

6-1-2008

CAFA Judicata: A Tale of Waste and Politics

Kevin M. Clermont

Cornell Law School, kmc12@cornell.edu

Theodore Eisenberg

Cornell Law School, ted-eisenberg@lawschool.cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/l srp_papers



Part of the [Jurisprudence Commons](#), and the [Litigation Commons](#)

Recommended Citation

Clermont, Kevin M. and Eisenberg, Theodore, "CAFA Judicata: A Tale of Waste and Politics" (2008). *Cornell Law Faculty Publications*. Paper 80.

http://scholarship.law.cornell.edu/l srp_papers/80

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CAFA JUDICATA: A TALE OF WASTE AND POLITICS

KEVIN M. CLERMONT[†] & THEODORE EISENBERG^{††}

The Class Action Fairness Act (CAFA) has taken on its real form through construction by federal judges. That form emerges in this empirical study of judicial activity and receptivity in regard to the Act. Our data comprise the opinions under the Act published during the two and a half years following its enactment in 2005.

CAFA has produced a lot of litigation in its short life. The cases have been varied, of course, but most typically the resulting published federal opinion involved a removed contract case, with the dispute turning on the statute's effective date or on federal jurisdiction. Even though the opinions shed some light on issues such as jurisdictional burden and standard of proof, most of the judicial activity was socially wasteful litigation. It emphasized transitional efforts to interpret sloppily drafted provisions.

More interestingly, we saw wise but value-laden resistance by judges to CAFA, as they interpreted it in a way that dampened the early hopes of overly enthusiastic removers. Regression analysis confirms the suggestion that one can derive from percentages of cases decided in certain ways. With the exception of Republican male judges, the federal judiciary has not warmly embraced the statute.

[†] Flanagan Professor of Law, Cornell University. We would like to thank for their enthusiastic and tireless coding and research assistance Amanda M. Burke '09 and Lauren Dana Westberg '10. And we thank for their comments and suggestions Donald Frederico, Michael Heise, Lonny Hoffman, and Trevor Morrison. We are especially thankful to the organizers and participants of the *University of Pennsylvania Law Review* Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, and to our two insightful commentators, Professor Steve Burbank, who also was instrumental in organizing the symposium, and District Judge Lee Rosenthal, who incidentally contributed to our database the fine exemplar of *Werner v. KPMG LLP*, 415 F. Supp. 2d 688 (S.D. Tex. 2006), in which the court declined to exercise CAFA jurisdiction after resolving burden-of-proof and effective-date issues.

^{††} Henry Allen Mark Professor of Law, Cornell University.

INTRODUCTION.....1554
 I. BACKGROUND1554
 II. METHODOLOGY1558
 III. OBSERVATIONS1562
 A. *Nature of Cases*.....1562
 B. *Nature of Issues*1565
 1. Burden of Proof1568
 2. Standard of Proof.....1569
 a. *Non-CAFA Cases*1569
 b. *CAFA Cases*1572
 c. *Optimal Approach*1574
 C. *Judicial Reactions*1579
 1. District Courts1579
 2. Courts of Appeals.....1582
 D. *Regression Models*1584
 CONCLUSION.....1592

INTRODUCTION

What happened when the Class Action Fairness Act of 2005 (CAFA)¹ encountered the federal judges—did the courts match the congressional ardor for class action reform? In an effort to answer this question, we studied the cases decided under the Act after its enactment on February 18, 2005, and before our cutoff of August 18, 2007. We measured judicial activity and receptivity in regard to the Act. It turned out not to be a matter of CAFA *ipsa loquitur*, because the courts played a role in reshaping the Act. By examining at close range the thing adjudged, we saw social waste by litigation, and we saw wise but value-laden resistance by judges.

I. BACKGROUND

The Republican Congress, in enacting the Class Action Fairness Act, gave it a broad scope covering interstate class actions, with the expressed intent of defeating the plaintiffs’ bar’s manipulation of state courts. When the Republican President George W. Bush signed it into law, he declared that it “marks a critical step toward ending the

¹ Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). See generally GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005 (2005); 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1756.2 (3d ed. 2005) (discussing CAFA’s expansion of both diversity and removal jurisdiction).

lawsuit culture in our country.”² The statute’s method was to funnel more class actions away from the state courts and into the federal courts, and perhaps thereby to discourage class actions. However, neither the cause of any malady nor the effectiveness of this cure is beyond debate.³

Let us run through the 2005 Act, showing in bold the potential points of dispute, for each of which we coded.

The Act contained a few minor **regulatory provisions** aimed at curbing certain class action abuses.⁴ Notably, in what is now 28 U.S.C.

² Remarks on Signing the Class Action Fairness Act of 2005, 41 WEEKLY COMP. PRES. DOC. 265, 265 (Feb. 18, 2005); see also 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, 1861-63, 1867 (2008) (stressing partisan support for CAFA).

³ See Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 392-405 (2005) (presenting and rebutting four arguments in favor of CAFA); Purcell, *supra* note 2, at 1851-56 (outlining the problems with the old class action regime and arguing that CAFA “chose not to address most of them, at least not directly”); CONGRESS WATCH, PUB. CITIZEN, CLASS ACTION “JUDICIAL HELLHOLES”: EMPIRICAL EVIDENCE IS LACKING (2005), available at <http://www.citizen.org/documents/OutlierReport.pdf> (reporting that very few jurisdictions are “unfair” to defendants and that various states have altered their class action rules for defendants’ benefit); cf. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 645, 652-54 (2006) (finding, on limited data, no differences in treatment of class actions between state and federal courts, and observing that “[a]ttorney perceptions of judicial predispositions toward their clients’ interests show little or no relationship to the judicial rulings in the surveyed [state and federal class action] cases”).

For the time being, defense lawyers seem quite content with the motives and effects of the Act. See, e.g., Podcast: Class Actions and Consumers: Do the Twain Still Meet? (Am. Bar Ass’n 2007), http://www.abanet.org/cle/podcast/nosearch/dl/abacle_podcast_classactionsandconsumers.mp3 (presenting arguments by John H. Beisner and Donald R. Frederico that state court class actions and unfavorable settlements are down, while federal decisions are prompt, predictable, and sound). But academics lean the other way, at least in the many law review articles that CAFA has generated. A Westlaw search applying this Article’s standard search term, “(‘class action fairness act’ or cafa) & da(aft February 17, 2005 and bef August 18, 2007),” to the titles of articles in the *Journals and Law Reviews* database, and excluding CLE-like materials, yielded 61 articles over the thirty-month period, of which 11 were student written. Of the articles taking a pronounced evaluative position on CAFA, “unfavorable” ran three-to-one against “favorable.” On the range of academic views, see Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1934-37 (2008).

⁴ See 28 U.S.C. §§ 1711–1715 (Supp. V 2005) (prescribing rules for attorney’s fees, class-member losses and discrimination, and notifications to state and federal officials of proposed settlements). Class action abuses were the original target of the bill, but over its formative years the bill’s jurisdictional adjustments grew in relative importance. See Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1594-95 (2006). Although Laurens Walker, in *The Consumer Class Action Bill*

§ 1712, Congress ratcheted up the judicial scrutiny applicable to a federal CAFA or non-CAFA class action's settlement terms that provide for recovery of discount coupons by class members.

More important for present purposes was the Act's expansion of federal subject matter jurisdiction for class actions or **mass actions**⁵ that were **commenced** on or after the enactment date. In 28 U.S.C. § 1332(d), Congress bestowed original jurisdiction on the federal district courts for sizable multistate class actions, generally those in which

of Rights: A Policy and Political Mistake, 58 HASTINGS L.J. 849, 849 (2007), provides some convincing arguments that these sections on abuse are "the most significant provision[s] of the new law," but see Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1711-20 (2006) (concluding that CAFA's settlement provisions do not adequately protect class members from unfair settlements), the fact remains that not a single case in our database involved a dispute over them. This lack of cases may be because reformers had exaggerated the degree of abuse, especially in the federal courts. Evidence of systematic abuse of coupon settlements or other nonmonetary relief was scant. See THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 50-52 (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/\\$file/clact05.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/$file/clact05.pdf) (finding that settlements of no value to federal class members were rare); THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 77-78 (1996), available at [http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/\\$file/rule23.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf) (similar); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 60 (2004) (finding questionable types of "soft" relief, such as injunctive relief or coupons, present in 7% of published federal and state class action settlements, while finding evidence of beneficial soft relief in 12% of the settlements). However, the early cases we studied would not likely involve many disputes over settlement terms. Coming after our study's period was *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1306-11 (S.D. Fla. 2007), in which the court described various objections made to a proposed settlement agreement. See Linda S. Mullenix, *CAFA and Coupons*, NAT'L L.J., Nov. 12, 2007, at 24 (stressing the *Figueroa* settlement's coupon component and the court's "in-depth analysis of procedural and substantive fairness of coupon settlements in a post-CAFA world").

⁵ "Mass actions" are actions involving numerous plaintiffs that, while not technically class actions, are joined by some procedure. 28 U.S.C. § 1332(d)(11) (Supp. V 2005). In our coded database, only two cases involved a mass action, *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1218-21 (11th Cir. 2007) (declining jurisdiction, in the course of a major opinion), *aff'g Lowery v. Honeywell Int'l, Inc.*, 460 F. Supp. 2d 1288 (N.D. Ala. 2006); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686-70 (9th Cir. 2006) (declining jurisdiction), and only three other cases discussed mass actions, *Garcia v. Boyar & Miller, P.C.*, No. 06-1936-D, 2007 WL 1556961, at *4 n.3 (N.D. Tex. May 30, 2007) (declining to treat the cases as a mass action, without any real dispute); *Lester v. Exxon Mobil Corp.*, No. 06-9158, 2007 WL 1029507, at *2 (E.D. La. Mar. 29, 2007) (finding a removal petition to be premature, and thus not deciding whether the action was a mass or class action); *In re Prempro Prods. Liab. Litig.*, No. 03-1507, 2007 WL 641416, at *1 (E.D. Ark. Feb. 27, 2007) ("A review of Plaintiffs' Amended Complaint makes it clear that this is a class action, not a mass action.").

the plaintiff class contains **at least 100 members** and their claims aggregated together **exceed \$5 million**, exclusive of interest and costs. The Act does not require complete diversity, but rather **minimal diversity**, which means that only one member of the class must differ in citizenship from any one defendant:

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

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.⁶

This jurisdiction, by a bewilderingly complicated qualification in **subsection (4)** of 28 U.S.C. § 1332(d), does not extend either to a class action in which two-thirds or more of the plaintiff members are citizens of the state where the action was filed and the primary defendants are also local citizens (the “home state” exception) or to a class action in which there are certain other markers of localism (the “local controversy” exception). Under **subsection (3)**, if that fraction falls between one-third and two-thirds, and if the primary defendants are citizens of the state where the action was filed, the district court may discretionarily decline jurisdiction over what it sees as an essentially local case. The statute goes on to **carve out** other cases from federal jurisdiction in subsection (5)(A) (certain actions where the primary defendants are governmental) and subsection (9) (certain securities and corporate actions).

In 28 U.S.C. § 1453, Congress further provided that any defendant can **remove** a class action from state court to the local federal district court—but only, as one presumes in accordance with the clear legislative history despite the absence of appropriate statutory wording, if the action would be within the original federal jurisdiction of § 1332(d). The statute goes on to say that the removing defendant can be a local citizen and need not seek the consent of the other defendants.

⁶ 28 U.S.C. § 1332(d)(2) (Supp. V 2005).

Upon enactment, all sorts of legal skirmishes and interpretive problems obviously lay ahead for the parties and the courts: What was the meaning of “primary defendants” and the related formulations? How would the one-third and two-thirds numerical tests work, especially for ill-defined classes? More problems lay beyond the words of the statute, including **choice of law**⁷ and **venue**.⁸ In fact, the Act has already generated much litigation on some other questions, especially on the Act’s effective date and threshold jurisdictional questions, including the **burden** and **standard** of proof. We wanted to systematically explore that case law.

II. METHODOLOGY

Our technique was to apply the search term “(‘class action fairness act’ or cafa) & da(aft February 17, 2005 and bef August 18, 2007)” in Westlaw’s *U.S. District Court Cases* (“dct”) and *U.S. Courts of Appeals Cases* (“cta”) databases. Those databases contain the opinions, published in print or online, of the federal district courts and courts of appeals, respectively.

In many situations, empirical research limited to published opinions is dangerous. To begin with, judicial decisions represent only the

⁷ CAFA’s choice-of-law possibilities have attracted a fair amount of scholarly attention. See, e.g., Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1949-52 (2006) (suggesting that federal choice-of-law rules should apply only in the CAFA cases in which the state choice-of-law doctrine is “materially influenced” by a state policy reflecting “a bias in favor of aggregate litigation”); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1864-71 (2006) (arguing for uniform federal choice-of-law rules in “national market” CAFA cases); Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 683-84 (2006) (using “anti-bootstrapping stricture” to justify a uniform federal choice-of-law doctrine); Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1755-57 (2006) (concluding that CAFA itself cannot support abandoning state choice-of-law rules in diversity suits). Our coding for choice of law in these early cases, however, turned up only a single case, *Bonime v. Avaya, Inc.*, No. 06-1630, 2006 WL 3751219 (E.D.N.Y. Dec. 20, 2006). *Bonime* involved an *Erie* issue regarding the applicability of state law class action limitations in federal court, with the court applying state law to defeat the federal class action.

⁸ Our coding turned up not a single dispute over venue. This result is less surprising once one realizes that most of these CAFA cases involved removal, where venue is indisputably proper in and only in the local federal court. 28 U.S.C. § 1446(a) (2000). Original cases were seemingly all brought where a substantial part of the claim arose. See 28 U.S.C. § 1391(a)(2), (b)(2) (2000) (listing a “judicial district in which a substantial part of the events or omissions giving rise to the claim occurred” as a proper venue for a civil action).

very tip of the mass of grievances, and it is sometimes tough to infer from that tip truths about the underlying mass of disputes or what lies below the disputes.⁹ More to the point, a rather small percentage of judicial decisions appear as published opinions.¹⁰ Those published

⁹ Nevertheless, substantial evidence exists that case characteristics often transcend litigation's filtering process. That is, studies of subsets of litigated cases can yield insights broader than the studied subset. See Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 275, 292-93 (1994) (book review) (finding that case categories in which plaintiffs do relatively well at the settlement stage are also categories in which plaintiffs do well at the litigation stage); Theodore Eisenberg, *The Relationship Between Plaintiff Success Rates Before Trial and at Trial*, 154 J. ROYAL STAT. SOC'Y ser. A 111, 113 (1991) (finding that case categories in which plaintiffs do relatively well at the litigated pretrial stage are also categories in which plaintiffs do relatively well at trial).

¹⁰ In one sense, this shortcoming is becoming more serious. The rate of publishing appellate dispositions in the *Federal Reporter* has dipped from almost 50% of all dispositions in 1976 to just over 20% in 2000. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 968. This decreasing sample is certainly not representative of all appellate dispositions. For example, publication choices skew seriously toward publication of reversals rather than affirmances: federal courts of appeals' civil dispositions show an 82% affirmance rate for all appeals from tried judgments, but the *Federal Reporter's* dispositions in comparable cases show only a 63% affirmance rate. *Id.* at 968-69; cf. *infra* note 99 (providing another example of this skewing, viz., the varying effect of the judge's sex). Yet today, Westlaw makes accessible and so effectively "publishes" almost all court of appeals dispositions that do not make it into the *Federal Reporter*. See William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 432-33 (2003) (distinguishing "publication" in sources outside the *Federal Reporter* from court rules that limit a decision's precedential effect); Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 203-11 (2007) (discussing in detail the growth of accessibility through electronic databases, the *Federal Appendix*, and court websites); see also ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/\\$file/citatio3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/$file/citatio3.pdf) (providing more detail on the distinction between decisions published outside the *Federal Reporter* and decisions that are nonprecedential under court rules). Incidentally, 97% of appellate dispositions on the merits, issued after oral hearing or submission on briefs, currently come by way of a reasoned ruling, with 36% of all those dispositions coming by an opinion signed by a judge and 61% by a reasoned but unsigned ruling. See JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 52 tbl.S-3 (2006), available at <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf>; cf. Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 186-96 (criticizing short-form dispositions).

Most district court opinions and decisions, however, still do not appear in print or in Westlaw. See Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1006101> (decrying the low rate of publication). Docket entries, at least, are widely available through the Public Access to Court Electronic Records (PACER) service, <http://pacer.psc.uscourts.gov/>, albeit not in text-searchable form.

opinions are, in fact, a skewed sample of judicial decisions.¹¹ Nonetheless, here we want to see how the courts have treated CAFA as a matter of doctrine. Published opinions are the decisions that move the law. Accordingly, published opinions are exactly what we wish to examine.

This Westlaw search yielded 382 federal district court published opinions and 63 court of appeals published opinions.¹² There is our first interesting result: CAFA has produced a lot of cases.¹³ For comparison purposes, an analogous search for the Private Securities Liti-

¹¹ The limited availability has very serious and varied skewing effects. See, e.g., Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 120-24 (questioning the validity of studies based solely on decisions available on Lexis and Westlaw). The determinants of publication are by no means obvious. See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. (forthcoming 2008) (manuscript at 41-44), available at <http://ssrn.com/abstract=982130> (arguing that fear of reversal primarily motivates the rare event of district court publication, more so than, say, the desire to move the law, make a mark, or signal an audience); Lizotte, *supra*, at 138-46 (analyzing publication patterns and identifying factors correlated with the decision to publish); cf. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 74-75 (2001) (“Understanding these diverse [determinants of publication] is crucial for . . . legal academics and social scientists who rely upon databases of published opinions to track judicial behavior.”).

¹² In the district court database, one decision appears twice, but we counted it only once: *Mattera v. Clear Channel Communications, Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006). The *All Federal & State Cases* (“allcases”) database additionally yielded one Supreme Court case that inconsequentially noted that CAFA did not yet apply, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571-72 (2005) (explaining that CAFA, not being retroactive, cannot be relevant to the Court’s interpretation of 28 U.S.C. § 1367, which was enacted in 1990); one inconsequential bankruptcy case, *In re Northwestern Corp.*, No. 03-12872, 2005 WL 2847228 (Bankr. D. Del. Oct. 25, 2005); and fifteen state cases. The state cases, not surprisingly, turn out to offer few occasions for illuminating discussion of CAFA, the best being *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024 (Wash. 2007), in which the court refused to dismiss a pre-CAFA class action, given the speculative nature of the defendants’ contention that the plaintiffs could instead maintain a CAFA federal action.

¹³ On the one hand, we could have produced more cases by using other search terms, such as statutory citation rather than statutory name. For example, Lonny Hoffman, in a thorough study of CAFA’s jurisdictional exceptions, came up with more cases on point than we did. See Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. (forthcoming 2008) (manuscript app. at 46-49), available at <http://ssrn.com/abstract=1005477>. We nevertheless stuck with our sampling technique in order to limit our sample to opinions focused enough to mention expressly the “Class Action Fairness Act” or “CAFA,” and especially in order to avoid further biasing our database toward kinds of CAFA disputes that involved some particular statutory section.

On the other hand, extending our search from Westlaw to Lexis would have had an insubstantial effect. See Lizotte, *supra* note 11, at 134-35.

gation Reform Act of 1995¹⁴ yielded 154 federal district court opinions and 14 court of appeals opinions in its first two and a half years of existence; for the Securities Litigation Uniform Standards Act of 1998,¹⁵ the numbers were 41 and 6; and for the Multiparty, Multiforum Trial Jurisdiction Act of 2002,¹⁶ the numbers were 4 and 1. CAFA's expansion of the right to appeal immediately from orders granting or denying remand¹⁷ might explain the larger number of court of appeals decisions, but the number for the district courts, at least, suggests that CAFA, with its wider applicability, made a bigger splash. Relatively and absolutely, CAFA has already generated an impressive hillock of case law.¹⁸

Of course, not all of the CAFA opinions turning up in our search were consequential treatments. Reading the cases revealed the references to CAFA to be inconsequential in about half of the opinions (in some, "CAFA" was used to refer to the Criminal Activity Forfeiture Act, Christians Against Family Abuse, or Citizens Against Forced Annexation). So, we decided to reject any opinion that mentioned CAFA as an aside, but to include it if the court resolved, no matter how easily, a Class Action Fairness Act point disputed by the parties. Only 182 of the district court opinions were relevant in this sense, with 200 irrelevant. On the court of appeals front, 44 were relevant, 19 not.¹⁹

Working with this residue of relevant opinions, we coded them. We coded for all the different types of disputes (bolded above) that could arise in construing CAFA. And we coded for many other things, including court (and its weighted case filings per authorized judge-ship²⁰), judge (and the judge's gender, birth year, confirmation year,

¹⁴ Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

¹⁵ Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

¹⁶ Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (codified in scattered sections of 28 U.S.C.). Here we used a three-year window because of this Act's different effective-date provision, and used broader search terms because of the Act's odder name.

¹⁷ 28 U.S.C. § 1453(c) (Supp. V 2005).

¹⁸ Admittedly, CAFA is no *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007), which imposed a plausibility test on pleadings, thereby discombobulating a basic area of law and managing to generate 2200 citations in its first five months. See Resnik, *supra* note 3, at 1949-51.

¹⁹ A few cases showed up more than once, either as subsequent steps at the trial court level or on appeal. We counted each different published opinion separately.

²⁰ We obtained the weighted filings from DUFF, *supra* note 10, at 414 tbl.X-1A, and LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, 2005 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 430 tbl.X-1A (2005), available at <http://www.uscourts.gov/judbus2005/contents.html>. This statistic accounts for both

and party affiliation²¹), subject area of claim, certification status,²² decision date, who won the decision, and whether the decision was receptive or resistant to CAFA.²³

III. OBSERVATIONS

A. *Nature of Cases*

In 91% of our district court CAFA cases, removal brought the case to federal court. The percentage has declined only slightly over the years, coming in at 94% in 2005, 90% in 2006, and 90% in 2007.

These figures appear to clash with the recent results of the Federal Judicial Center (FJC) concerning the impact of CAFA on federal filings through June 2006.²⁴ It concluded that CAFA had approximately doubled the number of diversity class actions, with the annual increase comprising between 300 and 400 cases.²⁵ About three-quarters of the increase in cases primarily asserted state-law contract (including insurance) claims or fraud claims.²⁶ More startling, about three-quarters of the increase consisted of original federal filings, rather than removed cases. Both removal and original cases spiked right after enactment, but removal then faded and original cases climbed. The FJC authors theorized that

civil and criminal filings. We had to use the 2006 numbers for the 2007 opinions, because the 2007 numbers are not yet available.

²¹ We obtained the judges' attributes from the S. Sidney Ulmer Project's Attributes of Federal Court Judges, <http://www.as.uky.edu/polisci/ulmerproject/auburndata.htm> (last visited Apr. 15, 2008).

²² Usually, the decisions in our database came without class certification having been decided. Class certification, or even a motion for certification, correlates with a much higher plaintiff recovery rate. See NICHOLAS M. PACE ET AL., *RAND INST. FOR CIVIL JUSTICE, INSURANCE CLASS ACTIONS IN THE UNITED STATES*, at xxi-xxii (2007).

²³ Although there are dangers in coding an attitudinal factor like resistance to CAFA, see Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007), we minimize them by defining resistance simply as a decision that narrows the scope of that statute and so restricts federal class action treatment. A court might take a narrow view of CAFA by construing rigorously its requirements or construing expansively its exceptions.

²⁴ THOMAS E. WILLGING & EMERY G. LEE III, *FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES* (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0407.pdf/\\$file/cafa0407.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0407.pdf/$file/cafa0407.pdf).

²⁵ *Id.* at 14 fig.3.

²⁶ *Id.* at 5-6 & fig.2a.

[a]s removal becomes more predictable, plaintiff attorneys might decide to file actions initially in federal court to avoid the costs and delays associated with removal. . . . In that way, plaintiff attorneys retain a choice of forum at least to the extent that, in a given case, jurisdiction and venue rules allow filing in more than one federal forum.²⁷

However, our data do not necessarily conflict with the FJC study. Probably the difference shows merely that among CAFA class actions, removed cases are the ones generating pitched battles and hence published opinions, and especially opinions that expressly mention CAFA. The difference between the two studies thus may reflect the danger of relying only on published cases to get a picture of what is really happening on the ground.²⁸

The reader must therefore bear in mind that our study features memorable threshold battles. Meanwhile, the FJC is telling us that practitioners may be seeing a lot of cases proceeding directly to struggles over certification and the merits, without any meaningful pause at the threshold. The result would be that our impression of CAFA litigation would differ from some practitioners'. Nevertheless, our skewed sample of published opinions still holds some lessons for those practitioners.

On the one hand, if certain plaintiffs' decisions to institute suit in federal court have resulted in less litigation over threshold issues, while by contrast those other plaintiffs who choose to file in state court are running into a pretty high number of threshold battles, then we could suggest that those who voluntarily choose to file suit in federal court have engaged in sound strategic decision making, at least in terms of reducing litigation costs and time delays.

On the other hand, these immediate savings might turn out not to be worth it. If the state court plaintiffs are actually winning a good share of the CAFA battles and getting remanded, while in the cases that stay in federal court the federal judges turn out to be more parsimonious with certification and possibly more unreceptive on the merits than some state judges (as defendants and lawmakers thought they would be²⁹), then the short-term gain of avoiding the threshold

²⁷ *Id.* at 16-17; *cf.* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1753 & fig.3 (2008) (noting that the number of removed diversity class actions was trending downward in the pre-CAFA period as well).

²⁸ *See supra* notes 10-11 and accompanying text.

²⁹ Although scant empirical basis supported CAFA's enactment, *see supra* note 3, it is true that defendants who choose to remove know what they are doing and end up in

struggles by just suing in federal court might constitute a foolish economy.

In any event, the election of federal court by only some plaintiffs creates a selection effect. Plaintiffs who are more squarely within the reach of CAFA presumably would tend to choose federal court. Unless defendants become more selective in choosing which state court cases to remove, the plaintiffs' selectivity will raise the plaintiff win rate in battles over entry to federal court.

Table 1: Number of Published *District Court* CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	2005	2006	2007	Total
Contract	28	23	23	74
Tort	1	17	10	28
Insurance	11	19	11	41
State labor law	3	8	3	14
Other subjects	9	12	4	25
Total	52	79	51	182

Table 2: Number of Published *Court of Appeals* CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	2005	2006	2007	Total
Contract	4	12	2	18
Tort	1	6	4	11
Insurance	1	4	2	7
State labor law	2	3	2	7
Other subjects	1	0	0	1
Total	9	25	10	44

a more favorable forum. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593, 594 tbl.1 (1998) (finding a plaintiff win rate in original diversity cases of 71%, compared to 34% for removed diversity cases).

As to the nature of the claims involved, the cases in our database overwhelmingly involved state law and, indeed, were mostly contract (including insurance) cases.³⁰ The other noteworthy lesson of the data underlying Tables 1 and 2 is that the total number of published cases, once they got going, has remained relatively steady over time. Note that 2006 is our only complete calendar year, so the midway peak is an illusion.

B. Nature of Issues

Many of these CAFA cases involved transitional problems, which a more carefully drafted statute could have avoided. This sloppy drafting³¹ created a lot of unnecessary social friction and costly litigation by not foreseeing things like effective-date problems. We can show this by examining more closely the nature of the CAFA issues the courts were deciding.

Most of the early disputes over CAFA involved effective-date questions³²—with jurisdictional issues coming in second, but finishing strong.³³ The numbers for “other issue” are low; they proportionately

³⁰ Incidentally, our contract category included fraud claims asserted in connection with a contract. For this reason, our results here match the FJC’s results. See Lee & Willging, *supra* note 27, at 1755-56 & fig.4 (changing their label for fraud to “Consumer Protection/Fraud”). For theories on why contract cases predominate under CAFA, see Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1615-21 (2008), which argues that the increased likelihood of litigating in federal court encourages contract claims and discourages tort claims.

³¹ The winner for sloppiness is CAFA’s authorization of immediate appeal from certain jurisdictional decisions by district courts, but only if litigants appeal “not less than 7 days after entry of the order”—when Congress meant “not more than 7 days.” See Adam N. Steinman, “Less” Is “More”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act’s Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1183 (2007).

³² Likewise, a study of district court and appellate court published opinions on CAFA at the eighteen-month mark found that of the 151 opinions, 85 (56%) dealt with effective-date problems while 48 (32%) involved amount-in-controversy or burden-of-proof issues. Ashish R. Talati, *The Class Action Fairness Act of 2005: Changing the Class Action Landscape Circuit by Circuit*, 61 FOOD & DRUG L.J. 561, 563 chart 1 (2006). A twelve-month review stressed effective-date problems even more. Lonny Sheinkopf Hoffman, *In Retrospect: A First Year Review of the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1135, 1136-48 (2006).

³³ We include under “jurisdictional provisions” our codes for disputes over citizenship (13 opinions involved such a dispute); class size (15); jurisdictional amount (58, by far the largest number for any of these codes); and discretionarily local (15), mandatorily local under the home state or local controversy exceptions (26), and other expected claims (10). The total for jurisdictional provisions in Table 3 is less than the sum of the numbers in this footnote because Table 3 gives the number of opinions that involved one or more of these jurisdictional codes.

increase for the appellate decisions only because some difficult questions of appellate jurisdiction fall into this category.³⁴ Incidentally, the numbers in Tables 3 and 4 add up to more than the total number of opinions, because a single opinion can decide multiple issues.

We present disputes over jurisdictional burden and standard of proof separately because we discuss them in detail below.

³⁴ In addition to the rare case involving a mass action, *see supra* note 5 and accompanying text, or choice of law, *see supra* note 7 and accompanying text, the “other issue” category in the district courts overwhelmingly involved threshold issues—usually ones with a jurisdictional flavor that did not fall within our specific jurisdictional codes. For example, the most common of these issues involved whether jurisdiction over a removed case survived denial of certification. Most of those cases proceeded in the right direction by upholding jurisdiction. *See, e.g.,* Colomar v. Mercy Hosp., Inc., No. 05-22409, 2007 WL 2083562, at *2-3 (S.D. Fla. July 20, 2007) (criticizing resort to discretionary remand in *Giannini v. Schering-Plough Corp.*, No. 06-6823, 2007 WL 1839789 (N.D. Cal. June 26, 2007)); *Genenbacher v. CenturyTel Fiber Co. II*, 500 F. Supp. 2d 1014, 1016-17 (C.D. Ill. 2007); *Falcon v. Philips Elecs. N. Am. Corp.*, 489 F. Supp. 2d 367, 368-69 (S.D.N.Y. 2007); *see also* RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 979-80 (9th ed. 2007) (“[T]he denial of certification 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.”). But, of course, one case went the other way. *See McGaughey v. Treistman*, No. 05-7069, 2007 WL 24935, at *3-4 (S.D.N.Y. Jan. 4, 2007). For more on this debate, *see* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1456 n.62 (2008); Linda S. Mullenix, *CAFA Jurisdiction*, NAT’L L.J., Feb. 4, 2008, at 13; Posting of Sean Costello to Drug and Device Law Blog, *CAFA’s Revolving Door?*, <http://druganddevicelaw.blogspot.com/2008/02/cafas-revolving-door.html> (Feb. 4, 2008, 08:23). Only one other opinion verged toward the merits, by deciding certification after rejecting a jurisdictional objection. *See Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 651 (W.D. Wash. 2007) (certifying class).

The courts’ treatment of these “other issues” was typical of their treatment of the cases in general, with judicial resistance to CAFA on these particular issues registering at 64%. *See infra* text accompanying Table 6.

**Table 3: Number of Published *District Court* CAFA Opinions
from February 2005 to August 2007,
by Multiple Disputed Issues**

Disputed Issue	2005	2006	2007	Total
Effective date	35	37	5	77
District court jurisdictional provisions	16	43	35	94
Jurisdictional burden and standard	7	18	8	33
Other issues	6	8	11	25
Total	64	106	59	229

**Table 4: Number of Published *Court of Appeals* CAFA Opinions
from February 2005 to August 2007,
by Multiple Disputed Issues**

Disputed Issue	2005	2006	2007	Total
Effective date	8	9	5	22
District court jurisdictional provisions	1	9	5	15
Jurisdictional burden and standard	1	8	4	13
Other issues	2	16	6	24
Total	12	42	20	74

We realize that a democratic political system will sometimes yield vague and ambiguous statutes, and that the courts are used to working with them. So CAFA is far from unique in creating wasteful litigation. Nonetheless, Congress did an especially poor job here on a predictably important subject, despite spending eight years in the drafting process. The result has been much more social waste due to CAFA than to comparable statutes. And that waste will—ironically—offset any of the benefits that CAFA’s supporters were attempting to create by corraling “wasteful” class action litigation.

Still, however wasteful it otherwise was, this flood of CAFA litigation has at least managed to shed some light, albeit of variable intensity. Two examples illustrate the different contributions the courts have made. First, the burden of proof on jurisdiction is a matter that CAFA itself failed to treat, even though its legislative history muddied the question. The result was a lot of litigation attempting to produce clarification just to get us to a point from which the statute could have

started.³⁵ Second, the standard of proof on jurisdiction has been a longstanding problem, albeit a finer technical point that Congress—more understandably—completely ignored. This issue has produced much less litigation, which has not managed to move the dispute toward resolution. We should expand on both issues.

1. Burden of Proof

A frequent point of contention in CAFA cases has been the determination of who bears the burden of proof on jurisdiction when the defendant removes: the plaintiff who brought suit or the defendant who invoked federal jurisdiction. The burden-of-proof question generated 32 disputes in our district court cases and 11 in our court of appeals cases. In conformity with the traditional rule, consensus under CAFA has settled on imposing the burden for jurisdictional requirements,³⁶ as opposed to exceptions,³⁷ on the removing defendant. The most recent of our set of appellate opinions on this point, by the Eleventh Circuit in *Lowery v. Alabama Power Co.*, explained it this way:

Under this traditional rule, the defendants, having removed the case to the district court, would bear the burden of establishing the court's jurisdiction. The defendants contend, however, that this traditional rule frustrates CAFA's motivating congressional purpose of expanded access to the federal courts. . . .

The uncertainty surrounding the burden of proof in CAFA cases arises not from the text of CAFA itself—which is silent on the matter—but from a few discrete excerpts of the statute's legislative history. . . .

Although several district courts have followed this apparent congressional intent in shifting the burden of proof onto the plaintiff, the courts

³⁵ See Lonny Sheinkopf Hoffman, *The "Commencement" Problem: Lessons from a Statute's First Year*, 40 U.C. DAVIS L. REV. 469 (2006) (examining the difficulties created by CAFA's often-ambiguous language).

³⁶ Commentators early recognized this as a hot-button issue. See, e.g., Linda S. Mullenix, *CAFA Proof Burdens*, NAT'L L.J., Dec. 19–26, 2005, at 12; Georgene M. Vairo, *Is CAFA Working?*, NAT'L L.J., Nov. 14, 2005, at 12. Indeed, it now gets its own section of the CAFA Law Blog. CAFA Law Blog: Jurisdictional Burden of Proof, <http://www.cafalawblog.com/cat-jurisdictional-burden-of-proof.html> (last visited Apr. 15, 2008).

³⁷ See *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1208 n.55 (11th Cir. 2007) ("We note in passing that the law of this circuit shifts the burden of proving the applicability of exceptions to CAFA's removal jurisdiction to the plaintiff seeking a remand."). For a difficult example, note that the courts have come uniformly to treat the one-third and two-thirds provisions of § 1332(d)(3)–(4) as exceptions, even though excellent arguments exist that they should form part of the prima facie showing of jurisdiction. See Hoffman, *supra* note 13, at 27–28 (arguing the same for § 1332(d)(5) and (9)).

of appeals have been reluctant to make the shift from such a “longstanding, near-canonical rule.” We have recently joined the Second, Third, Seventh, and Ninth Circuits in following the settled practice of placing the burden of proof on the removing [CAFA] defendant.³⁸

2. Standard of Proof

The second issue, the standard of proof, is more difficult, but only 5 of our district cases and 9 of our appellate cases addressed it.³⁹ The context was almost always a dispute about jurisdictional amount upon removal. Nevertheless, the cases split dramatically.

a. *Non-CAFA Cases*

The background on this latter issue is that under the prevailing *St. Paul* test of “legal certainty,” for the plaintiff to satisfy the jurisdictional amount requirement for original jurisdiction in a diversity case when the complaint pleads a claim for more than \$75,000, the plaintiff need show only a legal possibility that the judgment could exceed \$75,000 under the applicable law if the plaintiff were to prevail.⁴⁰ The plaintiff can pass this test easily, especially in unliquidated tort cases, because jurisdiction will exist even though a recovery over \$75,000 is, on the facts, highly unlikely. That is, because the jurisdictional amount and the merits overlap, courts do not apply the preponderance standard that is usual for issues of pure jurisdiction but instead ask for no more than a very modest factual showing to establish jurisdiction: the plaintiff can rebut legal certainty by establishing merely a legal possibility or, in other words, by establishing that a reasonable factfinder could award more than the jurisdictional amount. In sum, the jurisdictional-amount test, as applied to the damages that might be recovered, is actually a *prima facie* standard of proof that in essence requires a factual showing of a reasonable possibility of exceeding the floor amount.⁴¹

However, for the defendant to remove on the basis of diversity, when the plaintiff did not plead any amount or pleaded \$75,000 or less, and did not make a binding disclaimer of damages in excess of

³⁸ *Lowery*, 483 F.3d at 1207-08 (citations and footnotes omitted) (declining jurisdiction).

³⁹ See *infra* Part III.B.2.b.

⁴⁰ See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938).

⁴¹ See Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1008-11 (2006).

\$75,000, the defendant bears the burden—but the showing required of the defendant has remained unclear.⁴² In almost all courts the standard is high, but it ranges from requiring the defendant to show a legal certainty that recovery, if there is one, will exceed \$75,000,⁴³ down the step-scale of probability⁴⁴ to requiring a showing that more likely than not any recovery will exceed \$75,000.⁴⁵ Some courts have

⁴² See 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3725 (3d ed. 1998 & Supp. 2007) (providing 51 pages of text and 87 pages of supplement on “Amount in Controversy in Removed Actions”); Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff’s Complaint: The Need for Judicial and Statutory Reform To Preserve Defendant’s Equal Access to Federal Courts*, 62 MO. L. REV. 681 (1997) (discussing the circuit split on the issue). “As the numerous cases on the subject make clear, when the amount in controversy claimed in the plaintiff’s state court complaint exceeds \$75,000, the complaint generally is determinative of the amount in controversy issue for federal removal jurisdiction purposes” 14C WRIGHT ET AL., *supra*, § 3725, at 73.

⁴³ See, e.g., *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999), *abrogated on other grounds* by *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005); 14C WRIGHT ET AL., *supra* note 42, § 3725, at 89 n.26 (listing cases that follow this legal-certainty standard). The *Meritcare* approach was endorsed by *Samuel-Bassett v. KIA Motors America, Inc.*, 357 F.3d 392, 396-98 (3d Cir. 2004), but this later opinion was hopelessly confused. See *Valley v. State Farm Fire & Cas. Co.*, 504 F. Supp. 2d 1, 4 (E.D. Pa. 2006) (reading *Samuel-Bassett* to “require remand when it appears to a legal certainty that the plaintiff’s claims do not satisfy the amount in controversy requirement”). Courts do not explain what they mean by “legal certainty” here, but clearly they do not mean it in the *St. Paul v. Red Cab* sense. Rather, they mean it in the more usual legal sense of highest probability. Legal certainty conventionally means being virtually certain, which requires proof beyond a reasonable doubt. See Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1118-20 (1987) (grouping standards of proof into three categories: “more-likely-than-not,” “much-more-likely-than-not,” and “virtual certainty”). So, under the *Meritcare* approach, the defendant must show that any recovery almost certainly will exceed \$75,000.

⁴⁴ Between legal certainty and preponderance, there is conceivably the standard of high probability, which would require the defendant to show that any recovery *much* more likely than not will exceed \$75,000. See Clermont, *supra* note 43, at 1123. This standard appears to get the approval of *Moore’s Federal Practice*, where the authors (Professors Martin H. Redish and Georgene Vairo) approve of the legal-certainty cases but slightly water down the standard by talking of a required showing that an award at the jurisdictional amount would be “outside the range of permissible awards,” presumably meaning that it could not survive a new-trial motion for inadequacy. 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 102.107[3] (3d ed. 2007); 16 *id.* § 107.14[2][g][vi]. *But see* Clermont, *supra* note 41, at 1009-10 (disapproving factual standards of this sort).

⁴⁵ See, e.g., *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822 (6th Cir. 2006); *Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005); *Friedman v. N.Y. Life Ins. Co.*, 410 F.3d 1350, 1353 (11th Cir. 2005); *James Neff Kramper Family Farm P’ship v. IBP, Inc.*, 393 F.3d 828, 831 (8th Cir. 2005); *Garcia v. Koch Oil Co. of Tex.*, 351 F.3d 636, 638-39 (5th Cir. 2003); *United Food & Commercial Workers Union, Local 919 v.*

required less, such as a substantial possibility⁴⁶ or a reasonable possibility,⁴⁷ but such authority is relatively scanty and shaky. Of late, the courts, and especially the appellate courts,⁴⁸ markedly appear to be converging on the preponderance-of-the-evidence standard, which requires a more-likely-than-not showing.⁴⁹ This still-tough approach

CenterMark Props. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) (equating “reasonable probability” with preponderance); 14C WRIGHT ET AL., *supra* note 42, § 3725, at 90 n.27 (listing other cases); *cf.* Oshana v. Coca-Cola Co., 472 F.3d 506, 511 (7th Cir. 2006) (allowing plaintiff to rebut a removal notice by showing to a legal certainty that the claim *did not* meet the jurisdictional amount), *cert. denied*, 127 S. Ct. 2952 (2007); Martin v. Franklin Capital Corp., 251 F.3d 1284, 1290 (10th Cir. 2001) (requiring a preponderance showing “at a minimum”), *aff’d on other grounds*, 546 U.S. 132 (2005).

⁴⁶ *See, e.g.*, Haley *ex rel.* Davis v. Ford Motor Co., 417 F. Supp. 2d 811, 813 (S.D. Miss. 2006) (“[T]he defendant must demonstrate that the severity of the damages alleged give[s] rise to a reasonable probability that the jurisdictional amount has been met.”); 14C WRIGHT ET AL., *supra* note 42, § 3725, at 91 n.28 (listing more cases); *cf.* Jones v. Allstate Ins. Co., 258 F. Supp. 2d 424, 428 (D.S.C. 2003) (recognizing “reasonable probability” to be a standard lower than preponderance). These cases require careful parsing. A “reasonable probability” could mean, and has meant, just about anything. But in those cases where it represents a separate standard, it appears to be an analogue of the standard that some courts apply to flagrant abuse of the ad damnum by plaintiffs. *See, e.g.*, Nelson v. Keefer, 451 F.2d 289, 295-96 (3d Cir. 1971) (seeming to require a showing by plaintiffs of a substantial possibility of exceeding the amount-in-controversy requirement, in light of the court’s analogies to the new-trial test, which equates clear error by a jury with a decision made without a substantial possibility that it was correct); Clermont, *supra* note 41, at 1009-10 (noting that courts have rejected a stricter test to determine when the claim of damages is flagrantly exaggerated). Thus, we phrase it as a substantial-possibility standard in the text. Apparently, this is the standard preferred by Noble-Allgire, *supra* note 42, at 724, 728, 754.

⁴⁷ *See, e.g.*, Quinn v. Kimble, 228 F. Supp. 2d 1036, 1037 (E.D. Mo. 2002) (“[I]t does not appear to a legal certainty that the controversy between the parties is for less than the jurisdictional amount.”), *confirmed on renewed motion*, 228 F. Supp. 2d 1038 (E.D. Mo. 2002); Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn. 1993) (requiring a “reasonable possibility that the plaintiff can recover more than” the jurisdictional amount (quoting Ross v. Inter-Ocean Ins. Co., 693 F.2d 659, 663 (7th Cir. 1982))), *aff’d mem.*, 14 F.3d 591 (2d Cir. 1993); Hale v. Billups of Gonzales, Inc., 610 F. Supp. 162, 164 (M.D. La. 1985) (resorting to the double negative in characterizing the defendant’s burden as that of “proving that it does NOT appear to a legal certainty that the claim is actually for less than the requisite jurisdictional amount”); 14C WRIGHT ET AL., *supra* note 42, § 3725, at 92 n.30 (listing more cases); *cf.* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 344-48 (1969) (proposing a statute that would embody this approach). This standard is the so-called inverted legal-certainty test, in that it is the analogue of the *St. Paul* legal-certainty test normally applied to original jurisdiction and so requires only a reasonable possibility that recovery will exceed the jurisdictional amount.

⁴⁸ Noble-Allgire, *supra* note 42, at 695-97 & n.33.

⁴⁹ 14C WRIGHT ET AL., *supra* note 42, § 3725, at 90. The supplement to the Wright and Miller treatise lists 156 new citations in its footnote for the preponderance standard, but only 37 new citations, all of which are from the district court level, for the higher legal-certainty standard. *Id.* § 3725, at 45-61 (Supp. 2007). Although the foot-

against removal jurisdiction is seemingly incongruent with the anything-goes flavor of the *St. Paul* test for original jurisdiction.

b. *CAFA Cases*

If anything, the CAFA cases have added to the confusion. The Eleventh Circuit in *Lowery*⁵⁰ followed its non-CAFA precedent⁵¹ to apply the preponderance standard. Curiously, on this particular issue, the court did not cite another panel's earlier CAFA decision that had applied the preponderance standard.⁵² Strikingly, however, the *Lowery* court all but ridiculed its own approach:

There is a unique tension in applying a fact-weighting standard to a fact-free context. . . .

. . . .

. . . We note, however, that in situations like the present one—where damages are unspecified and only the bare pleadings are available—we are at a loss as to how to apply the preponderance burden meaningfully. . . .

. . . Regardless, our precedent compels us to continue forcing this square peg into a round hole.⁵³

Insightfully, the court suggested that the “unabashed guesswork” in the search for a “readily deducible” amount might in effect push the actual standard toward the higher legal-certainty standard.⁵⁴

Similarly, a district court in the Sixth Circuit ruled that “CAFA does not alter” the problem, and so it applied its non-CAFA precedent in support of the preponderance standard.⁵⁵ The Second Circuit did

note on the reasonable-possibility standard mixes in additional legal-certainty cases, the footnote on the substantial-possibility standard mixes in additional preponderance standard cases. These offsetting errors leave the preponderance standard clearly in the ascendency.

⁵⁰ *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1208-11 (11th Cir. 2007) (declining jurisdiction).

⁵¹ See cases cited *supra* note 45. Subsequent non-CAFA cases apply *Lowery* as a precedent. See, e.g., *Ellis Motor Cars, Inc. v. Westport Ins. Corp.*, No. 07-0020, 2007 WL 1991573, at *1 (M.D. Ala. July 5, 2007).

⁵² See *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11th Cir. 2006) (declining jurisdiction).

⁵³ *Lowery*, 483 F.3d at 1209-11.

⁵⁴ *Id.* at 1211.

⁵⁵ *Brown v. Jackson Hewitt, Inc.*, No. 06-2632, 2007 WL 642011, at *2 (N.D. Ohio Feb. 27, 2007) (declining jurisdiction). The Sixth Circuit later approved this approach

the same, without discussion.⁵⁶ The Fifth Circuit did too, but in a different context.⁵⁷

The Third Circuit in *Morgan*⁵⁸ also followed its non-CAFA precedent,⁵⁹ but this precedent meant a legal-certainty standard. Although one of its district courts had earlier found the circuit law on the precise point to be unsettled⁶⁰ and the *Morgan* court spoke with little clarity, another district court in the circuit later read its words to mean “that the Defendants must prove the requisite amount in controversy, \$5 million, to a legal certainty.”⁶¹

New complications, however, arose in the Ninth Circuit. In *Lowdermilk*, its most recent CAFA case on the point in our dataset, the Ninth Circuit abandoned its allegiance in non-CAFA cases to the preponderance standard, deciding in favor of the legal-certainty test for CAFA cases.⁶² The *Lowdermilk* court stressed the limited nature of federal jurisdiction and the idea that the plaintiff is master of the complaint.⁶³ But the holding may be limited to the facts of that case, wherein the plaintiff pleaded damages below the jurisdictional amount. Shortly before, another panel had applied the preponderance standard in a CAFA case in which the plaintiff’s complaint did not specify damages.⁶⁴ Some earlier non-CAFA cases had also distinguished between the plaintiff’s not pleading damages and the plain-

in a CAFA case. See *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404-05 (6th Cir. 2007).

⁵⁶ See *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (declining jurisdiction).

⁵⁷ See *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 485 F.3d 804, 813-14 (5th Cir. 2007) (declining jurisdiction, though here the issue was the uncontroversial standard for proving citizenship).

⁵⁸ *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) (declining jurisdiction).

⁵⁹ See cases cited *supra* note 43.

⁶⁰ See *In re Intel Corp. Microprocessor Antitrust Litig.*, No. MDL 05-1717, 2006 WL 1431214 (D. Del. May 22, 2006), *reconsideration denied*, 436 F. Supp. 2d 687, 688 (D. Del. 2006) (upholding jurisdiction by applying the Seventh Circuit’s *Brill* approach, which is discussed in the text accompanying note 67, *infra*).

⁶¹ *Lamond v. Pepsico, Inc.*, No. 06-3043, 2007 WL 1695401, at *4-5 (D.N.J. June 8, 2007) (declining jurisdiction).

⁶² See *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 998-1000 (9th Cir. 2007) (2-1 decision) (declining jurisdiction).

⁶³ See *id.* at 998-99.

⁶⁴ See *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006) (per curiam) (declining jurisdiction). The *Lowdermilk* court expressly noted that it was deciding the question reserved by *Abrego Abrego*: the standard applicable when the complaint requests damages below the jurisdictional amount. *Lowdermilk*, 479 F.3d at 996.

tiff's pleading less than the jurisdictional amount.⁶⁵ And subsequently the Ninth Circuit did try to limit *Lowdermilk* to CAFA cases in which the plaintiff's complaint clearly specified inadequate damages.⁶⁶

Finally, the Seventh Circuit adopted a complicated standard in *Brill*, the only one of these CAFA cases to develop a standard that upheld federal jurisdiction.⁶⁷ The *Brill* court seems to have required merely as a burden of production that the defendant show by a preponderance that the claim exceeded the jurisdictional amount. At the same time, the court said that this showing would sustain federal jurisdiction unless the plaintiff could come back to show to a legal certainty that the claim did not meet the jurisdictional amount. The court's motivation to complicate matters was the usual concern with the difficulty of applying a factual standard to an undeveloped factual record. Some earlier non-CAFA cases had deployed the same burden-shifting approach.⁶⁸

c. *Optimal Approach*

The messy CAFA cases at least generate an incentive to rethink the whole problem of measuring jurisdictional amount upon removal. To begin, courts seem to find it all too natural to invoke the phrase "legal certainty," because the Supreme Court in *St. Paul* enshrined that phrase as the very permissive test for the plaintiff's invocation of original jurisdiction.⁶⁹ Upon the defendant's invocation of removal jurisdiction, however, the phrase becomes ambiguous, with possible meanings spread across three major camps:

1. At one extreme, "legal certainty" could mean by direct analogy that the defendant has to show merely a reasonable possibility that the jurisdictional amount exists. In other words, whoever invokes federal jurisdiction, be it plaintiff or defen-

⁶⁵ See 16 MOORE ET AL., *supra* note 44, § 107.14[2][g][v] (disapproving that distinction).

⁶⁶ See *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 & n.4 (9th Cir. 2007) (dictum).

⁶⁷ See *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448-49 (7th Cir. 2005) (Easterbrook, J.) (upholding jurisdiction), *followed by* *Home Depot, Inc. v. Rickher*, No. 06-8006, 2006 WL 1727749, at *1 (7th Cir. May 22, 2006) (upholding jurisdiction).

⁶⁸ See 14C WRIGHT ET AL., *supra* note 42, § 3725, at 94 n.37 (favoring this approach, as embodied in *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411-12 (5th Cir. 1995), while emphasizing that the showings should not be sequential and that the plaintiff should forward all of his or her information on jurisdictional amount without waiting).

⁶⁹ See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938).

dant, has to show only a possibility of being right about the jurisdictional amount. This approach treats plaintiffs and defendants equally,⁷⁰ and it somewhat curtails plaintiffs' tactical abuse in provisionally making lowball claims to preclude removal.⁷¹ However, it makes no sense to allow the defendant to dislodge the plaintiff from state court on as minimal a showing as that required by *St. Paul* for a plaintiff to invoke federal jurisdiction; under the prevailing philosophy of jurisdiction, more should be required to dislodge a party from a proper court than is initially required to invoke jurisdiction.

2. Accordingly, most courts applying "legal certainty" have jumped to the other extreme, converting the phrase to mean that the defendant must show a virtual certainty that the jurisdictional amount exists. Part of the reason for this conversion might be semantic, in that the phrase "legal certainty" carries its own impetus to mean what it says and thus impose a very high standard rather than a very low standard. Another reason was that this removal issue arose in an era different from *St. Paul's*, at a time when enforcing limits on access to the overworked federal courts (especially on the basis of diversity) was quite appealing.⁷² In any event, the conversion is not necessarily illogical in relation to *St. Paul*: under this approach, for both original and removal jurisdiction, the plaintiff, as master of forum-choice, gets his or her way if there is a possibility that his or her position on jurisdictional amount is correct.
3. Many courts do not feel limited to these two choices. Given the stark choice that the phrase "legal certainty" offers between a pro-defendant approach and a pro-plaintiff approach, most circuit courts in non-CAFA cases have succumbed to the allure of compromise.⁷³ And of course the phrase "preponderance of the evidence" is also in the air, because it is the

⁷⁰ See Noble-Allgire, *supra* note 42, at 699-703, 718-19 (arguing that the *St. Paul* legal-certainty test "simply puts the defendant in precisely the same position as a plaintiff who filed the action directly in federal court in the first place," and that this is consistent with the policy behind removal statutes).

⁷¹ See *id.* at 692, 722 (noting the possibility of such strategic behavior).

⁷² See 14C WRIGHT ET AL., *supra* note 42, § 3725, at 96.

⁷³ See, e.g., Gafford v. Gen. Elec. Co., 997 F.2d 150, 158 (6th Cir. 1993) ("We conclude that the 'preponderance of the evidence' ('more likely than not') test is the best alternative. We believe that this test best balances the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction.").

usual standard of proof, including for jurisdictional issues that do not overlap the merits.⁷⁴ Here, however, any sort of preponderance standard cannot escape the central incoherence caused by applying a fact-weighting standard to an undeveloped factual record.

We see this incoherence as a major argument *against* any middle standard, such as a preponderance approach. Although courts are fairly adept at applying the legal-certainty standard without full discovery and without an evidentiary hearing (such as on motions for summary judgment), courts find curtailing the opponent's procedural opportunities for factual development to become more questionable as the standard moves from a legal-certainty extreme toward the middle standard of preponderance. Moreover, a middle standard would, in theory, more often necessitate jurisdictional dismissals during or after trial, when the facts get better developed. These difficulties are huge.⁷⁵

The CAFA appellate cases are picking up on this incoherence. *Lowery*, *Morgan*, *Lowdermilk*, and *Brill* all express some degree of repulsion from factual standards and therefore incline toward returning to a legal-certainty approach—and because of the aforementioned weight of authority and policy arguments, these four cases mostly lean toward the more demanding of the two versions of the legal-certainty test. Indeed, that workable legal-certainty test, under which the defendant must show to a virtual certainty that the jurisdictional amount exists, has prevailed in many district courts and in at least one circuit court for non-CAFA cases.⁷⁶

We find the major argument *for* the demanding legal-certainty test lying in the often-overlooked fact that the courts here are engaged not in some common-law endeavor but in construing the removal statutes.⁷⁷ The purpose of those statutes is not to favor defendants blindly but to even things up somewhat by giving them the delimited power,

⁷⁴ See, e.g., *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (noting the general proposition that a plaintiff must support his or her claim of jurisdiction by a preponderance of the evidence).

⁷⁵ See generally *Clermont*, *supra* note 41 (discussing the need to avoid problems of jury right, *res judicata*, and collateral attack).

⁷⁶ See *supra* notes 42-49 and accompanying text.

⁷⁷ Moreover, the courts give a strict construction to the removal statutes, and “the trend of the decisions is to restrict and limit the removal jurisdiction of the federal courts.” 14B WRIGHT ET AL., *supra* note 42, § 3721, at 340.

in some but not all circumstances,⁷⁸ to counter a plaintiff's choice of state court for a suit that is within federal jurisdiction. The main thrust of the statutes, then, was to tie the scope of removal jurisdiction to the scope of original jurisdiction.⁷⁹ Accordingly, any policy arguments about helping or hindering defendants are secondary to arguments based on the relative scope of removal and original jurisdiction. More particularly, under the statutes, the defendant can remove only if the suit, as put forward by the plaintiff, is necessarily within the federal jurisdiction. The plaintiff is master of the complaint, and so can refuse to plead a federal question or to demand in excess of the jurisdictional amount.⁸⁰ The plaintiff can thereby defeat removal, unless a federal question is necessarily in play, such as through preemption,⁸¹ or unless the demanding legal-certainty test certifies that more than \$75,000 is necessarily at stake. Any less-demanding test for jurisdictional amount, like the preponderance approach, means that defendants could remove suits that are not within federal original jurisdiction and thus violate the most basic theme of the removal statutes.

⁷⁸ See, e.g., 28 U.S.C. § 1441(b) (2000) (disadvantaging defendants relative to plaintiffs by disallowing removal if, in the absence of federal question jurisdiction, any served defendant is a citizen of the forum state). CAFA lifts this limit, but still ties removal jurisdiction to original jurisdiction.

⁷⁹ See 14B WRIGHT ET AL., *supra* note 42, § 3721, at 292 ("In general, and of cardinal importance, an action is removable from a state court to a federal court only if it might have been brought in the latter originally. This requirement that all of the conditions for original jurisdiction must be satisfied before removal will be allowed has been enforced in innumerable cases by courts at all levels of the federal judiciary."). Of course, special removal statutes authorize rare removal that goes beyond original jurisdiction. See, e.g., 28 U.S.C. §§ 1442–1443 (2000) (authorizing removal for suits against federal officers and for certain civil rights matters). But these statutes are express exceptions to the linkage between removal jurisdiction and original jurisdiction, and in any event they do not involve jurisdictional amount.

⁸⁰ See *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972) (focusing on the critical question of "whether the federal district court would have had original jurisdiction of the case had it been filed in that court"); *Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61, 65 (10th Cir. 1957) ("Removability is dependent upon the course of pleading actually used by the pleader and not by what he could have asserted had he so chosen."); 14B WRIGHT ET AL., *supra* note 42, § 3721, at 332 ("[T]he defendant cannot remove . . . on the ground that an alternative course of conduct that would have permitted removal of the case was available to the plaintiff."); *id.* § 3722, at 453.

⁸¹ 14B WRIGHT ET AL., *supra* note 42, § 3722, at 437-60; *id.* § 3722.1. Likewise, the plaintiff can often defeat removal by joining a nondiverse party, subject to the fraudulent joinder doctrine, which is supposed to be very narrow but is ever-exposed to ill-advised judicial stretching. *Clermont*, *supra* note 41, at 1011 n.170. This pattern suggests that under current law, in the absence of express statutory change, the plaintiff should be able to use the various available devices broadly to defeat removal, with the defendant able to counter only by making an overwhelming showing of some sort.

Therefore, the best approach in general, and even more so for CAFA cases where the question is new and where defendants' abuse is especially problematic, is to require that the removing defendant show to a legal certainty that any recovery will exceed the jurisdictional amount. If the defendant had to meet such a high standard, it would mean that the defendant would often fail in its removal effort.⁸² Just as the plaintiff can very easily survive the *St. Paul* test for original jurisdiction, the plaintiff will very easily survive this legal-certainty test applied to removal and so will achieve remand. This standard of proof consistently enables the plaintiff to be the master of forum choice.

A lot rides on this point. The standard of proof is determinative of jurisdiction, meaning that the parties know what they are doing when they wage battle over this seemingly arcane point that we have now examined at some length. Plaintiffs will suffer disadvantage if the statute and its construction go one way, and defendants will suffer disadvantage if the rulings go the other way—that is, the party whom the court sticks with the burden of proof on a spongy jurisdictional determination will suffer.⁸³ Moreover, doctrine not only affects the parties' fortunes but also constrains the judges' freedom. Prior rulings strongly influence subsequent judicial decisions on doctrine. For example, prior decisions on the burden of proof produced the result that, in the CAFA context, the burden for jurisdictional requirements, as opposed to exceptions, is on the removing defendant.⁸⁴

⁸² A true test of legal certainty, being comparable to judgment as a matter of law, would be so high that few tort cases could survive it:

It would rarely seem possible that a defendant could prove that the amount of damages would, as a matter of law, have to exceed a certain amount, because few, if any, rules of law require damages of a certain amount to be awarded, such as those limiting amount or kinds of damages in certain situations.

Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 111 (2007).

⁸³ Lonny Hoffman, in his empirical study of CAFA's jurisdictional exceptions, concluded that "allocation of the burden of proof is a key determinant in the forum contest's outcome." Hoffman, *supra* note 13, at 4. He had observed that the plaintiff heavily tends to win the forum contest when the burden of proof stays on the defendant, but heavily tends to lose when the court, as it usually does for CAFA exceptions, shifts the burden to the plaintiff. *Id.* at 3-4. Our results are consistent with this finding. In our district court jurisdictional burden-of-proof cases, the plaintiff win rate was 52% when the dispute concerned jurisdictional requirements (with the burden typically on the defendant), but only 25% when the dispute concerned jurisdictional exceptions (with the burden typically on the plaintiff).

⁸⁴ See *supra* text accompanying notes 36-38.

Thus, doctrine matters. We certainly do not contend to the contrary. But it remains possible that doctrine is not alone in influencing outcomes. We still must consider whether judicial attitudes for or against CAFA play a role, at least in some restricted realm of wriggle room. If so, and if judicial attitudes in fact incline against CAFA, then the hope of moving toward the optimal approach on standard of proof increases.

C. *Judicial Reactions*

The following data seem to show that both the district courts and the courts of appeals have resisted an expansive reading of CAFA. Because so many of the cases in our database were removed cases in which the plaintiff opposed application of CAFA, this resistant attitude among federal judges resulted in a high plaintiff win rate.

We shall look first at the plaintiff win rate, because so much prior empirical research has emphasized this metric. We shall define “plaintiff win rate” as the fraction of plaintiff wins among the opinions in our database that went either for the plaintiff or the defendant, as opposed to decisions for neither. Then we shall shift to our measure of receptive/resistant reaction⁸⁵ in order to look more directly at judicial disposition. We shall define “resistance rate” as the number of opinions in our database in which the court took a narrow view of CAFA, divided by the total of opinions in which the court took either a narrow or an expansive view of CAFA.

1. District Courts

The plaintiffs succeed in our cases at the unusual rate of almost two-to-one. This high plaintiff win rate could mean that the federal district courts are resisting what they see as improper use of CAFA by defendants. True, some plaintiffs are siphoning off cases squarely within CAFA by suing in federal court originally, and so bringing in state court a larger percentage of nonremovable cases.⁸⁶ Yet, defendants are correctly seeing CAFA as a pro-defendant statute, which prompts them to overuse it by unsuccessfully removing or otherwise

⁸⁵ See *supra* note 23.

⁸⁶ See *supra* text accompanying note 27.

trying to impose CAFA on plaintiffs.⁸⁷ Thus, the theory might run that the district courts, by resisting this sort of move by defendants, give plaintiffs the lopsided win rate we observe in published opinions.

Or it could be that the plaintiff win rate in the CAFA cases is not surprisingly high in the first place. True, defendants ordinarily do very well in removed cases, compared to original federal filings.⁸⁸ But perhaps plaintiffs have a high win rate in their efforts actually aimed at resisting removal. A couple of Alabama districts, for example, exhibit a peculiarly high rate of remand that exceeds 80%⁸⁹—nationally there is only about a 20% remand rate for removed actions.⁹⁰ If in over half the cases there is no effort to remand,⁹¹ the plaintiffs' national success rate would be a middling rate somewhat over 40%. Therefore, plaintiffs in our cases are doing remarkably well.

In any event, we would expect the defendants' failures to be concentrated at the beginning of CAFA's existence, as overly enthusiastic defendants flocked to the federal haven and the parties had not yet had the chance to adjust to the judiciary's statutory construction. In fact, the plaintiffs' 76% win rate in 2005 fell to 65% in 2006 and then to the more normal rate of 47% in 2007.

Table 5 gives the percentage of opinions in our database that went for the plaintiff, doing so for each set of opinions that involved a particular kind of CAFA dispute. It shows that plaintiffs did extremely well in litigation involving CAFA's effective date. Litigation on this issue was strictly transitional. Thus, defendants' successes mounted as the nature of the disputed issues evolved beyond the effective date. That early litigation, involving the defendants' losing battles to get cases into federal court, constituted social waste.

⁸⁷ See Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 554-55 (2005) (discussing the effect of CAFA on erroneous removal).

⁸⁸ See *supra* note 29.

⁸⁹ See Eisenberg & Morrison, *supra* note 87, at 568-74 (studying published and unpublished decisions).

⁹⁰ See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 123 fig.1 (2002); see also Eisenberg & Morrison, *supra* note 87, at 567.

⁹¹ See Eisenberg & Morrison, *supra* note 87, at 571 (noting an effort to remand in about half the removed cases in the high-remand-rate districts of Alabama).

**Table 5: Plaintiff Win Rate in Published District Court
CAFA Opinions from February 2005 to August 2007,
by Multiple Disputed Issues**

Disputed Issue	Plaintiff Win Rate (%)
Effective date	80
District court jurisdictional provisions	47
Jurisdictional burden and standard	47
Other issues	56
Total	63

Contrariwise, we would not expect the plaintiff win rate to vary much with primary subject area of the claims. Table 6 shows statistically insignificant differences. Recall that the three categories exhibiting the most extreme win rates, those categories other than contract and insurance, are the smallest categories in number of cases.

**Table 6: Plaintiff Win Rate in Published District Court
CAFA Opinions from February 2005 to August 2007,
by Primary Subject Area**

Subject Area	Plaintiff Win Rate (%)
Contract	67
Tort	54
Insurance	64
State labor law	71
Other subjects	54
Total	63

We could state all of these results alternatively in terms of the receptive/resistant code, but the story would be the same. Given that most of the cases were removal cases, where a victory for plaintiff was the resistant position, the resistance rate will be similar to the plaintiff win rate. Accordingly, the district courts resisted expansion of CAFA 63.3% of the time over the two and a half years, while they gave the plaintiffs a 62.7% win rate.

2. Courts of Appeals

Tables 7 and 8 show that, in a fashion similar to the district court CAFA cases, the courts of appeals exhibited elevated plaintiff win rates on CAFA disputes (especially for effective-date issues) but showed no pattern across subject area of claims (for example, the 0% win rate in the “other subject” category simply means that the *Brill* decision, involving the Telephone Consumer Protection Act and being the only appellate case to fall into that category, was decided in favor of the defendant⁹²). The 57% overall plaintiff win rate on appeal reflects who won the appeal, plaintiff or defendant, regardless of who the appellant was. The plaintiffs’ 89% win rate in 2005 fell to 52% in 2006 and then to 40% in 2007, a more normal rate for appellate courts.

**Table 7: Plaintiff Win Rate in Published Court of Appeals
CAFA Opinions from February 2005 to August 2007,
by Multiple Disputed Issues**

Disputed Issue	Plaintiff Win Rate (%)
Effective date	73
District court jurisdictional provisions	53
Jurisdictional burden and standard	62
Other issues	55
Total	57

**Table 8: Plaintiff Win Rate in Published Court of Appeals
CAFA Opinions from February 2005 to August 2007,
by Primary Subject Area**

Subject Area	Plaintiff Win Rate (%)
Contract	76
Tort	45
Insurance	29
State labor law	67
Other subjects	0
Total	57

⁹² See *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (upholding jurisdiction).

Most of the CAFA appeals (68%) resulted in affirmance, just as most non-CAFA appeals do.⁹³ Combining the high affirmance rate with the elevated plaintiff win rate in the district courts implies that plaintiffs should indeed have a high win rate for CAFA appeals. So, to get a better gauge of plaintiff success on appeal, we should instead compare the rate of reversal when the plaintiff is the appellant to the reversal rate when the defendant is the appellant. Ordinarily, plaintiffs see a dismal rate of success on appeal, with defendants doing more than twice as well—an effect that we labeled “plaintiphobia” in another article.⁹⁴ But in this regard, the CAFA appeals differ strongly from the ordinary: for CAFA, the defendants saw a 37% reversal rate in 35 cases, not statistically different from the 29% reversal rate for plaintiffs who appealed 7 cases.⁹⁵ This additional piece of the puzzle

⁹³ See generally Clermont & Eisenberg, *supra* note 90, at 126, 150-52 (finding an overall affirmance rate above 80%, but only just above 60% for published opinions, because reversals are more likely to be published); Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 130-34 (2001) (noting the consistently high affirmance rates on appeal); *supra* note 10 (noting that the affirmance rate in all appellate dispositions is higher than the affirmance rate in published appellate dispositions). The affirmance rate, which is the complement of the reversal rate, means the percentage of appeals that reach a decisive outcome and emerge as affirmed rather than reversed. We narrowly define “affirmed” as affirmed or dismissed on the merits. We define “reversed” as reversed or modified, in part or completely.

⁹⁴ See Clermont & Eisenberg, *supra* note 10, at 967 tbl.5 (finding a 29% reversal rate for defendants and a 13% reversal rate for plaintiffs in appeals from all judgments); Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. (forthcoming 2009), available at <http://ssrn.com/abstract=988199> (finding a reversal rate of 21.5% of trial judgments appealed by plaintiffs compared to 41.5% of ones appealed by defendants); see also, e.g., Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 129 (2000) (discussing findings that defendants succeed significantly more often than plaintiffs on appeal from civil trials); Kevin M. Clermont & Theodore Eisenberg, *Judge Harry Edwards: A Case in Point!*, 80 WASH. U. L.Q. 1275, 1275-76 (2002) (defending the empirical findings discussed above against an attack by a federal judge); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 548 (2003) (“On appeal[,] [employment-discrimination plaintiffs] have a harder time in upholding their successes, as well as in reversing adverse outcomes.”).

⁹⁵ In 2 of the 44 appellate cases, the result was such that neither plaintiff nor defendant prevailed. Of course, the remaining sample of 42 is modest in size, so that the absence of a statistically significant difference might be owing to insufficient statistical power. Nevertheless, a power calculation of 0.57 reveals that if the normal defendants' advantage prevailed, our sample had approximately a 57% chance of detecting the advantage at a significance level of 0.05. At a significance level of 0.10, the sample had a power of 0.72.

tends to show that it is opposition to extension of CAFA, rather than any aberrational pro-plaintiff attitude, that is driving the appellate judges. Apparently, the appellate courts' concern with CAFA causes them to overcome their usual leanings, which are pro-defendant relative to the district courts, and instead act like the district courts to restrict that statute's scope.

Again, we could state all of these results alternatively in terms of the receptive/resistant code, but the story would still be the same. In fact, the overall resistance rate in the court of appeals was 60%, quite consistent with the district courts' resistance rate of 63%. CAFA seems to be a matter that unites trial and appellate judges.

D. Regression Models

It looks as if judicial resistance to extension of CAFA was at work. Does this judicial resistance reveal a judicial inclination that is at least somewhat political?

On the one hand, it very well could be that the judges were just playing a neutral role. They arguably faced down an onslaught of overly enthusiastic defendants, doing so by simply applying CAFA's existing restrictions and perhaps by invoking a few "neutral" maxims, such as their duty to construe narrowly any grant of jurisdiction. We must admit that, in repelling the onslaught, the courts did not create a visible pile of opinions outlandish enough to refute their neutrality.⁹⁶

On the other hand, it is conceivable that the judges, on average, were expressing their disapproval of CAFA.⁹⁷ That orientation could

⁹⁶ An additional datum is that not one of our cases awarded "just costs" for improper removal under CAFA. See 28 U.S.C. § 1447(c) (Supp. V 2005); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) (reading the statute to authorize courts to award costs and fees when the defendant lacked an objectively reasonable basis for removal). *But cf.* Eisenberg & Morrison, *supra* note 87, at 561, 576 (arguing for more frequent fee-shifting to deter erroneous removal). Coming after our study's period was *Alicea v. Circuit City Stores, Inc.*, 534 F. Supp. 2d 432, 436 (S.D.N.Y. 2008) (awarding costs and attorney's fees).

⁹⁷ Over the years, the Judicial Conference expressed some opposition to the various predecessor versions of the CAFA bill, mainly on grounds of workload and federalism. See, e.g., Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the U.S., to Senator Patrick J. Leahy, Ranking Member, Comm. on the Judiciary, U.S. Senate (Apr. 25, 2003), reprinted in 151 CONG. REC. S1225, 1233 (daily ed. Feb. 10, 2005); see also Burbank, *supra* note 34, at 1447-48, 1512-16, 1533-35, 1539-41 (discussing the judiciary's waffling); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 303-04 (2003) (noting the Judicial Conference's opposition). Also, the Conference of Chief Justices, representing the state supreme courts, opposed CAFA. 151 CONG. REC. S1225, 1248 (daily ed. Feb. 10, 2005); see also Daniel

affect outcome on the margins, in difficult cases where the judges' ideology would have an impact on win rate.⁹⁸ That is, the judges' value-laden view of CAFA might be producing the judicial favoring of plaintiffs. Some of our results do in fact show just how value-laden these CAFA issues are:

- Interestingly, plaintiffs prevail in the district court more often, to a statistically significant degree, before Democrat judges (71%), but even Republicans favor plaintiffs more than half the time (55%).
- As to gender, plaintiffs prevail in the district court slightly more often before female judges (70%), but even male judges favor plaintiffs more than half the time (62%). Female Republicans (71%) and female Democrats (68%) showed no real difference, acting like male Democrats (72%). So, male Republicans (48%) are the distinctive group, to a statistically significant degree.⁹⁹

R. Karon, "How Do You Take Your Multi-State, Class-Action Litigation? One Lump or Two?" *Infusing State Class-Action Jurisprudence into Federal, Multi-State, Class-Certification Analyses in a "CAFA-nated" World*, 46 SANTA CLARA L. REV. 567, 573 n.28 (2006); cf. Georgene M. Vairo, *Foreword: Developments in the Law, The Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 979, 990 (2006) (going beyond "CAFA-nated" to add "CAFA-esque" to the world of puns, but thereby revealing the serious split over the pronunciation of CAFA's initial vowel as an "a" or an "ä").

⁹⁸ See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006); James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L.J. 315 (2007) (finding similar effects in a comparative study).

⁹⁹ A recent study likewise shows a pronounced effect of sex on judging. See Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging* 25 (July 3, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1001748> (finding that sex discrimination complainants fare better before female judges in published federal appellate opinions). Although that article views itself as bringing "closure" to the debate, *id.* at 31, we are more cautious. Evidence indicates that the legal system can appear quite different depending on whether one views it from the perspective of the mass of cases or a more filtered set of cases. See Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 263-64, 281 (1995) (noting that a district judge's political affiliation may be more or less relevant depending on whether a case is appealed or results in a published opinion); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) (studying perceptions of the federal court system in the constitutional tort context). Indeed, previous studies suggest that judicial sex effects that sometimes show up in published opinions, which our study utilizes, do not necessarily carry over to the mass of decisions. One such study is Ashenfelter et al., *supra*, which verified the existence of

- The Republican-male effect in the district court is most pronounced on issues other than effective date, that is, on issues where arguably ideology matters more or the answer is less clear cut. If we look at the issues other than effective date, male Republicans give plaintiffs a win rate of 33%, compared to 62% before other judges. That means, perhaps surprisingly, that male Republicans are deciding CAFA cases in a way that expands federal jurisdiction.

These results are important. In brief, the courts have resisted CAFA, and their motivation appears value laden. Moreover, the Republican-male effect is showing up in the published district court opinions under study or, in other words, in the decisions that moved the law.¹⁰⁰

However, these results, developed one variable at a time, might be explainable by confounding factors. For example, perhaps Republican male judges adjudicate a different mix of CAFA issues than do other judges. Because we lack the benefit of a controlled experiment—and because filtering by the publication decision defeats random assignment—we cannot completely eliminate the possibility of confounders influencing our findings.

Nevertheless, we can at least use regression analysis to control for the various factors observable in the opinions. In our regression

random assignment in a set of civil rights cases and then exploited random assignment of cases of the same case type to account for case characteristics. Another is Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998), which exploited federal district court discussions of the same legal issue (the Federal Sentencing Guidelines) to control for the principal covariate of concern (strength of cases) in comparing outcomes across judges in a complete sample of cases addressing the legal issue. Neither Ashenfelter et al., *supra*, at 281, nor Sisk et al., *supra*, at 1451-54, found a judicial sex effect in the mass of decisions.

Boyd et al., *supra*, wrongly deemed the use of propensity scores to be essential. In fact, the scores can be inferior to verified random assignment in controlling for unobserved covariates. See Marshall M. Joffe & Paul R. Rosenbaum, *Invited Commentary: Propensity Scores*, 150 AM. J. EPIDEMIOLOGY 327, 327 (1999) (“[U]nlike random assignment of treatments, the propensity score typically does not balance covariates that were not observed.”). However, Boyd et al. make a substantial contribution to the extent that they suggest that observational studies of judges lacking the characteristics of the Ashenfelter et al. and Sisk et al. studies may be improved by considering the use of propensity scores.

¹⁰⁰ The impact of judicial values might be even more intense in the courts of appeals. See Christopher Zorn & Jennifer Barnes Bowie, *An Empirical Analysis of Hierarchy Effects in Judicial Decision Making* 19 (June 30, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=987862> (finding that the effect of judges’ policy preferences on their decisions increases as one moves up the judicial hierarchy).

models, the dependent variable is coded “1” if the district court decision is receptive to federal class action treatment under CAFA and “0” if the decision instead takes a narrow view of CAFA. The explanatory variables include controls for case-, judge-, and district-level characteristics.

First, groups of cases can have substantially different characteristics that lead to varying outcomes, and to varying features such as rates of trial and settlement.¹⁰¹ Four classes of case characteristics that are available in our data are worth noting: (1) There is the characteristic of the kind of CAFA issue. The pattern of CAFA issues varies over time and in outcome, as Tables 3 and 5 show. The effective-date issue is the most distinctive type of CAFA dispute, as measured by plaintiff win rate. We therefore include in our regression analysis a dummy variable that equals 1 if the case involved CAFA’s effective date. (2) Subject-area categories, as shown in Tables 1 and 6, also show varying numbers and plaintiff win rates, so we include them in the regressions. But the statistical insignificance of the pattern suggests that this characteristic may not materially contribute to the models. (3) The removal or original genesis of the CAFA filing might be associated with case outcome. We therefore include a dummy variable for the origin of the case, equal to 1 when the case came to federal court via removal. (4) The models include a variable for the date of each opinion’s decision, in order to account for any linear time trend in case outcomes.

Second, analysts have long associated case outcomes with judge characteristics, though findings of associations between outcomes and judge characteristics such as political party and gender have been inconsistent.¹⁰² The party and gender effects reported above suggest including a dummy variable equal to 1 for Republican male judges. To help control for judges’ age and experience, which might be associated with party or gender, we also include in the regression models each judge’s birth year and confirmation year.

Third, district characteristics are potentially relevant because, for example, some commentators model judicial behavior as being responsive to traditional incentives, which include desire to minimize

¹⁰¹ See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1161-72 (1992) (examining the effect of case categories on outcomes after trial by judge or jury).

¹⁰² See *supra* notes 98-99 and accompanying text.

workload.¹⁰³ If they are right, one would expect judges in busy districts to be less receptive to the increased burden on federal courts that would result from an expansive view of CAFA. We account in the regressions for district court caseloads by using the district-level measure of weighted case filings per judge.¹⁰⁴

Table 9 shows the summary statistics for all of these variables used in our regression models.

¹⁰³ See, e.g., Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (arguing that judicial responses to various legal rules are often the result of judges' self-interest); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39 (1993) (positing that "judicial effort has a diminishing effect on the satisfactions from judicial voting").

¹⁰⁴ See *supra* note 20. Adding dummy variables for the circuit and accounting for district characteristics by use of a multilevel model do not affect these results in any important way. On the mixed pattern of variations by circuit, see Lee & Willging, *supra* note 27, at 1759-60 & figs.6 & 7.

Table 9: Summary Statistics for Regressed District Court CAFA Cases

Variable	Mean	Std. Dev.	Min.	Max.	Signif.
Judicial receptivity	0.35	0.48	0	1	-
Republican male judge	0.31	0.47	0	1	.019
Republican judge	0.44	0.50	0	1	.095
Female judge	0.26	0.44	0	1	.447
Birth year of judge	1944.47	9.88	1911	1966	.386
Confirmation year of judge	1993.22	7.74	1961	2007	.647
Removed case	0.92	0.27	0	1	.755
District's weighted filings per judge	479.22	112.73	239	927	.336
Decision year	2006.02	0.76	2005	2007	.006
CAFA effective date in issue	0.44	0.50	0	1	.001
Contract case	0.40	0.49	0	1	.999
Tort case	0.15	0.36	0	1	.479
Insurance case	0.24	0.24	0	1	.562
State labor law case	0.08	0.28	0	1	.141
Other type of case	0.12	0.33	0	1	.803

Note: Significance tested in the last column is the association between each variable and the dichotomous variable of judicial receptivity to CAFA; tests are based on Fisher's exact test for dichotomous variables and the Mann-Whitney test for continuous variables. *N*, the number of opinions for which all variables were ascertainable, is 156 (of a full sample of 182 opinions), representing a set that included opinions from 51 of the 56 districts and 116 of the 133 judges.

Table 10 reports regression results for models of judicial receptivity to CAFA, with each model utilizing a different set of variables. The regressions consistently show the Republican-male factor to have a significant effect on district court leaning. The coefficients' size and positive sign mean that such judges are markedly more receptive to an expansive reading of CAFA; the magnitude of the effect is indeed substantial, with the marginal effect being about a 20% increase in the probability of an expansive CAFA ruling. In addition, whether the case entailed an effective-date dispute consistently had a significant effect (judges appear less resistant to CAFA in later disputes, as the effective-date disputes fade away and the parties adjust to the judicial construction of the statute). Contrariwise, the insignificance of the factor representing docket pressure indicates that judges are not re-

sisting CAFA merely because of a heavy workload. Something other than such narrow self-interest is motivating the judges.

**Table 10: Logistic Regression Results
for District Court CAFA Cases**

Dependent Variable: Judicial Receptivity			
Independent Variable	(1)	(2)	(3)
Republican male judge	0.836*	0.852*	0.939*
	(2.20)	(2.27)	(2.57)
Birth year of judge	0.039		
	(1.18)		
Confirmation year of judge	-0.044		
	(1.24)		
Removed case	-0.487	-0.446	-0.371
	(0.71)	(0.65)	(0.55)
District's weighted filings per judge	-0.000		
	(0.10)		
Decision date	0.001	0.001	0.001
	(1.18)	(1.23)	(1.47)
CAFA effective date in issue	-0.986*	-1.044*	-0.925*
	(2.16)	(2.28)	(2.18)
Case type (contract = reference)			
Tort	0.062	0.002	
	(0.09)	(0.00)	
Insurance	0.229	0.258	
	(0.39)	(0.46)	
State labor law	-1.267	-1.197	
	(1.28)	(1.25)	
Other subject	-0.150	-0.240	
	(0.20)	(0.32)	
Constant	-10.439	-21.781	-23.188
	(0.22)	(1.23)	(1.49)
Observations	156	156	156
Correctly classified	70.5%	70.5%	72.4%
Reduction in error [†]	16.4%	16.4%	19.0%
Hosmer-Lemeshow <i>p</i> -value, 10 groups	0.501	0.862	0.636
Akaike information criteria	200.88	196.81	192.19

Note: Logistic regression is appropriate because the dependent variable is dichotomous. The decision date used in the models is the full date and not merely the year; robust *z* statistics are in parentheses; and standard errors are clustered by district.

[†] Reduction in error = reduction in percent misclassified, compared to 64.7% by the naïve model of always predicting against judicial receptivity to CAFA.

+ Significant at 10%; * significant at 5%; ** significant at 1%.

The set of all published opinions to date allows us to conclude that most federal judges have resisted CAFA. However, this set of opinions overwhelmingly featured threshold disputes about effective date or federal jurisdiction, rather than involving matters of certification and the merits.¹⁰⁵ So, judicial resistance may be aimed only at CAFA's intent to funnel cases from state to federal courts, rather than rejecting CAFA's more substantive distaste for class actions.

Statutory and rule fixes may not work.¹⁰⁶ Sometimes the law of unintended consequences causes the fix to have an effect opposite the one intended.¹⁰⁷ The effects of CAFA could be big or small, and on balance they could favor defendants or in the end even favor plaintiffs. It is too early to tell. This Article is but the first piece of evidence. It suggests that federal judges may dampen any big effects that would have favored the defendants.

This Article is not the place to develop our own views of the merits of CAFA, beyond noting that big parts of its motivation and effectuation appear to us to be questionable¹⁰⁸ and that at least initially defendants greeted it with too much enthusiasm.¹⁰⁹ We therefore lean toward considering the judicial resistance to be wise. Of course, we recognize that our evaluation is value laden—but then so is the judges' reaction.

¹⁰⁵ See *supra* note 34.

¹⁰⁶ See, e.g., Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 PACE L. REV. 203, 262 (2000) (concluding that the mandatory disclosure amendments to the Federal Rules of Civil Procedure failed to achieve their goals of expediting the disposition of cases and reducing litigation costs).

¹⁰⁷ Cf. Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 821 (2002) (finding inaccurate the frequent claims that a law will produce results directly contrary to those intended).

¹⁰⁸ See *supra* notes 3-4.

¹⁰⁹ See *supra* Part III.C (noting a high plaintiff win rate shortly after CAFA's enactment).

CONCLUSION

CAFA has produced a lot of litigation in its short life. Typically, the resulting published federal opinions involved removed contract cases, where the dispute turned on the statute's effective date or on federal jurisdiction. Our study of these decisions shows most of this litigation to have been socially wasteful. The decisions also reveal that most trial and appellate judges, with independence and wisdom but also with values engaged, have embraced CAFA with coolness. The judges thereby changed the statute on the books. And they very well may continue to do so.