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Federal Jurisdiction Over Claims by State Attorneys General: The Case for Removal of Pharmaceutical Parens Patriae Suits as “Mass Actions” Under the Class Action Fairness Act of 2005

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FEDERAL JURISDICTION OVER CLAIMS BY STATE ATTORNEYS GENERAL: THE CASE FOR REMOVAL OF PHARMACEUTICAL *PARENS PATRIAE* SUITS AS “MASS ACTIONS” UNDER THE CLASS ACTION FAIRNESS ACT OF 2005

By: Amy McIntire*

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INTRODUCTION

In the world of pharmaceutical litigation, in which verdicts and settlements frequently total hundreds of millions of dollars, the stakes are high for both plaintiffs and pharmaceutical company defendants. Recently, with state attorneys general bringing *parens patriae* suits, or suits on behalf of state citizens, against pharmaceutical companies, state attorneys general have begun to play an increasingly prominent role in the litigation. Results of these *parens patriae* actions have shown that the outcome of pharmaceutical litigation often depends on whether the matter is litigated in state court or is removed to a federal forum. State attorneys general have had more success in state courts, while pharmaceutical company defendants prefer a federal forum. With removal

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being such a critical litigation strategy but with no diversity jurisdiction over such suits pursuant to § 1332, pharmaceutical company defendants have argued for removal of these *parens patriae* suits under the Class Action Fairness Act of 2005 (“CAFA”).

Under CAFA, federal courts agree that suits brought by state attorneys general are removable “class actions” as long as they are brought under state statutes that are “similar” to the federal class action statute, Federal Rule 23 of Civil Procedure. Likewise, there is no dispute amongst courts that *parens patriae* suits seeking enforcement actions and civil penalties are not removable “mass actions” under CAFA. But, in addressing the critical question of whether *parens patriae* actions seeking money damages are removable pursuant to CAFA’s “mass action” provision, a decisive Circuit split has emerged. Although the Supreme Court recently granted a petition for a writ of certiorari and heard oral arguments concerning this issue, a guiding decision remains many months away.¹ With so much at stake in litigation but no clear precedent to rely upon, state attorneys general and pharmaceutical company defendants have turned to the text, structure, and purpose of CAFA in crafting arguments against and in favor of removal.

This Paper examines the application of CAFA to *parens patriae* actions seeking money damages and argues that these actions are removable pursuant to CAFA’s “mass action” provision. Part I of this Paper examines the high stakes world of pharmaceutical litigation and the Circuit split, both of which have made the question of removability such a contentious issue. Part II then turns to an exploration of CAFA’s text, structure, and purpose and examines the ways in which each of these elements supports (and opposes) the removability of *parens patriae* actions pursuant to CAFA’s “mass action” provision. Part II concludes that CAFA’s text, structure, and purpose support removal of these actions. Finally, Part III addresses another point of contention between state attorneys general and pharmaceutical company defendants—whether removal of *parens patriae* suits under the “mass action” provision would violate fundamental principles of federalism—and argues that these policy concerns are insufficient to bar the removal of actions that are otherwise removable under the text, structure, and purpose of CAFA. Therefore, CAFA’s removable “mass action” provision should apply to *parens patriae* actions seeking money damages, and to hold otherwise would violate the plain language and intent of the statute and would create unsound doctrine of statutory interpretation.

I. THE ROLE OF STATE ATTORNEYS GENERAL IN PHARMACEUTICAL LITIGATION

The stakes for plaintiffs and pharmaceutical company defendants are high since litigation involves pharmaceutical drugs and devices that have large revenues and sizable market shares. Verdicts and settlements frequently total hundreds of millions of dollars and sometimes even billions of dollars.² The stakes are generally higher for

¹ See Mississippi *ex rel.* Hood v. AU Optronics Corp., 133 S. Ct. 2736 (2013), *cert. granted*, Mississippi *ex rel.* Hood v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012).

² See, e.g., Margaret Cronin Fisk, Jef Feeley & David Voreacos, *J&J Said to Agree to \$2.2 Billion Drug Marketing Accord*, BLOOMBERG (June 11, 2012, 3:36 PM), <http://www.bloomberg.com/news/2012-06-11/j-j-said-to-pay-2-2-billion-to-end-risperdal-sales-probe.html> (reporting that Johnson & Johnson has agreed to pay as much as \$2.2 billion to settle U.S. probes of the marketing of its Risperdal antipsychotic drug and other medications . . .); David Voreacos & Allen Johnson,

the pharmaceutical company defendants than they are for the plaintiffs.³ While the plaintiffs in pharmaceutical litigation stand to win a lucrative verdict or settlement, the pharmaceutical companies stand to lose that amount of money and also face the risk of incurring unfavorable precedent for additional plaintiffs to capitalize upon.⁴ Therefore, both plaintiffs and pharmaceutical company defendants have vested interests in the outcome of pharmaceutical litigation.

Over the last several years, state attorneys general have played an increasingly prominent role in this type of pharmaceutical litigation, and lately, the number of state attorney general lawsuits filed against drug manufacturers has increased.⁵ These lawsuits are brought in the form of *parens patriae*⁶ actions by state attorneys general, allegedly acting in a representative capacity on behalf of a state's citizens.⁷ To bring these *parens patriae* suits, state attorneys general allege that states have either a sovereign interest⁸ or a quasi-sovereign interest⁹ implicated and, thus, that the action concerns a type of injury

Merck Paid 3,468 Death Claims to Resolve Vioxx Suits, BLOOMBERG (July 27, 2010; 4:27 PM), <http://www.bloomberg.com/news/2010-07-27/merck-paid-3-468-death-claims-to-resolve-vioxx-suits.html> (reporting that Merck paid \$4.84 billion in settlement to Vioxx drug users).

³ Abigail E. Rosen, Note, *Analysis of an FDA Compliance Defense for Pharmaceutical Tort Litigation*, 1 N.Y.U. J. L. & Bus. 241, 266 (2004).

⁴ *Id.* (“As a result, the pharmaceutical companies are typically more risk adverse than plaintiffs and are therefore more willing to settle even when the chance of victory is 50% or even higher.”).

⁵ See Miller & Schwartz, *Current Issues in Aggregate Litigation Against Drug and Device Manufacturers: Recent Developments in State AG and TPP Pharmaceutical Litigation*, DRUG AND MEDICAL DEVICE SEMINAR, at 257 (May 2012) (explaining that state attorneys general have filed greater numbers of actions against pharmaceutical manufacturers); Alexander Lemann, Note, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121, 122 (2011) (noting that *parens patriae* suits are “an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents”).

⁶ See Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel.*, Barez, 458 U.S. 592, 600 (1982) (noting that under the doctrine of *parens patriae*, literally meaning “parent of the country,” a state may file suit in a representative capacity to protect the interest of its citizens).

⁷ Miller & Schwartz, *supra* note 5, at 257.

⁸ The Supreme Court has distinguished two types of easily identifiable sovereign interests: (1) the exercise of sovereign power over individuals and entities within the relevant jurisdiction; and (2) the demand for recognition from other sovereigns. *Snapp*, 458 U.S. at 601-02. The exercise of sovereign power over individuals typically involves the power of a state to enforce civil and criminal codes, and the demand for recognition from other sovereigns most frequently involves the maintenance and recognition of states' borders. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1865 (2000).

⁹ The Supreme Court has acknowledged the difficulty of defining what constitutes a quasi-sovereign interest and noted that:

[Quasi-sovereign interests] are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. Formulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be filled in by turning to individual cases.

Snapp, 458 U.S. at 602. Individual cases show that valid quasi-sovereign interests include the health, welfare, and safety of a state's citizens. See *Georgia v. Pennsylvania Railroad*, 324 U.S. 439,

that the states have an interest in protecting citizens from incurring.¹⁰ Many of these lawsuits are premised on theories of economic loss under which a state attorney general claims injury by virtue of state citizens being forced to pay for allegedly defective or falsely marketed pharmaceuticals.¹¹ For many state attorneys general, these lawsuits have brought prominent and public success, with favorable state-wide publicity and hundreds of millions of dollars in verdicts or settlements.¹² In addition to the motivation of seeking such public and lucrative payouts, state attorneys general have also found lawsuits targeting pharmaceutical companies to be an effective way to alleviate shortfalls in state budgets that may be strained under increasing Medicare costs.¹³ Therefore, the act of bringing lawsuits against pharmaceutical companies has become an increasingly popular trend amongst state attorneys general.

With the number of these lawsuits increasing and with verdicts and settlements totaling hundreds of millions of dollars, both state attorneys general and pharmaceutical company defendants seek every available strategic advantage. Recent litigation has shown that the outcome of pharmaceutical litigation often depends on whether the matter is litigated in state court or is removed to a federal forum.¹⁴ State attorneys general have found

451 (1945) (holding that the economic welfare of a state's citizens constituted a quasi-sovereign interest); *Georgia ex rel. Hart v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907) (holding that the State of Georgia had a quasi-sovereign interest in protecting the State from pollutants emitted by a private company); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (extending quasi-sovereign interests to the protection of citizens' health).

¹⁰ See *Snapp*, 458 U.S. at 602 (noting that states are interested in quasi-sovereign interests on behalf of its citizens).

¹¹ Miller & Schwartz, *supra* note 5, at 257.

¹² A lawsuit by the Louisiana Attorney General over the drug Risperdal ended in a \$257.7 million verdict against Johnson & Johnson, after a jury found 35,542 violations of Louisiana's Medical Assistance Program Integrity Law and penalized the defendant \$7,250 for each violation. *Id.* Likewise, a similar suit by the South Carolina Attorney General over the same drug resulted in the imposition of \$327 million in penalties. *Id.*

¹³ Nina M. Gussack & Elizabeth M. Ray, *The New AG Case: Defending Cases Where There Is an Alliance Between an Attorney General and the Plaintiff' Bar*, DRUG AND MEDICAL DEVICE SEMINAR, at 225 (May 2010).

¹⁴ A comparison of state attorneys general actions in federal and state court best highlights the impact a forum may have on the outcome of litigation.

For instance, in the federal case of *In re Zyprexa Products Liability Litigation*, the pharmaceutical company, Eli Lilly was largely successful in defending claims made by the Mississippi Attorney General regarding the drug Zyprexa. See generally 671 F. Supp. 2d 397 (E.D.N.Y. 2009). Regarding Medicaid-related allegations of off-label branding, the federal judge applied an "individualized proof rule" which barred one of the State's main theories of causation—that Eli Lilly's conduct caused more Zyprexa to be prescribed to Medicaid beneficiaries. *Id.* at 454. Although the suit was not brought under Rule 23, the judge held that the "individualized proof rule" applied in this type of structural class action. *Id.* at 434. The "individualized proof rule" required plaintiff to prove causation on an individual basis and thus barred aggregate adjudication of claims that include a causation element. *Id.* Because the State Attorney General was not allowed to prove his theory of causation on an aggregate basis, the court granted Eli Lilly summary judgment with respect to any theory of causation that dependent upon individualized showings. *Id.* at 454–55.

In contrast, in a series of state cases regarding the drug Risperdal, pharmaceutical companies have been less successful. For instance, in 2011, a South Carolina judge ordered Johnson & Johnson to pay \$327 million in penalties to the State after a jury found the company liable of marketing

more success in state courts for a couple of reasons. First, the state statutes under which state attorneys general bring suit often do not require the state to prove causation of injury.¹⁵ Additionally, the pleading requirements in state courts are often less demanding than the requirements in federal court since the state pleading requirements typically do not require the plaintiff's complaint to include sufficient facts to make it "plausible" that the plaintiff will be able to prove facts to support his or her claims.¹⁶ In contrast, pharmaceutical company defendants have found more success when the matter has been removed to federal court. Unlike the state court actions brought under state statutes which may not require a showing of causation or injury, causation and injury are indispensable elements of tort claims and, thus, must be specifically alleged to satisfy the federal pleading requirements explicated by the Supreme Court in *Ashcroft v. Iqbal*¹⁷ and *Bell Atlantic Corp. v. Twombly*.¹⁸ In order to adequately plead causation in federal court, a plaintiff cannot merely make "conclusory statements," but rather must allege sufficient facts to show that his or her claim is "plausible" on its face to survive a motion to dismiss.¹⁹ Thus, if state attorneys general fail to allege plausible theories of causation or injury, federal courts are free to dismiss pharmaceutical lawsuits at the pleading stage.²⁰ Furthermore, even if these lawsuits survive the pleadings stage, the individualized nature of the causation and injury elements may render them difficult to prove at trial.²¹ Given this trend showing forum as an important determinant in a lawsuit's success, state attorneys general usually want *parens patriae* suits to remain in state court,²² while pharmaceutical company defendants typically strive to remove them to federal court.

With removal being such a critical strategy but with no diversity jurisdiction over suits by a state pursuant to § 1332, pharmaceutical company defendants have been forced to

violations. See Miller & Schwartz, *supra* note 5, at 265. Likewise, Johnson & Johnson lost a similar case involving Risperdal in Louisiana state court in 2010, and the pharmaceutical company was ordered to pay \$257.7 million in penalties and \$73.3 million in attorneys' fees and costs. *Id.* In these state court cases, the state attorneys general were not bound by the same federal pleading and "individualized proof" standards.

¹⁵ See Miller & Schwartz, *supra* note 5, at 261.

¹⁶ This standard, that a plaintiff's complaint must include sufficient facts to make it plausible that the plaintiff will be able to prove facts to support his or her claims, is the federal pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

¹⁷ See 556 U.S. 662 (2009).

¹⁸ See *Twombly*, 550 U.S. at 544-45.

¹⁹ *Id.* at 555.

²⁰ See Miller & Schwartz, *supra* note 5, at 257 (noting that courts are dismissing pharmaceutical cases for failure to show causation or injury).

²¹ *Id.* (citing *In re Neurotin Mktg. & Sales Practices Litig.*, 754 F. Supp. 2d 293, 311 (D. Mass. 2010) (holding "that where '[p]laintiffs allege an injury that is caused by physicians relying on [a pharmaceutical company's] misrepresentations,' . . . the injury cannot be shown by generalized proof.")).

²² Even if pharmaceutical company defendants remove claims to federal court, a federal court may still permit the suit to be "remanded" back to state court. See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 385 (1998) (explaining that pharmaceutical cases may be remanded to state court for further proceedings).

find less obvious means of removal.²³ As a result, pharmaceutical company defendants have argued for removal of *parens patriae* suits by state attorneys general under the Class Action Fairness Act of 2005 (“CAFA”).²⁴ These arguments for removal have been received with mixed success in federal courts. Federal courts do not disagree that suits brought by state attorneys general are removable “class actions” as long as they are brought under state statutes that are “similar” to the federal class action statute, Rule 23 of the Federal Rules of Civil Procedure.²⁵ Likewise, there is no dispute amongst federal courts that *parens patriae* suits seeking enforcement actions and civil penalties are not removable as “mass actions” under CAFA.²⁶ However, in light of the complex drafting of CAFA’s “mass action” provision, a decisive split has emerged amongst the Circuits as to whether *parens patriae* suits seeking money damages are removable to federal court as “mass actions” under CAFA.²⁷

²³ Pharmaceutical companies have also begun to explore removal through substantial-federal-question jurisdiction, under *Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005), with varied success, but substantial-federal-question jurisdiction is beyond the scope of this Paper.

²⁴ See Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in relevant part at 28 U.S.C. § 1332(d)).

²⁵ Regarding this issue, the Fourth, Seventh, Ninth, and Fifth Circuits all agree. In *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 172 (4th Cir. 2011), the Fourth Circuit held that the *parens patriae* lawsuit in question was not removable under CAFA as a class action since it was not “similar” to Rule 23 of the Federal Rules of Civil Procedure governing class actions. In affirming the decision to remand the case back to state court, the Fourth Circuit held that “[b]ecause this action was brought by the State under state statutes that are not ‘similar’ to Federal Rule of Civil Procedure 23, . . . it is not removable under CAFA as a class action.” *Id.* Likewise, in *LG Display Co. v. Madigan*, 665 F.3d 768, 172, 174 (7th Cir. 2011), the Seventh Circuit held that a *parens patriae* suit, brought by the Illinois Attorney General against eight manufacturers of LCD panels for violations of the Illinois Antitrust Act, was not a removable class action under CAFA. The Seventh Circuit held the *parens patriae* suit could not be a class action because it was not filed under Rule 23 or the state statute equivalent, 735 ILCS 5/2–801. *Id.* at 771-72. Similarly, in *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 850 (9th Cir. 2011), the Ninth Circuit held that attorney general enforcement actions were not removable as class actions under CAFA. In considering whether *parens patriae* lawsuits were class actions within the meaning of CAFA, the Ninth Circuit looked to the plain language of the statute. *Id.* at 847. The Ninth Circuit concluded that, under CAFA’s unambiguous definition of a class action, “a suit commenced in state court is not a class action unless it is brought under a state statute or rule similar to Rule 23 that authorizes an action ‘as a class action.’” *Id.* at 848. Finally, in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 422 (5th Cir. 2008), the Fifth Circuit, which has taken the minority view regarding the removability of mass actions under CAFA, did not take an opposing view regarding the removability of class actions under CAFA. Since the Fifth Circuit concluded that the matter in question was properly removed under CAFA’s “mass action” provision, the Fifth Circuit did not address whether this lawsuit could, following further proceedings on remand, properly proceed as a removable class action under CAFA. *Id.* at 430. Therefore, there is no disagreement among federal Circuits regarding the removability of class actions under CAFA.

²⁶ See, e.g., *LG Display Co.*, 665 F.3d at 772 (conceding that the state was the real party in interest for the enforcement-related claims); *Allstate Ins. Co.*, 536 F.3d at 429-30 (holding the claim for money damages was removable but leaving open the possibility of severing the claim for injunctive relief, in which the State of Louisiana was likely the real party in interest, and remanding that particular claim to state court).

²⁷ The majority approach, as taken by the Fourth, Seventh, and Ninth Circuits, has excluded the removal of *parens patriae* suits seeking money damages to federal court under CAFA’s “mass action” provision. These courts have held that suits brought by state attorneys general, on behalf of

In determining whether *parens patriae* suits seeking money damages qualify as removable “mass actions” under CAFA, federal courts have focused on the “real parties in interest”²⁸ in the lawsuits. A majority of Circuits—the Fourth, Seventh, and Ninth—have found the states to be the “real parties in interest” in such proceedings and, thus, have held that these *parens patriae* actions were properly labeled lawsuits and were not removable “mass actions” under CAFA.²⁹ Although the complaints by state attorneys general often include both enforcement-related claims and money damage claims, the majority of Circuits have refused to take a claim-by-claim approach, and instead,

state citizens, do not qualify as “mass actions” for purposes of CAFA. In contrast, the Fifth Circuit has taken the minority approach and held that *parens patriae* suits seeking money damages do qualify as “mass actions” under CAFA and, thus, are removable.

²⁸ Rule 17 of the Federal Rules of Civil Procedure provide that “[a]n action must be prosecuted in the name of the real party in interest.” Fed. R. Civ. P. 17(a)(1). This instruction to determine the real party in interest is necessary to “protect the defendant against subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.” Fed. R. Civ. P. 17 advisory committee’s notes.

²⁹ The opinions of the Seventh and Ninth Circuit best illustrate this holding. In *LG Display Co., v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011), the Seventh Circuit held that a *parens patriae* suit was not a removable “mass action.” The defendants argued that this case was a mass action because “monetary relief claims of 100 or more persons [we]re proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” *Id.* at 772. In their argument for removal, the defendants urged the court to consider that the Illinois resident purchasers (and not the State) were the real parties in interest in the controversy. *Id.* The defendants conceded that the State was the real party in interest for the enforcement-related claims, but they argued that the State was not the real party in interest for the damages claims asserted on behalf of Illinois consumers. *Id.* at 772–73. Therefore, in their argument for removal, the defendants urged the court to take a claim-by-claim approach and separately determine the parties in interest in each of the Attorney General’s claims. *Id.* at 773. The Seventh Circuit rejected this claim-by-claim approach and looked to the complaint as a whole. *Id.* According to the court, the finding of a state as the real party in interest in a suit “is a question to be determined from the ‘essential nature and effect of the proceeding,’” and thus, the State was the singular real party in interest. *Id.* Therefore, the Seventh Circuit affirmed the district court’s ruling that this *parens patriae* suit was not a removable “mass action” under CAFA. Likewise, in *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 665 (9th Cir. 2012), the Ninth Circuit held that a *parens patriae* suit filed by the Attorney General was not a removable “mass action” under CAFA. In that case, the Nevada Attorney General sued Bank of America, alleging that the lender misled borrowers about the terms and operation of its home mortgage modification and foreclosure processes, in violation of the Nevada Deceptive Trade Practices Act. *Id.* at 664. The determination of whether this *parens patriae* suit qualified as a “mass action” turned on “whether the State of Nevada or the hundred-plus consumers on whose behalf it [sought] restitution [we]re the real party(ies) in interest.” *Id.* at 669. Following the precedent set by the Seventh Circuit in *LG Display Co., Ltd. v. Madigan*, the Ninth Circuit examined the complaint as a whole and concluded that the State of Nevada, as opposed to the individual consumers, was the real party in interest in the lawsuit against Bank of America. *Id.* at 669–70. The court held that Nevada had a sovereign interest in protecting its citizens and economy from deceptive mortgage practices. *Id.* at 671. Specifically, the Ninth Circuit held that foreclosures presented a “widespread and devastating injury not only to those borrowers who were defrauded, but also to other Nevada residents and the Nevada economy as a whole.” *Id.* at 670. The court noted that Nevada had “been particularly hard-hit by the current mortgage crisis, and [therefore, had] a specific, concrete interest in eliminating any deceptive practices that may have contributed to its cause.” *Id.* Thus, the Ninth Circuit ruled that the injured consumers were not the real parties in interest and that the *parens patriae* lawsuit was not a removable “mass action” under CAFA.

these federal courts have looked at the complaint as a whole to determine the singular “real party in interest.”³⁰ Consequently, when examining the complaint as a whole, the majority of Circuits have found that states have a legitimate sovereign interest in protecting their citizens and economy from deceptive and defective products, such as pharmaceutical drugs,³¹ and therefore, the courts have held the states to be the “real parties in interest.”³² In contrast, the Fifth Circuit, standing alone, has found the private consumers, on whose behalf the state attorney general seeks money damages, to be the “real parties in interest” and, thus, has held that *parens patriae* suits seeking money damages are removable “mass actions” under CAFA.³³ As opposed to the majority of Circuits, which view the complaints of state attorneys general in their entirety, the Fifth Circuit has taken a claim-by-claim approach in which “the various claims could be severed so that those claims that were removable under CAFA would remain in federal court but that [state] claims could be remanded to state court.”³⁴ In applying this claim-by-claim approach, the Fifth Circuit held that the insurance policyholders, on whose behalf the state attorney general sought relief, were the real parties in interest,³⁵ at least in the context of money damages.³⁶ Therefore, unlike the majority of Circuits, the Fifth

³⁰ See, e.g., *Bank of Am. Corp.*, 672 F.3d at 670 (examining the complaint as a whole and concluding that the State of Nevada, as opposed to the individual consumers, was the real party in interest in the lawsuit against Bank of America); *LG Display Co.*, 665 F.3d at 773 (rejecting the defendants’ argument that the court should take a claim-by-claim approach and separately determine the parties of interest in each of the Attorney General’s claims).

³¹ See, e.g., *Bank of Am. Corp.*, 672 F.3d at 671 (holding that Nevada had a sovereign interest in protecting its citizens and economy from deceptive mortgage practices since mortgage foreclosures presented a widespread and devastating injury to all Nevada residents and the Nevada economy); *CVS Pharmacy, Inc.*, 646 F.3d at 172 (holding the State was acting in its sovereign and quasi-sovereign capacity as it sought injunctive relief and monetary recovery on behalf of its citizens for violations of West Virginia’s generic-drug pricing statute and the West Virginia Consumer Credit and Protection Act).

³² See, e.g., *Bank of Am. Corp.*, 672 F.3d at 670 (“We therefore examine ‘the essential nature and effect of the proceeding as it appears from the entire record,’ and conclude that Nevada—not the individual consumers—is the real party in interest in this controversy.” (citations omitted)); *CVS Pharmacy, Inc.*, 646 F.3d at 172 (holding that the action was a classic *parens patriae* action intended to vindicate the State’s quasi-sovereign interests and the individual interests of its citizens); *LG Display Co.*, 665 F.3d at 772-73 (holding the action was not a removable “mass action” because the State was the real party in interest for the enforcement-related claims, even if the State was the real party in interest for the damages claims asserted on behalf of Illinois consumers).

³³ *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008).

³⁴ *Id.* (citing *Louisiana v. AAA Insurance*, 524 F.3d 700, 711–12 (5th Cir. 2008)).

³⁵ *Id.* at 429. The court pointed to the text of the statute under which the Louisiana Attorney General sought relief. Specifically, Section 137 of the Louisiana Monopolies Act authorized the recovery of treble damages and plainly provided that “any person who is injured in his business or property, under the Monopolies Act ‘shall recover [treble] damages.’” *Id.* Therefore, the Fifth Circuit concluded that the plain language of that statute made it clear that individuals had the right to enforce this provision and thus that the private policyholders (and not the State) were the real parties in interest. *Id.*

³⁶ *Id.* The court left open the possibility of severing the claim for injunctive relief, in which the State of Louisiana was likely the real party in interest, and remanding that particular claim to state court. *Id.* at 430.

Circuit held that a suit brought by a state attorney general for money damages was a removable “mass action” under CAFA.³⁷

In spite of the importance of the issue for states and pharmaceutical company defendants and the divisive Circuit split that has emerged, the Supreme Court only recently granted a petition for a writ of certiorari to address this issue.³⁸ The Supreme Court heard oral arguments on November 6, 2013, and a decision is not due until 2014. Consequently, the question of whether *parens patriae* actions seeking money damages are removable pursuant to CAFA’s “mass action” provision remains an open-ended question and, for now, continues to be addressed on a circuit-by-circuit basis. With so much at stake in litigation but no clear precedent to rely upon, state attorneys general and pharmaceutical company defendants have turned to the text, structure, and purpose of CAFA in constructing their arguments.

II. THE CLASS ACTION FAIRNESS ACT OF 2005

On February 18, 2005, the Class Action Fairness Act of 2005 (“CAFA”) was signed into law, and its passage marked the most significant change in class action law since the revision of Rule 23 of the Federal Rules of Civil Procedure in 1966.³⁹ Since there is no dispute amongst the Circuits that suits brought by state attorneys general are removable “class actions” as long as they are brought under state statutes that are “similar” to Rule 23, proponents and opponents of the removal of *parens patriae* actions have focused their arguments on whether these actions qualify as “mass actions” under CAFA. Both sides have wielded the statute as a means to support their respective claims,⁴⁰ and both state attorneys general and pharmaceutical company defendants contend that the text, structure, and purpose of CAFA validate their respective arguments.

A. The Text of the Statute

At the heart of the statute, CAFA’s text expanded federal court jurisdiction through the adoption of a “minimal diversity” standard.⁴¹ In contrast to the Supreme Court’s holding

³⁷ *Id.*

³⁸ *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 2736 (2013); *see West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011), *cert. denied*, *CVS Pharmacy, Inc. v. West Virginia ex rel. McGraw*, 132 S. Ct. 761 (2011).

³⁹ *See* Edward F. Sherman, *Class Action Fairness Act and the Federalization of Class Actions*, 238 F.R.D. 504, 504 (2007) (noting the significance); Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1593, 1615 (2006) (same).

⁴⁰ State attorneys general and pharmaceutical company defendants interpret the text and purpose of CAFA to support their respective claims, and since “American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation,” the parties’ differing interpretations of the statute have created a compelling debate. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., The Foundation Press 1994); *see also* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14 (Amy Gutmann ed., Princeton Univ. Press 1997) (“[T]he American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory [of statutory interpretation].”).

⁴¹ *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (amending 28 U.S.C. § 1332 by inserting (d)(1)).

in *Strawbridge v. Curtiss*, which construed the federal diversity jurisdiction statute as requiring “complete diversity,”⁴² CAFA required something markedly less than “complete diversity” in order to achieve removal to federal court. Under a “minimal diversity” standard, CAFA expanded federal diversity jurisdiction over class action lawsuits for any case that includes at least 100 plaintiffs and more than a five million dollar amount in controversy,⁴³ as long as “any member of a class of plaintiffs is a citizen of a State different from any defendant.”⁴⁴ This expansion of federal diversity jurisdiction under a “minimal diversity” standard has limits. First, a district court must decline to exercise jurisdiction when more the two-thirds of class members and a defendant are citizens of the same forum state.⁴⁵ Additionally, a district court may decline to exercise jurisdiction when between one-third and two-thirds of class members and the primary defendant are citizens of the same forum state.⁴⁶

Although CAFA lowers the threshold for removal by establishing a “minimal diversity” standard, a party seeking removal must still prove that the action is either a “class action” or a “mass action.” A class action removable under CAFA is “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.”⁴⁷ A class action must have 100 or more “members of all proposed plaintiff classes” and an aggregate amount in controversy in excess of five million dollars.⁴⁸ The definition of “class action” under CAFA is relatively straightforward, and as discussed in Part I, federal courts do not dispute that suits brought by state attorneys general are removable “class actions” as long as they are brought under state statutes that are “similar” to Rule 23 of the Federal Rules of Civil Procedure.

CAFA’s provisions regarding removable “mass actions” have caused substantially more debate. Under CAFA, “mass actions” that qualify as “class actions,” removable under §§ 1332(d)(2) through (10), may be removed pursuant to the statute.⁴⁹ The text of CAFA proceeds to explicitly define “mass actions.”⁵⁰ While these provisions governing removable “mass actions” might appear straightforward upon first glance, state attorneys general and pharmaceutical company defendants have advocated for differing interpretations of the text to support their arguments regarding removal.

⁴² See 7 U.S. 267, 267 (1806); see also Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269, 275 (2012) (“Congress has also muddied the waters [of complete diversity] by enacting legislation . . . [such as] the Class Action Fairness Act . . .”).

⁴³ The claims of all of “the individual class members shall be aggregated” to determine the amount in controversy. 28 U.S.C. § 1332(d)(6) (2006). Additionally, any defendant can unilaterally move to remove the lawsuit at any time. § 1453(b).

⁴⁴ § 1332(d)(2)(a).

⁴⁵ § 1332(d)(4).

⁴⁶ § 1332(d)(3).

⁴⁷ § 1332(d)(1)(B).

⁴⁸ §§ 1332(d)(2), (d)(5)(B), (d)(6).

⁴⁹ § 1332(d)(11)(A).

⁵⁰ § 1332(d)(11)(B)(i).

The main point of contention between opponents and proponents of removal stems from CAFA's unusually worded definition of "mass action." The statute explicitly defines removable "mass actions" as:

[A]ny civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more *persons* are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).⁵¹

Opponents of removal of *parens patriae* suits as "mass actions" contend that these suits cannot be removed under CAFA because the state, through its attorney general, is the lone plaintiff in the litigation,⁵² which means that the specific choice of the word "persons," as opposed to "plaintiffs," becomes significant. Opponents of removal are eager to read this definition of "mass action" to require a numerosity of 100 or more plaintiffs since such a requirement would prevent *parens patriae* actions from qualifying for removal.

By the plain text of this provision,⁵³ the removability of a lawsuit as a "mass action" under CAFA depends on whether the lawsuit involves the monetary relief claims of 100 or more persons, and not 100 or more plaintiffs. To read the text of CAFA's definition of removable "mass action" to require "plaintiffs" would violate a fundamental rule of statutory interpretation—when a word is not defined by statute, the word should be construed in accord with its ordinary or plain meaning.⁵⁴ Courts and scholars have emphasized the importance of this plain meaning rule as a means to restrict federal

⁵¹ § 1332(d)(11)(B)(i) (citation omitted) (emphasis added).

⁵² See Jacob Durling, Note, *Waltzing Through a Loophole: How Parens Patriae Suits Allow Circumvention of the Class Action Fairness Act*, 83 U. COLO. L. REV. 549, 582 (2012).

⁵³ A sub-set of the textualist theory of statutory interpretation, the plain meaning approach emphasizes a strong preference for literal or conventional interpretation. This plain meaning approach has several variations, ranging from a conclusive presumption that the plain language always governs to milder approach under which the plain language merely is a starting point. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1199 (1990) ("The plain meaning rule expresses the principle that where the statute is narrowly and tightly drawn, the courts have considerably less interpretive flexibility than when the statute is phrased in vague or general terms."); *id.* at 1222–23 (examining the variations of the plain meaning rule).

But, the plain meaning approach has been the subject of much scholarly criticism. See, e.g., Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1317 (1975) (posturing that the plain meaning rule has outlived its usefulness because of its inconsistent application and because the rule does not answer deeper questions regarding the court's role in the legislative process); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807–08 (1983) (arguing that the proposition that courts adhering to the plain meaning rule necessarily begin with the text of the statute is false); see also *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 249 (1989) (O'Connor, J., dissenting) (questioning the value of facial plain meaning when taken out of context since the "notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.").

⁵⁴ *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 38 (1996) (holding that courts must apply the plain language of statutes).

courts' impulses to construe statutes to serve policy goals other than the ones Congress articulated within the statute itself.⁵⁵ Since the word "person" is not defined anywhere in § 1332(d), it should be understood in accord with its ordinary definition of "a human being."⁵⁶ Applying this rule of plain text interpretation to CAFA leads to the conclusion that a removable mass action merely requires the claims of "100 or more persons"⁵⁷ and not "100 or more plaintiffs." Therefore, the fact that a state via its attorney general is the only named plaintiff in litigation should not bar the action's removal as a "mass action" under CAFA.

Additionally, opponents and proponents of removal have clashed over the interchangeable use of the broad word "persons" and the more precise term "plaintiffs" in the definition of "mass action." Opponents of removal claim that the broad term "persons" should take its meaning from the narrower term "plaintiffs."⁵⁸ The confusion stems from the provision's use of both "persons" and "plaintiffs" in the definition of "mass action:"

[A]ny civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more *persons* are proposed to be tried jointly on the ground that the *plaintiffs'* claims involve common questions of law or fact, except that jurisdiction shall exist only over those *plaintiffs* whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).⁵⁹

The wording opens the door to the possibility that "plaintiffs" refers back to the broader term "persons" and, thus, that a removable "mass action" requires the claims of 100 or more plaintiffs, which would bar removal of *parens patriae* suits since the state via its attorney general is the lone plaintiff in the litigation. This possibility, however, should be rejected as it would improperly narrow the text of the statute, as chosen specifically by the drafters.

In the context of aggregate litigation, the drafters have labored to find a vocabulary that properly includes all of the persons and parties that have an interest in the proceedings,⁶⁰ and in the "mass action" provision of CAFA, the drafters deliberately chose to use the

⁵⁵ Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 972 (2005).

⁵⁶ *Person*, DICTIONARY.COM, available at <http://dictionary.reference.com/browse/person> (last visited Nov. 9, 2013).

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

⁵⁸ This claim somewhat resembles the principle of *ejusdem generis* which states that general terms in a list take their meaning from the preceding specific terms. For a more in-depth explanation of the principle of *ejusdem generis*, see Miller, *supra* note 53, at 1999–1200; Cecil L. Smith, *Statutory Interpretation—Ejusdem Generis—Strict Construction of Penal Statutes*, 29 TEX. L. REV. 120, 120–23 (1950).

⁵⁹ § 1332(d)(11)(b)(i) (emphasis added).

⁶⁰ Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 FORDHAM L. REV. 1875, 1893 (2010) (commenting on the unusual and vague choice of the word "persons" in the mass action provision).

broad word “persons,” rather than the more precise word “plaintiffs.”⁶¹ The difference between these two terms, in reference to the required numerosity of monetary relief claims, is meaningful. By choosing to use the broader term “persons,” the drafters recognized that persons and parties may join a case in more ways than through formal joinder as plaintiffs, such as through intervention.⁶² Especially in the context of complex aggregate litigation in which parties are not always neatly aligned, the use of the word “persons” allows CAFA to reach out and prevent abuses in instances in which the narrow label of “plaintiff” might not formally apply.⁶³ To relate back and substitute the word “plaintiffs” for the term “persons” would trample over the legislators’ deliberate choice of language and would transform the text and meaning of the statute into something that was not passed through the checks and balances system of bicameralism and presentment.⁶⁴ Therefore, although the interchange between “persons” and “plaintiffs” does cause some confusion, this choice of wording should not undermine the plain text of the statute which calls for the claims of 100 or more persons, not plaintiffs.

B. The Structure of the Statute

The structure of CAFA, specifically the interplay and overlap between “class actions” and “mass actions,” has also caused some confusion. Somewhat perplexingly under CAFA, “mass actions” are both class actions⁶⁵ and are not class actions.⁶⁶ If a “mass action” meets the provisions of §§ 1332(d)(2) through (10), which detail when a class action is removable under CAFA, then a “mass action” is deemed to be a removable “class action.”⁶⁷ If a mass action does not meet the aforementioned provisions, then it is not deemed a removable “class action.” CAFA explicitly defines “mass actions” as:

[A]ny civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).⁶⁸

⁶¹ This contention—that the legislators intentionally chose to use the broader term—is a common defense to the *ejusdem generis* principle. See Miller, *supra* note 53, at 1200–01.

⁶² See Knight, *supra* note 60, at 1893.

⁶³ See *id.* See generally TIDMARSH & TRANGSRUD, *supra* note 22.

⁶⁴ See *Zedner v. United States*, 547 U.S. 489, 509–10 (2006) (Scalia, J., concurring) (“I believe that the only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article I, §7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.”); see also John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 70–78 (2001) (explaining the importance of the structure of bicameralism and presentment to originalists and textualists); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712 (1997) (discussing the risks of circumventing bicameralism and presentment).

⁶⁵ 28 U.S.C. § 1332(d)(11)(A) (2006) (“[A] mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.”).

⁶⁶ § 1332(d)(11)(B)(i).

⁶⁷ § 1332(d)(11)(A).

⁶⁸ § 1332(d)(11)(B)(i).

This definition differs from the § 1711(2)'s definition of class actions⁶⁹ as it makes no mention of Rule 23 of the Federal Rules of Civil Procedure or an equivalent state rule. Therefore, by its plain language, CAFA's definition of "mass actions" does not include Rule 23 class actions, and by CAFA's text, "mass actions" can be removable "class actions" without being brought under Rule 23 as required by traditional "class actions."

In examining this seeming perplexity of differing definitions of "class actions," courts have labeled mass actions to be "a kind of statutory Janus...[since] under CAFA, a mass action simultaneously is a class action (for CAFA's purposes) and is not a class action (in the traditional sense of Rule 23 and analogous state law provisions)."⁷⁰ Therefore, the term "class action," including qualifying "mass actions," as used in CAFA refers to those actions which may be removed with minimal diversity under CAFA, and "class action" under CAFA does not necessarily mean that the action is brought under Rule 23 or a state rule equivalent.

Although there is no dispute among the federal courts that suits brought by state attorneys general are removable "class actions" as long as they are brought under state statutes that are "similar" to Rule 23, the fact that the term "class action" under CAFA has a broader meaning than the term "class action" in the traditional Rule 23 sense lends support to the point that "mass actions," removable as CAFA "class actions," should be construed broadly to include *parens patriae* actions. A substantial overlap between "mass actions" and "class actions" exists in the structure of CAFA's text. Given this structural overlap, a broad interpretation of one term is inextricably intertwined with a broad interpretation of the other term.⁷¹ Furthermore, an expansive construction of the scope of the statute is supported by the purpose of CAFA, which was enacted in order to curb procedural abuses regardless of the labels formally attached to the actions,⁷² as well as by the drafters' instructions to construe the scope of CAFA "liberally" and to look beyond "lawsuits that are labeled 'class actions.'"⁷³

⁶⁹ § 1711(2) ("The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.").

⁷⁰ *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1195 n.27 (11th Cir. 2007).

⁷¹ A conventional understanding of the idea of structural inference, as a mean for statutory interpretation, holds that when one part of a text is ambiguous, interpreters can clarify its meaning by considering how it fits within the context of related provisions—or the structure—of the statute in question. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2034 (2011) (examining structural inference); see also Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 720 (2008) (arguing that the context of a constitutional text may include "the structure created by the text"); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 13 n.72 (1975) (noting that structural considerations of a statute are often simply an embodiment of the actual text).

⁷² See *infra* Part II.C.1 (discussing the drafters' choice to include a "mass action" provision in order to allow for removal of abusive actions that may not be formally brought as "class actions").

⁷³ See *infra* Part II.C.2 (discussing S. Rep. No. 109-14, at 34 (2005), *reprinted in* 2005 U.S.C.C.A.N. 1, 3).

C. The Purpose of the Statute

1. Why CAFA was Enacted

Legislators drafted CAFA in order to address two broad areas of concern: (1) the abuse of class action procedures in state courts and (2) abusive forum shopping by plaintiffs' attorneys. For years prior to its enactment in 2005, CAFA was a hotly debated piece of legislation.

Plaintiff's attorneys and organizations representing consumers, employees, and other types of frequent class litigants vehemently opposed CAFA. Opponents emphasized the importance of class actions as a device that allows for the remedy of wrongs that may be "too trivial to support individual lawsuits"⁷⁴ or wrongs that may be too expensive for plaintiffs to litigate individually.⁷⁵ Some opponents feared that CAFA would make it more difficult for plaintiffs to have their claims heard if federal judges with heavy dockets refused to grant standing to class action plaintiffs.⁷⁶ Additionally, opponents defended the pre-CAFA law as essential to the rights of states to enforce their own law, and from a federalism perspective, opponents expressed concern that CAFA's expansion of federal jurisdiction would wrongfully sweep state law claims brought by state citizens into federal courts.⁷⁷ Opponents contended that this expansion of federal jurisdiction was inconsistent with the principles of federalism and would also result in a substantially heavier workload for federal courts across the country.⁷⁸

In contrast, CAFA legislation also had its fair share of ardent supporters. Corporations and organizations representing business interests typically supported the legislation,⁷⁹ and these proponents claimed that CAFA was necessary to prevent class action abuse.⁸⁰ Proponents claimed that the pre-CAFA law unfairly allowed plaintiff's attorneys to choose any state forum in which to file and litigate nationwide class action claims.⁸¹ Consequently, plaintiff's attorneys often engaged in forum shopping and chose to file suits in "judicial hellholes," state court forums which were historically predisposed to hastily certify nationwide classes, or "magnet jurisdictions," small counties which had acquired reputations for being plaintiff-friendly and thus attracted a high volume of

⁷⁴ See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts*, 156 U. PA. L. REV. 1723, 1725 (2008).

⁷⁵ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 685 (1986) ("[T]he class action device lowers plaintiffs' litigation costs below the level that would be incurred by bringing individual suits . . .").

⁷⁶ Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1660 (2006).

⁷⁷ Lee & Willging, *supra* note 74, at 1725–26.

⁷⁸ *Id.* at 1728.

⁷⁹ According to one study done by a consumer rights group, from 2000 to 2002, at least 100 large companies and pro-business organizations had at least 475 lobbyists advocating for the passage of CAFA. Kanner, *supra* note 76, at 1659.

⁸⁰ Lee & Willging, *supra* note 74, at 1725.

⁸¹ Forum shopping itself is not an illegitimate tactic for lawyers, and CAFA, which provides for removal from state court by a defendant, is actually a method of forum shopping. Rather, CAFA's drafters and proponents were concerned with "abusive" practices of forum shopping.

class actions.⁸² Proponents also pointed to the practice of “copy-cat” filings in which plaintiff attorneys would simultaneously file in numerous jurisdictions in order to find the most sympathetic judge.⁸³ Additionally, proponents of the legislation accused state court judges of being overly lax in applying Rule 23, certifying frivolous class actions as a form “blackmail” to force corporate defendants to pay settlement “ransoms” rather than undertaking expensive litigation costs, and denying corporate defendants their due process rights.⁸⁴ In response to opponents’ criticism that CAFA violates principles of federalism by sweeping state law claims into federal court, proponents claimed that the litigation of large class action lawsuits in state courts was itself a violation and perversion of federalism and the intent of the framers.⁸⁵

In their effort to curb abusive class action practices, the drafters of CAFA recognized that these practices occurred outside of the narrow context of suits brought under Rule 23, and thus, the drafters specifically included the provision for removable “mass actions.” Mass actions originally emerged as a means for plaintiffs, who could not meet the class action requirements of Rule 23(b) of the Federal Rules of Civil Procedure, to aggregate their claims.⁸⁶ Mass actions also arose in states that did not have rules permitting class actions, as a way for large numbers of cases to be joined and then treated like class actions.⁸⁷ Thus, the history and purpose of mass action lawsuits are intertwined with class actions.⁸⁸

The drafters of CAFA recognized that many of the abuses that occurred in class action lawsuits were also present in mass action lawsuits.⁸⁹ In some ways, the drafters concluded that the abuses in mass action lawsuits were more concerning since mass actions allowed plaintiff’s attorneys to join unrelated claims arising from different transactions, a practice that could potentially confuse a jury into giving lucrative awards to individual plaintiffs who may not have suffered a real injury.⁹⁰ By drafting a separate and distinct “mass action” provision, the drafters astutely recognized that the removal of suits labeled “class actions” was insufficient in order to achieve the broad purposes

⁸² Lee & Willging, *supra* note 74, at 1725; Lemann, *supra* note 5, at 124 (“CAFA itself contains a rebuke of ‘[a]buses in class actions’ by ‘State and local courts’ that are ‘acting in ways that demonstrate bias against out-of-State defendants.’”).

⁸³ Lemann, *supra* note 5, at 125.

⁸⁴ *Id.* at 124.

⁸⁵ *Id.* at 125.

⁸⁶ See generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995).

⁸⁷ See Howard M. Erichson, *Mississippi Class Actions and the Inevitability of Mass Action Litigation*, 24 MISS. C. L. REV. 285, 286 (2005) (observing that Mississippi, which declined to adopt a state rule on class actions, is a “hotbed” of mass action litigation). See generally Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

⁸⁸ See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 736 (1997) (“Mass actions—lawsuits in which lawyers consensually represent large numbers of signed clients—are natural models for class actions . . .”).

⁸⁹ S. Rep. No. 109-14, at 46 (2005).

⁹⁰ S. Rep. No. 109-14, at 47 (2005); see Silver & Baker, *supra* note 88, at 751 (“The danger of attorney opportunism is predictably greater in mass actions than in conventional lawsuits.”).

of CAFA. Therefore, the drafters included the provision regarding removable “mass actions,” giving CAFA a broad scope of coverage over interstate class action lawsuits and similarly structured lawsuits that may not be brought formally under Rule 23.⁹¹

Construing the scope of CAFA broadly is consistent with the purposes behind its enactment.⁹² The statute was initially enacted in order to prevent an array of procedural abuses, including the mistreatment of “mass actions” which do not necessarily fit into the narrow definition of “class actions.”⁹³ CAFA’s drafters acknowledged that many removable “mass actions” are actually “class actions in disguise.”⁹⁴ Therefore, when enacting CAFA, the legislators did so with the goal of preventing a broad spectrum of abusive actions. This broad reading of CAFA’s purpose is also reflected in the Senate Judiciary Committee’s instruction to construe the term “class action” liberally.⁹⁵ Additionally, as covered in Part II.B, the fact that the term “class action” under CAFA has a broader meaning than the term “class action” in the traditional Rule 23 sense, combined with the structure of CAFA which creates substantial overlap between “class actions” and “mass actions,” lends support to the point that the term “mass actions” should be construed liberally.⁹⁶ Therefore, taking into consideration the goal of the legislators who drafted and enacted the statute supports the proposition that CAFA should be construed to have a broad scope.

2. Liberal Interpretation of “Class Action”

Legislative history shows that CAFA’s drafters were more concerned with the substance of claims, rather than the labels attached to lawsuits. Proponents of removal use this legislative history to support a broad interpretation of the scope of CAFA,⁹⁷ which would allow for the inclusion of *parens patriae* suits as removable “mass actions.” In its instruction to interpret the definition of “class action” under CAFA, the Senate Judiciary Committee explicitly noted that:

[T]he definition of “class action” is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled “class actions” by the

⁹¹ Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1449 (2008); Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1554 (2008).

⁹² In addition to valuing the specific intent of the drafters, legal scholars who emphasize the importance of legislative intent as the goal of statutory interpretation have looked to the legislature’s general intent—its purpose—in enacting the law. See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990) (“[T]he Court views its role as implementing the original intent or purpose of the enacting Congress.”).

⁹³ See *supra* notes 85–87 and accompanying text.

⁹⁴ S. Rep. No. 109-14, at 47 (2005).

⁹⁵ See *infra* Part II.C.2.

⁹⁶ See *supra* Part II.B.

⁹⁷ Proponents of legislative history as a tool for statutory interpretation argue that it is relevant to determining the legislative purpose in enacting legislation and also to assist in determining the meaning of specialized terms. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861 (1992); *supra*, notes 90–91.

named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class action for the purpose of applying these provisions.⁹⁸

Proponents of removal argue that this instruction to construe the scope of CAFA “liberally” and look beyond “lawsuits that are labeled ‘class actions’” shows that the drafters intended the statute to be construed broadly.⁹⁹ By providing such an explicit instruction, the legislators expressed their specific intent for a liberal interpretation of removable “class actions.” Since removable “mass actions” are “class actions” for the purposes of CAFA,¹⁰⁰ this instruction for liberal construction must include “mass actions.” By including such an explicit Senate Judiciary Committee instruction, the legislators expressed their specific intent in favor of liberal interpretation of “class actions” and “mass actions,” and any construction of CAFA should take such specific instruction into account.¹⁰¹ Therefore, after examining the specific intent, as well as the general intent,¹⁰² of the legislators,¹⁰³ the drafters’ explicit instructions to look beyond the mere labels of lawsuits supports proponents’ argument that CAFA should be construed broadly to include the removal of *parens patriae* suits as “mass actions.”

⁹⁸ S. Rep. No. 109-14, at 35 (2005), U.S. Code Cong. & Admin. News 2005, p. 3.

⁹⁹ *Id.*

¹⁰⁰ See 28 U.S.C. § 1332(d)(11)(A) (2006) (“[A] mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.”).

¹⁰¹ Many legal scholars emphasize the importance of legislative intent as the goal of statutory interpretation. See, e.g., Eskridge, *supra* note 92, at 641 (“Given our society’s commitment to representative democracy, the legislative background of statutes seems like an acceptable source of context.”); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 9–10 (1988) (arguing that theories of statutory interpretation which fail to give dispositive weight to legislative intent are inconsistent with the principle of legislative supremacy). See generally, ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* (1992) (arguing that the goal of statutory interpretation should be the legislature’s intent). Even more narrowly, these subscribers to an intentionalist theory of interpretation argue that the specific intent of the legislators—their actual decision regarding an issue of statutory scope or application—is paramount. See, e.g., Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 24–27 (1985) (contending that concerns regarding separation of powers and electoral accountability limit federal courts to interpreting statutes based on the specific intentions of the enacting body).

¹⁰² See *supra* Part II.C.1.

¹⁰³ Many scholars distinguish between legislative intent with respect to a specific controversy and a more general legislative purpose. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 127 (1990) (differentiating between ascertaining “a general legislative aim or purpose” and “how the enacting legislature wanted the [specific] question to be resolved.”); William Popkin, *Foreword: Non-Judicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301, 307 (1990) (discussing the problem of specific statements in legislative history). For the purposes of this Paper, I contend that legislative intent with respect to a specific controversy and a more general legislative purpose both support an argument for removal.

3. Rejection of the Pryor Amendment

Legislative history also shows that CAFA’s drafters considered excluding *parens patriae* suits from the scope of CAFA, but deliberately chose not to adopt this exclusion. When drafting CAFA, Congress specifically considered an amendment that would have disqualified representative actions by state attorneys general from removal to federal courts under CAFA.¹⁰⁴ This provision, named the “Pryor Amendment” after Senator Mark Pryor who sponsored the amendment, was proposed to protect state interests, in light of federalism concerns.¹⁰⁵ Senator Pryor, a former state attorney general, argued that state attorneys general should “be allowed to pursue their individual State’s interests as determined by themselves and not by the Federal Government” and advocated that the amendment was necessary to avoid “infringement on State rights”¹⁰⁶ After much debate, Congress eventually rejected this amendment and, thus, chose not to exclude *parens patriae* suits from CAFA’s scope. Congress’s choice not to legislate an explicit exclusion of *parens patriae* suits from CAFA’s scope has become the topic of much debate between proponents and opponents of removal of *parens patriae* suits.

Opponents of removal of *parens patriae* suits argue that this amendment was rejected because Congress concluded it was unnecessary since these *parens patriae* suits fell outside the scope of CAFA, with or without this specific amendment. Specifically, these opponents point to Senator Chuck Grassley’s argument that “because almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition [of class actions].”¹⁰⁷ Consequently, Senator Grassley concluded that *parens patriae* suits would remain unaffected by CAFA and that the proposed amendment was unnecessary.¹⁰⁸ Thus, opponents of removal point to this piece of legislative history to support their argument that the drafters never intended for CAFA to remove *parens patriae* suits to federal court.

In contrast to this argument that the amendment was rejected as an unnecessary addition, proponents of removal of *parens patriae* suits argue that the legislative history shows that the amendment was rejected due to concerns over creating a loophole that would allow continued abuse of class and mass actions in state court. Legislative history demonstrates that the drafters of CAFA were concerned that such an amendment would allow state attorneys general to manipulate CAFA to keep class action suits in state court that actually belonged in federal court.¹⁰⁹ Undisputedly, CAFA was drafted for the purpose of curbing these abuses of class action procedures in state court. Senator

¹⁰⁴ 151 Cong. Rec. S1157 (daily ed. Feb. 9, 2005).

¹⁰⁵ *Id.* at S1158 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor that his amendment would protect “the intent of our Founding Father in recognizing that State sovereignty should not be dismissed by Federal action so easily.”).

¹⁰⁶ *Id.* (statement of Sen. Pryor).

¹⁰⁷ *Id.* at S1163 (statement of Sen. Grassley).

¹⁰⁸ *Id.* at S1163 (statement of Sen. Grassley).

¹⁰⁹ *See id.* at S1163-64 (statement of Sen. Hatch).

Orrin Hatch explained the drafters' concern about creating a loophole that would allow continued abuse in state court in his statement:

At best, [the amendment] is unnecessary. At worst, [the amendment] will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court...If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action.¹¹⁰

Similarly in his rejection of the proposed amendment as unnecessary, Senator Grassley also acknowledged that the amendment could create “a very serious loophole in [CAFA].”¹¹¹ Likewise, Senator Arlen Specter noted that state attorneys general could abuse the proposed amendment by “deputizing” private attorneys into bringing their class actions in state courts.¹¹² Therefore, in their rejection of the proposed amendment to exclude *parens patriae* suits from CAFA's removal provisions, at least a portion of the drafters expressed concern that such an exclusion would allow for continued abuse and defeat the purpose of CAFA.¹¹³ The rejection of the proposed amendment by this portion of drafters was not solely based on the amendment being deemed “unnecessary.” Rather, rejection of the proposed amendment reflected the drafters' concern that a per se exclusion of *parens patriae* suits from CAFA's scope would allow for continued abuse of the very kind that CAFA was enacted to prevent.

With different portions of the debate regarding the rejection of the Pryor Amendment applicable to support arguments by both proponents and opponents of removal, the use of legislative history regarding the Pryor Amendment offers little value to support claims by either state attorneys general or pharmaceutical company defendants. Furthermore, the use of legislative history in statutory interpretation is itself a practice maligned

¹¹⁰ *Id.* (statement of Sen. Hatch).

¹¹¹ *Id.* at S1163 (statement of Sen. Grassley). Senator Grassley's statement that this amendment was unnecessary since *parens patriae* suits do not “fall within the definition [of class actions]” and his statement that such an amendment could create a “very serious loophole” seem contradictory. *Id.* These statements can be understood and reconciled best if Senator Grassley meant that true *parens patriae* suits in which the state has a genuine sovereign or quasi-sovereign interest do not “fall within the definition [of class action].” *Id.* Implicitly, this means that some *parens patriae* suits are abusively mislabeled and should be removed to federal court.

¹¹² *Id.* at S1161 (statement of Sen. Specter).

¹¹³ Data on the frequency that state attorneys general actually engage in abuse by lending their name to private plaintiff lawyers is difficult to obtain. But, despite the unavailability of such data, the opportunity for such abuse is great, especially in the context of pharmaceutical litigation. In pharmaceutical litigation, state attorneys general frequently work in conjunction with and/or contract work to private plaintiff attorneys. Gussack & Ray, *supra* note 13, at 225. Instead of working on the litigation with their own staffs, state attorneys general often hire private attorneys to bring the cases on the states' behalf. *Id.* Lately, these alliances have come under increased scrutiny and suspicion. *Id.* Given the frequent co-mingling between state attorneys general and private plaintiff's attorneys in pharmaceutical litigation, the threat of a state attorney general lending his or her name to a private lawsuit is entirely credible.

by many scholars¹¹⁴ and justices,¹¹⁵ and in instances such as this where statements of different legislators support conflicting interpretations, an argument for the limited value of legislative history is even more persuasive.¹¹⁶ Since no portion of the Pryor Amendment was incorporated into the final version of CAFA, nothing in the text of the statute indicates which legislative statements were the more reliable, more accurate indicators of the rationale behind the vote of the whole legislative body. Furthermore, with only the conflicting statements of the legislative debate to rely on, one drafter's statement cannot be construed to carry more weight or be labeled more "correct" than another drafter's statement. Therefore, in light of this direct conflict between the drafters over the Pryor Amendment, legislative history should factor into interpretation of CAFA, if at all, only based on the undisputed instruction by the Senate Judiciary Committee to interpret the definition of class action "liberally" and to look beyond the labels of lawsuits when determining the statute's scope.¹¹⁷ This limited use of legislative

¹¹⁴ See e.g., William R. Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 14, 16–17 (1965) (arguing that legislative history represents the position of "only a very small portion of the lawmaking body" and thus should not be considered when interpreting statutes); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (calling legislative intent an "absurd fiction" that should not be taken into account since the legislature as a whole has "has no intention whatever in connection with words which some two or three men drafted . . .").

¹¹⁵ During his confirmation hearing, Justice Scalia voiced his displeasure towards using legislative history:

Once it was clear that the courts were going to use [committee reports] all the time, they certainly became a device not to inform the rest of the body as to what the intent of the bill was, but rather they became avowedly a device to make some legislative history and tell the courts how to hold this way or that. Once that happens, they become less reliable as a real indicator of what the whole body thought it was voting on.

Nomination of Judge Antonin Scalia Before the S. Comm. on the Judiciary, 99th Cong. 106 (1986) (statement of J. Scalia). Most scholars consider Justices Scalia and Thomas to be textualists. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 351 (1994); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 717 (1998).

¹¹⁶ This point is part of a much larger scholarly debate as to the extent in which courts should use legislative history and non-textual sources to interpret statutes. See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 256 (1992) (examining the Supreme Court's differing views regarding textualism and intentionalism); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281-82 (1990) (noting the controversy at the Supreme Court over the use of legislative history when construing statutes); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1314 (1990) ("There are many examples where the textualist has at least arguably reached a result contrary to that which would likely have been reached by the intentionalist."). Textualists advocate for the exclusion of reliance on legislative history, even in cases of ambiguity, on the grounds that such history is unenacted and therefore does not reliably reflect legislative understandings of statutory meaning. See SCALIA, *supra* note 40, at 29–36; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 38 (2006) ("Textualists tend to exclude one particular piece of evidence: legislative history."). Intentionalists, in contrast, advocate for the use of legislative history in statutory interpretation.

¹¹⁷ S. Rep. No. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34.

history supports the argument made by proponents of removal that CAFA has a broad scope and that *parens patriae* suits should not be excluded from removal.

III. POLICY IMPLICATIONS

After making arguments for or against removal of *parens patriae* suits based upon the text, structure, and purpose of CAFA, state attorneys general and pharmaceutical company defendants come to one final point of contention—whether removal of *parens patriae* suits under the “mass action” provision would violate fundamental principles of federalism.

Since the inception of the statute, opponents of removal have feared that CAFA’s expansion of federal jurisdiction would wrongfully sweep state law claims, brought on behalf of state citizens, into federal courts.¹¹⁸ Opponents argue that state courts have the most interest in overseeing *parens patriae* suits, since by their very nature these actions concern the rights of state citizens, and opponents to removal contend that an expansion of federal jurisdiction over such state-centric actions violates the fundamental principles of federalism.¹¹⁹ In response to opponents’ criticism that CAFA violates principles of federalism by sweeping state law claims into federal court, proponents of removal claim that the litigation of large class action lawsuits in state courts is itself a perversion of federalism and would violate the framers’ intent.¹²⁰ Proponents argue that removal would not undermine the fundamental principles of federalism since state courts are not the appropriate forums for large, interstate class actions that may span many states and involve citizens from several states.¹²¹ This rebuttal of opponents’ federalism concerns is less persuasive in the context of *parens patriae* suits since those actions, by their very nature, do not involve citizens of many different states. The seriousness of concerns regarding federalism has led several of the Circuits that remain split over removal of *parens patriae* actions to acknowledge and address this policy issue.¹²²

Hesitation over sweeping state law claims into federal court is a serious policy concern,¹²³ and broad removal of all *parens patriae* suits would indeed interfere with

¹¹⁸ See *supra* Part II.C.1.

¹¹⁹ See *supra* Part II.C.1.

¹²⁰ See Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4 (2005).

¹²¹ See *supra* Part II.C.1.

¹²² The Fourth Circuit also noted that a finding of federal jurisdiction over *parens patriae* actions “would risk trampling on the sovereign dignity of the State and inappropriately transforming what is essentially a West Virginia matter into a federal case.” *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011). The court noted that a federal court should be extremely reluctant to compel this type of removal and should reserve its constitutional supremacy only for when removal serves an overriding federal interest. *Id.*

Although the Fifth Circuit ultimately held that the State of Louisiana had waived its sovereign immunity by joining private parties in the lawsuit and could be involuntarily removed to federal court, the court acknowledged and addressed federalism concerns in a portion of its opinion. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 431-32 (5th Cir. 2008).

¹²³ See Virginia F. Milstead, *State Sovereign Immunity and the Plaintiff State: Does the Eleventh Amendment Bar Removal of Actions Filed in State Court?*, 38 J. MARSHALL L. REV. 513, 521-22 (2004) (examining the problem of whether a waiver and consent to suit in one court necessarily translates to waiver and consent in a different court); Heather Scribner, *Protecting Federalism*

state enforcement of state law and hinder the right of states to function independently.¹²⁴ But, broad removal of all *parens patriae* actions is not the issue of present concern. Recalling that there is no dispute amongst courts that *parens patriae* suits seeking enforcement actions and civil penalties are not removable under CAFA,¹²⁵ federalism concerns are not an issue in civil penalties and enforcement actions, in which the remedy sought is legitimately in the interest of the state and not private citizens. Since civil penalties and enforcement actions are left undisturbed in state court, only suits in which state attorneys general seek money damages on behalf of private citizens implicate these federalism concerns. Since the remedy sought in these *parens patriae* suits is no different from the remedy sought in suits brought by private citizens, it seems odd to hold that federalism concerns require these *parens patriae* suits to stay in state court while actions by private citizens could reach a federal forum through § 1332's diversity jurisdiction, simply because the state attorney general attaches his or her name to the lawsuit. Additionally, in the event that the state attorney general is engaging in jurisdictional gamesmanship by bringing a *parens patriae* suit in order to pursue money damages in a favorable state court, the risk of trampling upon a state's dignity by hauling it unwillingly into federal court seems to be of far less concern than the risk of allowing such an abusive practice by the state attorney general.¹²⁶

Furthermore, hesitation over bringing state law claims into federal court has not created a policy concern that is so serious as to stop scholars and courts from generally agreeing that suits brought by state attorneys general are removable "class actions" as long as they are brought under state statutes that are "similar" to Rule 23.¹²⁷ Although federal courts have not had the occasion to hold *parens patriae* suits removable "class actions" under CAFA, since the actions in question have not been brought under statutes "similar" to Rule 23, *parens patriae* actions have been classified as "class actions" outside of a CAFA context.¹²⁸ Therefore, it logically follows that, under the appropriate procedural circumstances, *parens patriae* suits may be "class actions" within the context of CAFA.

Interests After the Class Action Fairness Act of 2005, 51 WAYNE L. REV. 1417 *passim* (2005) (arguing that CAFA addressed a "horizontal federalism" problem but created a serious "vertical" one); Georgene M. Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 *passim* (2000) (examining federalism implications in mass tort litigation).

¹²⁴ Lemann, *supra* note 5, at 151.

¹²⁵ See *supra* Part I.

¹²⁶ Lemann, *supra* note 5, at 151.

¹²⁷ See *supra* Part I.

¹²⁸ See Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1922 (2000) ("[I]t is possible for a state to initiate *parens patriae* suits in a class action format . . ."); Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1854 (2000) ("The authority is not particularly robust, but the general approach seems to be that a state attorney general may bring a class action on behalf of a class."); see also *Alabama v. Chevron U.S.A., Inc.*, No. CIV.A.78-51-N, 1980 WL 1808, at *1, *2 (M.D. Ala. Jan. 11, 1980) (allowing a class action suit brought by the State on behalf of the State's public entities that had purchased liquid asphalt from the defendants); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 284 (S.D.N.Y. 1971) (approving a class of states bringing *parens patriae* cases on behalf of citizen who had purchased antibiotics); *In re Sclater*, 40 B.R. 594, 599 (Bankr. E.D. Mich. 1984) ("Attorneys general have been held to be proper class representatives.").

This idea is supported by the fact that the otherwise split Circuits agree that such a procedural situation would qualify as a removable “class action” under CAFA, as long as the suit is brought under a statute “similar” to Rule 23.¹²⁹ Because courts and scholars have not deemed federalism concerns sufficiently serious to bar the removal of *parens patriae* suits as “class actions,” this same hesitation over bringing state law claims into federal court should not bar the removal of *parens patriae* actions seeking money damages as “mass actions” under CAFA. Therefore, although removal of *parens patriae* suits under the “mass action” provision of CAFA implicates some concerns over the violation of principles of federalism, these concerns should not carry the day and prevent removal of actions that are otherwise removable under the text, structure, and purpose of CAFA.

CONCLUSION

The application of CAFA’s removable “mass action” provision to *parens patriae* suits seeking money damages is a complex problem, with far reaching and serious implications upon a variety of areas, including pharmaceutical litigation. With federal courts split as to this key question, proponents and opponents of removal are forced to turn to the statute itself. An examination of CAFA’s text, structure, and purpose reveal nothing that would prohibit *parens patriae* actions seeking money damages from removal to federal court. Since the plain text of CAFA’s “mass action” provision does not bar the removal of *parens patriae* suits and the legislative history of CAFA offers little insight other than an unchallenged instruction to interpret “class actions” broadly, these types of actions should be removable under CAFA’s “mass action” provision.

¹²⁹ See *supra* Part I.