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CLASS ACTION FAIRNESS ACT

Defendants can remove select state attorneys general actions from state court into a federal forum under the Class Action Fairness Act, note attorneys Anthony Rollo, Michael D. Ferachi, and Richard A. Freshwater in this BNA Insight. The authors track the development of the 2005 law and the cases addressing removal. They note that while little case law exists at the circuit level, one Pennsylvania case provides detailed analysis and clear guidance and should be studied by litigators who ''feel pressured into litigating a case against the state in that state's very own courthouse.''

Removal of Attorney General Actions Under the Class Action Fairness Act of 2005

By Anthony Rollo, Michael D. Ferachi, and Richard A. Freshwater

In a time when state attorneys general are becoming more and more involved in civil litigation across the country, many attorneys feel pressured into litigating a case against the state in that state's very own courthouse. In a rapidly developing area of law under the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4, codified in relevant part at 28 U.S.C. §§ 1332(d) and 1453 (''CAFA''), a new option is arising for litigators to remove select state attorney general actions from state court into the federal forum. This article tracks the development of that law from its inception with the litigation surrounding Hurricane Katrina. It then outlines the few cases that have addressed the issue, examining first those that have accepted jurisdiction and then those that have opposed it.

It Began in the Aftermath of Katrina

Practically everyone practicing law today knows the basic story of Hurricane Katrina's devastation on the Gulf Coast region in August of 2005. What everyone may not know, however, is that on August 23, 2007, the attorney general of Louisiana, on behalf of the state and numerous Louisiana citizens, filed a class action against various insurance companies in state court, alleging a breach of contract action for failure to pay insurance claims following Hurricanes Katrina and Rita. *In re Katrina Canal Breaches Consolidated Litigation*, E.D.La.

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No. 05-4182; *In re Katrina Canal Breaches Litigation*, 524 F.3d 700 (5th Cir. 2008). Shortly after the complaint was filed, the defendants removed it to federal court, relying on CAFA as a basis for federal jurisdiction.[1]

As a matter of first impression, the district court was forced to address two questions: (1) did CAFA allow for removal of a class action when a state was one of the named plaintiffs; and (2) did Louisiana possess sovereign immunity from involuntary removal to federal court as it had sued in its state court to enforce state law? Answering yes to the first and no to the second, the district court denied the state's motion to remand. The U.S. Fifth Circuit upheld the district court's finding, and it set the ground work for removal of attorney general actions to federal district courts across the United States.

A. *In re Katrina's* Consideration of Removal Under CAFA when Attorney General Is a Named Plaintiff

The attorney general of Louisiana attempted to argue that never before had a state been treated as a ''person'' for the purposes of establishing federal diversity jurisdiction. *In re Katrina*, 524 F.3d at 705. In noting the broad scope of CAFA's jurisdiction, the Fifth Circuit rejected this argument as applied to CAFA. The court noted that CAFA defined a class action ''as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.'' *In re Katrina*, 524 F.3d at 705, citing 28 U.S.C. § 1332(d)(1)(B). The statute under which the attorney general filed his action, Louisiana Code of Civil Procedure Article 591, was considered to be such a statute authorizing an action to be brought by 1 or more representatives.

In further rejecting the notion that the attorney general could not be considered a ''person'' for purposes of jurisdiction under CAFA, the Fifth Circuit noted that Congress actually considered ***and*** rejected an amendment that would have exempted class actions (as defined by CAFA) brought by an attorney general. *In re Katrina*, 524 F.3d at 705. The amendment in question was introduced by Senator Pryor where he stated, ''[m]y amendment simply clarifies that State attorneys general should be exempt from [CAFA] and be allowed to pursue their individual State's interests as determined by themselves and not by the Federal Government.'' Congress rejected the proposed amendment. *See* 151 Cong. Rec. S1157-02, S 1158, 2005 WL 309648 (Feb. 9, 2005).[2]

In addressing CAFA's jurisdictional requirements, the Fifth Circuit noted that the requisite amount in controversy was met ($5,000,000), but there remained an issue as to the minimal diversity required under 28 U.S.C. § 1332(d)(2)(A). The court conceded that ''a state is not a citizen under the diversity statutes, including CAFA.'' *In re Katrina*, 524 F.3d at 706. It did state, however, that Louisiana sought ''relief for both the State and the citizens as 'recipients' of insurance.'' *Id.* As the citizens were real parties in interest in the case, the Fifth Circuit concluded that CAFA diversity existed. Thus, the only remaining issue was Louisiana's state sovereignty.

B. Fifth Circuit's Consideration of State Sovereignty

The Fifth Circuit noted that sovereign immunity exists through Article III, Section 2, of the Constitution, providing for federal jurisdiction over ''[c]ontroversies . . . between a State and Citizens of another State,'' and the Eleventh Amendment, which provides, ''The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'' *In re Katrina*, 524 F.3d 707-08. The defendants argued that sovereign immunity only exists when the state is a defendant as only ''those actions against the State that offend its dignitary interests and imperil its coffers'' enjoy Eleventh Amendment protection. *Id.* at 706. While the court failed to reject this argument, it took the easy way out, noting that ''any immunity from removal to federal court was waived by the addition of the class of private citizens . . . and relatedly that immunity of the State from removal to federal court does not extend to the members of the class.'' *Id.* at 707. In short, because the state brought individuals into the case, it waived any sovereign immunity claims it may have held as its immunity would not extend to private citizens. *Id.* at 711. And with that holding, the Fifth Circuit affirmed the district court's jurisdiction under CAFA and paved the way for attorney general actions to be removed to federal court.

Extending the Removability of Attorney General Actions in a Post Katrina World

A. Cases Upholding Removal Under CAFA

In the matter of *Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008), the attorney general for the State of Louisiana brought a *parens patriae* action against various insurance companies asserting violations of Louisiana's antitrust laws (a *parens patriae* is an action filed by an attorney general on behalf of the citizens of the state). In short, the attorney general alleged that the companies engineered a strategy designed to purposely undervalue insurance claims. *Caldwell*, 536 F.3d at 422. The state sought both injunctive and treble damage relief suffered by individual policyholders.

Following the lead of *In re Katrina*, the defendants removed under CAFA, but this time, other than the state, no plaintiffs were named. Apparently, the attorney general learned his lesson in *In re Katrina* and wanted to stay in state court. In arguing jurisdiction was proper, the defendants claimed that when the substance of the complaint was examined rather than how the parties were labeled, the real parties in interest were a select group of citizens, despite the fact it was filed by the attorney general. Furthermore, despite the

[1] The defendants also relied on the Multiparty Multiform Trial Jurisdiction Act (MMTJA), found at 28 U.S.C. § 1369, which provides for original jurisdiction in the district court, and removal to district court, for certain minimal diversity actions arising from a ''single accident.'' Neither the district court nor the Fifth Circuit addressed this issue, as it found jurisdiction existed under CAFA.

[2] It bears noting that on July 1, 2010, the United States House of Representatives passed a bill that would amend CAFA to prevent removal of actions filed by state attorneys general on behalf of their citizens. The bill was received in the Senate, and sent to the Committee on Commerce, Science, and Transportation on July 13, 2010. See http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.5503: (accessed February 14, 2011). No action has been taken on that bill since. *Id.*

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fact that the attorney general did not style the claim as a class action under Rule 23, the defendants argued that the complaint satisfied all the procedural requirements under CAFA, specifically that minimal diversity existed and that the putative class exceeded 100 (no one contested that at least $5,000,000 was at stake). The district court agreed, and the Fifth Circuit affirmed, finding that jurisdiction existed under CAFA. *Caldwell*, 536 F.3d at 430.

Shortly thereafter, the State of West Virginia, acting through its attorney general, brought a *parens patriae* antitrust and consumer protection suit in the Circuit Court of Marshall County, West Virginia. *West Virginia v. Comcast Corp.*, 705 F. Supp.2d 441 (E.D.Pa. 2010). The attorney general alleged that Comcast, the defendant, required its ''premium'' subscribers to use and pay a fee for special cable boxes, while boxes with equivalent capabilities exist in the open market. The attorney general's complaint alleged that this purported requirement that premium subscribers rent the boxes only from Comcast constituted impermissible tying behavior, in violation of the West Virginia Antitrust Act (''WVAA''), the West Virginia Consumer Credit and Protection Act (''WVCCPA''), and the common law of West Virginia. The attorney general sought treble damages under the WVAA, damages under the WVCCPA, restitution, disgorgement, civil penalties under both the WVAA and the WVCCPA, an injunction against the alleged improper tying, attorneys' fees and litigation expenses.

Comcast removed the case to the U.S. District Court for the Northern District of West Virginia under CAFA, arguing that federal jurisdiction was proper as: (i) the amount in controversy exceeded $5,000,000; (ii) the parties were diverse; and (iii) that CAFA's requirement that a class action existed under the parameters of 28 U.S.C. § 1332(d)(1)(B). After removal, the case was transferred to the Eastern District of Pennsylvania pursuant to a MDL order, where there the district court denied the attorney general's motion to remand.[3]

B. Cases Rejecting Removal Under CAFA

While the Fifth Circuit (on two separate occasions) and the Eastern District Court in Pennsylvania have embraced CAFA's jurisdictional reach to include removability of attorney general actions, five other districts have failed to jump on board.[4] In the case of *Missouri v. Portfolio Recovery Associates Inc.*, 686 F. Supp. 2d 942 (E.D. Mo. 2010), the district court failed to apply the ''claim-by-claim'' approach used by *Comcast* in the context of CAFA.

The *Portfolio Recovery* case involved a lawsuit by the state against defendants for violating the Missouri Merchandising Practices Act (MMPA), Mo. Rev. Stat. §§ 407.010, et seq., through, *inter alia*, purchasing debts that had been discharged in bankruptcy, and attempting to collect non-collectable debts. *Portfolio Recovery*, 686 F. Supp. 2d at 943. The state sought an injunction and statutory damages under the MMPA for victims of the statute, which the attorney general would distribute. The defendants removed, arguing that when the complaint was examined, the state was really acting as a class action plaintiff on behalf of those consumers that were harmed. *Id*. 944.

The court rejected the notion that its case was a ''class action'' under CAFA and ignored the fact that the suit did not affect the state as a whole, but only select citizens. In explaining its reasoning, the court stated ''the State is a real party in interest because it has an interest in protecting its citizens from consumer fraud. . . .'' *Portfolio Recovery*, 686 F. Supp. 2d at 944. In attempting to distinguish itself from *Caldwell*, the district court noted that the Fifth Circuit considered a ''mass action'' under CAFA, and not a ''class action'' as alleged in its case. *Id*. at 945. Specifically, the court noted that under the MMPA, the attorney general was not required to seek certification and, therefore, the action could not be considered a ''class action'' under CAFA.[5]

In so doing, the court departed from the widely accepted view that CAFA was enacted to expand jurisdiction and instead explicitly rejected the 5th Circuit's opinion in *Caldwell*. Rather, it mistakenly applied the jurisprudence developed for complete diversity which finds that removal statutes, in that context, must be ''strictly construed.'' While *Portfolio Recovery* ultimately acknowledged that such cases may be subject to removal, it used a wholesale approach analysis. By using this analysis and rejecting the argument that the case was a ''class action,'' the court held the attorney general was the proper party in its case, and thus the requirements of CAFA were not met.[6]

In *West Virginia v. CVS Pharmacy*, No. 2:09-1000, 2010 WL 3743876 (S.D.W. V. Sept. 21, 2010) (stay pending decision petition to appeal, *CVS Pharmacy Inc. v.*

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[3] Recently, the Ohio attorney general brought an action against GMAC Mortgage, LLC and Ally Financial that alleged violations of the state's consumer protection laws in connection with the foreclosure crisis. *State of Ohio v. GMAC Mortgage,* LLC, __ F. Supp.2d __, 2011 WL 124187 (N.D. Ohio, Jan. 14, 2011). While the action was removed from state court to the Northern District of Ohio under the general diversity statute, the Northern District of Ohio relied heavily upon the Fifth Circuit's opinion in *Caldwell*. Ultimately, the court found that the attorney general was not the real party in interest, but that the attorney general only represented ''a distinct and identifiable group of Ohio citizens—Ohio citizens with mortgages held by GMAC and Ally, that are in, or in danger of, foreclosure.'' *GMAC Mortgage,* 2011 WL 124187, *4. Even though jurisdiction was found to exist under the general diversity statute, jurisdiction likely would have existed under CAFA as well. *Id*. at *9.

[4] They include *In re LFT-LCD Flat Panel Antitrust Litigation*, N.D. Cal. No. C 07-1827 SI, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011); *Connecticut v. Moody's Corp.*, D. Conn No. 3:10cv546, 2011 WL 63905 (D. Conn. Jan. 5, 2011); *West Virginia v. CVS Pharmacy*, No. 2:09-1000, 2010 WL 3743876 (S.D.W. V. Sept. 21, 2010) (stay pending decision petition to appeal, *CVS Pharmacy, Inc. v. West Virginia*, 4th Cir. No. 10-267 (Oct. 14, 2010); *Missouri v. Portfolio Recovery Associates, Inc.*, 686 F. Supp. 2d 942 (E.D. Mo. 2010); and *Oklahoma v. BP America, Inc.*, No. 09-945, (W.D. Okla. Oct. 29, 2009). As noted *infra*, two of these five decisions are currently on appeal.

[5] CAFA defines a ''class action'' as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure ***or*** similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons.. . .'' 28 U.S.C. § 1332(d)(1)(B). The definition of ''class action'' makes no mention of requiring that a certification take place.

[6] The same rejection of the claim-by-claim approach was used in the third case in favor of a wholesale analysis. *In re LFT-LCD Flat Panel Antitrust Litigation*, N.D. Cal. No. C 07-1827 SI, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011). In ignoring CAFA's broad jurisdictional mandate, the court shortened CAFA's reach by concluding that there is no ''language in CAFA to support a claim-by-claim approach to evaluating the real party in the interest in a *parens patriae* case.'' *Id.* at *3.

West Virginia, 4th Cir. No. 10-267 (Oct. 14, 2010)), the state attorney general alleged that the defendant violated W. Va. Code § 30-5-12b(g) and its consumer protection act through failing to pass on the savings of using generic prescription drugs to consumers. The attorney general sought an injunction and a statutory penalty of $5,000 for each violation.

The district court found it of import that the attorney general sought the $5,000 statutory penalty which could only be asserted by the attorney general. *CVS Pharmacy*, 2010 WL 3743876 at *10. That portion of the statute also contained no requirement that the attorney general pay the injured consumer any money. Furthermore, the attorney general also sought disgorgement from the defendants for all profits obtained in violation of the statute. *Id*. at 14.

Rather than examine the claim in the context of CAFA, the district court in *CVS Pharmacy* chose to determine whether the action was one of a *parens patriae* nature. In concluding that the attorney general was enforcing a consumer statute and held a quasi-interest in protecting its citizens as consumers, the court held the action was one of a *parens patriae* nature. *Id*. at *14. The court reached this conclusion without much thought to a claim-by-claim analysis or a wholesale analysis to determine the nature of the proceeding under CAFA. Indeed, its limited discussion on CAFA seemed more like an afterthought, but it remains to be seen what the Fourth Circuit will do with the appeal.[7]

In the fourth case declining to apply CAFA, *Oklahoma v. BP America Inc.*, No. 09-945 (W.D. Okla. Oct. 29, 2009), the Oklahoma attorney general brought an action against the defendants alleging that they manipulated the commodities markets with the effect of raising prices of propane throughout the state. *Id*. at 1. The attorney general alleged violations of Oklahoma's Consumer Protection Act, Okla. Stat. tit. 15, § 752, *et seq*., and sought to recover actual damages, statutory damages, and a declaratory judgment that the alleged behavior violated the act. The defendants removed the action to federal court under CAFA, and the attorney general filed a motion to remand.

The court noted that a *parens patriae* action is one where the state asserts an interest apart from a particular party or parties, and a quasi sovereign interest must exist. Relying on *Snapp & Sons Inc. v. Puerto Rico,*, 458 U.S. 592, 607 (1982), the district court asserted that quasi sovereign interests fall into two general categories: (1) the State's interest in the health and well-being, both physical and economic, of its residents in general, and (2) the State's interest in not being discriminatorily denied its rightful status within the federal system.

In addressing the status of the parties, the Court pointed out that not one citizen was represented in this case, but rather the suit was brought to ''protect the integrity of Oklahoma markets and to enforce the civil penalties and fortfeiture [*sic*] provisions of the Oklahoma Consumer Protection Act.'' *BP America, Inc.*, at 3. With this conclusion and without any analysis under CAFA, the court ended its short opinion and held that it did not have jurisdiction under CAFA.[8] The Court was not swayed by the fact that not all citizens of Oklahoma purchased propane.[9]

The Analysis: So With the Above Cases In Mind, How Is a Determination Made?

The issues the courts above faced were two-fold: First, can diversity be satisfied under CAFA when the face of the complaint is labeled as a *parens patriae* action and names the state as a plaintiff? Thus, unlike *In re Katrina*, can CAFA diversity be satisfied when the only named plaintiff is a State? Second, when an action is not specifically filed under Rule 23, can it be properly characterized as a ''class action'' or ''mass action'' under CAFA?

Unlike traditional, complete diversity jurisdiction, which requires complete diversity of citizenship of all the parties (*see* 28 U.S.C. § 1332(a)), CAFA only requires minimal diversity. In other words, ''one member of the plaintiff class—named or unnamed—must be diverse from any one defendant.'' *Lowery v. Alabama Power Co*., 483 F.3d 1184, 1193 n.24 (11th Cir. 2007) (referencing 28 U.S.C. § 1332(d)(2)(A)). The problem arises then, when a state is the sole named plaintiff in what appears to be a *parens patriae* action, and cannot be considered a ''citizen''—how can diversity jurisdiction exist?

In the *Portfolio Recovery*, *CVS Pharmacy*, and *BP America* cases, the courts failed to look beyond the labels placed by the plaintiffs in the pleadings. The courts' analyses simply focused on whether the relative complaint could constitute a *parens patriae* action under the relevant state law. Answering yes, the courts elected to stop the analysis there.

Both the *Comcast* and *Caldwell* courts, however, noted that even outside the expansive CAFA context, courts have long held that to determine if diversity jurisdiction is present, one must look beyond the labels placed on pleadings to determine who the real parties

[7] It is also worth noting that the district court held that ''[w]hether viewed as a 'class action' or as a 'mass action' defendants have not demonstrated that at least one alleged consumer member of any putative class satisfies the CAFA amount-in-controversy requirement.'' *CVS Pharmacy*, 2010 WL 3743876 at *16, n.6. After making this statement, the district court cited *Cappuccitti v. DirecTV Inc.*, 611 F.3d 1252, 1256 (11th Cir. 2010), which made a one-of-a-kind holding that to establish jurisdiction under CAFA, at least one plaintiff must allege an excess of $75,000 in damages in addition to the $5,000,000 aggregate. The Eleventh Circuit, however, having recognized its error in issuing such a holding, reconsidered and vacated. See *Cappuccitti v. DirectTV Inc*., 623 F.3d 1118 (11th Cir. 2010).

[8] One commentator suggests that *parens patriae* actions should not be subject to CAFA jurisdiction. Alexander Lemann, Note, *Sheep In Wolves' Clothing: Removing Parens Patriae Suits Under The Class Action Fairness Act*, 111 Colum. L. Rev. 121 (2011). Mr. Lemann's article concludes that, in his view, removal jurisdiction in this context ''run[s] afoul of the principles of federalism embodied in the Eleventh Amendment. . . .'' *Id.* at 153.

[9] The final case rejecting CAFA jurisdiction is *Connecticut v. Moody's Corp.*, D. Conn No. 3:10cv546, 2011 WL 63905 (D. Conn. Jan. 5, 2011). Long before the court conducted a CAFA analysis, the court predetermined that the state attorney general was a real party in interest under a general diversity jurisdiction analysis – which contrary to CAFA – is to be narrowly construed against federal jurisdiction. *Id.* at *3. When the court considered the attorney general's standing under CAFA, it held that because it already determined the attorney general to be a real party in interest under the general diversity statute, there could be no diversity under CAFA. *Id*. at 4.

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in interest are. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) (''It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach.''). When parties exist that are ''directly and personally concerned in the outcome of the litigation,'' they must be considered ''real parties in interest'' and analyzed in determining diversity jurisdiction. *Id*. at 428.

A. Determining the Real Party in Interest: Approach Analyzes One Claim at a Time

The question then becomes, ''how does one determine the real party in interest?'' The *Comcast* court noted that a party is a real party in interest ''when it is 'directly and personally concerned in the outcome of the litigation to the extent that his participation therein will insure a genuine adversary issue between the parties. . . .' '' *Caldwell*, 536 F.3d at 428, quoting *Land O'Lakes Creameries v. La. State Bd. of Health*, 160 F. Supp. 387, 388 (E.D. La. 1958) (internal citation omitted). Despite the fact that injunctive relief was sought in *Caldwell*, because the state sought to recover damages suffered by individual policy holders, the Fifth Circuit found that absent the separate claims for relief being partitioned into separate cases, the real parties in interest were the policy holders and not the State. *Caldwell*, 536 F.3d at 430.

The *Comcast* court, however, went a step further and engaged in a more detailed analysis on how to determine if the state is the real party in interest. In so doing, it established a test to determine whether the state is the real party in interest under CAFA. It noted that courts in the past have implemented two kinds of tests to determine the real party in interest in non-CAFA *parens patriae* removal cases: (i) a wholesale approach; and (ii) the ''claim-by-claim'' approach.

The court noted that the wholesale approach, which examines the entire complaint as a whole, usually resulted in the case being remanded for lack of jurisdiction. The claim-by-claim approach, however, had the opposite effect, as each claim was examined individually. In determining the appropriate analysis to use in the CAFA context, the court noted that ''[i]t is undeniable that Congress intended for CAFA 'to expand substantially federal court jurisdiction over class actions.' '' *Comcast*, 2010 WL 1257639 at *5, quoting S. Rep. No. 109-14, at 43 (2005) (and see cases cited therein). Noting that Congress drafted CAFA with the intent that courts would ''strongly favor the exercise of federal diversity jurisdiction over class actions,'' the *Comcast* court determined that the ''claim-by-claim'' analysis was appropriate. (Quoting S. Rep. No. 109-14, at 35.) The *Comcast* court also noted that, while not specifically articulated in this manner, the claim-by-claim analysis was the same approach actually used by the Fifth Circuit in *Caldwell*.

By examining each claim, the *Comcast* court asked if the state possessed a quasi-sovereign interest in bringing a claim for treble damages. In comparing its facts with those in *Caldwell*, the *Comcast* court noted that the state brought the claim for a select group of state citizens—premium subscribers—and not the general citizenry of West Virginia. Because it possessed no direct interest in the treble damages claim sought and represented only a select group of citizens, the court concluded that when the true nature of the pleadings was examined, the action was not of a *parens patriae* nature and the premium subscribers were thus the real parties in interest. As the state was not the only true plaintiff, minimal diversity did exist under CAFA—giving rise to federal jurisdiction.

B. If Not Labeled as a Class Action, Can It Still Be Removed?

In interpreting CAFA, some courts have taken the approach that if it looks like a duck, quacks like a duck, and acts like a duck, it is a duck. CAFA contains a broad definition and defines a removable class action as ''any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.'' 28 U.S.C. § 1332(d)(1)(B). Obviously, in a complaint labeled as a *parens patriae* action, there will be no mention of Rule 23 or class certification. Both the *Comcast* and *Caldwell* courts addressed this issue.

Looking to the congressional history of CAFA, both the District Court in Pennsylvania and the Fifth Circuit noted that the term ''class action'' must be defined broadly to avoid ''jurisdictional gamesmanship.'' ''Generally speaking, *lawsuits that resemble a purported class action should be considered a class action* for the purpose of applying these provisions.'' *Comcast*, 2010 WL 1257639 at *9, quoting S. Rep. No. 109-14, at 35 (emphasis in original). In *Comcast*, the court held that when a citizen who failed to ''opt-out'' of the lawsuit would be bound by the judgment, it operated as a Rule 23 class action. The WVAA required the attorney general to provide notice, an opt-out opportunity, and adequate representation—just like a class action. Distinguishing itself from *Missouri v. Portfolio Recovery Associates Inc.*, 686 F. Supp. 2d 942 (E.D. Mo. 2010) (discussed *infra*), *Comcast* noted that the Missouri statute at issue did not discuss the potential binding effect upon consumers in a *parens patriae* context—making it possible that the case was not a ''class action'' under CAFA. Because in both the *Comcast* and *Caldwell* cases the state attorney general was not the real party in interest and the actions in all but name were class actions, the courts properly concluded that CAFA jurisdiction was proper.

C. The Dissenter's Common Link

In *Missouri v. Portfolio Recovery Associates Inc.*, 686 F. Supp. 2d 942 (E.D. Mo. 2010), *West Virginia v. CVS Pharmacy*, No. 2:09-1000, 2010 WL 3743876 (S.D.W. V. Sept. 21, 2010), and *Oklahoma v. BP* America, *Inc.*, No. 09-945, (W.D. Okla. Oct. 29, 2009), the courts failed to look beyond how the parties were captioned. Rather than conduct an analysis under CAFA, which was enacted to ''expand federal jurisdiction'' (S. Rep. No. 109-14, at 43 (2005)), the courts focused on whether the suit could be classified as one of a *parens patriae* nature. Once the answer was yes (as it would be in almost any attorney general case), the analysis ended and the case was remanded. Indeed, only the court in *Portfolio Recovery* attempted to lay out reasoning as to why CAFA jurisdiction should not apply, but even then, it chose to take a wholesale approach in determining the nature of the complaint, rather than the more reasoned claim-by-claim approach articulated in *West Virginia v. Comcast Corp.*, 705 F. Supp. 2d 441. As an appeal is pending in

CVS Pharmacy, there is a possibility, however, for clarity by a higher court on these issues.[10]

Conclusion: Where Do We Go From Here?

Since the issuance of *In re Katrina Canal Breaches Litigation* by the Fifth Circuit in 2008, in the span of just over a year, case law is beginning to emerge that addresses the scope of CAFA and whether that scope covers certain actions filed by attorneys general. What is clear from that picture, however, is that the law is far from settled.

Little case law at the circuit level exists, and the best case to provide clear guidance on deciding the issue with a detailed analysis is a district court opinion out of Pennsylvania. *West Virginia v. Comcast Corp.*, 705 F. Supp. 2d 441 (E.D. Pa. 2010). Given the recent rise in attorney general actions on behalf of consumers, this new and undeveloped area of CAFA law involving attorneys general will likely move into the forefront of CAFA litigation. Only time will tell, however, whether courts will follow the intent of CAFA and continue to expand federal jurisdiction to cover such suits or whether such litigation will remain in state court.

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[10] The appeal in *Oklahoma v. BP America, Inc.*, was voluntarily withdrawn under FRAP 42(b). See *Oklahoma v. BP America, Inc.*, Case No. 10-6171 (10th Cir. Jan. 13, 2011).

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