts merely state jurisdiction is premised on cases being certified as class actions under CAFA and cannot exist where the premise no longer holds true.²¹⁵

B. Harmonizing Analysis

In cases that reach a decision on certification, harmonizing CAFA's jurisdictional provisions requires courts to consider jurisdiction at least twice during the litigation: once before the certification decision is rendered and another time after.²¹⁶ Based on CAFA's ordinary language, the legitimacy of jurisdiction before certification in no way depends on a court ultimately certifying a class.²¹⁷ As long as a qualifying putative class action is alleged, CAFA confers subject matter jurisdiction at least until a court decides certification.²¹⁸ When a class is certified, CAFA makes clear that jurisdiction continues.²¹⁹ And when a certification request is denied, to avoid ignoring any of the provisions Congress chose to include in

213. *Avritt v. Reliastar Life Ins. Co.*, No. 07-1817, 2009 WL 1703224, at *2 (D. Minn. June 18, 2009) (citing *Muehlbauer v. Gen. Motors Corp.*, No. 05 C 2676, 2009 WL 874511, at *9–10 (N.D. Ill. Mar. 31, 2009); *Salazar v. Avis Budget Grp., Inc.*, No. 07-cv-0064, 2008 WL 5054108, at *5 (S.D. Cal. Nov. 20, 2008); *Jones v. Jeld-Wen, Inc.*, No. 07-22328-CIV, 2008 WL 4541016, at *4 (S.D. Fla. Oct. 2, 2008); *Clausnitzer v. Fed. Express Corp.*, 621 F. Supp. 2d 1266, 1269 (S.D. Fla. 2008); *Arabian v. Sony Elecs. Inc.*, No. 05CV1741, 2007 WL 2701340, at *5 (S.D. Cal. Sept. 13, 2007)); *cf.* 28 U.S.C. § 1332(d)(8) (2016) (providing for jurisdiction “before . . . the entry of a class certification order”).

214. *Avritt*, 2009 WL 1703224, at *2.

215. *Id.*; *Lampone*, *supra* note 26, at 1161.

216. *Lampone*, *supra* note 26, at 1170. In cases where certification is denied, courts may need to consider jurisdiction under CAFA more than twice. *See id.* For example, a court may initially certify a class and later exercise its discretion to decertify it. Were that to happen, jurisdiction would be considered when the case was filed, when the court certified the class, and again when the court decertified the class.

217. 28 U.S.C. § 1332(d)(2).

218. 28 U.S.C. § 1332(d)(1)(B).

219. 28 U.S.C. § 1332(d)(2).

the statute,²²⁰ this article suggests jurisdiction ceases. Because Congress intended to allow the largest, nationwide class actions to be tried in federal courts, and because Rule 23 authorizes courts to reconsider class action decisions until final judgment, however, courts should consider the likelihood that cases might later qualify for class treatment before deciding certification.²²¹ They may accomplish this task by seeking briefing on whether apparent class deficiencies might be remedied before reaching a decision on certification.²²² Once a court denies certification, however, it should remand or dismiss the individual claims unless they independently meet the jurisdictional requirements to be in federal court.

1. Dismissal or Remand is Suggested

Reading the statute's jurisdictional provisions together suggests jurisdiction should end when a class fails. The definition of "class certification order" in the statute expressly includes an order approving class treatment.²²³ It does not, however, include an order denying class treatment.²²⁴ Thus, in addition to the reasons identified earlier, the standard axiom of statutory interpretation "*expressio unius est exclusio alterius*"—the expression of one thing excludes the other²²⁵—suggests CAFA jurisdiction does not continue after a denial of class certification. Because Congress set forth one situation in which jurisdiction would continue—where at least partial class treatment is approved—but did not include the other way—where class treatment is denied as to all aspects of the case—this choice suggests Congress intended jurisdiction to end after a denial of class certification.²²⁶

220. See discussion *supra* Part II.B.

221. See Wasserman, *supra* note 28, at 841.

222. See *id.* at 855 (comparing situations in which class deficiencies may be remedied with ones in which the deficiencies are inherent in the class).

223. 28 U.S.C. § 1332 (d)(1)(C).

224. *Id.*

225. *Watt v. GMAC Mortgage Corp.*, 457 F.3d 781, 783 (8th Cir. 2006).

226. See *Avritt v. Reliastar Life Ins. Co.*, No. CIV 07-1817, 2009 WL 1703224, at *2 (D. Minn. June 18, 2009) (citing *Watt v. GMAC Mortgage Corp.*, 457 F.3d 781, 783 (8th Cir.2006)).

In addition, considering CAFA's jurisdictional statutory scheme as a whole leads to the same conclusion. Reading "before or after" and "entry of a class certification" in a way that avoids rendering these provisions redundant or superfluous suggests jurisdiction ends after a class fails. While some have contended this language serves merely to make clear jurisdiction is not dependent on a grant of certification, such an interpretation would render these provisions redundant partial restatements of what the statute already provides.²²⁷ Statutes should be construed in ways that "avoid a statutory construction that would render another part of the same statute superfluous."²²⁸ Likewise, courts should avoid interpretations that render some words redundant.²²⁹ The statute already plainly provides that jurisdiction exists as soon as a qualifying alleged class action is filed, and that jurisdiction continues at least until a certification decision is reached.²³⁰ Thus, there is no need for the "before and after" language to make these directives clearer.

Furthermore, the attempt to rationalize the statute's "before or after" and "class certification order" provisions by suggesting Congress intended these provisions to operate to allow putative class actions to be removed for the first time after a class certification order is signed would likely conflict with the statute's removal provisions in the vast majority of cases. CAFA's removal provision

227. See 28 U.S.C. § 1332(d)(8).

228. See *United States v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir.2002) ("[C]ourts avoid a statutory construction that would render another part of the same statute superfluous.").

229. *U.S. v. Alaska*, 521 U.S. 1, 59 (1997); *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883); see also *Avritt*, 2009 WL 1703224, at *2 (D. Minn. June 18, 2009) (citing *U.S. v. Stanko*, 491 F.3d 408, 413 (8th Cir. 2007)). On the other hand, the argument that jurisdiction under CAFA should not continue after a class fails because section 1332(d)(2) merely authorizes a court to determine whether it has jurisdiction by deciding whether the alleged class qualifies for Rule 23 treatment is unconvincing for a similar reason as it would render the whole of section 1332(d)(2) superfluous. It is well established that federal courts always have jurisdiction to determine whether they have jurisdiction. See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 95–96 (2d ed. 2011) (citations omitted). Indeed, whenever a court's subject matter jurisdiction is challenged, courts must have authority to decide whether the challenge is valid and thus must consider whether it may properly exercise jurisdiction over the case. *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 292 (1947). Thus reading section 1332(d)(2) to mean so little would render this jurisdictional grant redundant of the power federal courts already exercise.

230. See 28 U.S.C. § 1332(d)(2) (2016).

incorporates most aspects of the general removal statute.²³¹ CAFA provides:

A class action may be removed to a district court of the United States in accordance with section 1446 [the general removal statute] (except that the 1-year limitation under section 1446(c)(1) 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.²³²

The general removal provision set forth in section 1446(b)(1) provides, “[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based”²³³ Presumably, a court could not certify a class action in the absence of any class allegations having been made.²³⁴ Therefore, when class treatment is alleged, the latest that allegation could be raised would be simultaneously with the certification decision, after which, the defendant would have thirty days to remove the action to federal court.²³⁵ Thus, an argument that the “before and after” and “class certification” order reflects Congress’s intention to allow removal for

231. See 28 U.S.C. § 1453(b) (2016).

232. 28 U.S.C. § 1453.

233. See 28 U.S.C. § 1446(b) (2016).

234. While much was made at the time of CAFA’s passage of the “phenomenon of ‘drive-by class certification’” and “judicial hellholes,” presumably, even in those courts, class allegations could not have come for the first time after the class was certified. See Purcell, *supra* note 9, at 1872, 1886 n.249. Perhaps it is not impossible to imagine a situation in which a class certification could make an action that had not been removable at one point become removable later under the statute. For example, imagine a situation in which a qualifying putative class is filed in state court, then removed to federal court under CAFA. The federal court then denied certification and remanded the case to state court. Logically, at that point, the case could still contain the kinds of class allegations covered by CAFA, but the case would not be removable as it had just been remanded. But if the state court later certified the class action, that class certification decision could operate to render the case removable again under CAFA’s removal provision.

235. See 28 U.S.C. § 1446(b).

the first time after a class certification order is signed is fairly unpersuasive.

2. Reliance on Diversity Statute is Misplaced

For several reasons, reliance on the statute's placement in the diversity statute is misplaced. The argument that CAFA's placement in the general diversity statute means Congress intended courts to exercise CAFA jurisdiction the same way courts exercise general diversity jurisdiction is contradicted in at least two ways. First, the idea that by placing CAFA's jurisdictional provisions in the general diversity statute, Congress intended courts in these putative class actions to assess jurisdictional facts only at one time during a case—at the time of filing or removal—is undermined by the fact that when Congress intended this result, it said so.²³⁶ Consider the following provision in CAFA:

Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of the filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.²³⁷

Where Congress intended jurisdictional facts to be assessed by reference to one specific point in time in a lawsuit, it made that intention explicit.²³⁸ In addition, the quoted provision uses the same rule on timing to determine citizenship under CAFA as is used in determining citizenship under the general diversity statute.²³⁹ If Congress intended all of the accepted rules that have developed under

236. See 28 U.S.C. § 1332(d)(7) (2016) (expressly providing several times during which jurisdictional facts may be assessed).

237. 28 U.S.C. § 1332(d)(7).

238. See 28 U.S.C. § 1332(a).

239. See 28 U.S.C. § 1332(d)(7).

the general diversity statute, there would exist no need to single out this one.

This reasoning applies equally to the warnings that if jurisdiction fails at any point in the litigation, jurisdiction will be considered to have been flawed from the beginning.²⁴⁰ Applying this accepted, nearly black letter rule from the general diversity statute, some have argued if jurisdiction could be found lacking after a class fails, then in the time before the certification decision, “jurisdiction would neither exist nor not exist,” and the action “would float in some kind of suspended animation.”²⁴¹ CAFA’s ordinary language, however, refutes this argument because it makes clear jurisdiction exists before a certification decision.²⁴² The relevant part of the statute states, “[t]he district courts shall have original jurisdiction of any civil action in which the matter . . . is a class action” and defines a “class action” as “any civil action filed under rule 23 . . . or similar State statute.”²⁴³ Congress thus defined the term “class action” in a way that explicitly includes “any civil action filed” as the kind of putative class action contemplated by the statute.²⁴⁴ That this language operates to confer jurisdiction on federal courts as soon as plaintiffs file a qualifying putative class action is supported by logic because, again, class actions cannot be certified before they are alleged.²⁴⁵ Moreover, the very provisions in CAFA that create confusion after a court denies a certification request prove that Congress intended federal courts to have jurisdiction before a certification decision is reached. Those provisions state CAFA applies “to any class action before or after the entry of a class certification order” with “class certification order” defined as an order approving at least some aspects of the case for class treatment.²⁴⁶ Before the court decides

240. *Calvillo v. Siouxsland Urology Assocs. P.C.*, No. CIV. 09–4051–KES, 2011 WL 5155093, at *5 (D.S.D. Oct. 28, 2011).

241. *Id.*

242. See 28 U.S.C. § 1332(d)(8).

243. 28 U.S.C. § 1332(d)(1)(B), (d)(2).

244. 28 U.S.C. § 1332(d)(1)(B).

245. See *infra* Part II.A.

246. 28 U.S.C. § 1332(d)(1)(C), (d)(8).

certification, it cannot enter a class certification order.²⁴⁷ Any expressed concern that interpreting jurisdiction to expire after a class fails would render earlier rulings on discovery and other motions moot is, therefore, misplaced.

3. *Relevant Policies Are Not Undermined*

Dismissal or remand in cases where class certification fails is consistent with CAFA and Rule 23's purposes. CAFA was meant, in part, to prevent "a parade of abuses" by plaintiffs who choose to file class actions in states they consider most likely to render favorable certification decisions.²⁴⁸ Relying on that policy to conclude jurisdiction must continue after a court denies certification, however, ignores the reality that plaintiffs do not control that decision, which means this situation would present fewer opportunities for abuse. The concern about forum abuse also ignores that continuing jurisdiction in every case provides another, albeit different, opportunity for abuse.²⁴⁹ The *Karhu* and *Walewski* cases illustrate situations in which plaintiffs could seek to keep the smallest claims in federal courts merely by alleging a qualifying putative class action.²⁵⁰ Judicial economy weighs against continuing jurisdiction in these situations. The statute already requires federal courts to spend effort, even if the court dismisses the class allegations at the pleadings stage.²⁵¹ It thus already burdens courts with its very broad expansion of federal jurisdiction; its effects should not also be expanded to require federal courts to spend additional resources, including in some cases trying these cases in their entirety, after they cease to have even a possibility of qualifying as a class action. While costs will likely deter most plaintiffs from stubbornly continuing to pursue their individual actions in federal court after their class allegations fail, exceptions exist. Continuing jurisdiction in these kinds of cases

247. See FED. R. CIV. P. 23(c)(1).

248. See S. REP. NO. 109-14, *supra* note 51, at 6.

249. See, e.g., *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857 (11th Cir. 2012); *Karhu v. Vital Pharmaceuticals*, No. 13-60768-CIV, 2014 WL 1274119 (S.D. Fla. Mar. 27, 2014).

250. See discussion *supra* Part III.A.2.

251. See 28 U.S.C. § 1332(d).

would provide plaintiffs the opportunity to force federal courts to try cases that would not otherwise even satisfy the comparatively generous standards for subject matter jurisdiction in state courts.

The idea that not allowing jurisdiction to continue after a denial of certification would be inefficient and give plaintiffs more opportunities to engage in forum shopping and treat litigation as a “ping-pong match” is somewhat convincing, but not enough to justify continuing jurisdiction after a class fails. For context, consider what a potential litigation “ping-pong match” might look like. When a plaintiff files a qualifying putative class action in state court, the defendants could remove the case to federal court.²⁵² If jurisdiction ended when the class failed, the case would be remanded to state court, where it could be certified as a class action.²⁵³ Although one may question whether a state court would certify a class action after a federal court denied class treatment, it could.²⁵⁴ The state’s class certification rules would likely be more generous than Rule 23’s requirements.²⁵⁵ In addition, recent Supreme Court precedents concerning the preclusive effect of a denial of class certification and the ability of named plaintiffs to stipulate away rights of absent class members suggest a state court could certify a nationwide class if it chose to do so.²⁵⁶ CAFA’s provisions suggest if a state court were to certify the class, the defendants would have the opportunity again to remove the action back to the federal court that earlier rejected class treatment.²⁵⁷ The federal court would then have to apply Rule 23 to

252. Jodi Kleinick & Mor Wetzler, *Removability of Federal Class Action Claims from State Court*, N.Y.L.J. Apr. 11, 2013.

253. 28 U.S.C. § 1447(c) (2016) (“If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded.”).

254. *See, e.g.*, *Puckett v. City of Emmett*, 747 P.2d 48 (Idaho 1987).

255. *See, e.g.*, *Smith v. Bayer Corp.*, 564 U.S. 299, 311–12 (2011) (rejecting injunction against state court’s consideration of nearly identical class because state law rules on certification could differ from Rule 23).

256. *See id.* at 316 (acknowledging danger that class counsel could repeatedly attempt to certify the same class to force defendants to settle but nevertheless rejecting injunction against state court’s consideration of nearly identical class); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348–49 (2013) (rejecting class plaintiff’s stipulation that neither he nor class would seek damages in excess of \$5 million because plaintiff could not bind absent class members before certification).

257. *See* 28 U.S.C. § 1332(d)(1)(c), (d)(8) (2016).

determine whether class treatment could be allowed.²⁵⁸ Since federal courts retain the authority to revisit class certification decisions until final judgment, the federal court could decertify the class again.²⁵⁹ In doing so, the court would again lose jurisdiction and have to remand the case to state court, where the process theoretically could be repeated.²⁶⁰

Although the danger of rendering litigation a game of jurisdictional ping-pong exists, the worry about inefficient, serial litigation is not a new one, nor is it particularly likely to play out in CAFA cases because of the likely obstacles to continuing to pursue litigation after a class fails.²⁶¹ Take, for example, a situation in which plaintiffs file their claims in federal courts pursuant to CAFA. Certification decisions generally take time, and plaintiffs' individual claims would be dismissed after a class fails.²⁶² In that situation, plaintiffs will likely encounter statute of limitations problems, particularly if the cases began in federal rather than state courts. In federal courts, class action tolling operates to toll the statute of limitations for absent class members' individual claims in all federal courts while a class action is pending.²⁶³ If plaintiff's individual action was dismissed, however, plaintiff would have to assert some other basis of federal subject matter jurisdiction that would allow plaintiff to file the individual action in federal court with the guarantee that class action tolling would apply.²⁶⁴ If no independent

258. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 393 (2010).

259. *Mazzei v. Money Store*, 829 F.3d 260, 266 (2d Cir. 2016).

260. See 28 U.S.C. § 1447(c) (2016).

261. See, e.g., Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 GEO. MASON L. REV. 339, 347 (2016).

262. Richardson, *supra* note 25, at 126.

263. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (extending *American Pipe* tolling to putative class members' later-filed individual actions); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553–54 (1974) (holding that attempted intervenors claims were not time-barred). *American Pipe* tolling is intended to prevent duplicative litigation that would result if plaintiffs had to intervene or file independent lawsuits to protect their interests while the class action was pending. *Crown, Cork & Seal Co.*, 462 U.S. at 351; *Am. Pipe*, 414 U.S. at 553–54. Thus it is consistent with the efficiency concerns underlying both CAFA and Rule 23. While the operation of class action tolling in later-filed individual actions is straightforward, in other scenarios, such as in cross-jurisdictional tolling situations, its operation is less certain. Pierce, *supra* note 261, at 339 (citing e.g., *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 252 (Mont. 2010)).

264. See Pierce, *supra* note 261, at 347.

basis for federal jurisdiction existed and if the limitations period had already passed, cross-jurisdictional tolling would have to apply to save plaintiff's claim, but few states allow this kind of tolling.²⁶⁵ Without class action tolling to save limitations, plaintiffs whose limitations periods expired while courts were considering certification, could not successfully pursue successive litigation.

Furthermore, the Supreme Court has not found efficiency arguments particularly compelling in other contexts, especially when weighed against the interests of federalism inherent in our parallel state and federal court systems.²⁶⁶ For example, in the *Smith v. Bayer* case, which dealt with whether a federal court could properly enjoin a state court in a parallel action from certifying an alleged class that was nearly identical to one earlier rejected by a federal court, the Court recognized that these policy concerns arise with the use of the class action device.²⁶⁷ It acknowledged the theoretical danger that class counsel could repeatedly attempt to certify the same class, thus effectively forcing defendants to settle.²⁶⁸ The Court also noted the Seventh Circuit's earlier objection "to an 'an asymmetric system in which class counsel can win but never lose' because of their ability to relitigate the issue of certification."²⁶⁹ But, the Seventh Circuit reasoned that when it had earlier confronted a similar problem in *Taylor v. Sturgell*, no such serial relitigation came to pass.²⁷⁰

In addition, dismissal or remand in cases where class certification fails is consistent with CAFA's purpose of moving the nation's

265. See, e.g., *Vincent v. Money Store*, 915 F. Supp. 2d 553, 561, 56970 (S.D.N.Y. 2013) ("The plaintiffs cannot rely on *American Pipe* to toll the statutes of limitations for their state law claims. The plaintiffs must look to any state analogue to *American Pipe* tolling rather than *American Pipe* itself."). Cross-jurisdictional tolling refers to situations in which class actions are filed in a jurisdiction other than the one in which plaintiff seeks to have the limitations period tolled. *Id.* at 569–70 (citing e.g., *Patterson v. Novartis Pharm. Corp.*, 909 F. Supp. 2d 116, 122–23 (D.R.I. 2012); *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 254 (Mont. 2010)).

266. See *Pierce*, *supra* note 261, at 369.

267. *Smith v. Bayer Corp.*, 564 U.S. 299, 302 (2011).

268. *Id.* at 316 (quoting Brief for Respondent at 47–48, *Bayer*, 564 U.S. 299 (No. 09-1205)).

269. *Id.* (quoting *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003)).

270. *Bayer*, 564 U.S. at 316–17 (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)). That does not mean, however, that these decisions are above persuasive criticism. See, e.g., Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 584–85 (2011). But they are the law.

largest class actions to federal court. Despite the possibility that plaintiffs could seek to have state courts certify class actions after federal courts deny them, realistically when class actions fail, they now pose little continuing threat of becoming the kind of large nationwide class action, with the potential ramifications on businesses and interstate commerce that CAFA sought to avoid.²⁷¹ If federal courts were to continue to exercise jurisdiction indefinitely in these kinds of cases, CAFA would infringe upon the jurisdiction of state courts even more than it already clearly does. Such an interpretation would present an affront to federalism that otherwise could be avoided. Furthermore, interpreting jurisdiction to continue after a court decides a class does not and never will qualify for class treatment would further diminish limits the Supreme Court has historically placed on federal courts' ability to extend their "protective jurisdiction."²⁷² Indeed, as a scholar recently noted, by incorporating a minimal diversity requirement in CAFA, "Congress accomplished through CAFA much of what it previously declined to do with a proposed grant of protective jurisdiction. If the [Supreme] Court's limits on protective jurisdiction are to remain meaningful, the Court must explore ways of reigning in the broadest forms of minimal diversity."²⁷³

Finally, if CAFA jurisdiction were interpreted to attach permanently, such that later events could not divest that jurisdiction, Article III's limits and Congress's authorization of federal judicial authority could be exceeded.²⁷⁴ If a denial of certification is final, all that is left before the court is an individual action. In individual actions that rely on diversity jurisdiction, complete diversity between

271. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C. § 1332(d) (2016) and other sections of 28 U.S.C.).

272. Pfander, *supra* note 34, at 1448.

273. *Id.*

274. See U.S. CONST. art. III, § 2 (authorizing judicial authority for federal court over nine categories of cases); *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (finding judicial power of federal courts dependent on Congress's actions to invest such courts with jurisdiction). *But see* A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1, 46 (2011) (arguing that while the accepted view that Congress may limit the jurisdiction of the lower federal courts "is of ancient lineage, the proposition has never satisfactorily been established by the [Supreme] Court").

parties must exist.²⁷⁵ If the action is in federal court solely by virtue of the minimal diversity requirement in CAFA, however, it follows that complete diversity between the named plaintiff and the defendants likely would not exist.²⁷⁶ And, in situations where complete diversity did exist, if plaintiff earlier had to rely solely on CAFA for federal subject matter jurisdiction, plaintiff would likely have depended on the statute's aggregation of class members' claims to satisfy the amount-in-controversy requirement.²⁷⁷ The general diversity statute, on the other hand, requires at least one plaintiff to satisfy the amount-in-controversy requirement.²⁷⁸ In situations where it is clear to a legal certainty no plaintiff's claim could exceed \$75,000, the general diversity statute would not be satisfied.²⁷⁹ And while additional plaintiffs may sometimes rely on another plaintiff's damages to meet the amount-in-controversy requirement,²⁸⁰ no such authority exists in this situation to relax the complete diversity requirement after a class action fails.

CONCLUSION

“[A]ll informed observers of the litigation process . . . understand that Federal Rule of Civil Procedure 23 and state class action rules, although regulating the process of litigation, can still have a major substantive impact.”²⁸¹ That fact is especially salient in cases that make their way to federal court via CAFA. Scholars and courts have disagreed on whether jurisdiction should continue under the statute after a court denies a class certification request.²⁸² Some have

275. *Strawbridge v. Curtiss*, 7 U.S. 267 (1807) (affirming dismissal for lack of diversity jurisdiction, interpreting the Judiciary Act of 1789 to require complete diversity of citizenship); *see also* Dodson & Pucillo, *supra* note 119 (citing 13 E. CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3605 (3d ed. 2014); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1424 (7th ed. 2015)).

276. *Pierce*, *supra* note 46 at 40.

277. Dodson & Pucillo, *supra* note 119 at 1334.

278. 28 U.S.C. § 1332(a) (2016); *see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

279. *See* 28 U.S.C. § 1332(a).

280. *See Exxon Mobil Corp.*, 545 U.S. at 566.

281. Burbank, *supra* note 33, at 1442.

282. *See supra* Section III.A.

concluded CAFA's grant of federal subject matter continues after certification only if a class is certified.²⁸³ Others have held the opposite.²⁸⁴ This article critiques each side, as well as the various rationales on which they rely. Then, despite some identified, possible negative effects, it suggests CAFA's statutory scheme and relevant policies support the conclusion that CAFA's jurisdiction expires at the failure of class certification.

For the most part, this interpretation does not conflict with or undermine the purposes underlying CAFA or Rule 23. Considering CAFA jurisdiction before and after a certification decision means federal courts have jurisdiction over the nation's largest putative class actions as soon as they are alleged. That original jurisdictional grant reduces incentives to forum shop because federal court jurisdiction before a certification decision is not dependent on class treatment being granted. Indeed, that jurisdiction, along with all of its accompanying consequences, continues until a class action fails.²⁸⁵ At that point, however, the case can no longer be a nationwide class action, so the concerns underlying CAFA jurisdiction are no longer implicated.²⁸⁶ Thus, discontinuing jurisdiction is appropriate. In cases where the class deficiency may be remedied, however, the efficiency concerns underlying both CAFA and Rule 23 suggest courts should carefully consider the likelihood that a class could later be certified.²⁸⁷ If the case has the potential of becoming the kind of nationwide class CAFA intended be litigated in federal court, a court should seek additional information and allow attempts to remediate the class before it decides certification.

This approach furthers Congress's articulated intention to allow class actions of national importance to be heard in federal courts, but does not interpret that intention to mean every case that ever qualified for jurisdiction under the statute should remain in federal

283. See *supra* Section III.A.1.

284. See *supra* Section III.A.2.

285. *Karhu v. Vital Pharmaceuticals, Inc.*, No. 13-60768-CIV, 2014 WL 1274119, at *1 (S.D. Fla. Mar. 27, 2014).

286. *Id.* at *4.

287. See Wasserman, *supra* note 28, at 855.

courts forever.²⁸⁸ While theoretically possible, allowing CAFA jurisdiction to lapse is not likely to lead to the parade of horrors some courts have used to rationalize their conclusions that CAFA subject matter jurisdiction continues no matter what. Allowing plaintiffs' inclusion of class allegations to irrevocably vest federal courts with subject matter jurisdiction would burden the federal court system in ways even greater than CAFA necessarily does and would present an unnecessary, further affront to federalism than is caused by the proposed interpretation of continuing jurisdiction under CAFA. Reading CAFA in the way this article proposes would give meaning to all of its provisions, while also recognizing its limitations and avoid many of the identified problems that would otherwise result.

288. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d)(2) (2016)).