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The Class Action (Un)Fairness Act of 2005: Could it Spell the End of the Multi-State Consumer Class Action?

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I. INTRODUCTION

Any act of Congress with the potential to eradicate the multi-state consumer class action essentially renders much, if not all, of the consuming public impotent in the battle against unfair and deceptive trade practices.¹ This unfortunate state of affairs will arise because the aforementioned practices typically cause monetary or property damage too small to enable

1. See *infra* notes 276–286 and accompanying text.

litigation on an individual, or even statewide, basis.² Thus, if the injured consumers are unable to litigate their claims as part of a multi-state class action, they will be left with no viable means of recourse against the corporate entity.³

The significance of the multi-state consumer class action does not, however, lie merely in the fact that it aggregates numerous small claims which would otherwise be foreclosed by the expense of litigation. For instance, in situations where consumers are injured and the government agencies charged with protecting them do not choose to intervene, a multi-state consumer class action may serve as a means of economic regulation.⁴ Furthermore, in general, the consumer class action is important because it produces positive “externalities” for society.⁵ Thus, particularly in the consumer context, the multi-state class action is vital for a number of reasons.⁶

The importance of class action litigation has not gone unnoticed by Congress. In fact, in enacting the Class Action Fairness Act of 2005 (CAFA),⁷ Congress specifically endorsed the class action mechanism as a “valuable part of the legal system.”⁸ Given this endorsement, the practical effect of CAFA—the destruction of the multi-state state-law-based consumer class action—becomes even more puzzling.

2. See *infra* note 278 and accompanying text.

3. As the Supreme Court has previously recognized:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

4. David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1286 (2007) (quoting *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“As the Supreme Court has declared, ‘[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.’”)).

5. See William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 709 (2006). As Rubenstein explains, “[t]he externality conceptualization of the small claims class action focuses not only on why an individual litigant would not rationally file suit, but additionally—and perhaps more importantly—on the social costs of that lost opportunity.” *Id.* at 720. According to Rubenstein, the “externalities” produced by the small claims class action can be broken down into four general categories: (1) decree effects; (2) settlement effects; (3) threat effects; and (4) institutional effects. See *id.* at 723–25.

6. See Rubenstein, *supra* note 5, at 710 (explaining that the externalities created by class action litigation “are under-produced in the small claims setting in the absence of the class form”).

7. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–15).

8. *Id.* § 2(a)(1), 119 Stat. at 4 (codified as note to 28 U.S.C. § 1711).

In order to appreciate the practical effect of CAFA, it is important to first understand how the legislation fundamentally altered federal diversity jurisdiction for multi-state class actions. Prior to CAFA, a multi-state class action premised entirely on state law claims could reach federal court only if it met the two requirements of diversity jurisdiction under 28 U.S.C. § 1332: (1) complete diversity⁹ and (2) an amount-in-controversy of at least \$75,000.¹⁰ However, CAFA changed all of this by amending § 1332 to provide for federal adjudication of state-law-based class actions in which “minimal diversity” exists—meaning that at least one member of the proposed plaintiff class is diverse from one defendant—and the aggregate amount-in-controversy exceeds \$5,000,000.¹¹ Most multi-state consumer class actions can at least be argued to involve an aggregate amount-in-controversy of \$5,000,000, and class actions that do not entail some level of diversity are rare. Thus, CAFA essentially federalized all multi-state consumer class actions of any significance.¹²

In light of this subsequent federalization under CAFA, the legislation was considered a “political triumph for pro-business, pro-corporate conservatives, and a defeat for consumer advocates, public interest groups, and the plaintiffs’ bar.”¹³ The reason for this perception is quite simple—once in federal court, multi-state state-law-based consumer class actions are not likely to be certified, thereby leaving injured consumers without a forum to adjudicate their claims.¹⁴ In opposition to this argument, pro-business advocates would contend that, in enacting CAFA, Congress expressed no intent to inhibit the certification of such class actions. Much to the contrary,

9. 28 U.S.C. § 1332(a). Prior to CAFA, if any named plaintiff and any named defendant were from the same state, then the action could not be filed in or removed to federal court. See Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366 (1921), *overruled in part on other grounds by* Toucey v. N.Y. Life Ins. Co., 314 U.S. 118 (1941).

10. 28 U.S.C. § 1332(b). Before CAFA, in order for a federal court to exercise diversity jurisdiction over a class action, every single putative class member had to satisfy the jurisdictional amount of \$75,000. See *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 301 (1973); *Snyder v. Harris*, 394 U.S. 332, 336 (1969). Furthermore, under *Zahn*, the claims of putative class members could not typically be aggregated to meet the required jurisdictional amount. See *Zahn*, 414 U.S. at 301.

11. See 28 U.S.C. § 1332(d)(2), (d)(6).

12. See Marcus, *supra* note 4, at 1290; Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 543, 549–50 (2006) [hereinafter Cabraser, *Manageable Nationwide Class*]; Anthony Rollo & Gabriel A. Crowson, *Mapping The New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 CONSUMER FIN. L.Q. REP. 11, 13 (2006).

13. Elizabeth J. Cabraser, *The Class Action Fairness Act: One Year Later*, 744 PLI/LIT 67, 69 (2006).

14. See *infra* notes 96–155 and accompanying text.

CAFA purported to protect consumers by “assur[ing] fair and prompt recoveries for class members with legitimate claims.”¹⁵ Nevertheless, commentators generally agree that the primary political aim of CAFA’s supporters was to limit the certification, and thus the function, of multi-state state-law-based consumer class actions.¹⁶

Presently, it appears that CAFA’s supporters will achieve their goal, as there is little reason to believe that the federal judiciary’s attitude toward the certification of multi-state state-law-based consumer class actions will change anytime soon. However, if nothing changes, consumers will lose a litigation tool that has become increasingly important in the national marketplace where fraudulent and deceitful business practices often transgress state lines.

In light of the devastating potential of CAFA, the goal of this Comment will be to suggest a solution that allows multi-state consumer class actions to proceed in federal court. Part II begins with a brief history of the Federal Trade Commission Act of 1914 (FTC Act) and the various state unfair and deceptive acts and practices (UDAP) statutes.¹⁷ Part III follows with an analysis of the differences among the state UDAPs.¹⁸ Part IV elaborates on the federal court’s hostility toward multi-state state-law-based class actions.¹⁹ Part V discusses several proposals to overcome the manageability issues arising in multi-state state-law-based consumer class actions and ultimately proposes a new solution: a private right of action under section 5

15. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(1), 119 Stat. 4, 5 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–15).

16. See Marcus, *supra* note 4, at 1280 (“[CAFA’s] supporters believe that the statute will result in fewer certified classes. This result would mean fewer settlements and verdicts in plaintiffs’ favor, which in turn would limit the regulatory reach of the sorts of state laws often enforced by way of class actions.”); see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1417 (2006) (“In the short run, it is difficult to avoid the conclusion that CAFA was designed to offer absolution to potential defendants in what are termed ‘negative value’ class actions, such as consumer cases, in which the only capacity to bring suit is premised on the ability of an entrepreneurial attorney to organize a class action of suitable dimensions.”). According to Elizabeth Cabraser:

It is indisputable that the primary political goal of CAFA was to remove [state-law-based] class actions to the federal system, where, it was assumed, they would be dealt with severely (either through active denial of class certification, or simply by being warehoused indefinitely by an overwhelmed judiciary). A cynical consumerist observer might be forgiven for concluding that CAFA’s concealed purpose was to perpetuate, rather than eliminate, the gap between nationwide market activity and fragmentary consumer law enforcement—a law-free zone in which much corporate (mis)conduct may escape accountability.

Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 548 (internal citations omitted).

17. See *infra* notes 23–61 and accompanying text. State-law-based consumer class actions are typically brought under these statutes.

18. See *infra* notes 62–95 and accompanying text.

19. See *infra* notes 96–155 and accompanying text.

of the FTC Act.²⁰ Part VI predicts the impact on consumers if the proposed solutions are not accepted.²¹ Finally, Part VII concludes by reasserting the need to address the unjust potential inherent in CAFA.²²

II. RISE OF THE MODERN STATE-LAW-BASED CONSUMER CLASS ACTION

The statutory underpinnings of the modern consumer class action date all the way back to the 1914 enactment of the FTC Act.²³ In the FTC Act, Congress established the Federal Trade Commission (FTC), a regulatory agency which was eventually given the authority to act on behalf of injured consumers.²⁴ Then, paralleling the rise of “consumerism” in the 1960s, the FTC was harshly criticized for its failure to adequately protect consumers.²⁵ This failure of public enforcement led to the development of state consumer protection acts, many of which provide a private remedy for injured consumers.²⁶

A. *The FTC Act*

In 1914, Congress created the FTC in order to prevent unethical business practices from interfering with national commerce.²⁷ The original goal of the FTC Act was not to protect consumers; rather, it was enacted to supplement existing antitrust legislation.²⁸ Thus, whereas the Clayton Act

20. See *infra* notes 156–275 and accompanying text.

21. See *infra* notes 275–86 and accompanying text.

22. See *infra* notes 287–88 and accompanying text.

23. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2006)).

24. See generally A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority (2008), <http://www.ftc.gov/ogc/brfovrvw.shtml>; see also A Guide to the Federal Trade Commission, Commissioners (2004), <http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtml> (“The FTC is an independent agency that reports to Congress on its actions. The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term.”).

25. J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 356 (1992).

26. See *infra* notes 65–95 and accompanying text.

27. See Neil W. Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 226 (1981).

28. See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 991 (D.C. Cir. 1973) (“[T]he [FTC Act] and the Clayton Act were coordinate statutes, both furthering the same general objective of avoiding monopoly and concentrations.”); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 7–8 (2005); Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private*

enumerated specific types of prohibited conduct, the FTC Act, in broad, sweeping language, prohibited “unfair methods of competition in commerce.”²⁹

Soon after Congress enacted the FTC Act, the FTC attempted to expand its regulatory authority into the areas of false and misleading advertising.³⁰ At first, the FTC’s efforts were successful, and its cease and desist orders were upheld in several noteworthy decisions.³¹ In 1931, however, the FTC’s authority was severely limited by the Supreme Court’s holding in *FTC v. Raladam Co.*³² In *Raladam*, the Court interpreted the express language of the FTC Act narrowly and held that an unfair method of competition could be attacked by the FTC only where some form of competitive injury was shown.³³ The *Raladam* holding jeopardized the agency’s ability to implement the FTC Act because it “threatened to complicate problems of proof, to increase the cost of proceedings, and to stifle enforcement in industries in which competition was lacking or in which all sellers were engaged in the same misleading practices.”³⁴ Thus, in light of the threat posed by *Raladam*, the FTC implored Congress to provide it with the

Uses of Federal Trade Commission Jurisprudence, 48 GEO. WASH. L. REV. 521, 524 (1980); David W. Carpenter, Note, *Implied Civil Remedies for Consumers Under the Federal Trade Commission Act*, 54 B.U. L. REV. 758, 787–88 (1974).

29. Charles Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987, 988 (1949).

30. Leaffer & Lipson, *supra* note 28, at 525.

31. First, in 1919, the Seventh Circuit upheld an FTC cease and desist order against Sears, Roebuck & Co. for deceptively advertising that it was able to sell certain merchandise at “less than wholesale price” because it buys this merchandise in markets that are not accessible to competitors. *See Sears, Roebuck & Co. v. FTC*, 258 F. 307, 308–09 (7th Cir. 1919). In reaching this holding, the Seventh Circuit pointed out that “[o]n the face of [the FTC Act] the legislative intent is apparent. The [FTC is] not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived.” *Id.* at 311. Rather, in considering whether or not to issue a cease and desist order, “[t]he commissioners . . . are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers.” *Id.* (emphasis added). Following a similar rationale, the Supreme Court upheld a FTC cease and desist order against Winsted Hosiery Co. for mislabeling certain goods as “Natural Wool” or “Merino.” *See FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 490–91, 494 (1922). In recognizing that deceptive labeling constitutes an unfair method of competition, the *Winsted* court explained that “when misbranded goods attract customers by means of the fraud which they perpetuate, trade is diverted from the producer of truthfully marked goods.” *Id.* at 493.

32. 283 U.S. 643 (1931). In *Raladam*, the FTC sought a cease and desist order against the manufacturer of a medicine advertised as a cure for obesity. *Id.* at 644–46. In the course of its advertising, the manufacturer failed to disclose that, in light of certain ingredients, the medicine could only be used safely under the supervision of a doctor. *Id.* at 645. The FTC issued a cease and desist order but failed to show that the misleading advertisements caused any injury to the manufacturer’s competitors. *Id.* at 652–53.

33. *Raladam*, 283 U.S. at 649. According to the Supreme Court, “[t]he paramount aim of the [FTC Act of 1914 was] the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, and this presupposes the existence of some substantial competition to be affected.” *Id.* at 647–48.

34. Averitt, *supra* note 27, at 233.

authority to proceed against fraudulent and deceptive business practices without needing to show competitive injury.³⁵

Reacting to the FTC's concerns, Congress sought to amend the FTC Act in order to allow the agency to bring actions specifically aimed at protecting consumers.³⁶ Thus, in the 1938 Wheeler-Lea Act, Congress overruled *Raladam* and altered section 5 of the FTC Act to prohibit "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."³⁷ Prior to the passage of the Wheeler-Lea Act, there was some indication that it was meant to be purely procedural in nature.³⁸ It is now clear, however, that by extending the FTC's authority to business practices injurious to consumers as well as competitors, the Wheeler-Lea Act went further and provided consumers with a level of protection they had not previously enjoyed.³⁹

35. *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 992 (D.C. Cir. 1973).

36. *Averitt*, *supra* note 27, at 233.

37. *See* Wheeler-Lea Act of 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)) (emphasis added). The definitions of the terms "unfair" and "deceptive" are constantly changing as a result of FTC adjudications, judicial decisions, the promulgation of FTC rules, and the creation of agency "guides." Schwartz & Silverman, *supra* note 28, at 9. The policy underlying the development of the FTC's consumer unfairness and deception standards has been the preservation of consumer sovereignty. Franke & Ballam, *supra* note 25, at 365. That said, at present, an "unfair" act is defined as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Schwartz & Silverman, *supra* note 28, at 9-10 (further explaining that "a practice or omission is deceptive if: (1) it is likely to mislead consumers; (2) the consumer's interpretation of the representation is reasonable under the circumstances; and (3) the representation is 'material' in that it is likely to affect either a consumer's choice of whether to purchase a product or the consumer's health or safety in its use.").

38. In 1936, Senator Wheeler introduced the proposed Wheeler-Lea amendment in the following manner:

The present bill is a reenactment of the present law upon the statute books with comparatively few amendments which the [FTC] has recommended, not for the purpose of adding to their powers but for the purpose of aiding them in carrying out their present powers. . . .

....

. . . The bill under consideration is solely for the purpose of removing some of [the] ambiguities and technicalities which made administration [of the FTC Act] difficult and costly. It does not change the fundamentals of the act in the slightest . . .

80 CONG. REC. 6570, 6589 (1936) (statement of Sen. Wheeler).

39. *See* *Averitt*, *supra* note 27, at 235; *see also* Leaffer & Lipson, *supra* note 28, at 525 (explaining that, through the amendment to § 5 of the FTC Act, "the FTC was expressly given the authority to proscribe practices that were unfair or misleading to the public, but not injurious to competitors"); Carpenter, *supra* note 28, at 762 ("The Wheeler-Lea Act of 1938 converted the Act into a consumer protection measure as well. . . . [T]he amendment to section 5 not only proscribed a new class of conduct but also extended the protection of the Act to a new class of persons—consumers.").

While the breadth of the FTC's mandate had certainly been increased, following the enactment of the Wheeler-Lea Act the FTC utilized relatively few of its resources to combat consumer injury.⁴⁰ In light of the FTC's shortcomings as a consumer-oriented agency, it faced severe criticism in the late 1960s.⁴¹ This criticism came primarily in the form of two reports, one authored by Ralph Nader and a group of law students—referred to collectively as “Nader’s Raiders”—and the other by the American Bar Association (ABA), which was commissioned to write a follow-up to the Nader Report.⁴² Although the Nader Report was far more brash and colorful than the ABA Report, they both reached the same general conclusion that the FTC's attempts in the realm of consumer protection were severely lacking.⁴³ In response to such harsh criticism, the FTC began encouraging the states to take a more active role in consumer protection.⁴⁴

B. State UDAPs

During the 1960s and 1970s, states began enacting UDAP statutes in an effort to complement public enforcement of § 5 of the FTC Act with agency and private enforcement at the state level.⁴⁵ These state UDAPs—also

40. During the 1940s and 1950s, the FTC's efforts in the consumer protection realm were limited to deceptive trade practices. See Leaffer & Lipson, *supra* note 28, at 525–26. However, the FTC concentrated on simply preventing fraud and deception and “appears to have given little attention to the effect of deceptive practices on the consumer, to other practices that injured consumers more, to measuring the injury caused by such practices, or to the need to allocate resources to remedial or compensatory activities on behalf of the consumer.” *Id.* at 526.

41. See Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 12 (2006); Franke & Ballam, *supra* note 25, at 356.

42. Scheuerman, *supra* note 41, at 12; see also Leaffer & Lipson, *supra* note 28, at 526 n.32. Nader's Raiders included law students and recent graduates from Harvard and Yale, as well as a student studying architecture at Princeton, who interviewed FTC employees and reviewed internal FTC documents to reach their conclusions. See Scheuerman, *supra* note 41, at 12 n.76.

43. The Nader Report found the FTC to be “a self-parody of bureaucracy, fat with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by the agents of commercial predators, [and] impervious to governmental and citizen monitoring.” Scheuerman, *supra* note 41, at 12–13 (quoting EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULTZ, “THE NADER REPORT” ON THE FEDERAL TRADE COMMISSION vii (1969)). The ABA couched its criticism in far less creative terms, but nevertheless found that the FTC's attempts to remedy consumer injuries were inadequate at best. See *id.* at 13 (citing *Report of the ABA Commission to Study the Federal Trade Commission* [July–Sept.], Antitrust & Trade Reg. Rep. (BNA Spec. Supp.) No. 427 (Sept. 16, 1969)).

44. Franke & Ballam, *supra* note 25, at 357; see also MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:2 (2007).

45. See PRIDGEN, *supra* note 44, at § 3:2. As Pridgen explains, there were other factors that contributed to the enactment of the first wave of state UDAPs:

First, common law actions for consumers were considered inadequate Second, there was a perceived inequality of bargaining power between merchants and consumers. Many policy makers in state government felt that, while the forces of competition and the

commonly referred to as the “Little FTC Acts”⁴⁶—can be broken into four broad categories.

State UDAPs in the first category are based on the Uniform Deceptive Trade Practices Act (UDTPA), a model statute which was originally proposed by the National Conference of Commissioners on Uniform State Laws in 1964 and later revised in 1966.⁴⁷ The 1966 model statute prohibited specific deceptive trade practices and included a catch-all provision forbidding any other conduct which “similarly creates a likelihood of

existing legal actions were sufficient for handling disputes between businesses, consumers were not on an equal footing with the business entities with whom they had to deal. . . . Third, costs were prohibitive for litigating small claims.

Id. In light of these considerations and others that have arisen over the years, all fifty states and the District of Columbia have now enacted at least one form of UDAP statute. See ALA. CODE § 8-19-1 (2007); ALASKA STAT. § 45.50.471 (2007); ARIZ. REV. STAT. ANN. § 44-1521 (2007); ARK. CODE ANN. § 4-88-101 (West 2007); CAL. BUS. & PROF. CODE § 17200 (West 2007); CAL. CIV. CODE § 1750 (West 2007); COLO. REV. STAT. ANN. § 6-1-101 (West 2007); CONN. GEN. STAT. ANN. § 42-110a (West 2007); DEL. CODE ANN. tit. 6, § 2501 (2007); D.C. CODE § 28-3901 (2008); FLA. STAT. ANN. § 501.201 (West 2007); GA. CODE ANN. § 10-1-370 (West 2007); HAW. REV. STAT. § 481-3 (2007); HAW. REV. STAT. § 480-2 (2007); IDAHO CODE ANN. § 48-601 (2007); 815 ILL. COMP. STAT. 505/1 (2007); 815 ILL. COMP. STAT. 510/1 (2007); IND. CODE ANN. § 24-5-0.5-1 (West 2007); IOWA CODE ANN. § 714.16 (West 2007); KAN. STAT. ANN. § 50-601 (2007); KY. REV. STAT. ANN. § 367.110 (West 2007); LA. REV. STAT. ANN. § 51:1401 (2007); ME. REV. STAT. ANN. tit. 5, § 213 (2007); ME. REV. STAT. ANN. tit. 10, § 1211 (2007); MD. CODE ANN., COM. LAW § 13-101 (West 2007); MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 2008); MICH. COMP. LAWS ANN. § 445.901 (West 2007); MINN. STAT. ANN. § 325D.09 (West 2007); MINN. STAT. ANN. § 325F.67 (West 2007); MISS. CODE ANN. § 75-24-1 (West 2007); MO. REV. STAT. § 407.010 (2007); MONT. CODE ANN. § 30-14-101 (2007); NEB. REV. STAT. § 59-1601 (2007); NEB. REV. STAT. § 87-301 (2007); NEV. REV. STAT. ANN. § 598.0903 (West 2007); N.H. REV. STAT. ANN. § 358-A:1 (2007); N.J. STAT. ANN. § 56:8-1 (West 2007); N.M. STAT. ANN. § 57-12-1 (West 2007); N.Y. GEN. BUS. LAW § 349 (McKinney 2007); N.C. GEN. STAT. § 75.1-1 (2007); N.D. CENT. CODE § 51-15-01 (2007); OHIO REV. CODE ANN. § 1345.01 (West 2007); OHIO REV. CODE ANN. § 4165.01 (West 2007); OKLA. STAT. ANN. tit. 15, § 751 (West 2007); OKLA. STAT. ANN. tit. 78, § 51 (West 2007); OR. REV. STAT. ANN. § 646.605 (West 2007); 73 PA. CONS. STAT. ANN. § 201-1 (West 2007); R.I. GEN. LAWS § 6-13.1-1 (2007); S.C. CODE ANN. § 39-5-10 (2007); S.D. CODIFIED LAWS § 37-24-1 (2007); TENN. CODE ANN. § 47-18-101 (West 2007); TEX. BUS. & COM. CODE ANN. § 17.01 (Vernon 2007); UTAH CODE ANN. § 13-11-1 (West 2007); VT. STAT. ANN. tit. 9, § 2451 (2007); VA. CODE ANN. § 59.1-196 (West 2007); WASH. REV. CODE ANN. § 19.86.010 (West 2007); W. VA. CODE ANN. § 46A-6-101 (West 2007); WIS. STAT. ANN. § 426.110 (West 2007); WYO. STAT. ANN. § 40-12-101 (West 2007).

46. See, e.g., Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 439 (1991); Schwartz & Silverman, *supra* note 28, at 15. This reference is based on the fact that a majority of the state UDAPs contain a provision that tracks the exact language found in § 5 of the FTC Act. See *infra* note 52 and accompanying text.

47. Scheuerman, *supra* note 41, at 15.

confusion.”⁴⁸ At present, thirteen jurisdictions have enacted a form of the UDTPA.⁴⁹

The second category of state UDAPs is derived from the Unfair Trade Practices and Consumer Protection Law (UTPCPL), a model act created by the FTC and the Committee on Suggested State Legislation of the Council of State Governments.⁵⁰ The UTPCPL contained three alternative versions.⁵¹ The first version, which paralleled § 5 of the FTC Act and broadly prohibited “unfair methods of competition and unfair or deceptive acts or practices” in trade or commerce, has been adopted by seventeen states.⁵² The second alternative, banning “[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce,” is not used in its exact form by any state.⁵³ Finally, the third version, which broadly proscribed

48. *Id.*

49. See DEL. CODE ANN. tit. 6, § 2532; GA. CODE ANN. § 10-1-372; HAW. REV. STAT. § 481-3; 815 ILL. COMP. STAT. 510/2; ME. REV. STAT. ANN. tit. 10, § 1212; MINN. STAT. ANN. § 325D.44; NEB. REV. STAT. § 87-302; NEV. REV. STAT. ANN. § 598.0915; N.Y. GEN. BUS. LAW § 349 (broadly prohibiting “[d]eceptive acts or practices” with no specific list of unlawful deceptive practices); OHIO REV. CODE ANN. § 4165.02; OKLA. STAT. ANN. tit. 78, § 53; OR. REV. STAT. ANN. § 646.608; WYO. STAT. ANN. § 40-12-105 (catch-all provision prohibits all “unfair or deceptive acts or practices”). The state UDAP in Arkansas broadly prohibits deceptive and unconscionable practices without listing any specific unlawful conduct. See ARK. CODE ANN. § 4-88-107. Also, Colorado, Indiana, and the District of Columbia all follow the pure “laundry-list” approach, prohibiting only a specific list of deceptive practices. See COLO. REV. STAT. ANN. § 6-1-105 (prohibiting only specific list of unfair and deceptive practices); D.C. CODE § 28-3904; IND. CODE ANN. § 24-5-0.5-3.

50. Schwartz & Silverman, *supra* note 28, at 15. According to one source, the FTC’s motivation behind creating the UTPCPL “was one of practicality—the widespread existence of consumer abuse at the local level precluded any effective enforcement by federal authorities, a task which could only be accomplished on the state and local level.” Franke & Ballam, *supra* note 25, at 357.

51. Leaffer & Lipson, *supra* note 28, at 521 n.2 (citing William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 275 (1971)).

52. See ALASKA STAT. § 45.50.471(2007); CAL. BUS. & PROF. CODE § 17200 (West 2007); CONN. GEN. STAT. ANN. § 42-110b (West 2007); FLA. STAT. ANN. § 501.204 (2007) (also prohibiting “unconscionable acts or practices”); HAW. REV. STAT. § 480-2 (2007); LA. REV. STAT. ANN. § 51:1405 (2007); ME. REV. STAT. ANN. tit. 5, § 207 (2007); MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 2008); MONT. CODE ANN. § 30-14-103 (2007); NEB. REV. STAT. § 59-1602 (2007); N.M. STAT. ANN. § 57-12-3 (West 2007) (also prohibiting unconscionable trade practices); N.C. GEN. STAT. § 75-1.1 (2007); R.I. GEN. LAWS § 6-13.1-2 (2007); S.C. CODE ANN. § 39-5-20 (2007); VT. STAT. ANN. tit. 9, § 2453 (2007); WASH. REV. CODE ANN. § 19.86.020 (West 2007); W. VA. CODE ANN. § 46A-6-104 (West 2007). In construing these “little-FTC Acts,” state courts typically utilize FTC and federal court precedent as an interpretive source. See Leaffer & Lipson, *supra* note 28, at 533. In fact, many of these statutes specifically direct that state courts look to such jurisprudence. See CONN. GEN. STAT. ANN. § 42-110b(b); FLA. STAT. ANN. § 501.204(2); HAW. REV. STAT. § 480-2(b); ME. REV. STAT. ANN. tit. 5, § 207(1); MASS. GEN. LAWS ANN. ch. 93A, § 2(b); MONT. CODE ANN. § 30-14-104(1); N.M. STAT. ANN. § 57-12-4; R.I. GEN. STAT. § 6-13.1-3; S.C. CODE ANN. § 39-5-20(b); VT. STAT. ANN. tit. 9, § 2453(b); W. VA. CODE ANN. § 46A-6-101(1). However, although the state courts must consider FTC and federal court decisions, they are not bound by that precedent.

53. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 2007). Texas enacted an adaptation of this model that contains a non-exclusive list of false, misleading, and deceptive practices that are declared unlawful. See *id.* Kentucky’s state UDAP also tracks the language of this model. See KY.

“any act or practice which is unfair or deceptive to the consumer” and included a list of prohibited practices, has been followed by eleven states.⁵⁴

Still other states have enacted consumer protection statutes based on the Uniform Consumer Sales Practices Act (UCSPA), which was adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1971.⁵⁵ The UCSPA and the UDTPA are similar in that both outlaw deceptive acts and practices and provide a specific list of actionable conduct.⁵⁶ However, unlike statutes modeled on the UDTPA, which typically apply to any trade or commerce, the four state UDAPs based on the UCSPA only apply to “consumer transactions.”⁵⁷

Finally, the last category of state UDAPs is comprised of statutes referred to as the consumer fraud acts. These statutes are similar to statutes premised on the first version of the UTPCPL in that they all broadly prohibit deceptive and unconscionable acts or practices and fraud without enumerating any specific unlawful conduct.⁵⁸ These statutes differ from the aforementioned model act, however, because they do not address unfair methods of competition.⁵⁹

REV. STAT. ANN. § 367.170 (West 2007) (prohibiting “[u]nfair, false, misleading, or deceptive acts or practices” and explaining that the term “unfair” is to be construed to mean unconscionable).

54. See ALA. CODE § 8-19-5 (2007); CAL. CIV. CODE § 1770 (West 2007); GA. CODE ANN. § 10-1-393 (West 2007); IDAHO CODE ANN. § 48-603 (2007); MD. CODE ANN., COM. LAW § 13-301 (West 2007); MICH. COMP. LAWS ANN. § 445.903 (West 2007) (prohibiting “[u]nfair, unconscionable, or deceptive methods, acts, or practices”); MISS. CODE ANN. § 75-24-5 (West 2007); N.H. REV. STAT. ANN. § 358-A:2 (2007); OKLA. STAT. ANN. tit. 15, § 753(20) (West 2007) (prohibiting “unfair or deceptive trade practice[s]” but providing no specific list); 73 PA. CONS. STAT. ANN. § 201-3 (West 2007); TENN. CODE ANN. § 47-18-104 (West 2007).

55. PRIDGEN, *supra* note 44, at § 3:7.

56. See *supra* note 48 and accompanying text.

57. See KAN. STAT. ANN. § 50-626 (2007); OHIO REV. CODE ANN. § 1345.02 (West 2007); UTAH CODE ANN. § 13-11-4 (West 2007); VA. CODE ANN. § 59.1-200 (West 2007).

58. Although not based on any one model act, the consumer fraud acts all contain some derivation of the following language:

The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

See ARIZ. REV. STAT. ANN. § 44-1522 (2007); DEL. CODE ANN. tit. 6, § 2513 (2007); 815 ILL. COMP. STAT. 505/2 (2007) (prohibiting unfair and deceptive acts or practices); IOWA CODE ANN. § 714.16(2) (West 2007) (also includes a prohibition against unfair practices); MINN. STAT. ANN. § 325F.69(1) (West 2007); MO. REV. STAT. § 407.020 (2007) (also includes a prohibition against unfair practices); N.J. STAT. ANN. § 56:8-2 (West 2007); N.D. CENT. CODE § 51-15-02 (2007); S.D. CODIFIED LAWS § 37-24-6 (2007).

59. See statutes cited *supra* note 58. The only exception is the Illinois Consumer Fraud Act,

Theoretically, these state UDAPs should provide the framework for the multi-state state-law-based consumer class actions which will be forced into federal court by CAFA. However, removing such actions to federal court “is likely to prompt endless arguments on the reconcilability of the different legal regimes that might apply had low-value consumer claims been prosecuted individually—an exchange as unrealistic as it is contrary to the animating premise of CAFA: the existence of economic activity of nationwide scope.”⁶⁰ Thus, given that issues with legal variation will almost inevitably arise in multi-state class actions premised on state UDAPs,⁶¹ it is unlikely that injured consumers will be able to obtain certification of such actions.

III. LEGAL VARIATION AMONG THE STATE UDAPs

As one might expect, there are significant differences between the three categories of state UDAPs and even among the statutes within each category. These variations are most apparent in the following areas: (1) the availability of private remedies and class action lawsuits,⁶² (2) the need to prove reliance, intent, and injury or damages;⁶³ and (3) the possible remedies.⁶⁴

A. Availability of Private and Class Action Lawsuits

The FTC urged states to provide injured consumers with private remedies “as a way of avoiding direct government regulation, and instead allowing for private regulation by way of individual consumer actions.”⁶⁵ Thus, most state UDAPs permit consumers to bring a private action to redress violations.⁶⁶ Under Iowa’s UDAP, however, injured consumers must rely on the Attorney General to institute an action on their behalf.⁶⁷

which does prohibit unfair methods of competition. See 815 ILL. COMP. STAT. 505/2.

60. See Issacharoff & Sharkey, *supra* note 16, at 1417.

61. See *infra* notes 62–90 and accompanying text.

62. See *infra* notes 65–76 and accompanying text.

63. See *infra* notes 77–87 and accompanying text.

64. See *infra* notes 88–95 and accompanying text.

65. Franke & Ballam, *supra* note 25, at 357.

66. See, e.g., *Roberts v. Am. Warranty Corp.*, 514 A.2d 1132, 1134 (Del. Super. Ct. 1996) (“Therefore, those who are damaged by violation of § 2531 may seek damages for that violation whether they engage in trade or are members of the consuming public.”). In several states, where the consumer protection statute did not explicitly provide for a private right of action, such a right has been judicially implied. See *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P.2d 1119, 1122 (Ariz. 1974) (“Although the Act does not specifically provide for a right of action against persons violating the provisions of the article, we believe inferentially such right of action is granted . . .”).

67. See IOWA CODE ANN. § 714.16(7) (West 2007); see also *Molo Oil v. River City Ford Truck*

Furthermore, the Arkansas consumer protection statute only authorizes private actions by elderly or disabled persons.⁶⁸

While most every state provides injured consumers with a private right of action under its state UDAP, the availability of the class action mechanism is more limited. Twelve states explicitly permit class action lawsuits within the text of their consumer protection statute.⁶⁹ However, the consumer protection statutes in Alabama,⁷⁰ Georgia,⁷¹ Louisiana,⁷² Mississippi,⁷³ Montana,⁷⁴ and South Carolina⁷⁵ specifically exclude class actions. Furthermore, a federal court has held that a class action would likely not be certified under Wisconsin's Consumer Protection Act.⁷⁶

B. Elements of Reliance, Intent, and Injury or Damages

State UDAPs vary with regard to the need to prove reliance. In some states, a plaintiff bringing an action under the state UDAP must prove actual reliance on the allegedly deceptive practice.⁷⁷ In other states, however, as

Sales, 578 N.W.2d 222, 228 (Iowa 1998).

68. See ARK. CODE ANN. § 4-88-204 (West 2007).

69. See CAL. CIV. CODE § 1781 (West 2007); CONN. GEN. STAT. ANN. § 42-110g(b) (West 2007); D.C. CODE § 28-3905(k)(1)(E) (2008); IDAHO CODE ANN. § 48-608(1) (2007); IND. CODE ANN. § 24-5-0.5-4(b), (c) (West 2007) (permitting both private litigants and the Attorney General to bring a class action lawsuit); MASS. GEN. LAWS ANN. ch. 93A, § 9(2) (West 2008); MICH. COMP. LAWS ANN. §§ 445.910, 445.911(3) (West 2007) (permitting both private litigants and the Attorney General to bring a class action lawsuit); MO. ANN. STAT. § 407.025(2) (West 2007); N.H. REV. STAT. ANN. § 358-A:10-a (2007); N.M. STAT. ANN. § 57-12-10(E) (West 2007); R.I. GEN. LAWS § 6-13.1-5.2(b) (2007); WYO. STAT. ANN. § 40-12-108(b) (West 2007).

70. ALA. CODE § 8-19-10(f) (2007) ("A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class . . .").

71. GA. CODE ANN. § 10-1-399(a) (West 2007) (prohibiting actions brought "in a representative capacity").

72. LA. REV. STAT. ANN. § 51:1409(A) (2007) ("[Consumers] may bring an action individually but not in a representative capacity . . .").

73. MISS. CODE ANN. § 75-24-15(4) (West 2007) ("Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.").

74. MONT. CODE ANN. § 30-14-133(1) (2007) ("A consumer . . . may bring an individual but not a class action . . .").

75. S.C. CODE ANN. § 39-5-140(a) (2007) (prohibiting actions brought "in a representative capacity").

76. See *Demitropoulos v. Bank One Milwaukee N.A.*, 915 F. Supp. 1399, 1416 n.17 (N.D. Ill. 1996).

77. See *Pauley v. Bank One Colo. Corp.*, 205 B.R. 272, 276-77 (D. Colo. 1997); *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 650-51 (N.C. Ct. App. 1990); IND. CODE ANN. § 24-5-0.5-4 (private action requires reliance on deceptive act); TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B) (Vernon 2007) (requiring that consumer relied on deceptive act or practice and was harmed as a

long as reliance was reasonable given the circumstances, the plaintiff need not prove individual reliance on the deceptive practice.⁷⁸ Additionally, in Arizona, reliance is a required element, but it need not be reasonable reliance.⁷⁹ Finally, in another group of states, reliance is simply not an element of a cause of action brought under the state UDAP.⁸⁰

The state UDAPs also differ in terms of the degree of scienter that the plaintiff must prove in a private action. Some place the burden on the plaintiff to establish that the defendant willfully violated the statute.⁸¹ Other state UDAPs require the plaintiff to demonstrate that the defendant committed a violation either knowingly or intentionally.⁸² Finally, under the state UDAPs in several states, the plaintiff need not prove any intent to deceive on the part of the defendant.⁸³

result); WYO. STAT. ANN. § 40-12-108(a) (West 2007) (requiring reliance on “an uncured unlawful deceptive trade practice” that causes harm).

78. See, e.g., *Dix v. Am. Bankers Life Assurance Co. of Fla.*, 415 N.W.2d 206, 209 (Mich. 1987) (“We hold that members of a class proceeding under the [Michigan] Consumer Protection Act need not individually prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations.”).

79. See *Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992).

80. See *Aurigemma v. Arco Petroleum Prods. Co.*, 734 F. Supp. 1025, 1029 (D. Conn. 1990) (“Plaintiffs need not prove reliance or that the alleged unfair or deceptive representation became part of the basis of the bargain.”); *Prishwalko v. Bob Thomas Ford, Inc.*, 636 A.2d 1383, 1388 (Conn. App. Ct. 1994); *Att’y Gen. v. Wyndham Int’l, Inc.*, 869 So. 2d 592, 598 (Fla. Dist. Ct. App. 2004). Under the UDAP of the following states, the plaintiff need only show that the defendant’s deceptive trade practice has a tendency to confuse or mislead the consumer: California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Washington. See *PRIDGEN, supra* note 44, at App. 3B.

81. See *FLA. STAT. ANN. § 501.207* (West 2007); *KAN. STAT. ANN. § 50-626(b)(2), (3)* (2007); *MISS. CODE ANN. § 75-24-19 (1)(b)* (West 2007) (scienter requirement for private action is knowledge and willfulness); *OR. REV. STAT. ANN. § 646.638(1)* (West 2007).

82. See *COLO. REV. STAT. ANN. § 6-1-105* (West 2007); *IDAHO CODE ANN. § 48-603* (2007); *IND. CODE ANN. § 24-5-0.5-3* (West 2007); *KAN. STAT. ANN. § 50-626(b)(1), (4), (7)–(10)*; *OHIO REV. CODE ANN. § 1345.03* (West 2007); *OKLA. STAT. ANN. tit. 15 § 753* (West 2007) (violation must be done knowingly or with reason to know); *S.D. CODIFIED LAWS § 37-24-6(1)* (2007) (requiring knowledge and intent); *UTAH CODE ANN. § 13-11-4(2)* (West 2007) (requiring knowledge or intent); *WYO. STAT. ANN. § 40-12-105(a)* (requiring knowledge); *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311-12 (N.M. 1991) (“The ‘knowingly made’ requirement [of New Mexico’s state UDAP] is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading.”).

83. See *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 937 n.6 (1st Cir. 1985) (defendant’s intent irrelevant under Massachusetts’s state UDAP); *Maine v. Bob Chambers Ford, Inc.*, 522 A.2d 362, 365 (Me. 1987); *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990) (“That defendants may have made these misrepresentations negligently and in good faith, in ignorance of their falsity, and without intent to mislead, affords no defense to an action under [N.C. GEN. STAT. § 75-1.1 (2007)].”); *Williams v. Trail Dust Steak House, Inc.*, 727 S.W.2d 812, 814 (Tex. App. 1987) (holding that Texas’ Deceptive Trade Practices Act “is intended to be an objective standard,” and, thus, there is no scienter requirement).

Among the various state UDAPs, there are also significant differences regarding the need to show injury and damages. Some statutes do not require any showing of injury or damages.⁸⁴ However, in order to recover under a number of state UDAPs, a private plaintiff must prove he or she suffered an “ascertainable loss” of money or property as a result of the unfair or deceptive trade practice.⁸⁵ This ascertainable loss threshold is apparently lower than that of actual damages,⁸⁶ which must be demonstrated under other state UDAPs.⁸⁷

C. Available Remedies

The remedies provided under the various state UDAPs are anything but uniform. Under several state UDAPs, equitable relief is the only available remedy.⁸⁸ Pursuant to other state UDAPs, a private plaintiff may be able to

84. See D.C. CODE § 28-3904 (2008) (statute can be violated “whether or not any consumer is in fact . . . damaged”); KAN. STAT. ANN. § 50-634 (2005) (consumer aggrieved by violation of statute may bring an action, whether or not he or she is entitled to damages).

85. See ALASKA STAT. § 45.50.531 (2007); CONN. GEN. STAT. ANN. § 42-110g (2007); IDAHO CODE ANN. § 48-608; KY. REV. STAT. ANN. § 367.220 (West 2007); LA. REV. STAT. ANN. § 51:1409 (2007) (“ascertainable loss of money or movable property”); MISS. CODE ANN. § 75-24-15 (West 2007); MO. REV. STAT. § 407.025 (2007); MONT. CODE ANN. § 30-14-133 (2007); N.J. STAT. ANN. § 56:8-19 (West 2007) (“ascertainable loss of moneys or property”); OR. REV. STAT. ANN. § 646.638; 73 PA. CONS. STAT. ANN. § 201-9.2 (West 2007); R.I. GEN. LAWS § 6-13.1-5.2 (2007); TENN. CODE ANN. § 47-18-109 (West 2007); W. VA. CODE ANN. § 46A-6-106 (2007).

86. See *Hinchliffe v. Am. Motors Corp.*, 440 A.2d 810, 813–14 (Conn. 1981) (holding that “the words ‘any ascertainable loss’ . . . do not require a plaintiff to prove a specific amount of actual damages”).

87. See ALA. CODE § 8-19-10 (2007) (requiring monetary damages); FLA. STAT. ANN. § 501.207 (West 2007); IND. CODE ANN. § 24-5-0.5-4 (actual damages must be proven); MICH. COMP. LAWS ANN. § 445.910 (West 2007) (Attorney General may bring class action for actual damages); S.D. CODIFIED LAWS § 37-24-31 (2007) (actual damages must be proven); TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 2007) (plaintiff can show either economic damages or damages for mental anguish); VA. CODE ANN. § 59.1-204 (West 2007); WYO. STAT. § 40-12-108 (West 2007) (actual damages must be proven).

88. See DEL. CODE ANN. tit. 6, § 2533(a) (2007); GA. CODE ANN. § 10-1-373(a) (West 2007); HAW. REV. STAT. § 481A-4(a) (2007); 815 ILL. COMP. STAT. 510/3 (2007); ME. REV. STAT. ANN. tit. 10, § 1213 (2007); MINN. STAT. ANN. § 325D.072 (West 2007); NEB. REV. STAT. § 87-303(a) (2007).

recover only actual damages,⁸⁹ or elect to receive the greater of either actual damages or some statutorily defined amount.⁹⁰

In addition to providing for the recovery of actual damages, some state UDAPs also contain provisions aimed at further penalizing defendants who violate the statute. For instance, under several state UDAPs, plaintiffs may be awarded punitive damages if the defendant's actions were intentional, reckless, or malicious or if the defendant repeatedly or flagrantly violated the statute.⁹¹ Furthermore, under approximately two-thirds of the state UDAPs, a plaintiff's recovery may be increased by "trebling" the damage award or by awarding punitive damages.⁹² Even among these statutes, however, there is a significant amount of variation with regard to when damages may be trebled.⁹³

89. See ARK. CODE ANN. § 4-88-113(f) (West 2007); FLA. STAT. § 501.211(2); MD. CODE ANN. COM. LAW § 13-408 (West 2007); MISS. CODE ANN. § 75-24-15(1); NEB. REV. STAT. § 59-1609 (2007); S.D. CODIFIED LAWS § 37-24-31; TEX. BUS. & COM. CODE ANN. § 17.50(b)(1); WYO. STAT. § 40-12-108(b); see also *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585-86 (Fla. Dist. Ct. App. 1984) (punitive damages not available under Florida's state UDAP).

90. See ALA. CODE § 8-19-10(a)(1) (greater of actual damages or \$100); IDAHO CODE ANN. § 48-608(1) (greater of actual damages or \$1,000); IND. CODE ANN. § 24-5-0.5-4(a) (West 2007) (greater of actual damages or \$500); KAN. STAT. ANN. §§ 50-634(b), 50-636 (2007) (greater of actual damages or penalty; penalty not available in class actions); MICH. COMP. LAWS ANN. § 445.911(2) (greater of actual damages or \$250; actual damages only in class actions); MONT. CODE ANN. § 30-14-133(1) (greater of actual damages or \$500); N.H. REV. STAT. ANN. § 358-A:10(1) (2007) (greater of actual damages or \$1,000); N.M. STAT. ANN. § 57-12-10(B) (West 2007) (greater of actual damages or \$100); OR. REV. STAT. ANN. § 646.638(1) (greater of actual damages or \$200); VA. CODE ANN. § 59.1-204(A) (greater of actual damages or \$500); W. VA. CODE § 46A-6-106(a) (greater of actual damages or \$200).

91. See CAL. CIV. CODE § 1780(a)(4) (West 2007); CONN. GEN. STAT. ANN. 42-110g(a) (West 2007) (punitive damages awarded at court's discretion); D.C. CODE § 28-3905(k)(1)(C) (2008) (court has discretion to award punitive damages); IDAHO CODE ANN. § 48-608(1) (punitive damages awarded for repeated or flagrant violations); KY. REV. STAT. ANN. § 367.220(1) (West 2007) (punitive damages awarded at court's discretion); MO. ANN. STAT. § 407.025(1) (2007) (punitive damages awarded at court's discretion); OR. REV. STAT. ANN. § 646.638(1) (permitting either court or jury to award punitive damages); see also *Smith v. Prime Cable of Chi.*, 658 N.E.2d 1325, 1336 (Ill. App. Ct. 1995) (punitive damages available under Illinois's state UDAP "where the alleged misconduct is outrageous either because the acts are done with malice or an evil motive or because they are performed with a reckless indifference toward the rights of others"); *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069-70 (Me. 1995) (punitive damages available under Maine's state UDAP if cause of action based on conduct that was malicious or motivated by ill will).

92. Schwartz & Silverman, *supra* note 28, at 23. "Trebling" refers to tripling the amount of the actual damages. See *id.*; BLACK'S LAW DICTIONARY 419 (8th ed. 2004) (defining "treble damages" as "[d]amages that, by statute, are three times the amount that the fact-finder determines is owed").

93. Under the state UDAP in New Jersey, the trebling of damages is mandatory. See N.J. STAT. ANN. § 56:8-19 (West 2007). In some jurisdictions, damages may only be trebled where the injured consumer is elderly or disabled. See IND. CODE ANN. § 24-5-0.5-4(i). Furthermore, under some state UDAPs, the plaintiff may choose between a statutory amount and treble damages. See ALASKA STAT. § 45.50.531(a) (2007) (greater of treble damages or \$500); COLO. REV. STAT. ANN. § 6-1-113(2)(a)(III) (West 2007) (greater of actual damages or \$500 or treble damages "if it is established by clear and convincing evidence that [the defendant] engaged in bad faith conduct"); D.C. CODE § 28-3905(k)(1)(A) (greater of treble damages or \$1,500 per violation); HAW. REV. STAT. § 480-

The aforementioned differences⁹⁴ highlight the considerable legal variation among the state UDAPs. This legal variation is problematic in light of the fact that similar variation among other statutory and common law causes of action has derailed virtually every significant multi-state state-law-based class action filed in federal court for more than a decade.⁹⁵

IV. FEDERAL COURT HOSTILITY TOWARD MULTI-STATE STATE-LAW-BASED CLASS ACTIONS

There is an emerging trend of hostility toward multi-state state-law-based class actions in the federal judiciary.⁹⁶ Indeed, since 1995, nearly every federal appellate court addressing a multi-state state-law-based class action has denied certification based on the presence of legal variation.⁹⁷

13(a)(1) (2007) (greater of treble damages or \$1,000); N.M. STAT. ANN. § 57-12-10(B) (greater of treble damages of \$300 for willful violation of statute); VA. CODE ANN. § 59.1-204(A) (greater of treble damages or \$1,000 for willful violation of statute).

94. See *supra* notes 65–93 and accompanying text.

95. Prior to 1990, multi-state state-law-based class actions were a rarity in federal courts, as neither plaintiffs nor defendants could meet the amount-in-controversy requirement for “diversity” jurisdiction as established in *Zahn*. See *supra* note 10 and accompanying text. However, the Judicial Improvements Act of 1990 (JIA) significantly altered the jurisdictional requirements for such class actions. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (adding § 1367 to 28 U.S.C.). The JIA provided that, where a district court has original jurisdiction over a civil action, it may also exercise “supplemental jurisdiction over all other claims that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy.” 28 U.S.C. § 1367(a). Within the first six years after Congress enacted the JIA, both the Fifth and Seventh Circuits held that the statute overruled *Zahn* and permitted multi-state state-law-based class actions to proceed in federal court when at least one named plaintiff satisfied the amount-in-controversy requirement. See *Free v. Abbott Labs. (In re Abbott Labs.)*, 51 F.3d 524, 528–29 (5th Cir. 1995); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 931–32 (7th Cir. 1996); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997). These decisions opened the door for the development of federal court precedent regarding the certification of such multi-state class actions in a variety of contexts.

96. See *Marcus, supra* note 4, at 1305–08.

97. See *Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, amended by and reh’g denied, 273 F.3d 1266 (9th Cir. 2001); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). However, the decision to deny certification to multi-state state-law-based class actions is not unanimous among the circuits. See *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003) (certifying nationwide class of dealers of Exxon gasoline claiming breach of contract for Exxon’s failure to discount their wholesale purchases as promised in the contract; court held that common questions of fact predominated over any individual variation in damages); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000) (plaintiffs alleged breach of an express warranty found in Waste

Problems with legal variation have arisen because the federal courts have consistently construed state choice-of-law principles to require that each putative class member's claims must be governed by the laws of his or her state of residence.⁹⁸ In general, this need to apply a variety of legal standards undermines the efficiency of the class action mechanism and prevents multi-state state-law-based class actions from meeting the predominance and superiority requirements for certification under Federal Rule of Civil Procedure 23(b)(3).⁹⁹

A. Predominance and Superiority Requirements for Certification Under Rule 23(b)(3)

There are three particular federal appellate level decisions from the mid-1990s that poignantly illustrate the federal judiciary's hostility toward multi-state state-law-based class actions: *In re Rhone-Poulenc Rorer, Inc.*,¹⁰⁰ *Georgine v. Amchem Products, Inc.*,¹⁰¹ and *Castano v. American Tobacco Co.*¹⁰² This trio of cases, referred to as the "unholy trinity" by one commentator,¹⁰³ stand for the general proposition that multi-state state-law-based class actions cannot meet the requirements of Rule 23(b)(3). As such,

Management's asset sale agreements; plaintiff class consisted of just eighty-one members from eight states, thereby rendering issues of legal variation far more manageable).

98. See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 674-75 (7th Cir. 2001); *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1302; *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 313-15 (5th Cir. 2000); *Am. Med. Sys.*, 75 F.3d at 1085; *Castano*, 84 F.3d at 739-50; *Amchem*, 83 F.3d at 627; *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 70-71 (S.D.N.Y. 2002); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 487-90 (D.N.J. 2000); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 211-17 (E.D. Pa. 2000); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 498 (N.D. Ill. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456-57 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 224 (E.D. La. 1998); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 498 (N.D. Ill. 1998); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-23 (E.D. La. 1997); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 631-32 (D. Kan. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-19 (D.C. Cir. 1986).

99. Under Rule 23(b)(3), in order to grant class certification, the federal court must find that common questions of law or fact predominate over individual ones and a class action is a superior method for resolving the claims at issue. See Fed. R. Civ. P. 23(b)(3). Furthermore, the court's analysis is to be informed by, *inter alia*, "the likely difficulties in managing [the] class action." Fed. R. Civ. P. 23(b)(3)(D). With these considerations in mind, federal courts facing multi-state state-law-based class actions are quick to deny certification on the basis that legal variation among the applicable state laws renders the class litigation unmanageable. See Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 553.

100. 51 F.3d 1293.

101. 83 F.3d 610 (3d Cir. 1996).

102. 84 F.3d 734 (5th Cir. 1996).

103. See Marcus, *supra* note 4, at 1284.

they have had a tremendous impact on class certification proceedings in federal court.¹⁰⁴

1. The “Unholy Trinity”

The Seventh Circuit was the first federal appellate court to address the issue of certifying a multi-state state-law-based class action. In *In re Rhone-Poulenc Rorer, Inc.*,¹⁰⁵ the court decertified a nationwide class of hemophiliacs claiming negligence on the part of the defendants for allegedly manufacturing hemophilia-related products that were infected with the AIDS virus.¹⁰⁶ In reaching this decision, the Seventh Circuit raised concerns

104. Describing the impact that this triumvirate of appellate court decisions has had on the federal judiciary, Elizabeth Cabraser stated that:

[*Georgine, Castano, and Rhone-Poulenc*] appear to reconstruct the record to suit the intended outcome. Moreover, they disregard the broad discretion afforded trial courts under Rule 23, as well as the inherently conditional nature of class related rulings. Further, rather than remanding those matters for corrective procedures or serving as findings, these decisions declare the categorical impossibility of class treatment in those cases.

Such decisions have had a demonstrable chilling effect on the willingness of trial courts to exercise the broad discretion that was formerly—and is still formally—theirs. The decisions have also had a deleterious effect on class actions bearing little factual or legal resemblance to either *Rhone-Poulenc* or *Castano*.

Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 375–76 (1998). Also, referencing *Castano* in particular, Ryan Patrick Phair highlighted that “the comprehensiveness of the Fifth Circuit’s opinion has presented the federal courts with a towering precedent that has been consistently used to resist certification of Rule 23(b)(3) nationwide class actions on choice-of-law grounds, and as a result, a strong presumption has taken root in the case law.” Ryan Patrick Phair, *Resolving the “Choice-of-Law Problem” in Rule 23(B)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 841–42 (2000).

105. 51 F.3d 1293.

106. See *id.* at 1295–96. The plaintiffs originally sought certification under Rule 23(b)(3), but the district court certified the lawsuit under Rule 23(c)(4)(A) as “a class action [only] with respect to particular issues.” *Id.* at 1297 (citing Fed. R. Civ. P. 23(c)(4)(A)). Although the Seventh Circuit inevitably decertified the class action, several sources have suggested that other federal courts could utilize Rule 23(c)(4)(A) in order to overcome some of the manageability issues created by multi-state state-law-based class actions. See Phair, *supra* note 104, at 854; see also Holly Kershell, *An Approach to Certification Issues in Multi-State Diversity Class Actions in Federal Court After the Class Action Fairness Act of 2005*, 40 U.S.F. L. REV. 769, 786 (2006). For instance, “by isolating core issues that are common to and typical of the class members, such as general causation, negligence, failure to warn, and the defectiveness of a product, a district court may properly grant a partial nationwide Rule 23(b)(3) class certification on core liability issues.” Phair, *supra* note 104, at 853–54; see also Kershell, *supra*, at 786 (“To facilitate certification, the court can defer dealing with management concerns surrounding the severed issues until the class action portion of the trial is complete.”). Then, once the core liability issues have been decided, class members can employ collateral estoppel in individual actions. Phair, *supra* note 104, at 854. This alternative seems viable on its face, but the constitutionality of issue severance and partial certification has been questioned.

regarding the impact that variations among the state negligence laws could have on the proposed litigation—namely, on the process of jury instruction.¹⁰⁷ The court began by flatly rejecting the district court judge’s proposal to offer “a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia.”¹⁰⁸ Having discarded the proposed instruction, the Seventh Circuit concluded that even mere differences of “nuance” in the applicable state laws could render the task of instructing the jury unmanageable.¹⁰⁹

In addition to focusing on legal variation, the *Rhone-Poulenc* court also discussed larger policy issues surrounding multi-state class actions.¹¹⁰ The Seventh Circuit questioned the propriety of “forcing [the] defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”¹¹¹

See *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1297, 1303–04 (questioning whether certification of a class only as to particular issues under Rule 23(c)(4)(A) might violate class members Seventh Amendment right to a jury trial).

107. *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1300. The Sixth Circuit shares the Seventh Circuit’s concern that legal variation could create significant problems in the jury instruction phase of a multi-state state-law-based class action. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (“If more than a few of the laws of the fifty states differ [in a multi-state state-law-based class action], the district judge would face an impossible task of instructing a jury on the relevant law . . .”).

108. *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1300.

109. Elaborating on the importance of nuanced differences between the state laws, the *Rhone-Poulenc* court explained that:

The law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause, may as the plaintiffs have argued forcefully to us differ among the states only in nuance, though we think not But nuance can be important, and its significance is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formulations of the meaning of negligence and the subordinate concepts.

Id. The court then stated that allowing a single negligence standard to be applied to a nationwide plaintiff class would certainly run afoul of the *Erie* Doctrine, because “thousands of members of the plaintiff class [would] have their rights determined, and the four defendant manufacturers [would] have their duties determined, under a law that is merely an amalgam, an averaging, of the nonidentical negligence laws of 51 jurisdictions.” *Id.* at 1302.

110. See *id.* at 1299–1300.

111. *Id.* at 1299. Chief Judge Richard A. Posner, who authored the opinion in *Rhone-Poulenc Rorer, Inc.*, essentially adopted the argument that the class action mechanism amounts to legalized blackmail. See Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003). This argument has been gaining force since it was first introduced in 1972, and it “is now a recognized objection to class certification.” *Id.* at 1358 (collecting cases). Thus, if the logic behind the argument holds up, it would certainly appear to weigh against the certification of larger multi-state and national consumer class actions. However, according to Silver, “[b]y describing class actions as legalized blackmail, judges have used inflammatory rhetoric that impugns the character of plaintiffs and trial lawyers who bring class actions, and of trial judges who certify them. They have done this needlessly and . . . wrongly.” *Id.* at 1429. Also, Elizabeth J. Cabraser has criticized the “avowedly procorporate” nature of Posner’s opinion in *Rhone-Poulenc*, stating that:

Rhone-Poulenc voiced the concern, found nowhere in the Federal Rules, that a classwide

According to the court, the defendants' liability should be determined through a decentralized process, consisting of multiple trials and different juries.¹¹² Thus, by refusing to decide the "fate of an industry" in a single trial, the *Rhone-Poulenc* court laid the foundation for similar certification decisions in the Third and Fifth Circuits.¹¹³

One year after the Seventh Circuit decided *Rhone-Poulenc*, in *Georgine v. Amchem Products, Inc.*, the Third Circuit decertified a nationwide settlement-only class action seeking to resolve the claims of somewhere between 250,000 and 2,000,000 individuals exposed to asbestos.¹¹⁴ The court cited issues with legal predominance and manageability among the primary reasons for its holding.¹¹⁵ Furthermore, the Third Circuit pointed out that problems created by legal variation would be "compounded exponentially" by the complexity of the required choice-of-law analysis.¹¹⁶

trial on liability that the defendant lost would place it into bankruptcy, or force it to settle, short of trial, because the risk of loss, rather than or in addition to the risk presented by the merits, would force a corporate decision to surrender. Since such pressure would not be present had the company faced only a series of scattered individual trials—with lower consequences of defeat, and repeated opportunities for victory—class actions therefore comprise, in the *Rhone-Poulenc* analysis, a form of 'blackmail.'

Utterly absent from *Rhone-Poulenc's* diatribe against class certification was any recognition that the victims had corresponding rights.

Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1481 (2005) [hereinafter Cabraser, *Counterreformation*].

112. See *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1299–1300.

113. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996).

114. See *Amchem*, 83 F.3d at 617. The massive plaintiff class consisted of both individuals who had already suffered injuries and those who had not yet shown signs of a fatal asbestos-related disease. *Id.* The Third Circuit billed the class action as one of the "few great cases [each decade] that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." *Id.* The court chose the latter of the two options, refusing to forge any such solution to the problem of asbestos-related diseases.

115. *Id.* at 627. The *Amchem* court also pointed out that issues of fact did not predominate, as there were significant differences among the type and level of exposure among the plaintiffs. *Id.* at 626. Such analysis of factual predominance is important in every certification decision because the plain text of Rule 23(b)(3) merely requires that common issues of law or fact predominate. See Fed. R. Civ. P. 23(b)(3). In light of the disjunctive nature of the predominance requirement, one commentator has suggested that federal courts should not be able to hide behind legal variation where there are common issues of fact. See Phair, *supra* note 104, at 846 ("In *Amchem Products, Inc v. Windsor*, the Supreme Court noted that '[p]redominance [of fact] is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. . . . Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance [of fact] requirement.' . . . Therefore, if common questions of fact routinely predominate in nationwide Rule 23(b)(3) class actions, the choice-of-law problem with respect to predominance is marginalized." (quoting *Amchem*, 83 F.3d at 625)).

116. See *Amchem*, 83 F.3d at 627.

This analysis from the *Amchem* court further strengthened the growing body of precedent weighing against the certification of multi-state state-law-based class actions.

Following *Rhone-Poulenc* and *Amchem*, the Fifth Circuit denied certification to a nationwide class of smokers in *Castano v. American Tobacco Co.*,¹¹⁷ a case which one source deemed the “paradigmatic example of the choice-of-law problem [in multi-state class actions].”¹¹⁸ The *Castano* court based its holding primarily on the district court’s failure to consider how variations in the applicable state laws would affect the requirements of predominance and superiority.¹¹⁹ As the Fifth Circuit noted, “[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance.”¹²⁰ Thus, in order for a district court to grant certification under Rule 23(b)(3), it must first conduct a “rigorous analysis” of the substantive law issues controlling the litigation.¹²¹ The Fifth Circuit found that the district court failed in this regard, engaging in only a “ cursory review” of the applicable state laws.¹²² Accordingly, the Fifth Circuit conducted its own brief review, concluding in the span of a single footnote that significant state law variations “[made] it difficult to fathom how common [legal] issues could predominate.”¹²³

117. *Castano*, 84 F.3d at 737. In refusing to grant certification, the *Castano* court, much like the *Rhone-Poulenc* court one year prior, displayed a pronounced pro-corporate bias:

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.

Id. at 746 (internal citations omitted).

118. See Phair, *supra* note 104, at 841.

119. *Castano*, 84 F.3d at 744–48.

120. *Id.* at 741 (citing *Amchem*, 83 F.3d at 618; *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996)).

121. *Id.* at 740. In elaborating on this “rigorous analysis” standard, the *Castano* court cited *In re School Asbestos Litigation* as an exemplar of what is required of both plaintiffs and the district court when issues of legal variation arise. *Id.* at 742 (citing *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)). Essentially, the plaintiff must provide an “extensive analysis” of the variation in state law, and the district court must examine the analysis, granting certification only if it is satisfied that such certification would not create “insuperable obstacles.” *Id.*

122. *Id.* at 742.

123. *Id.* at 742 n.15 (citing *Amchem*, 83 F.3d at 626). The Fifth Circuit also pointed out that, similar to the proposed class in *Amchem*, there was a great deal of factual variation among the claims of the nationwide class of smokers:

The [*Castano*] class members were exposed to nicotine through different products, for different amounts of time, and over different time periods. Each class member’s knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons. Each of these factual differences impacts the application of legal rules

In addition to issues regarding predominance, the Fifth Circuit also noted that the complexity of the choice-of-law analysis “ma[de] individual trials a more attractive alternative and, *ipso facto*, render[ed] class treatment not superior.”¹²⁴ Along these same lines, the *Castano* court criticized the district court for recognizing the manageability problems created by the choice-of-law difficulties and failing to provide a suitable rationale for certifying the *Castano* class despite such problems.¹²⁵ Inevitably, the court ruled that the district court’s certification decision was an abuse of discretion and must be overturned.¹²⁶

In the wake of the aforementioned trio of cases, five other federal circuits ruled against certifying multi-state state-law-based class actions.¹²⁷ Thus, it is quite apparent that this unholy trinity of federal appellate court decisions “heralded a seismic shift in federal judicial attitudes toward the propriety of multistate classes.”¹²⁸

B. Impact of Legal Variation on Multi-State State-Law-Based Consumer Class Actions in Federal Court

This prevailing hostility in the federal courts has been particularly damaging for multi-state consumer class actions premised on state UDAPs.¹²⁹ Indeed, when plaintiffs have attempted to bring such actions, the federal courts have typically been very receptive to defendants’ arguments that class certification is inappropriate given the legal variation among state UDAPs. Two cases in particular, *In re Bridgestone/Firestone, Inc.*¹³⁰ and *In re Pharmaceutical Industry Average Wholesale Price Litigation (AWP)*,¹³¹

such as causation, reliance, comparative fault, and other affirmative defenses.

Id. at 742–43 n.15.

124. *Id.* at 749–50 (citing *Amchem*, 83 F.3d at 634).

125. *Id.* at 747–49.

126. *Id.* at 752.

127. See *Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996).

128. Marcus, *supra* note 4, at 1285 (citing Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 385–88 (2005)).

129. As the Senate Report accompanying CAFA explains, “six Circuit Courts and 26 District Courts have consistently denied certification of multi-state consumer cases.” S. REP. NO. 109-14, at 86 (2005), as reprinted in 2005 U.S.C.A.N. 3.

130. 288 F.3d 1012 (7th Cir. 2002).

131. 230 F.R.D. 61 (D. Mass. 2005).

illustrate the different ways in which multi-state consumer class actions have been dealt with in the federal system.

1. *In re Bridgestone/Firestone, Inc.*

The Seventh Circuit's holding in *Bridgestone/Firestone* is representative of recent judicial hostility toward multi-state consumer class actions. In the late 1990s, certain Firestone tires sold on Ford Explorer SUVs contained defects, which caused the tires to fail at an abnormally high rate and lead to injuries and deaths.¹³² There were two broad categories of litigation pertaining to the aforementioned defects: (1) plaintiffs seeking to recover for personal injuries; and (2) plaintiffs seeking to recover under state UDAPs for the risk that their Firestone tires would fail.¹³³ In 2000, all such lawsuits filed in, or removed to federal court, were consolidated in the U.S. District Court for the Southern District of Indiana.¹³⁴ One year later, the district court certified two nationwide classes: (1) owners and lessees of various Firestone tires; and (2) owners and lessees of various Ford Explorer models.¹³⁵

At the outset of its analysis of the district court's certification order, the Seventh Circuit expressed unmistakable resistance to multi-state, state-law-based class actions, stating that "[n]o class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of [Rule] 23(a), (b)(3)."¹³⁶ The Seventh Circuit then criticized the district court for misapplying Indiana's *lex loci delicti* choice-of-law doctrine and finding that only one state's law—the law of the defendants' headquarters—would govern each nationwide class.¹³⁷ Given this standard, the Seventh Circuit

132. *Bridgestone/Firestone*, 288 F.3d at 1014.

133. *Id.* at 1014–15.

134. *Id.* at 1015.

135. *Id.*

136. *Id.*

137. Federal courts have often expressly rejected arguments that the law of the defendants' headquarters or principal place of business should be applied to all putative class members' claims in a multi-state state-law-based class action. See *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 314 (5th Cir. 2000) (rejecting the notion that the law of the state "where the product was manufactured and where it was placed in the stream of commerce" should control the warranty claims of each putative class member in a nationwide product defect class action); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 83 (D. Mass. 2005) (nationwide class bringing claims under state UDAPs; court declined to apply law of defendants' headquarters finding that "the home state of the consumer ha[d] a more significant relationship to the alleged fraud than the place of business of the defendant"); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 70 (S.D.N.Y. 2002) (concluding that New Jersey's interest in regulating the conduct of resident manufacturer did not outweigh the interests of "every other state in ensuring that its own citizens are compensated for their injuries" and "that the standards it sets for product sales within its borders are complied with"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 370–71 (E.D. La. 1997) (rejecting plaintiffs'

explained that, if recovery under the state UDAPs were possible, then “the injury [was] decidedly where the *consumer* [wa]s located, rather than where the seller maintains its headquarters.”¹³⁸ Thus, the court concluded that the consumer protection laws of all fifty states and multiple territories would apply.¹³⁹

After finding that the consumer protection laws of multiple jurisdictions would govern the litigation, the court stated that “[s]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state’s law to sales in other states with different rules.”¹⁴⁰ The court found that the legal variation among the state consumer-protection laws rendered the nationwide classes unmanageable.¹⁴¹ Thus, the Seventh Circuit reversed the district court’s order granting certification under Rule 23(b)(3).¹⁴²

2. *In re Pharmaceutical Industry Average Wholesale Price Litigation*

Whereas the Seventh Circuit’s decision in *Bridgestone/Firestone* illustrates the typical attitude of federal courts addressing the certification of multi-state state-law-based class actions, the U.S. District Court for the District of Massachusetts’ recent decision in *AWP* reflects a more welcoming approach. In *AWP*, the plaintiffs asserted claims against forty-two pharmaceutical manufacturers, claiming that the defendants fraudulently

proposal to apply Michigan law to warranty claims of 650,000 putative class members because that jurisdiction was defendants’ principal place of business and the alleged location of key vehicle design decisions); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 497–98 (S.D. Ill. 1999) (rejecting proposed application of law of defendant’s principal place of business in nationwide product defect class action); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456–57 (D.N.J. 1998) (refusing to apply law of manufacturer defendant’s home state to all claims, noting that each class member’s home state “has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws”); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423 (E.D. La. 1997) (“[T]he analysis favors application of some law other than that of Masonite’s primary place of business.”).

138. *Bridgestone/Firestone*, 288 F.3d at 1017.

139. *Id.* at 1018. In multi-state consumer class actions premised on state UDAPs, federal courts typically hold that the UDAP of each state where a class member resides must be applied. See *Lyon v. Caterpillar*, 194 F.R.D. 206, 211–12 (E.D. Pa. 2000) (“All of the relevant jurisdictions have an interest in utilizing the state [UDAP] crafted by their state’s legislature to protect their consumers and/or residents.”).

140. See *Bridgestone/Firestone*, 288 F.3d at 1018 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568–73 (1996)); see also *In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)) (“[A] court must give effect to variations in state law, however minor they may be.”).

141. See *Bridgestone/Firestone*, 288 F.3d at 1018.

142. *Id.* at 1020.

and grossly inflated the price of certain drugs by misstating their “average wholesale prices” in industry publications.¹⁴³ The plaintiffs sought certification of three nationwide classes, including a class of all consumers and entities who overpaid on co-payments for certain physician-administered drugs.¹⁴⁴ The nationwide consumer class asserted claims under the state UDAPs of forty-seven states.¹⁴⁵ Predictably, the defendant pharmaceutical companies argued that, given the legal variation among state UDAPs, common issues of law or fact could not possibly predominate.¹⁴⁶ However, unlike the Seventh Circuit, the district court in *AWP* found this argument entirely unpersuasive.

In order to analyze the predominance challenge, the *AWP* court first determined which law would govern the proposed class.¹⁴⁷ Applying Massachusetts’ choice-of-law principles, the court explained that, “[although] the defendants made the alleged misrepresentations in the states of their principal places of business when sending the AWP’s to publishers . . . the home state of the consumer ha[d] a more significant relationship to the alleged fraud.”¹⁴⁸ Thus, the court found that each putative class member’s claims would be governed by the state UDAP of his or her state of residence.¹⁴⁹

However, unlike the *Bridgestone/Firestone* court, the *AWP* court was quick to point out that its choice-of-law decision did not sound the death knell for the proposed class:

Having smelled victory on the choice-of-law issue, defendants expect a knock-dead punch on their argument that the differences among the state consumer laws are so significant that they cause individual issues to predominate. Indeed, in a double-dare at oral

143. *In re Pharm. Indus. Average Wholesale Price Litig. (AWP)*, 230 F.R.D. 61, 65 (D. Mass. 2005). The plaintiffs claimed that, as a result of these overstated average wholesale prices, millions of people and 11,000 third party payors overpaid for medications. *Id.*

144. *Id.* at 77. The physician-administered drug class was further broken down into three subclasses: (1) consumers who made co-payments for physician-administered drugs under Medicare; (2) third-party payors that paid supplemental insurance for co-payments made by Medicare beneficiaries; and (3) third-party payors that made payment for physician-administered drugs outside the Medicare context. *Id.*

145. *See id.* at 77.

146. *See id.* at 82.

147. *See id.* at 82–83.

148. *Id.* at 83. The *AWP* court’s conclusion was based in large part on the rationale that the “state consumer protection statutes are designed to protect consumers rather than to regulate corporate conduct.” *See id.* As Elizabeth Cabraser explains, this rationale is problematic in that it leaves a state with no recourse when a corporate entity within its jurisdiction engages in misconduct that only impacts non-resident consumers. Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 566. Cabraser argued that “[i]n this era of nationwide marketing of consumer goods, the resulting gap seems anachronistic.” *Id.*

149. *AWP*, 230 F.R.D. at 83.

argument, they waxed that no court in the nation has successfully certified a nationwide consumer class for litigation (as opposed to settlement) purposes.¹⁵⁰

Rather than simply declare the litigation unmanageable, the *AWP* court actually considered how differences in the state UDAPs might play out in the litigation, and then acted accordingly. First, the court excluded all claims brought under state UDAPs that prohibit either private or class action litigation.¹⁵¹ Second, the court analyzed the differences in the scienter requirements of the remaining state UDAPs and found that they were irrelevant to the litigation at hand.¹⁵² Finally, the *AWP* court noted that, in the context of consumers simply making a co-payment based on a stated average wholesale price, differing standards of reliance and causation among the state UDAPs could easily be managed.¹⁵³ Thus, the court granted conditional certification under Rule 23(b)(3).¹⁵⁴

The district court's certification decision in *AWP* represents a much different approach than that of the Seventh Circuit in *Bridgestone/Firestone*. However, it is doubtful that *AWP* can stand up to the veritable mountain of precedent favoring defendants in multi-state consumer class action for two reasons. First, unlike in *AWP*, in most consumer class actions, differing standards among the various state UDAPs with respect to scienter, reliance, and causation will likely be relevant, if not outcome dispositive. Second, the *AWP* court's decision was "highly discretionary" and "neither guarantee[s] nor preclude[s] that similar classes [will] or [will] not be certified by other courts."¹⁵⁵

150. *Id.*

151. *See id.* Private consumers are unable to bring claims under Iowa's state UDAP, and class actions are prohibited under the state UDAPs of Alabama, Alaska, Georgia, Kentucky, Louisiana, Mississippi, and Montana. *See supra* note 67, 71–73 and accompanying text. Thus, claims premised on any of these state UDAPs were dropped from the litigation by the *AWP* court. *AWP*, 230 F.R.D. at 83.

152. The *AWP* court found that there was no state where an intentional, fraudulent act would be permitted under the consumer protection statute. *AWP*, 230 F.R.D. at 85. Thus, because the plaintiffs only alleged that the defendants intentionally made fraudulent misrepresentations as to the average wholesale prices, the different scienter requirements in the state UDAPs were not pertinent to the litigation. *Id.*

153. *See id.*

154. *Id.* at 96. The *AWP* court did not grant certification to either of the other proposed nationwide classes. *See id.* at 86, 90.

155. Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 567. Although careful not to say that the *AWP* court's ruling represents a new trend in the federal system, Cabraser expresses some optimism regarding future certification decisions in multi-state class actions: "The *AWP* decision

V. POSSIBLE SOLUTIONS TO CERTIFICATION ISSUES IN FEDERAL COURT

In light of the federal courts' recent certification decisions, it appears that CAFA will have the effect that pro-business lobbyists were hoping for: extend federal jurisdiction to consumer class actions of national importance, only to have the federal courts deny certification on the basis that choice-of-law issues create manageability concerns. Unfortunately, if this scenario does become a reality, then many injured consumers will be left with virtually no remedy when corporations violate the law.¹⁵⁶ Thus, the choice-of-law problem must be solved in order to ensure that CAFA achieves its stated goal of providing a federal forum that will actually decide interstate cases of national importance.¹⁵⁷

A. Proposed Feinstein–Bingaman Amendment to CAFA

Recognizing that CAFA, “if left uncorrected, could leave many properly filed multistate consumer class actions without a forum,”¹⁵⁸ Senators Diane Feinstein (D-CA) and Jeff Bingaman (D-NM) proposed an amendment that they hoped would neutralize the choice-of-law problem. The proposed amendment read as follows:

(c) CHOICE OF STATE LAW IN INTERSTATE CLASS ACTIONS.—Notwithstanding any other choice of law rule, in any class action, over which the district courts have jurisdiction, asserting claims arising under State law concerning products or services marketed, sold, or provided in more than 1 State on behalf of a proposed class, which includes citizens of more than 1 such State, as to each such claim and any defense to such claim—

- (1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied;
- (2) the district court shall require each party to submit their recommendations for subclassifications among the plaintiff class

is . . . noteworthy as a precursor of a fresh approach in the federal courts, one that will reconcile variations of state law with the overall predominance of common legal issues in a given case, thereby enabling complex multi-state classes to proceed under a class action framework.” *Id.* at 567. Cabraser explains that the *AWP* court’s holding should be taken seriously, because earlier decisions denying certification to multi-state classes may “as a matter of procedural justice, [be] obsolete . . . [because] CAFA has eliminated the state court ‘safe harbor’ in which single-state class actions can be litigated.” *Id.*

156. See *infra* notes 276–278 and accompanying text.

157. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–15) (explaining that one of the purposes of CAFA is to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance”).

158. 151 CONG. REC. S1157-02, S1167 (daily ed. Feb. 9, 2005) (statement of Sen. Bingaman).

based on substantially similar State law; and

(3) the district court shall—

(A) issue subclassifications, as determined necessary, to permit the action to proceed; or

(B) if the district court determines such subclassifications are an impracticable method of managing the action, the district court shall attempt to ensure that plaintiffs' State laws are applied to the extent practical.¹⁵⁹

In essence, the proposed Feinstein–Bingaman amendment (the Amendment) was meant to ensure that district court judges would no longer refuse to certify multi-state consumer class actions merely because the consumer protection laws of different states—potentially even fifty states—would apply.¹⁶⁰ With this objective in mind, the Amendment offered two basic solutions to the choice-of-law problem: (1) apply the substantive law of one state to all class members; or (2) make a more concerted effort to utilize subclasses. Unfortunately, the Amendment, dubbed a “compromise” amendment by its sponsors,¹⁶¹ was ultimately struck down on the final day of debate in the Senate.¹⁶² However, the proposed solutions in the Amendment should not be deemed impractical or unhelpful simply because the Amendment itself was not enacted.¹⁶³ Thus, each of these proposed solutions will be dealt with in turn.

159. *Id.* at S1166.

160. As Senator Bingaman stated, “If we are going to take away the right of State judges to hear a class action, it is incumbent upon us to make sure the Federal judge is not able to not certify the class because too many State laws would apply. That would be an unfair result.” *Id.* at S1168. However, other senators felt that the amendment itself would create an unfair result. Senator Grassley, for instance, argued that “[t]he net result of [the Feinstein–Bingaman] amendment is that it would require Federal judges to hear dissimilar claims that do not belong together as a class action” *Id.* at S1171.

161. *Id.* at S1166 (statement of Sen. Feinstein) (“What [Senator Bingaman and I] tried to do, and did, was develop a compromise amendment that provides Federal judges with guidance on how to proceed in [multi-state consumer class actions], while leaving the judges with the discretion they need to manage their court dockets.”).

162. *Id.* at S1184 (Feinstein–Bingaman amendment defeated 61–38 in Senate vote).

163. The argument against disregarding the solutions proposed in the Feinstein–Bingaman amendment, simply because the amendment itself failed to pass the Senate, is bolstered by at least one commentator’s suggestion that the substance of the amendment was not the primary reason that it was struck down. See Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 551–52 (suggesting that the Feinstein–Bingaman amendment, and several other provisions that would have clarified “key terms” in CAFA, were rejected “[p]rimarily because . . . proponents [of CAFA] imposed a ‘no amendments’ rule to expedite its passage”).

1. Applying One State's Law in a Multi-State State-Law-Based Consumer Class Action

Any attempt to apply one state's consumer protection statute to out-of-state litigants must, in the first instance, be informed by the statute's text and legislative history. If the text and legislative history of the statute provide an explicit directive against applying it to non-resident plaintiffs, then that directive trumps other choice-of-law rules.¹⁶⁴ Thus, because the consumer protection statutes of at least seventeen states arguably contain such a directive, applying those statutes to out-of-state plaintiffs in a multi-state class action could be deemed inappropriate.¹⁶⁵

Unlike the abovementioned statutes, other states' UDAPs are silent with respect to their geographic reach. In light of this silence, various federal and state courts have suggested that the consumer protection statutes of at least thirteen states could be applied to non-resident plaintiffs. The thirteen states include: California,¹⁶⁶ Delaware,¹⁶⁷ Florida,¹⁶⁸ Illinois,¹⁶⁹ Iowa,¹⁷⁰

164. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.")

165. See ALA. CODE § 8-19-3(8) (2007) (consumer protection statute meant to govern only trade or commerce "affecting the people of [Alabama]"); IDAHO CODE ANN. § 48-602(2) (2007) (consumer protection statute intended to govern "trade" or "commerce . . . directly or indirectly affecting the people of this state"); KY. REV. STAT. § 367.110(2) (West 2007) (same); LA. REV. STAT. ANN. § 51:1402(9) (2007) (same); ME. REV. STAT. ANN. tit. 5, § 206(3) (2007) (same); MASS. GEN. LAWS ANN. ch. 93A, § 1(b) (West 2007) (same); MISS. CODE ANN. § 75-24-3(b) (West 2007) (same); MO. REV. STAT. § 407.010(7) (2007) (same); MONT. CODE ANN. § 30-14-102(8) (2007) (same); NEB. REV. STAT. § 59-1601(2) (2007) (same); N.H. REV. STAT. ANN. § 358-A:1(II) (2007) (same); N.M. STAT. ANN. § 57-12-2(C) (West 2007) (same); OR. REV. STAT. ANN. § 646.605(8) (West 2007) (same); 73 PA. STAT. ANN. § 201-2(3) (West 2007) (same); R.I. GEN. LAWS § 6-13.1-1(5) (2007) (same); S.C. CODE § 39-5-10(b) (2007) (same); TEX. BUS. & COM. CODE ANN. § 17.45(6) (Vernon 2007) (same); W. VA. CODE ANN. § 46A-6-102(6) (West 2007) (same).

166. See *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 243 (Ct. App. 2001) (upholding certification of nationwide class action brought under California's consumer protection statutes where "the defendant [was] a California corporation and some or all of the challenged conduct emanate[d] from California"); *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 614-15 (Ct. App. 1987) (reversing denial of certification to nationwide class action premised on California's consumer protection laws where Plaintiff alleged that the "fraudulent misrepresentations and unfair business practices forming the basis of the claim of each member of the proposed nationwide class emanated from California").

167. See *Lony v. E.I. DuPont de Nemours & Co., Inc.*, 821 F. Supp. 956, 961-62 (D. Del. 1993) (reversing summary judgment against out-of-state plaintiff on consumer protection act claim and explaining that if it "were to accept [the] proposition that only Delaware residents [we]re afforded the protections of the Consumer Fraud statute, the construction mandated by the Delaware General Assembly would be lost").

168. The Florida courts have been somewhat unclear as to whether or not the state's consumer protection statute should be applied to non-residents. However, it appears that the weight of authority favors application to out-of-state consumers. See *Millennium Commc'ns & Fulfillment, Inc. v. Office of Attorney Gen.*, 761 So. 2d 1256, 1262 (Fla. Dist. Ct. App. 2000) (holding that out-of-state consumers could bring action under Florida's consumer protection statute against Florida business for sending allegedly deceptive solicitations because the "offending conduct occurred entirely within [Florida]"); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439 (Fla. Dist.

Michigan,¹⁷¹ Minnesota,¹⁷² New Jersey,¹⁷³ Ohio,¹⁷⁴ Oklahoma,¹⁷⁵
Tennessee,¹⁷⁶ Washington,¹⁷⁷ and Wisconsin.¹⁷⁸

Ct. App. 1999) (granting certification to nationwide class action brought under Florida's consumer protection act against cruise line for deceptively including certain charges in price of cruise where principal place of business of cruise line was in Florida and pertinent contract and marketing information was developed in Florida). *But see* *Oce Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.*, 760 So. 2d 1037 (Fla. Dist. Ct. App. 2000) (holding that only in-state consumers can pursue a valid claim under Florida's Unfair Trade Act).

169. *See* *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 853–54 (Ill. 2005) (holding that a non-resident plaintiff “may pursue a private cause of action under the Consumer Fraud Act if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois”).

170. *See* *Iowa ex rel. Miller v. New Womyn, Inc.*, 679 N.W.2d 593, 597 (Iowa 2004) (holding that Iowa's consumer fraud act provides for restitution for all consumers, including non-residents).

171. *See* *Nesbitt v. Am. Cmty. Mut. Ins. Co.*, 600 N.W.2d 427, 433 (Mich. Ct. App. 1999) (holding that, when “a Michigan-licensed company, operating from its home office within [the] state, has engaged in trade or commerce” with a person, that person may bring a claim under Michigan's consumer protection act, regardless of his or her status as a non-resident of Michigan).

172. *See In re St. Jude Med., Inc.*, No. 01-1396, 2006 WL 2943154, at *6 (D. Minn. Oct. 13, 2006) (applying Minnesota's consumer protection statute in a nationwide class action against a Minnesota heart valve manufacturer and concluding (1) that “[c]onsumer protection statutes focus on the behavior of the defendant, and therefore it is appropriate to apply [the] law . . . [of the state] where the defendant ha[d] the most contacts,” and (2) that there was “no basis for a Minnesota corporation manufacturing a product in Minnesota to escape liability from consumer protection laws in Minnesota merely because plaintiffs [had] contacts with other states”).

173. *See* *Dal Ponte v. Am. Mortg. Exp. Corp.*, No. 04-2152, 2006 WL 2403982 (D.N.J. Aug. 17, 2006). *Dal Ponte* involved a nationwide consumer class action claiming fraud on the part of a New Jersey credit loan company. *Id.* at *1–2. After finding that New Jersey had “the strongest interest in applying its consumer fraud statute” to the litigation, the court concluded that the New Jersey consumer fraud statute “was intended to be one of the strongest consumer protection laws in the nation” and did not “exclude[] from its protections non-New Jersey residents who deal with New Jersey businesses.” *Id.* at *6–7. *See also* *Boyes v. Greenwich Boat Works, Inc.*, 27 F. Supp. 2d 543, 547 (D.N.J. 1998) (“This court has little doubt that the New Jersey Legislature intended its Consumer Fraud statute to apply to sales made by New Jersey sellers even if the buyer is an out-of-state resident and some aspect of the transaction took place outside New Jersey.”); *Peterson v. BASF Corp.*, 618 N.W.2d 821, 826 (Minn. Ct. App. 2000) (certifying nationwide class action under New Jersey's Consumer Fraud Act); *Kulger v. Haitian Tours, Inc.*, 293 A.2d 706, 711 (N.J. Super. Ct. Ch. Div. 1972) (holding that the New Jersey Consumer Fraud Act “is not confined by its terms or spirit to activities involving residents of [New Jersey, and] . . . it prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon”).

174. *See* *Brown v. Mkt. Dev., Inc.*, 322 N.E.2d 367, 369 (Ohio Ct. Com. Pl. 1974) (“The court concludes that the [Ohio Consumer Sales Practices] Act is intended to prohibit . . . deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions, irrespective of the location of the consumer, whether within or without Ohio.”).

175. *See* *Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048, 1054 (Okla. Civ. App. 1999) (holding that Oklahoma's consumer protection law could apply to a nationwide class).

176. *See* *Steed Realty v. Oveisi*, 823 S.W.2d 195, 198 (Tenn. Ct. App. 1991) (holding that “[t]here is no requirement that one be a resident of [Tennessee] in order to bring an action” under the Tennessee Consumer Protection Act).

Assuming that one state's consumer protection statute may be applied to out-of-state plaintiffs, there is still another significant hurdle standing in the way of applying a single uniform standard in a multi-state consumer class action—namely, the Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*.¹⁷⁹ In *Shutts*, the Supreme Court created a two-prong test which established the constitutional limits for applying a single state's law to the claims of all class members in a multi-state class action.¹⁸⁰ Under the first prong, a court must determine if there is a "material" conflict between the single state law sought to be applied and the substantive law of any other state implicated in the litigation.¹⁸¹ If no such material conflict exists, then it is constitutionally permissible to apply a single legal standard.¹⁸² If a material conflict is brought to light, however, then under the second prong of the *Shutts* test, for one state's substantive law to apply to the entire class that state must have "a significant contact or significant aggregation of contacts, creating state interests, such that [the] choice of its law is neither arbitrary nor fundamentally unfair."¹⁸³

Pursuant to the Court's holding in *Shutts*, a single legal standard could potentially be applied in a multi-state consumer class action. In light of this potential, the Amendment sought to fix the choice-of-law problem by "effectively codif[ying]" *Shutts*.¹⁸⁴ Professor Arthur Miller summed up this first solution in a letter to Senator Bingaman when he explained:

177. Washington's consumer protection statute is meant to govern "commerce directly or indirectly affecting the people of the state of Washington." WASH. REV. CODE ANN. § 19.86.010 (West 2007). Thus, an argument could be made that it should not be applied to out-of-state litigants. However, there is also persuasive evidence that it may be applied to such out-of-state plaintiffs. *Id.* at § 19.86.090 (providing a private right of action to "[a]ny person who is injured in his or her business or property" by a violation of the state's consumer protection act); see also Schnall v. AT&T Wireless Servs., Inc., 161 P.3d 395, 402–03 (Wash. Ct. App. 2007) (holding that Washington's Consumer Protection Act, rather than the law of state in which defendant communications company was headquartered, governed consumers' nationwide class action).

178. See *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1415 (N.D. Ill. 1996) ("Defendants have failed to present any persuasive authority such as legislative history or actual court holdings that [Wisconsin's Consumer Protection Act] only gives rise to a cause of action for Wisconsin residents. We reject the contention. This Court's review of the statute leads to the conclusion that the Act may be violated so long as the allegedly deceptive or misleading representation was 'ma[de], publish[ed], disseminate[d], circulate[d], or placed before the public, in [Wisconsin]' and the citizenship of the individual receiving the deceptive or misleading statement is of no consequence.").

179. 472 U.S. 797 (1985).

180. See *id.* at 816–18.

181. *Id.* at 816.

182. *Id.*

183. *Id.* at 818.

184. 151 CONG. REC. S1157-02, S1171 (2005) (letter from Arthur R. Miller, Professor, Harvard Law School).

[The Feinstein–Bingaman] amendment would allow a federal court to choose not to follow the choice-of-law rule of the state in which the court is located. The federal judge could instead make the case more manageable by choosing the law of one state with sufficient ties to the underlying claims to meet the choice of law requirements that the Constitution demands be met.¹⁸⁵

However, if the Amendment would truly have allowed a district court to simply disregard the choice-of-law rule of the state in which it sits, then it would have done more than merely codify *Shutts*. In addition, it would have overruled the Supreme Court’s decision in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,¹⁸⁶ which requires a federal court sitting in diversity to apply the choice-of-law rules of the state in which it is located.¹⁸⁷ As opponents of the Amendment noted, in granting a federal court the discretion to set aside the choice-of-law rule of the state in which it is located, the Amendment seemingly would have lead to a “serious distortion of federalism principles.”¹⁸⁸ Thus, it was appropriate to summarily reject this provision in the proposed Amendment.

185. *Id.* at S1170.

186. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The phrase, “[n]otwithstanding any other choice of law rule,” at the very beginning of the Amendment, seems to imply that a district court would have been able to simply disregard *Klaxon* when performing its choice-of-law analysis. See *supra* note 160 and accompanying text.

187. *Klaxon*, 313 U.S. at 496. Overruling *Klaxon* would be highly inappropriate given the important federalism principles underlying the Court’s holding. See *In re Jackson Nat’l Life Ins. Co. Premium Lit.*, 183 F.R.D. 217, 223 (W.D. Mich. 1998) (“[T]he choice-of-law analysis is a matter of due process and is not to be altered in a nationwide [or multi-state] class action simply because it may otherwise result in procedural and management difficulties.”). As the Court noted in *Klaxon*, a federal court sitting in diversity must apply the choice-of-law rule of the state in which it is located, because “[o]therwise the accident of diversity of citizenship would constantly disturb [the] equal administration of justice in coordinate state and federal courts sitting side by side.” *Klaxon*, 313 U.S. at 496. The Court further justified its holding by stating that any “lack of uniformity this [ruling] may produce between federal courts in different states is attributable to [the] federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.” *Id.*

188. 151 CONG. REC. S1157-02, S1173 (2005) (letter from Walter Dellinger, Partner, O’Melveny & Myers LLP). The argument that the Amendment would have violated basic federalism principles appeared throughout the Senate debate. First, as Walter Dellinger explained in a letter to the Chairman of the Committee on the Judiciary:

When [Congress] is acting within its constitutional power under Article I, [it] can decide to impose a uniform rule on the states. It is a far more serious intrusion into the autonomy of the States when a single judge, not Congress, acts to set aside the laws of all of the states (but one) by choosing whichever particular state law the judge likes best and imposing that law on all of the other states.

Id. at S1172. Dellinger also noted that the Amendment would have “eviscerate[d] a number of

Given the continuing viability of the Court's holding in *Klaxon*, the *Klaxon* analysis will "remain[] the fulcrum through which all choice-of-law inquiries must pass."¹⁸⁹ Interestingly enough, this creates yet another obstacle for a court attempting to apply one state's consumer protection statute to non-resident plaintiffs. Indeed, although it may be constitutionally permissible for a federal court, pursuant to *Shutts*, to apply one state's substantive law to all class members in a multi-state consumer class action, "the court may [still] be foreclosed from considering such a possibility by *Klaxon*'s obligation to apply the forum state's choice-of-law methodology."¹⁹⁰ However, this does not necessarily mean that all hope of utilizing *Shutts* to solve the choice-of-law problem is lost. In fact, in states which have adopted the Restatement (Second) of Conflict of Laws as their choice-of-law rule,¹⁹¹ district courts have a great deal of latitude in terms of framing and applying the *Klaxon* analysis.¹⁹² Thus, at least in the aforementioned states, a federal court may be able to justify applying a single legal standard to all class members in a multi-state consumer class action by "refocus[ing] the *Klaxon* analysis on the policy of distributing greater justice to small plaintiffs in negative value suit scenarios."¹⁹³ However, this argument rests squarely on the assumption that federal courts will be willing to refocus the *Klaxon* analysis in this manner—an assumption which is questionable at best.¹⁹⁴

decisions by state supreme courts, refusing to apply one state's consumer protection laws in nationwide class actions." *Id.* In effect, Dellinger and others were concerned that, by permitting a district court to apply a single state's law in a multi-state class action, the Amendment would have wreaked havoc on the principle of state sovereignty. However, as one commentator pointed out more than two decades ago, "[i]f there is a threat to federalism or state sovereignty in a multistate class action, it comes from improper choice of law Effective limits on choice of law . . . should satisfy that concern." John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1065 (1983). Such effective limits on the choice-of-law analysis are currently in place as a court must look to both *Shutts* and *Klaxon* when determining if the use of a uniform legal standard is permissible in a multi-state state-law-based class action.

189. Phair, *supra* note 104, at 851.

190. *Id.*

191. Ten states currently follow the *lex loci delicti* choice-of-law rule, which dictates that, when a conflict of laws arises, a court should apply the law of "the state where the last event necessary to make [the] actor liable for an alleged tort [took] place." Jeremy T. Grabill, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 303 (2005). The rest of the states have adopted modern approaches which "differ only in detail from" the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971)) ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . .").

192. See Phair, *supra* note 104, at 852 ("The *Klaxon* analysis is a subjective inquiry requiring a balancing of loosely defined factors and ambiguous interests, and as a result, a district court retains a tremendous amount of discretion.").

193. Phair, *supra* note 104, at 852–53.

194. There is at least one example—albeit not in the context of a multi-state class action premised on state UDAPs—where a federal district court framed the *Klaxon* analysis in this manner. As Phair

The aforementioned assumption is particularly tenuous in light of evidence presented in the Senate Report accompanying CAFA (the Report).¹⁹⁵ According to the Report, one of the main purposes of CAFA was to fix the problem of “false federalism.”¹⁹⁶ Elaborating on the significance of this problem, the Report lamented that “many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to other states, resulting in a breach of federalism principles.”¹⁹⁷ Thus, the “problem” that the Report refers to as “false federalism” and purports to solve by enacting CAFA, is the very thing which the Supreme Court’s holding in *Shutts* has been interpreted to promote—the application of a single state’s law to all asserted claims in a multi-state class action.¹⁹⁸

The Report also argued that there is “ample evidence” suggesting that, unlike state courts in the past, the federal courts will not fall prey to such “false federalism.”¹⁹⁹ First, federal courts have “consistently heeded the Supreme Court’s admonitions” against courts from one state applying their state’s laws to conduct occurring outside the state’s borders.²⁰⁰ Second, in

explains:

[I]n *In re Seagate Technologies Securities Litigation*, a California district court, applying California’s comparative impairment version of interest analysis, presented the relevant interest inquiry as a choice between a foreign state’s interest in allowing their resident’s legal “claims to proceed under [another state’s] law—or not at all.” The underlying assumption is that if the *Shutts* test and the *Klaxon* analysis truly resulted in the applicability of all fifty states’ laws then a nationwide class action could never be certified and the policies underlying Rule 23 would be defeated. Therefore, the court held that a foreign state’s interest in the maintenance of a class action at all outweighs its interest in the application of its own laws to its residents, and consequently, the law of the forum state should be applied.

Phair, *supra* note 104, at 852 (footnotes omitted). However, the weight of authority in federal case law strongly suggests that the federal judiciary will not be quick to refocus, or alter, the *Klaxon* analysis in order to apply one state’s law to all putative class members in a multi-state consumer class action. See *infra* note 202 and accompanying text.

195. S. Rep. No. 109-14, at 61–64 (2005).

196. *Id.* at 61. The term “false federalism” was created by Walter Dellinger—the Acting Solicitor General during the Clinton Administration—whose law firm figured prominently in the passage of CAFA.

197. *Id.*

198. See *id.* at 63; see also *supra* notes 179–88 and accompanying text.

199. See S. Rep. No. 109-14, at 62.

200. See *id.* at 62–63 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (“A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.”)); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (cited for proposition that states should not apply their own laws to matters with which they have no significant contact); *Bigelow v. Virginia*,

the multi-state class action context, federal courts have respected each state's interest in ensuring that its residents receive the benefits of its laws.²⁰¹ Finally, according to the report:

[I]n [the] very few instances in which a federal district court has toyed with the idea of engaging in “false federalism” (*i.e.*, applying a single state's law to all asserted claims [in nationwide or multi-state class actions]), that notion has been reversed on appeal almost immediately. The bottom line is that over the past ten years, the federal court system has not produced any final decisions—not even one—applying the law of a single state to all claims in a nationwide or multi-state class action. And there are hundreds of federal court decisions . . . flatly rejecting arguments to use such a “false federalism” choice-of-law approach—applying the laws of a single state to all claims in a multi-state case. [This record] confirms that the passage of [CAFA] will end the “false federalism” game that is occurring in the state court class action arena.²⁰²

In light of this evidence, it appears unlikely that federal courts will make any additional effort to utilize the *Shutts* test to manage multi-state class actions now that CAFA has been enacted.²⁰³

421 U.S. 809, 824 (1975) (“A state does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that state.”); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of [one State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.”); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of the other states.”)).

201. S. Rep. No. 109-14, at 63.

202. *Id.* at 63–64 (internal citations omitted). According to the Report, an Institute for Civil Justice/RAND study offers three additional rationales for permitting the federal judiciary to adjudicate more interstate class actions:

- (1) “[F]ederal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly;”
- (2) “state judges may not have adequate resources to oversee and manage class actions with a national scope;” and
- (3) “if a single judge is to be charged with deciding what law will apply in a multi state class action, it is more appropriate that this take place in federal court than in a state court.”

Id. at 67 (citing DEBORAH HENSLER ET AL., *CLASS ACTION DILEMMAS, PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 28 (1999)).

203. See Joel S. Feldman, *Class Certification Issues for Non-Federal Question Class Actions—Defense Perspective*, 710 PLI/LIT 259, 346 (2004) (“Federal courts almost unanimously reject plaintiffs’ attempt to apply the law of one state in non-federal question class suits. Courts find this attempt to end-run legal variation as a simplistic approach that ignores state law choice of law principles and violates constitutional due process concerns.”).

However, given the potential viability of *Shutts* as a solution to the choice-of-law problem, one could argue that the federal courts *should* be required to engage in a *Shutts* analysis whenever a conflict of law arises in a multi-state consumer class action. This argument is bolstered by evidence in the Report that federal courts, as opposed to their state-level counterparts, are far more capable of balancing the pertinent state interests and contacts as required under *Shutts*.²⁰⁴ Furthermore, the federal courts' rationale for refusing to apply the *Shutts* rule before CAFA was enacted—if we do not act, the state courts will—is no longer tenable.²⁰⁵ For all intents and purposes, the state court system is no longer a plausible alternative for most multi-state consumer class actions.²⁰⁶ Much to the contrary, “[t]he federal courts . . . are now the near-exclusive guardians of absent class members’ procedural due process interests—including the fundamental right of access to the courts.”²⁰⁷ Given this background, at the very least, federal courts should not be able to simply assume that a multi-state consumer class action is unmanageable and thereby avoid the *Shutts* rule altogether.²⁰⁸

At this point, before moving on to discuss the use of subclasses in multi-state consumer litigation, it is important to address one more issue regarding the application of one state’s consumer protection statute to out-of-state plaintiffs. This issue arises from the Senate debate, wherein opponents of the Amendment argued that applying one state’s UDAP could actually end up hurting non-resident consumers.²⁰⁹ Developing this argument, opponents of the Amendment pointed out that, if the laws of a state with historically weak consumer protection measures were applied to class members residing

204. S. REP. NO. 109-14, at 60–61 (2005) (“It is far more appropriate for a federal court to interpret the laws of various states (a task inherent in the constitutional concept of diversity jurisdiction), than for one state court to dictate to other states what their laws mean or, even worse, to impose its own state law on a nationwide case.”).

205. See Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 552–53 (explaining that, prior to CAFA, in multi-state consumer cases “federal trial or appellate courts were able to evade application of the *Shutts* rule, and avoid dealing with multistate class actions at all, in significant part because the state court system remained a plausible alternative”).

206. See *supra* notes 9–10 and accompanying text.

207. Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 546.

208. See Cabraser, *Manageable Nationwide Class*, *supra* note 12, at 546–47 (citing the Supreme Court’s holding in *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) and stating that, although *Hyatt* was not a class action, it “timely reaffirm[ed] that courts who conduct a faithful *Shutts* choice-of-law analysis will be protected, at least, from constitutional ‘second-guessing’ by the federal appellate system; that the Supreme Court itself will respect their choices of substantive law; and that the judgments implementing these choices will stand”).

209. See 151 CONG. REC. S1157-02, S1173 (daily ed. Feb. 9, 2005) (letter from Walter Dellinger, O’Melveny & Myers LLP); see also *id.* at S1174-75 (daily ed. Feb. 9, 2005) (statement of Sen. Sessions).

in a state with particularly strong consumer protection laws, then those class members would be hurt because they would not receive the benefit of their state's laws.²¹⁰ This argument definitely merits some consideration and adds to the growing body of authority weighing against the application of one state's UDAP in multi-state consumer class actions.

2. Utilizing Subclasses

Under the proposed Amendment, if a district court either (1) found that the application of one state's law would not be constitutional under *Shutts* or (2) simply opted not to apply a single state's law to all putative class members, then the court would have been required to apply the choice-of-law rule of the state in which it is located. However, if the district court chose this option, then provision (c)(1) of the Amendment would have prevented the court from denying certification on the narrow ground that multiple states' laws would apply.²¹¹ If this was the district court's only reason for denying certification, then it would have been required to use

210. Walter Dellinger provided this persuasive example of how consumers from a state with strong consumer protection laws might be hurt by the extraterritorial application of another state's laws:

[A]ssume that someone brings a nationwide class action alleging that the defendant company participated in fraudulent sales behavior. . . . [T]he court may decide to apply Alabama law to all claims. That would be bad news for the class members living in California and other states with strong consumer protection statutes, because the Alabama statute prohibits the assertions of consumer protection claims on a class basis. Thus, the claims of all class members presumably would be subject to dismissal.

Id. at S1173. A similar problem would arise if the consumer protection statutes of Georgia, Louisiana, Mississippi, Montana, and South Carolina were applied to out-of-state plaintiffs, because those statutes prohibit private citizens from bringing a class action lawsuit to address violations. *See supra* notes 67–72 and accompanying text. However, it should be noted that, even if a multi-state class action were brought in, or removed to, a district court in one of the aforementioned states, the district court would not necessarily have to apply its state's UDAP. For instance, if the defendant's principal place of business were in another state, then it might be constitutionally permissible, pursuant to *Shutts*, to apply that state's consumer protection statute to all class members.

211. *See supra* note 159 and accompanying text. Proponents of the Amendment argued that provision (c)(1) "[would] not [have] implicate[d] the Constitution in any way," but, rather, would merely have "encourage[d] federal judges to try to go forward and reach the merits of the dispute." 151 CONG. REC. S1157-02, S1171 (daily ed. Feb. 9, 2005). On the other hand, Walter Dellinger asserted that, by infringing on the discretion of federal court judges, provision (c)(1) of the Amendment carried serious constitutional implications:

The [Feinstein–Bingaman] amendment [will] distort traditional and prevailing class action practice in a way that raises serious due process concerns. The basic reason is that it [will] instruct federal judges that, even if they truly believe that the fact that several (or even all 50) states' laws must be applied in a particular case means that the case cannot possibly be fairly adjudicated as a class action, they must simply ignore that true belief and grant class certification anyway.

Id. at S1173.

subclasses²¹² or apply each state's substantive law "to the extent practical"²¹³ in order to make the litigation more manageable.

Opponents of the Amendment scoffed at the notion that subclasses could be used to neutralize the choice-of-law problem in multi-state consumer class actions. For instance, when Senator Sessions rose to speak in opposition to the Amendment, he first pointed out that "[u]nder the current law, Federal judges have the discretion to decide when subclassing makes sense."²¹⁴ Senator Sessions further asserted that "[this] approach is working . . . and it is better to [leave] the discretion with the judge than for us to try to anticipate and put in hard law requirements involving complexities in the future we cannot anticipate fully today."²¹⁵ In reality, what the senator referred to as an approach that is "working," is actually a total lack of receptivity to the use of subclasses as a management tool in multi-state class action litigation. For the most part, federal courts have found that "rather than alleviating the problem, the potential need for numerous subclasses often heightens . . . concerns about the manageability of the litigation as a class action."²¹⁶

212. See *supra* note 159 and accompanying text.

213. See *supra* note 159 and accompanying text. As one might imagine, the ambiguity in this phrase worried opponents of the Amendment. Senator Sessions voiced his concerns when he stated:

What does ["to the extent practicable"] mean? How does the court partially carry out State law? Judges are responsible for carrying out the law, not for carrying out the law to the extent practicable. It would be a dangerous empowerment and an erosion of our classical commitment to following law.

151 CONG. REC. S1157-02, S1175 (daily ed. Feb. 9, 2005) (statement of Sen. Sessions). Thus, because this provision (1) is dangerously ambiguous, (2) is not clarified, or really even discussed, elsewhere in the Senate debate, and (3) arguably should not have been included in the proposed amendment, it will not be analyzed further.

214. 151 CONG. REC. S1157-02, S1174 (daily ed. Feb. 9, 2005) (statement of Sen. Sessions).

215. *Id.* Senator Sessions's statement highlights one crucial point regarding the viability of the subclassing technique as a solution to the choice-of-law problem in multi-state consumer class actions. *Id.* As the senator points out, under FRCP 23(c)(5), a district court *may* use subclasses when appropriate, but even when "subclassing makes sense" a federal court is not required to employ that technique. *Id.* Thus, even assuming that one district court granted certification to a multi-state consumer class action on the basis that the state UDAPs could be grouped into a few subclasses, it would certainly not guarantee that other district courts would follow suit.

216. Feldman, *supra* note 200, at 349-50. Feldman argues further that:

Subclasses may mask over, but cannot solve the problem of legal variation. While a group of states may have the same approach to one element of the case, they may disagree on others. Even if several states require similar elements of proof, those same states might have different standards for the burden of proof, making the subclass system unworkable.

Id. at 350 (citing *Poe v. Sears, Roebuck & Co.*, 1998 WL 113561, at *3 (N.D. Ga. Feb. 13, 1998)).

Even given this trend among the federal courts, there is still some evidence that the use of subclasses could be an effective management tool in multi-state consumer class actions. In the case *In re School Asbestos Litigation*, the Third Circuit found that a nationwide plaintiff class seeking damages under FRCP 23(b)(3) met its burden of proving legal predominance by undertaking an extensive analysis of various state product liability laws and ultimately separating the laws into four subclasses.²¹⁷ Under this rationale, if the state UDAPs could be similarly separated into four subclasses, it might be possible for a multi-state consumer class to meet its burden of proving legal predominance, even where all fifty such laws would apply. To this end, it has been suggested that the various state UDAPs could be divided into the following subclasses: (1) “states that broadly prohibit any ‘unfair or deceptive act or practice,’ either with no further specificity or with an ‘included but not limited to’ list of specific practices that are prohibited”; (2) states that prohibit “any unfair or deceptive act” and require an element of intent to induce reliance; (3) states that merely list prohibited practices; and (4) states “which require a showing of scienter, or a knowing misrepresentation in order [for conduct] to be actionable.”²¹⁸ Unfortunately, a similar proposal to separate the state UDAPs into manageable subclasses was recently rejected by a federal court in *Lyon v. Caterpillar, Inc.*²¹⁹ Thus,

217. See *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986). In deferring to the district court’s finding that it could manage the litigation, the Third Circuit expressed concern that legal variation may still present “insuperable obstacles” in the class certification process. See *id.* at 1010 & n.11 (quoting Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 742 (1979) (“[T]here will be a point at which the sheer magnitude of the task of construing the various laws will compel a court not to certify the multistate class or to reduce it to a more manageable number of states. Even short of that point, choice of law may pose major problems. The first is the danger of an unwarranted intrusion into another state’s legal affairs through a mistaken application of its laws. The court should thus consider its own familiarity with the other state’s law, the degree to which that law is unclear or unsettled, and the extent to which it implicates important interests of the other state.”)).

218. Lisa J. Rodriguez, *Intersection Between UDAP Statutes and Class Actions*, 1242 PLI/CORP 377, 380 (2001). Support for this proposed subclassing arrangement can be found in Larry Kramer’s “relative uniformity” prediction that “there will never be fifty different substantive rules, or even fifteen or ten. States tend to copy their laws from each other, and many use identical or virtually identical rules. In practice, . . . [there] will seldom . . . [be] more than three or four formulations.” Phair, *supra* note 101, at 854 (quoting Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996)). But see *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219-20 (E.D. Pa. 2000) (finding that “each state’s consumer [protection] act is unique” and that, in general, the statutes are “not uniform”); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 489 (D.N.J. 2000) (“[T]here exist many legal variations between the states’ consumer protection laws.”).

219. In *Lyon*, 194 F.R.D. at 208, the plaintiff moved for certification of a nationwide class claiming a violation of the Illinois Consumer Protection Act or various other states’ UDAPs. The plaintiff initially asserted that Illinois law should apply to all putative class members. *Id.* at 218. However, after a thorough choice-of-law analysis, the court found that “the applicable state law may not be limited to the statute in effect in Illinois,” but, rather, must include the consumer protection act of each state implicated in the litigation. *Id.* at 218–19. The plaintiff then asserted that the

as with the use of the *Shutts* rule, the weight of authority stands against the proposition that subclasses can be used to solve the choice-of-law problem in multi-state consumer class actions.

B. Private Right of Action Under § 5 of the FTC Act

The aforementioned “solutions” are subject to the same potentially fatal flaw: they both rely on the discretion of a federal judiciary which has, time and time again, proven to be particularly unwilling to tackle the choice-of-law problem in multi-state state-law-based class actions. With this in mind, maybe the “solution” to the choice-of-law problem, at least in the context of multi-state consumer class actions, is simply a means of avoiding the problem all together. Such a means will not arise, however, as long as multi-state consumer class actions are premised on state UDAPs. Thus, the solution is to amend § 5 of the FTC Act and create a private right of action for consumers injured by unfair and deceptive trade practices.²²⁰

If such a private remedy were established, then multi-state consumer class actions could proceed in federal court under 28 U.S.C. § 1337, which provides that a district court shall have “original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and

consumer protection acts could be separated into the following four subclasses:

- (1) Statutes generally prohibiting unfair and deceptive practices or which list prohibited practices, which practices include the practice in question, without the need to show intent that there be reliance;
- (2) Statutes with a general prohibition of unfair and deceptive practices or a list of specific practices which includes the practice in question where the defendant intends to induce reliance but do not require a specific intent to deceive or proof of actual reliance;
- (3) Statutes which impose a scienter requirement . . . and
- (4) Statutes that require proof of individual reliance by the plaintiff.

Id. at 218 n.18. In responding to the proposed subclasses, the court then noted that another federal “court rejected a plaintiff’s attempts to group consumer [protection] acts into four subclasses as ‘overly simplistic in light of the nuances and differences presented by the consumer [protection] acts.’” *Id.* at 219 (quoting *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493 (N.D. Ill. 1998)). Ultimately, the court held that the plaintiff failed to provide an adequate analysis of the differences in the applicable consumer protection statutes, and thus, the use of subclasses would be inappropriate. *Id.* at 220–21.

220. Amendments of this type have already been offered in Congress without success. See Leaffer & Lipson, *supra* note 28, at 524 n.17 (arguing that the “[p]rospects for passage of such legislation appear dim”). But see Stephen W. Gard, *Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 NW. U. L. REV. 274, 280 (1975) (“The [FTC], apparently recognizing its failings, has consistently advocated that private actions by consumers be sanctioned under the [FTC] Act.”). However, given the potential of CAFA to eradicate the multi-state consumer class action, it would appear that such an amendment deserves reconsideration.

monopolies.”²²¹ In this way, diversity jurisdiction could be avoided, and, despite the best efforts of those pro-business lobbyists who pushed for CAFA, federal courts would still be able to adjudicate “interstate [consumer] cases of national importance.”²²²

Thus, given the express objectives outlined in CAFA, a private right of action under § 5 of the FTC Act seems logical. There is, however, one potential problem with this “solution” to the choice-of-law problem. In the 1971 case *Holloway v. Bristol-Myers Corp.*, the D.C. Circuit examined the FTC Act and the underlying legislative history and concluded that such a private remedy was inappropriate.²²³ The *Holloway* court explained that, because “the substantive prohibitions of the [FTC Act] are inextricably intertwined with provisions defining the powers and duties of [the] specialized administrative body charged with its enforcement,” private enforcement is unwarranted.²²⁴ In reaching this conclusion, the *Holloway* court raised the type of issues and provided the type of analysis which must be considered if one is to develop a well-reasoned theory of private

221. See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988 n.2 (D.C. Cir. 1973) (referencing 28 U.S.C. § 1337 and explaining that “plainly, th[e] language [of the statute] applies to the Federal Trade Commission Act”); see also *United States v. Basic Prods. Co.*, 260 F. 472, 477 (W.D. Pa. 1919) (finding that “it was the intent of Congress, by the passage of the [FTC Act], to exercise some of the powers vested in it by the Constitution to regulate interstate and foreign commerce”).

222. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–15).

223. *Holloway*, 485 F.2d at 989. In reaching the conclusion that Congress intended to exclude private enforcement of the FTC Act, the *Holloway* court reasoned as follows:

The Supreme Court, in *Moore v. New York Cotton Exchange*, denied a private remedy under section 5 as worded prior to the 1938 Wheeler–Lea Amendments. The 1938 amendments, recognizing the need to protect consumers as well as injured competitors, endowed the FTC with new and more potent enforcement tools but did not explicitly overrule *Moore* by providing the additional enforcement mechanism of a private right of action. Thus, the *Holloway* court inferred that Congress intended agency enforcement to be exclusive.

Comment, *Implied Consumer Remedy Under FTC Trade Regulation Rule—Coup de Grâce Dealt Holder in Due Course?*, 125 U. PA. L. REV. 876, 898 (1977) [hereinafter *Implied Consumer Remedy*] (internal citations omitted). This reasoning is open to three noteworthy criticisms. First, in *Moore* the Court held that relief under the FTC Act “must be afforded in the first instance by the [FTC].” *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 603 (1926) (emphasis added). This holding could be interpreted to mean that the FTC has only primary, not exclusive, jurisdiction under the FTC Act. See *Implied Consumer Remedy, supra*, at 898. Furthermore, the *Moore* Court “cited no authority to support [its] holding . . . [and] simply gave a literal—and narrow—construction to the 1914 Act.” Allan Bruce Currie, *A Private Right of Action Under Section Five of the Federal Trade Commission Act*, 22 HASTINGS L.J. 1268, 1269 (1971). Second, basing legislative intent on Congressional inaction—failure to overrule *Moore*—“is a fallacious method of statutory construction.” *Implied Consumer Remedy, supra* at 898. Third, there is evidence that Congress did not intend for the FTC to have exclusive jurisdiction over enforcement of the FTC Act. Professor Bunn explained that the prohibition of unfair or deceptive acts or practices in the FTC Act is absolute while FTC enforcement is allowed only when the public interest so requires. Bunn, *supra* note 29, at 992. An inference is thereby created that the scope of FTC enforcement of the Act is not exclusive. *Id.*

224. *Holloway*, 485 F.2d at 989.

consumer action under § 5 of the FTC Act.²²⁵ Thus, in an effort to show that such a private remedy is as appropriate as it is necessary, the balance of this article will be devoted to uncovering the shortcomings in the *Holloway* court's analysis²²⁶ and illustrating the additional benefits of a private right of action under § 5 of the FTC Act.²²⁷

1. Private Remedy Appropriate Despite *Holloway*

In *Holloway*, a group of consumers and two consumer protection organizations brought a class action alleging that defendant Bristol-Myers Corporation's advertisements were deceptive and, thus, violated § 5 of the FTC Act.²²⁸ The plaintiffs argued that, because a private right of action under § 5 of the FTC Act was a necessary supplement to FTC enforcement, the court should recognize such a right through the doctrine of judicial implication.²²⁹ The *Holloway* court declined to imply a private right of action under § 5, and explained that the "core" of its decision was premised on an "analysis of the ramifications of the asserted private remedy and a comparison of these with the policies and objectives sought to be advanced by Congress" in enacting the FTC Act.²³⁰

Throughout the course of its analysis, the *Holloway* court asserted that private enforcement of the FTC Act would disrupt the "[agency-based] enforcement scheme embodied in the Federal Trade Commission Act" in

225. James A. Castleman, *Advertising, Product Safety, and a Private Right of Action Under the Federal Trade Commission Act*, 2 HOFSTRA L. REV. 669, 679 (1974). In general, the *Holloway* court's rationale has been followed without question. See *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973) ("The protection against unfair trade practices afforded by the Act vests initial remedial power solely in the Federal Trade Commission."). But see *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 586-88 (N.D. Ind. 1976) (sole case rejecting the *Holloway* court's reasoning; court found an implied private right of action under § 5 of the FTC Act for a group of consumers seeking to compel the defendant to comply with a prior FTC consent order).

226. See *infra* notes 228-53 and accompanying text.

227. See *infra* notes 254-75 and accompanying text.

228. *Holloway*, 485 F.2d at 987-88. Plaintiffs presented a novel theory of liability, as no federal court had ever dealt with the issue of a private remedy for injured consumers under § 5 of the FTC Act. *Id.* at 988. Prior to *Holloway*, the Supreme Court held that there is no private remedy for injured competitors under the FTC Act. See *FTC v. Klesner*, 280 U.S. 19, 25, 27 (1929) (The FTC filed a complaint regarding a dispute between former business associates who were both claiming rights to the use of a trade name; "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. . . . [T]o justify the Commission in filing a complaint under § 5, the purpose must be protection of the public.").

229. *Holloway*, 485 F.2d at 989.

230. *Id.*

two main ways.²³¹ First, it was argued that private enforcement would lead to a “lack of coherence” in FTC Act precedent.²³² As the *Holloway* court explained, the FTC Act’s enforcement scheme “stresses the [Federal Trade] Commission’s role in providing certainty and specificity to the [broad] proscriptions of the Act . . . [through] the centralized and orderly development of precedent.”²³³ According to the court, private enforcement would jeopardize the orderly development of precedent, because “[p]rivate litigants are not subject to the same constraints [as the FTC] . . . [and] may institute piecemeal lawsuits, reflecting disparate concerns [rather than] a

231. See *id.* at 997–98. This assertion has been criticized on a number of grounds. For instance, one commentator argued that the notion “that private enforcement [of the FTC Act] would interfere with the administrative enforcement by the [FTC] . . . is heavily undercut by the fact that the [FTC] has never believed it to be true and has urged that private enforcement of the [FTC] Act be authorized.” Gard, *supra* note 220, at 288–89; see also Castleman, *supra* note 225, at 687 (“[A]s one observer has noted, through recommendations for enactment of state consumer protection acts, ‘the FTC . . . has made it known that it . . . desires the establishment of private consumer remedies.’” (quoting *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U. L. REV. 413, 435 (1972))). Other sources have condemned the *Holloway* court for focusing too heavily on the “enforcement scheme” and essentially casting aside the real intent behind the Wheeler–Lea Amendment of 1938. According to one commentator, the *Holloway* court’s assertion “that a private remedy is inconsistent with the legislative scheme is unpersuasive to the extent that it gives lesser weight to the importance of section 5’s policy of protecting consumers than to the secondary policy of maintaining the integrity of the Act’s enforcement mechanism.” *Implied Consumer Remedy*, *supra* note 223, at 901; see also Carpenter, *supra* note 28, at 787–88 (“Since the [FTC] Act appears to have had the protection of consumers as its primary purpose . . . the fact that a private consumer action would interfere with the attainment of what should be considered subsidiary policies should not have been made dispositive of the consumer’s claim [in *Holloway*].”). This argument is bolstered by the argument of another commentator that the Wheeler–Lea amendment constituted a radical transformation of the intent behind the FTC Act:

[W]hen Wheeler–Lea amended Section 5 [of the] FTC Act to make “unfair or deceptive acts or practices” unlawful, [the nature of the interests protected by the Act were] radically transformed. First, a wholly new class of citizens—consumers—became legally protected. Second, a more precise species of unlawful conduct—deceptive acts or practices—was proscribed, a type of unlawful conduct not normally related to antitrust violations. Hence the old reasons for not making Section 5 privately actionable no longer govern, and private enforceability of the consumer rights created under Wheeler–Lea really deserves new, separate and independent consideration.

Lovett, *supra* note 51, at 278–79.

232. *Holloway*, 485 F.2d at 998.

233. *Id.* Another important aspect of this agency-based enforcement scheme is the “availab[ility] of the FTC] to act in an advisory capacity to those who are anxious to comply with the terms of the [FTC] Act.” *Id.* (explaining that, by acting in its advisory capacity, the FTC can benefit both businesses and consumers). The *Holloway* court felt that any advantages derived from this informal aspect of the enforcement scheme would also be “endangered” if private enforcement were permitted. *Id.* However, even if a private remedy were created, a business could still approach the FTC and ask for advice *before* engaging in a potentially unfair or deceptive trade practice. In fact, if a practice is questionable, there is a duty on the part of the business to inquire as to whether or not the proposed action would constitute a violation. Thus, it seems that, to a large extent, the FTC’s informal means of securing compliance would be preserved.

coordinated enforcement program.”²³⁴ Thus, the court concluded that the FTC’s sound discretion and expert judgment are needed to consider the merit of each action and exactly how the litigation will advance the agency’s long range policy goals.²³⁵

Aside from disrupting the orderly development of precedent, the *Holloway* court also argued that, by empowering the federal judiciary to interpret and apply the FTC Act without prior agency proceedings, private enforcement would undermine the statutory scheme of enforcement.²³⁶ As the *Holloway* court noted,

[t]he role of the courts in the enforcement of the [FTC] Act is one that comes into play primarily only after the [FTC] has set its administrative processes in motion. The court’s role is not one of direct enforcement but one related to the administrative process—in part supervisory and in part collaborative.²³⁷

234. *Id.* at 997–98. At least one district court has suggested that, even though they are not subject to the same constraints as the FTC, private individuals are the appropriate entity to determine when an action should be maintained under the FTC Act. See *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 588 (N.D. Ind. 1976) (“To conclude that, without exception the Federal Trade Commission . . . is in a better position than a private litigant to gauge the injury a deceptive practice will cause to the public . . . ignore[s] the basic premise of the free enterprise economy—that consumers should have the opportunity to choose between competing merchants on the basis of price, quality and service.”).

235. *Holloway*, 485 F.2d at 997. The *Holloway* court stressed the advantages of an agency-based program of discretionary enforcement under the FTC Act:

Inherent in the exercise of this discretion is the interplay of numerous factors: the relative seriousness of the departure from accepted trade practices, its probable effect on the public welfare, the disruption to settled commercial relationships that enforcement proceedings would entail, whether action is to be taken against a single party or on an industry-wide basis, the form such action should take, the most appropriate remedy, the precedential value of the rule of law sought to be established, and a host of other considerations.

Id.

236. See *id.* at 998. The *Holloway* court did state that where the FTC had not previously considered an issue, the problems created by private enforcement “could be remedied in part by FTC intervention in [the courtroom] proceedings.” *Id.* at 999. However, the court felt that this “remedy” would only create more problems:

The effect of requiring the [FTC] to intervene whenever it felt that a private litigant might stray from its policies, impair its precedents, or disadvantageously compromise meritorious litigation makes it part hostage to private concerns, part competitor (in a race to the courthouse), and risks not only its resources but the extent of its contribution to the public interest.

Id.

237. *Id.* at 1002.

The court further explained that the federal courts are relegated to a secondary role in the enforcement of the FTC Act, because they lack the “special expertise” of the FTC and do not have the tools necessary to promote settlements efficiently.²³⁸ In light of this analysis, the court rejected the “notion that [the courts could] be injected into the pertinent subject-matter directly, without the benefit of FTC consideration.”²³⁹

Having elaborated on the “ramifications” of the proposed private remedy, the *Holloway* court concluded that the FTC Act must be enforced exclusively by the FTC.²⁴⁰ The assumption underlying this conclusion is that, regardless of the circumstances, private enforcement of the FTC Act must either be permitted or completely denied.²⁴¹ However, “[w]hen the FTC has already defined explicitly the range of acceptable trade practices in a particular area, the conflict between a private remedy and the statutory scheme of enforcement is significantly reduced, if not eliminated altogether.”²⁴² Thus, the *Holloway* court’s assumption is faulty in that it fails to take into account the fact that agency-based enforcement of the FTC Act would not be undermined by a private action alleging conduct which the FTC had already declared unlawful.²⁴³ In that case, private enforcement would merely supplement agency-based enforcement.²⁴⁴

Given this rationale, a private action under § 5 of the FTC Act would seem appropriate where: (1) the defendant’s conduct arguably violated a rule of decision from one of the FTC’s prior adjudicative proceedings; (2) the defendant’s conduct violated one of the FTC’s trade regulation rules; or (3) the defendant engaged in conduct which the FTC had otherwise specifically

238. *Id.* at 998.

239. *Id.*

240. *Id.* at 1002.

241. *See* Carpenter, *supra* note 28, at 788.

242. *Implied Consumer Remedy*, *supra* note 223, at 901; *see also id.* at 902 (“In the absence of a significant conflict with the enforcement policy of the Act, the dominant concern should be to effectuate the Act’s policy of affording consumers adequate protection from [unfair and] deceptive trade practices.”).

243. As Carpenter correctly pointed out, “Congress contemplated protecting consumers *only* from those practices declared to be in violation of the [FTC] Act by the [Federal Trade] Commission.” Carpenter, *supra* note 28, at 789. Where the FTC has already decided that a practice is unlawful under the FTC Act, the court need only apply that precedent. In this way, “[c]oherence of precedent is assured, because the courts will grant relief only when the offending conduct already has been construed in the expert judgment of the FTC to be in violation of section 5.” *Implied Consumer Remedy*, *supra* note 223, at 901.

244. Under these circumstances, a private action under § 5 of the FTC Act would be very similar to a private action brought under one of the state little-FTC Acts. *See supra* note 52 and accompanying text. Indeed, the exact same body of precedent would control the litigation. Thus, given the fact that the FTC helped develop the UTPCPL, the act which served as the model for the state little-FTC Acts, it would seem that a similar federal private right of action would not be objectionable. *See supra* note 52 and accompanying text.

outlawed under § 5 of the FTC Act.²⁴⁵ In each of the three aforementioned scenarios, a private action would “still . . . impinge on [the] FTC’s prosecutorial discretion, but the need for this discretion relative to the need to protect individual consumers is diminished.”²⁴⁶

The argument that a private right of action under § 5 should be permitted where the FTC has already declared a practice to be unfair or deceptive is further supported by the enactment of the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (TCFAPA).²⁴⁷ Although it does not authorize consumer protection suits generally under the FTC Act, the TCFAPA allows for private enforcement of certain FTC trade regulations promulgated under the act.²⁴⁸ However, a private party may not simply proceed to the district court when it feels that a trade regulation has been violated. Rather, before filing suit under the TCFAPA, a private party must serve written notice and a copy of its complaint to the FTC.²⁴⁹ The FTC then has the right to intervene in the private action.²⁵⁰ Furthermore, if a lawsuit has already been filed by or on behalf of the FTC, a private litigant may not “institute a civil action against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.”²⁵¹ Through these safeguards,²⁵² Congress ensured that the FTC could control the orderly development of precedent under the TCFAPA.

245. Carpenter, *supra* note 28, at 789–90.

246. *Implied Consumer Remedy*, *supra* note 223, at 901–02.

247. 15 U.S.C. §§ 6101–08 (2008).

248. 15 U.S.C. § 6104(a). The FTC has suggested, on at least one occasion, that private litigants should be able to enforce the trade regulation rules promulgated under the FTC Act:

The Commission believes that the courts should and will hold that any person injured by a violation of [a trade regulation] rule has a private right of action against the violator, under the Federal Trade Commission Act, as amended, and the rule. The existence of such a right is necessary to protect the members of the class for whose benefit the statute was enacted and the rule is being promulgated, is consistent with the legislative intent of the Congress in enacting the Federal Trade Commission Act, as amended, and is necessary to the enforcement scheme established by the Congress in that Act and to the Commission’s own enforcement efforts.

See Final Guides to the Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49966, 49971 (Aug. 24, 1979).

249. 15 U.S.C. § 6104(b).

250. *Id.* Apparently, in enacting the TCFAPA, Congress did not agree with the *Holloway* court that the FTC will become “part hostage . . . [and] part competitor” if it is required to intervene in a private action which is contrary to its enforcement goals. *See supra* note 233 and accompanying text.

251. § 6104(c).

252. *See supra* notes 245–48 and accompanying text.

Thus, by making FTC precedent a necessary precursor to a private action and erecting safeguards similar to those found in the TCFAPA,²⁵³ it appears private litigants could enforce the FTC Act without causing any of the asserted “ramifications” that troubled the *Holloway* court. In fact, by supplementing agency-based enforcement efforts, private litigation would likely benefit both the consuming public and the FTC.

2. Additional Advantages of a Private Remedy

Several additional advantages would arise if Congress enacted a private right of action under § 5 of the FTC Act. First, private enforcement of § 5 “would provide for full enforcement . . . by enlisting thousands of interested as well as informed persons and [thus] would be a powerful deterrent to potential violators.”²⁵⁴ This added enforcement and deterrence would undoubtedly benefit consumers.²⁵⁵ However, there would also be costs of such additional deterrence. Indeed, “[d]epending on the market structure, the defendant may simply pass the cost of a lawsuit on to its customers.”²⁵⁶ This added expense would be worthwhile up until a certain point, after

253. Another limitation in the TCFAPA that bears mentioning is the \$50,000 amount-in-controversy limitation, which must be (1) comprised entirely of actual damages and (2) alleged by each individual, as there is no aggregation of damages. 15 U.S.C. § 6105(a). This amount-in-controversy limitation would not be helpful in enacting a private remedy under § 5 of the FTC Act, as it would stifle virtually all multi-state consumer class actions. However, some such limitation should be imposed, if only to avoid an onslaught of unmeritorious litigation. That said, 28 U.S.C. § 1337, the basis of jurisdiction for a private right of action under the FTC Act, does not contain an amount-in-controversy limitation. See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988 n.2 (D.C. Cir. 1973). Thus, maybe the amount in controversy necessary to bring a private right of action under § 5 of the FTC Act should be set at \$5,000,000 in the aggregate. See *supra* note 11 and accompanying text. Congress found this figure to be appropriate for other interstate cases of national importance, so there is no reason why it would not be sufficient for multi-state consumer class actions brought under the FTC Act. This figure would mean that class actions, not small private claims, would be brought under § 5 of the FTC Act. Such smaller private claims could still be brought under state UDAPs. In this way, the proposed private right of action under § 5 of the FTC Act would merely supplement current private enforcement at the state level.

254. Gard, *supra* note 220, at 281. Other commentators have suggested that full enforcement of the FTC Act could not be achieved without a private right of action for injured consumers. See *Sovern*, *supra* note 46, at 440–42 (“[T]he FTC can, by selecting its caseload appropriately, target cases in which there is a real possibility for deterring fraud . . . [However,] given the restraints on the FTC, the FTC must choose its cases so carefully that it is unlikely to bring as many worthwhile cases as it would like . . .”); Castleman, *supra* note 225, at 690 (“Where [a class] action is brought as a strictly private suit [under § 5], not only may the plaintiffs receive compensation that might otherwise be unavailable to them, but the action may serve as a deterrent factor, one which could fill the gap left by the ineffectiveness of FTC action.”) (internal citations omitted).

255. See Gard, *supra* note 220, at 283 (explaining that the prevalence of unfair and deceptive trade practices in the marketplace impairs a consumer’s ability to make rational choices, which, in turn, causes a breakdown in the free enterprise economy).

256. Comment, *Private Enforcement and Rulemaking Under the Federal Trade Commission Act: Expansion of FTC Responsibility*, 69 NW. U. L. REV. 462, 475 (1974) [hereinafter *Private Enforcement & Rulemaking*].

which the total cost of protection would become self-defeating.²⁵⁷ Thus, assuming that the cost of protection does not reach this breaking point, it is certainly reasonable to argue that the advantages of additional deterrence would outweigh the potential disadvantages.

In addressing the potential costs and benefits of additional deterrence, one must also consider the argument that Congress never intended for enforcement of the FTC Act to carry a deterrent effect.²⁵⁸ According to the *Holloway* court, in enacting the Wheeler–Lea Amendment of 1938 “Congress considered matters of deterrence . . . [but] relied instead on the FTC’s cease and desist procedures . . . [and] voluntary compliance [measures]” to secure acquiescence.²⁵⁹ In light of this finding, the *Holloway* court reasoned that the deterrent effect of a private damages remedy would offset the “balance” Congress struck in the 1938 amendment.²⁶⁰ The problem with this reasoning, however, is that it is outdated. Indeed, since *Holloway*, Congress has altered the “balance” struck in 1938 by authorizing the FTC to seek damages in civil actions to redress consumer injury.²⁶¹ The availability of a compensatory damages remedy presents the threat of indeterminate liability for violators, which serves as a significant deterrent.²⁶² Thus, although the FTC’s authorization to seek damages is limited to certain situations,²⁶³ the fact that such authorization was granted at all shows that Congress intended for enforcement of § 5 of the FTC to function, at least partly, as a deterrent to future violations.

257. *See id.*

258. *See Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 999–1000 (D.C. Cir. 1973); Carpenter, *supra* note 28, at 793 (“The [FTC] Act does not appear to have been intended to have more than a minimal deterrent effect The statute merely gives the FTC the power to issue ‘cease and desist’ orders; no criminal sanction follows the initial FTC determination that the statute has been violated. Thus, there was no attempt by Congress to directly deter violations of the [FTC] Act.”).

259. *Holloway*, 485 F.2d at 1000.

260. *Id.*

261. Congress granted this authorization when it enacted the Magnuson–Moss Warranty—Federal Trade Commission Act of 1975 (hereinafter Magnuson–Moss Act). *See* 15 U.S.C. §§ 2301–2312 (1976). In addition to the payment of damages, the FTC was also authorized to seek rescission or reformation of contracts and the refund of money or return of property to redress consumer injuries. *See* 15 U.S.C. § 57b(b) (1976).

262. *See* Carpenter, *supra* note 28, at 766.

263. Under the Magnuson–Moss Act, the FTC may only commence a civil suit to obtain redress where consumers have been injured by: (1) a violation of one of the FTC’s trade regulation rules, *see* 15 U.S.C. § 57b(a)(1), or (2) a violation of the broad proscription found in § 5 of the FTC Act, but only where the FTC has already issued a cease and desist order *and* where a reasonable person would have known under the circumstances that the act or practice was dishonest or fraudulent. *See* § 57b(a)(2).

In addition to deterring future violations, private enforcement of § 5 of the FTC Act would take much of the enforcement burden off the FTC. This, in turn, would allow the FTC to concentrate its limited resources on developing policy through informal proceedings and rulemaking.²⁶⁴ According to one commentator, by focusing more on the development of policy, the FTC could overcome certain deficiencies which have plagued the agency in the past:

From the time of its inception . . . the FTC [has] incurred repeated criticism for inordinate delay in investigating and prosecuting alleged violations, for failing to establish priorities for its enforcement apparatus, and for failure to establish policy that would punish violators and guide those eager to stay within the law. Rulemaking . . . is an obvious means of attempting to overcome these failings.²⁶⁵

Indeed, because rulemaking “comprehensively delimit[s] what constitutes [an] illegal practice[],” it has the potential to greatly increase the speed and efficiency of private enforcement under the FTC Act.²⁶⁶ Furthermore, whereas agency-based enforcement of the FTC Act is virtually always arbitrary,²⁶⁷ “rulemaking operates more even-handedly . . . [and] ensures that [an] entire industry bears the burden of innovation in policy.”²⁶⁸ Finally, in light of the fact that the FTC must consider suggestions from businesses and the consuming public when promulgating a rule under the FTC Act,²⁶⁹ through increased rulemaking the FTC can generate policy which more fully represents the interests of businesses and consumers.²⁷⁰

264. See Gard, *supra* note 220, at 281; see also *Private Enforcement & Rulemaking*, *supra* note 256, at 479 (“[Trade regulation] rules enumerate specific practices which the [FTC] considers to be proscribed by statutory language of the FTC Act. . . . [V]iolations of [such] rules are considered violations of the statutory provision from which the rule is derived.”). This reallocation of scarce FTC resources seems appropriate given the fact that, “[a]s a public agency having a certain expertise, and benefiting from its broad perspective on the national economy, the FTC is especially well-situated to develop consistent, reasoned consumer protection policy.” Leaffer & Lipson, *supra* note 28, at 553–54.

265. *Private Enforcement & Rulemaking*, *supra* note 256, at 486 (internal citations omitted).

266. See *id.* at 487.

267. See Gard, *supra* note 220, at 282 (“Enforcement by an administrative agency is almost inevitably somewhat arbitrary unless the agency proceeds against all known violators with equal vigor and dispatch.”).

268. *Private Enforcement & Rulemaking*, *supra* note 256, at 487.

269. Promulgating a rule under the FTC Act is essentially a three step process: (1) the FTC formulates a proposed rule and publishes it; (2) the public may submit written comments on the proposed rule; (3) the trade regulation rule, in its final form, is promulgated. See *id.* at 479.

270. *Id.* at 487.

So, theoretically, “consumers . . . should be able to rely on public agencies charged with enforcing statutory law . . . to take action against businesses that violate legal rules.”²⁷¹ In practice, however, public agencies such as the FTC, are severely limited by both financial and political constraints.²⁷² That said, private enforcement of § 5 of the FTC Act would “serve important public purposes by supplementing the work of [the FTC].”²⁷³ This is not to say that private enforcement would be completely problem-free.²⁷⁴ However, even if it does create some problems, “the sheer diversity of enforcers should generate more innovations than a monopolistic government enforcer would produce.”²⁷⁵

VI. IMPACT

If federal courts refuse to certify multi-state state-law-based consumer classes and the proposed amendment to § 5 of the FTC Act is rejected, then intrastate class actions will be the only remaining remedy for injured consumers.²⁷⁶ This outcome “would fly in the face of what the proponents

271. Edward F. Sherman, *Consumer Class Actions: Who are the Real Winners?*, 56 ME. L. REV. 223, 236 (2004) (quoting DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 69 (2000)).

272. *See id.*

273. *Id.* (quoting HENSLER ET AL., *supra* note 271, at 69).

274. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999 (D.C. Cir. 1973) (expressing concern that private litigants might “disadvantageously compromise meritorious litigation”).

275. Rubenstein, *supra* note 5, at 725 (quoting Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 206).

276. *See* Kershell, *supra* note 106, at 781. Even intrastate consumer class actions can be removed to federal court if they meet the minimal diversity and amount-in-controversy requirements laid out in CAFA. *See* 28 U.S.C. § 1453 (2008). Thus, if class representatives are forced to structure consumer classes on a state-by-state basis, they must do so carefully. With this in mind, there are several exceptions to CAFA’s removal provision that should be considered when attempting to avoid federal jurisdiction. First, a federal court *may not* exercise diversity or removal jurisdiction over a class action if two thirds of all class members are citizens of the forum, *and* either the “primary defendants” are residents of the forum or at least one defendant from whom “significant relief” is sought and whose conduct is a “significant basis” of the claims asserted is a resident of the forum state. *See* 28 U.S.C. § 1332(d)(4)(A)–(B) (2008). In the latter case, where the primary defendants are not residents of the forum, federal jurisdiction is prohibited only where the “principal injuries resulting from the alleged conduct or any related conduct of each defendant” were suffered in the forum state. *See* § 1332(d)(4)(A). Second, a federal court *may* decline to exercise jurisdiction over a class action where the primary defendants and at least one third of all class members are citizens of the forum state. *See* § 1332(d)(3). In determining whether or not to exercise this discretionary power the federal court will consider the following factors: whether the claims involve matters of national or interstate interest; whether the claims involve the application of the law of states other than the forum; whether there is a “distinct nexus” between the case and the forum state; whether the class members residing in the forum state substantially predominate over residents of other states;

of [CAFA were] apparently trying to achieve, which [wa]s to consolidate [multistate and] nationwide class actions in one forum, federal court, so that businesses d[id] not have to face multiple lawsuits throughout the country.”²⁷⁷ More importantly, the resulting decentralization could dramatically impact many consumers’ ability to achieve any meaningful compensation for their injuries. For instance, given the expense and risk inherent in a class action lawsuit, intrastate class actions would typically only be available to consumers from highly-populated states where it would be worthwhile for class counsel to take on the case.²⁷⁸ Also, in states which

and whether similar class actions have been brought within the past three years. See § 1332(d)(3). Given the aforementioned exceptions to removal under CAFA, it appears that the safest option for potential intrastate consumer classes would be to file suit against at least one “primary defendant” that is non-diverse and claim aggregate damages well below the \$5,000,000 amount established in CAFA.

277. See 151 CONG. REC. S1170 (daily ed. Feb. 9, 2005) (letter from Arthur R. Miller, Professor, Harvard Law School). There are essentially two models of efficiency in the legal system: the central planning model and the market model. In *Bridgestone/Firestone*, Judge Easterbrook identified the fundamental difference between these two models:

Efficiency is a vital goal in any legal system—but the vision of “efficiency” underlying this class certification is the model of the central planner. . . . The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution. What is the law of Michigan, or Arkansas, or Guam, as applied to this problem? Judges and lawyers will have to guess, because the central planning model keeps the litigation far away from state courts. . . . One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident. . . . Markets instead use diversified decisionmaking to supply and evaluate information. . . . This method looks “inefficient” from the planner’s perspective, but it produces more information, more accurate prices, and a vibrant, growing economy. When courts think of efficiency, they should think of market models rather than central-planning models.

In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002) (internal citations omitted). The market model has met with a great deal of support in the federal judiciary. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (“The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury.”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (“[I]t is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11 [bankruptcy].”). However, it is clear that Congress explicitly rejected the market model in enacting CAFA. See *Cabraser, Manageable Nationwide Class*, *supra* note 12, at 553–54 (“CAFA prospectively eliminated the *Bridgestone/Firestone* outcome (the dispersion of consumer class claims among many states’ courts) by expressly rejecting its policy rationale. . . . [W]hen Congress thought of efficiency, it opted decisively in favor of federal court central-planning for class actions.”). Thus, by effectively splintering multi-state and national class actions into multiple, duplicative intrastate classes, CAFA achieved the very result it purported to avoid—the decentralization of consumer claims. This failure could be overcome, however, if section 5 of the FTC Act were amended. In that case, related consumer claims could be adjudicated in a single forum, under a single law, as the text of CAFA promises. See *supra* note 157 and accompanying text.

278. See *Kershell, supra* note 106, at 781 (explaining that an “unsettling result [of multiple statewide class actions] may be that plaintiffs’ counsel will only file [such actions] on behalf of

do not allow class actions in the consumer context,²⁷⁹ the absence of a multi-state class action would translate into the absence of effective redress for consumers with claims of minimal monetary value. Finally, in a scenario where the defendant has a limited amount of funds available to compensate injured consumers, class certification on a statewide basis could result in a “litigation lottery.”²⁸⁰ In this situation, recovery is determined on a first-come first-served basis, with very few injured consumers receiving any compensation.²⁸¹ Thus, if the intrastate consumer class action becomes the only available option for injured consumers, then many consumers—particularly those residing in smaller states—will essentially lose all forms of redress for unfair and fraudulent corporate conduct.²⁸²

In addition to the potential lack of consumer redress, other significant policy considerations dictate against the development of numerous consumer classes on a state-by-state basis. First, given the relative ease with which consumer fraud now transgresses jurisdictional borders in the national

residents of the most populous states, so that the damages will be sufficient to support the litigation. Since one-half of the population can be gathered in about nine states, the concern is that less populous states will be left out”) (internal citations omitted); Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1608 (2006) (explaining that if multi-state and nationwide class actions are no longer an option, then “[e]ven the most successful entrepreneurial plaintiffs’ class action firms could not undertake many class actions in fifty states and might well focus instead on a small number of larger states.”).

279. See *supra* notes 70–75 and accompanying text.

280. See Jonathon Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 475 (2000). Essentially, a “litigation lottery” occurs where multiple intrastate classes file suit against the same defendant or group of defendants and base the lawsuit on the same conduct. See *id.* at 475 (discussing the notion of a “litigation lottery” in the mass tort context).

281. In the context of a “litigation lottery,” there is an opportunity for defendants to structure a favorable settlement with receptive class representatives from a single action that would preclude recovery in other pending cases. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 378–79 (1996) (recognizing the power of state courts to preclude relitigation of even purely federal causes of action by approved settlements of nationwide class actions in state court). If no such settlement is achieved, then the first plaintiffs in line to ask for damages, especially punitive damages, could bankrupt a particular defendant if not the entire industry. See Turley, *supra* note 280, at 475. As Turley correctly concludes, this result “[does not] make[] much sense. There is no reason why one group of litigants should, solely on the basis of residency in a particular state, receive the lion’s share of damages to the deprivation of [numerous] other injured parties.” *Id.*

282. Setting aside the lack of financial incentives for filing an intrastate consumer class action in a smaller state, see *supra* note 278 and accompanying text, there is another potential roadblock for such claims. Under Federal Rule of Civil Procedure 23(a), which most states have adopted verbatim, a class must be “so numerous that joinder of all members is impracticable.” See Fed. R. Civ. P. 23(a)(1). Particularly in a smaller state, it may be difficult to amass enough class members that joinder becomes impracticable. However, if the potential consumer class could not meet the numerosity requirement, then class treatment of the consumers’ claims would no longer be justified and certification would certainly be denied.

marketplace, it is essential that states and their citizens have the ability to prosecute corporate violators located within their jurisdiction, even if the victims are located elsewhere.²⁸³ Second, there is the potential that state courts could interpret similar state UDAPs differently.²⁸⁴ Thus, a particular trade practice might be actionable in one state and permissible in another. This would create uncertainty with respect to the potential liability of businesses with a multi-state or national presence. Third, numerous intrastate class actions against the same defendant and alleging the same unfair or fraudulent conduct would result in a far greater expenditure of legal resources in state courts.²⁸⁵ Finally, even if an intrastate class action was successfully litigated and a favorable result was achieved, consumers would typically recover far less because a much larger percentage of the damages award would go to pay attorneys' fees.²⁸⁶

Forcing consumers to adjudicate their claims on a state-by-state basis and essentially compete for compensation from the same defendants simply replaces one problem with another: ambitious plaintiffs' firms will no longer be able to abuse the class action mechanism, but many consumers will be denied compensation for their injuries. This outcome shields corporate defendants from liability even when their practices are clearly unfair or deceptive, and simply cannot be tolerated.

283. See Cabraser, *Counterreformation*, *supra* note 111, at 1483–84 (“The mass production and nationwide marketing of standard products and services creates the potential for massive liability in cases of intentional wrongdoing, negligence, or sometimes mere error. This massive risk goes with the territory in our mass market economy. Voluntary entrants into the market should not expect the courts to protect them from that entrance’s consequences. . . . [T]he purpose of civil litigation is to correct, not exacerbate or ignore, the harms and errors that sometimes result from market activities.”) (footnotes omitted).

284. Being forced to fend off multiple intrastate class actions and potentially facing inconsistent judgments might actually be preferable for corporate defendants. As Edward Sherman explains, this situation “would be consistent with the ‘divide-and-conquer’ strategy [utilized by many defendants].” Sherman, *supra* note 278, at 1607–08.

285. See *id.* at 1607. In addition to placing greater demands on state courts, the development of multiple related class actions against the same defendant would likely increase that defendant’s litigation costs. See *id.* But see Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL’Y 855, 903 (2005) (“[CAFA] may simply shift a larger share of class litigation to large plaintiffs’ firms, who can afford to file many simultaneous intrastate class suits in several states, while shifting power away from smaller plaintiffs’ firms, who cannot afford this strategy. If so, [CAFA], perversely, may simply augment the market power of the country’s richest plaintiffs’ firms, without reducing defendants’ litigation costs.”). However, as Sherman explains, “[m]any defendants would gladly shoulder the additional costs of having to defend in multiple class actions around the country if they could avoid a national class action that gives enormous bargaining power to the plaintiffs.” Sherman, *supra* note 278, at 1607.

286. It is unclear how effectively forcing consumers to adjudicate their claims in intrastate classes, which will inevitably result in a smaller reward for each class member, does anything to solve the problem that “[c]lass members often receive little or no benefit from class actions.” Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4, 4 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–15).

VII. CONCLUSION

By aggregating hundreds, thousands, or potentially even millions of small claims, the multi-state class action empowers injured consumers in a manner unmatched by other litigation tools, including similar class actions on a state-by-state basis.²⁸⁷ This powerful litigation method must remain part of the consuming public's arsenal if it is to have any impact on the ever-increasing corporate misconduct plaguing the national marketplace. Thus, if consumers' rights are of any concern to either the federal judiciary or Congress, and they certainly should be, then the practical effect of CAFA²⁸⁸ must be dealt with swiftly and in a manner that no longer immunizes corporate defendants engaging in unfair and deceptive practices.

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287. See *supra* notes 276–83 and accompanying text.

288. See *supra* notes 9–16 and accompanying text.

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