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"CAFA-nated": A Jittery Interpretation of Forum Selection in *Standard Fire Insurance Co. v. Knowles*

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I. Introduction

The Class Action Fairness Act of 2005 (CAFA)[1] gives federal district courts original jurisdiction over class action lawsuits in which the amount in controversy exceeds $5 million in sum or value.[2] To determine whether a matter exceeds this threshold amount, CAFA states, "the claims of the individual class members shall be aggregated."[3] The United States Supreme Court interpreted CAFA's jurisdictional provisions for the first time in *Standard Fire Insurance Co. v. Knowles*.[4] In *Knowles*, the Court ruled that named plaintiffs could not avoid federal jurisdiction by stipulating prior to class certification that damages would not exceed CAFA's $5 million amount-in-controversy threshold.[5] The opinion confirmed the Court's desire to keep plaintiffs' lawyers from unilaterally attempting to keep class actions in state court. In effect, the unanimous Court sent a clear message: Lawyers representing a class cannot stipulate away potential damages in order to avoid federal jurisdiction.

Nearly two years later, questions about the Court's holding in *Knowles* still linger. The litigation originated in Miller County, Arkansas, a jurisdiction known as plaintiff friendly in class action cases.[6] Class action defendants have long considered Miller County a "judicial hellhole"[7] and a "magnet jurisdiction."[8] This note explores one potential objective of the Court's decision in *Knowles*—curbing the practice of forum shopping. Indeed, the Court's forum-shopping jurisprudence demonstrates its distaste for the gamesmanship which often occurs in order to keep class action cases in state court.[9] Part II begins by exploring the Court's traditional view toward forum shopping. Part II then analyzes the purposes of CAFA and provides background on the perceived problems occurring in Miller County and other magnet jurisdictions. Part III suggests that the Court's true objective in *Knowles* was to curb gamesmanship by class action plaintiffs in jurisdictions such as Miller County. Ultimately, this note suggests that the *Knowles* decision promises to appropriately deter future forum shopping in suits brought under CAFA, at least in terms of efforts by class representatives to stipulate an amount in controversy lower than the threshold for removal to federal court.

II. Forum Shopping: A Primer

A. The Court's Traditional View Toward Forum Shopping

Black's Law Dictionary defines forum shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."[10] The United States Supreme Court's disdain for the practice can be traced to the seminal 1938 decision in *Erie Railroad Co. v. Tompkins*.[11] *Erie* limited the practice

of forum shopping by requiring federal courts in diversity cases to apply the substantive law of the state in which they sit.[12] *Klaxon Co. v. Stentor Electric Manufacturing Co.*[13] further diminished the practice by requiring federal courts to apply the forum state’s choice-of-law rules.[14] In 1965, the Court explicitly condemned forum shopping in *Hanna v. Plumer*[15] by citing “the twin aims” of *Erie*—“discouragement of forum-shopping and avoidance of inequitable administration of the laws.”[16] The *Hanna* holding suggests that differences in procedural rules are less likely to encourage forum shopping than the substantive differences permitted by *Swift v. Tyson*.[17] By the middle of the twentieth century, Justice Jackson went as far as to describe the practice as “evil.”[18] More recently, while examining the state and federal systems in *Pennzoil Co. v. Texaco, Inc.*,[19] an abstention case, Justice Marshall lamented “the odor of impermissible forum shopping which pervade[d] th[e] case.”[20] Commentators have since placed this line of cases in context:

> [I]t was not *Erie* itself, but instead the Court’s subsequent decision in *Hanna v. Plumer* which, in retrospect, assigned a “discouragement of forum shopping” purpose to *Erie*, describing *Erie* as “in part[,] a reaction to the practice of ‘forum-shopping’ which had grown up in response to the rule of *Swift v. Tyson*.”[21]

Although these cases demonstrate the Court’s general position, each addressed the practice in a very specific context—the application of state versus federal substantive law once a case was properly before federal court on diversity grounds. *Knowles*, on the other hand, presented a demonstrably different question—whether the case should have been before a federal court in the first place.[22] The distinguishable nature of the case created tension between the Court’s traditional aversion of forum shopping and a fundamental legal principle—“the plaintiff is the master of the complaint.”[23]

The United States Supreme Court has traditionally embraced this rule, acknowledging “the well-pleaded-complaint rule enables [a plaintiff] . . . to have the cause heard in state court.”[24] The general rule that a plaintiff may frame his or her suit to avoid removal has been the law for more than 100 years.[25] In *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*,[26] the Court stated, “[i]f [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.”[27]

These cases suggest that a plaintiff is entitled to some deference in terms of the forum he or she selects. If the plaintiff wants to plead his or her claim in a way that avoids federal jurisdiction, the United States Supreme Court appears willing to allow it. Although the Court clearly disapproves of ordinary forum shopping, its reluctant acceptance of the practice was not absolute in the context of class actions, even before the passage of CAFA.[28]

B. The Role of CAFA in Forum Shopping

CAFA dramatically limited the ability of plaintiffs’ lawyers to keep class action litigation in friendly state courts. Instead of the normal presumption that the plaintiff is master of his or her complaint, CAFA’s drafters sought to eliminate gamesmanship and forum shopping of class venues. CAFA’s legislative history explicitly states as much: “The Class Action Fairness Act of 2005 is a modest, balanced step that would address some of the most egregious problems in class action practice.”[29] Shortly after CAFA became law, commentators began to analyze the legislation: “A major premise of [] CAFA is that a federal forum is a superior venue for resolving class actions with multistate aspects. Limiting plaintiffs’ attorneys’ ability to choose a state forum for a class action appears to have been a major reason for enacting [] CAFA into law.”[30]

Senator Orrin Hatch, CAFA’s chief sponsor, urged his colleagues to pass the legislation as a means of curbing the “intolerable practice” of “lawyers gaming the system.”[31] The longtime Utah Senator also described his frustration with the current practices of the class action bar, which “starts with a few class action attorneys sitting around a table, thinking of an idea for a class action lawsuit.”[32] He also explained that plaintiffs’ attorneys often find a lead plaintiff to avoid diversity jurisdiction and then search for a compliant judge to certify the class.

Many of Senator Hatch’s colleagues in the Senate shared similar concerns about the rise of class action practice. In its report on CAFA, the Senate Judiciary Committee made three noteworthy conclusions. First, the Committee found that state courts were less thorough than their federal counterparts when applying the complicated procedural requirements of class action lawsuits.[33] Second, the Committee reported that federal judges focused more on the important procedural hurdle of class certification.[34] Finally, the Committee concluded that the enormous caseloads and limited resources of many state court judges frustrated their ability to appropriately combat opportunistic plaintiffs’ lawyers.[35] These findings contributed to a problem specifically addressed by CAFA—“[s]tate and local courts . . . sometimes acting in ways that demonstrate bias against out-of-State defendants.”[36]

President George W. Bush expressed his position when he signed CAFA into law: “Before today, trial lawyers were able to drag defendants from all over the country into sympathetic local courts, even if those businesses have done nothing wrong. . . . This bill helps fix the system.”[37] Around the time President Bush signed CAFA into law, many noted the vilification of forum shopping in Washington.[38] In 2004, Arizona Congressman Trent Franks described forum shopping as “the notorious practice by which personal injury attorneys cherry-pick courts and bring lawsuits in jurisdictions that consistently hand down astronomical awards, even when the case has little or no connection to the state or locality.”[39] That same year, special interests groups championed CAFA as a means of “curbing class action lawsuit abuses in state courts that result from rampant venue shopping of large national class action lawsuits in a few select jurisdictions around the country.”[40] Disinterested outlets have since noted the overarching purpose of the legislation—“to make it more difficult for plaintiffs to litigate class actions in state courts, which were thought to be hostile to corporate defendants in comparison to federal courts.”[41] In sum, although the plaintiff should normally be the master of his or her complaint, the text and legislative history of CAFA show a clear and unmistakable intent by Congress to limit forum shopping and curb gamesmanship by plaintiffs’ counsel in class actions.

C. Miller County and Other “Magnet Jurisdictions”: What Makes Them “Judicial Hellholes”?

The class action bar’s preference for state court stems from the willingness of state court judges to certify classes.[42] Certain courts have become especially appealing: “Dispassionate academics referred to such courts as ‘magnet jurisdictions,’ wry plaintiffs lawyers called them ‘magic counties,’ and irate tort reformers called them ‘judicial hellholes.’”[43] The ATRF uses its preferred term—“judicial hellhole”—to describe “places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants, in civil lawsuits.”[44]

Today, class action filings are unevenly distributed throughout the country. Some population centers, such as Los Angeles County, California; Cook County, Illinois; and Dade County, Florida, see a disproportionately high number of class action filings, but other, less populated areas, such as Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida, experience the same phenomenon.[45] Miller County, Arkansas appeared in the 2006 edition of *Judicial Hellholes*, an annual publication of the ATRF, alongside jurisdictions such as Madison County, Illinois.[46] In a 2013 interview with *Arkansas Business*, Ted Frank of the Center for Class Action Fairness noted the rise of Miller County on the class action circuit, naming it alongside at least one of the aforementioned “magnets.”[47]

D. Notable “Magnet Jurisdictions”

1. Madison County, Illinois

Madison County, located in southern Illinois, is considered a notorious “magnet jurisdiction,” once ranked the worst in the country by the ATRF in its 2004 edition of *Judicial Hellholes*.[48] One report showed that the rate of class actions filings in Madison County was around twenty times the national average in 2001.[49] According to the two prominent, pro-business organizations, Madison County “has increasingly gained a reputation as a claimant’s heaven, a place where

lawsuits are given a sympathetic ear by friendly trial judges, generous juries, and equally receptive appellate courts.”[50] It is not only extra-territorial sources that have raised concerns about the seemingly one-sided jurisdiction. John DeLaurenti, a retired judge with nearly three decades of experience in Madison County, has conceded that the accusations are warranted, at least to a certain extent: “When people come from hither and thither to file these cases, there’s got[] [to] be an inducement, doesn’t there? They’re not coming to see beautiful Madison County.”[51]

Asbestos litigation in Madison County courts illustrates the problem.[52] In 2012, Madison County made up only 0.0008% of the nation’s population, but the jurisdiction handled 25% or more of the nation’s asbestos cases.[53] Reports have shared one possible example where an Indiana resident could sue a Pennsylvania corporation for exposure that allegedly occurred in Indiana.[54] In such a case, the plaintiffs could join an innocent Illinois business as a defendant in order to keep the case in a Madison County court.[55] After one year, removal to federal court is not permitted in this situation, and the court will properly dismiss the local defendant; however, the case against the out-of-state defendant brought by an out-of-state plaintiff for an out-of-state injury will proceed.[56] Although this anecdote is illustrative, the problem is far more pervasive.

2. Miller County, Arkansas

Miller County is known both nationally and locally as a favorable jurisdiction for class action plaintiffs. Nationally, corporate defendants view Miller County as “rife with abusive litigation tactics and plaintiff-friendly local judges.”[57] The county is infamous for “tactic[s] used by plaintiffs’ attorneys to ensure that cases are handled by state judges, rather than in the federal courts that tend to give businesses a more favorable reception.”[58] National sources have also noted that Miller County ranks alongside Madison County, Illinois as one of the magnet jurisdictions where out-of-state defendants, such as Standard Fire, fail to receive the relief CAFA was enacted to provide.[59]

After President Bush signed CAFA into law in 2005, Miller County lawyers needed a means of keeping their lucrative class action lawsuits before receptive state court judges.[60] The “stipulation” at issue in *Knowles* provided precisely such a means.[61] Because the plaintiffs’ lawyers in *Knowles* wanted to keep the litigation in Miller County, they employed a familiar tactic—they stipulated that the lead plaintiff and the class he sought to represent would seek less than $5 million in damages.[62] Lawyers for the class also confined their claims to a two-year period although the applicable statute of limitations provided for five.[63]

Arkansas media outlets gave extensive coverage to the class certification process in Miller County in advance of the ruling by the United States Supreme Court. One outlet reported that the process can take years, which forces defendants, especially those without the deepest of pockets, to settle out of court.[64] The same report analyzed the tactics used by prominent Miller County attorneys.[65] Over the seven-year period leading up to *Knowles*, the same attorneys who represented the lead plaintiff in the case “received more than $420 million in attorneys’ fees tied to out-of-court settlements—not jury verdicts—in 23 lawsuits, nearly all of them in Miller County.”[66] Jeremy Rosen, a California attorney who filed an amicus brief in support of Standard Fire, analyzed this practice in greater detail:

> After a case is filed in Miller County, . . . the plaintiffs’ attorneys begin pummeling defendants with requests to produce—at their own expense—thousands or even millions of pages of documents. The discovery costs alone could run into the millions, often more than the $5 million to which the plaintiffs have voluntarily limited total damages, before the case is even certified as a class action.[67]

Rosen distinguished this process from the one typically seen in federal courts, where a federal judge would promptly schedule a hearing to determine whether discovery should proceed.[68]

In one case similar to *Knowles*, a state court judge ordered an insurance company defendant to produce all of its claim files within ninety days, despite the fact

that estimated production costs exceeded $45 million.[69] Amicus briefs filed in the *Knowles* case by other insurance companies sued in Miller County added, “the court repeatedly ruled that decisions on most of their threshold motions would be deferred—for as long as seven to nine years, in their experience—while discovery went forward on all questions presented by the complaint.”[70]

In one infamous case, after a Sebastian County judge denied the plaintiffs’ requests to delay ruling in a class action involving insurance claims, the case was voluntarily dismissed at 1:00 PM and re-filed in Miller County at 2:43 PM on the same day.[71] A brief filed by the Arkansas State Chamber of Commerce in support of Standard Fire further demonstrated the business community’s frustrations with the jurisdiction:

> Arkansas class-action practice is among the most plaintiff-friendly in the United States. State courts in Miller County, Arkansas, are a particular magnet for the abusive class-action attacks on business and interstate commerce that Congress sought to prevent by adopting the Class Action Fairness Act of 2005 (“CAFA”). This case involves a device designed to thwart CAFA. Businesses are wary of doing business in Arkansas, lest they become ensnared in a coercive class action without the ordinary protections of removal to federal court.[72]

III. What’s Really Going on? the Court’s True Objective In *Knowles*

Although *Knowles* appeared to present a dry procedural question, the United States Supreme Court’s unanimous opinion has potentially far-reaching implications. The Court’s deference to plaintiffs who plead around jurisdictional rules seemingly dissipates when it comes to CAFA.[73] One possible explanation for this lack of tolerance is that CAFA represents a direct attempt by Congress to curb gamesmanship.[74] The Constitution tasks the Court with the duty to interpret statutes such as CAFA.[75] In *Knowles*, the Court did so while also eliminating one means of unilaterally evading federal jurisdiction. If the Court fails to police this type of forum shopping, who else will? Or who else can? Unlike other jurisdictional statutes and rules, CAFA’s jurisdictional provisions were clearly enacted to curtail forum shopping, and the Court effectuates congressional intent when it judicially regulates this type of conduct by plaintiffs’ lawyers.

A. Dissecting *Knowles*

Although the *Knowles* opinion did not explicitly address Miller County or the concept of forum shopping, both concerns played a significant role during oral argument. Theodore Boutrous, arguing the case on behalf of Standard Fire, opened his argument by highlighting the problems associated with litigating a class action lawsuit in Miller County.[76] He stated that Congress designed CAFA “to protect defendants and absent class members against the kind of State court class action abuses that are occurring in Miller County, Arkansas.”[77] He explained that the plaintiffs’ attorneys used stipulations in order to keep cases in state court, which, according to Boutrous, was inconsistent with congressional intent.[78] He then described the problem in Miller County: “It’s not speedy justice. It takes five or six years to get a hearing on anything and then there’s no hearing, even on class certification.”[79] Boutrous believed that the plaintiffs’ lawyers were “slicing and dicing the classes up into pieces . . . to thwart jurisdiction and manipulate jurisdiction.”[80] David Frederick, arguing on behalf of the class, disagreed with these allegations of abuse.[81]

During oral argument, the Justices clearly had forum shopping on their minds. Victor Schwartz, General Counsel for the American Tort Reform Association, attended the argument and noted that most of the nine Justices appeared to recognize “that letting plaintiff[s’] lawyers have total control over whether a class action meets the Class Action Fairness Act’s $5 million jurisdictional threshold could allow them to chop class actions into small pieces and keep such litigation in super plaintiff-friendly state and county courts.”[82] For example, when discussing the stipulation, Justice Scalia was skeptical: “The State court could find, and I suspect this State court would find, that it’s worth the money to be in State court.”[83] Justice Alito questioned the intent of the stipulation when he asked whether the $5 million requirement had any meaning at all to plaintiffs’ attorneys in this type of litigation.[84] Chief Justice Roberts also suggested that the plaintiffs’

approach would allow two adjacent state courts to hear separate $4 million lawsuits—one for plaintiffs whose last names begin with A to K, and the other whose names start with L to Z—rather than push a single $8 million case to federal court.[85]

Justice Breyer also condemned the perceived end-around CAFA’s jurisdictional requirements as “a loophole because it swallows up all of Congress’s statute.”[86] He spoke at length on the gamesmanship possible under the plaintiffs’ proposed approach: “[W]e’ve found a way around this. And what we’re going to do is we will divide our $25 million class action into six subsidiary actions and proceed exactly the same merry way. And we do that by means of stipulation.”[87] This hypothetical demonstrates the Court’s aversion to attempts to undermine the legislative intent of CAFA. Justice Kennedy also denounced the plaintiffs’ theory: “What you’re saying is that the simplest thing is to evade the statute. Evasion is simple.”[88]

Commentators quickly described the tone of the oral argument—the Court did not “buy[] Knowles’s attempt to have his jurisdictional cake and then to feast on damages.”[89] After the Court issued its ruling in *Knowles*, the tone of the argument became readily apparent. News outlets quickly reported the implications of the Court’s ruling in favor of Standard Fire—plaintiffs’ attorneys will now struggle to evade federal jurisdiction in class action lawsuits.[90]

B. Why Did the Court Decline to Discuss Gamesmanship?

The mysterious absence of any mention of forum shopping in the opinion begs an important question—why would the United States Supreme Court choose to omit such a significant policy consideration? Avoiding an underlying issue is not a maneuver unfamiliar to the Court.[91] *Bell Atlantic Corp. v. Twombly*[92] and *Ashcroft v. Iqbal*[93] serve as two recent examples of the Court’s unspoken objectives. In both cases, the Court interpreted Federal Rule of Civil Procedure 8, which governs the general rules of pleading.[94] *Twombly* involved treble damages in civil antitrust cases,[95] while the plaintiffs in *Iqbal* alleged that federal officials violated their constitutional rights following their arrests for suspected involvement with terrorist groups.[96] Both cases reached the nation’s highest Court because of the novel issues presented with respect to pleading requirements.[97] The true intent behind the applicable changes to pleading requirements was arguably to curb the excessive costs of private-party discovery.[98] In both *Twombly* and *Iqbal*, the Court limited federal jurisdiction; however, policy considerations did not appear to be a motivating factor in either opinion.[99]

According to Theodore Boutrous, one potential explanation for the Court’s narrow, and often vague, holdings involves the difficulty in garnering the necessary number of votes in broad decisions; a narrow focus allows for a majority or even, as in *Knowles*, a unanimous decision.[100] Judge John T. Noonan, Jr. once asserted that “[t]he first audience for a judge writing on an appellate court is comprised of the other judges on the court.”[101] Judicial opinions are frequently less than clear because “[i]n recognition of their initial audience, Justices may frame their holdings in tempered utterances so as to enhance the collegial relations and to increase the chance that other Justices with a broad range of views will in fact join the opinion containing the holding.”[102] Thus, it stands to reason that Justice Breyer may have written the *Knowles* opinion narrowly in order to garner the support of his colleagues on the Court.[103] Had he discussed the gamesmanship occurring in Miller County or the Court’s dislike of forum shopping, perhaps Justices such as Kagan and Sotomayor, whose questioning seemed to favor the plaintiffs,[104] may have chosen to either concur or dissent, and the weight of a unanimous decision would have been lost.

Perhaps another factor that may have influenced Justice Breyer’s terse opinion is the concern about how lower courts would interpret the decision. The Court seems averse to a protracted discussion of the issues in many cases, possibly in order to avoid providing dicta a lower court could misconstrue.[105] A recent example of this phenomenon is the Court’s 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.[106] In a five-four decision, the Court reversed a lower court’s class-certification order under Federal Rule of Civil Procedure 23(b)(2),[107] but this particular section of the opinion was written very narrowly.[108] However, Justice Scalia’s broad writing on the commonality requirement prompted four Justices to dissent in part.[109] This shows that if a Justice wants a consensus, he or she would be wise to keep the opinion as narrow as possible.

One potential problem with the Court sidestepping the forum-shopping issue in *Knowles* is that some have characterized the decision as a technical interpretation of the CAFA amount-in-controversy requirement. Therefore, lower courts might interpret the ruling as an unremarkable, straightforward decision regarding one specific element of CAFA, as opposed to a case that stands for a larger policy proposition. According to Richard Norman, one of the attorneys who represented the plaintiffs in *Knowles*, the opinion was “very simple” and “did not really stand for anything besides the invalidity of stipulations.”[110] By failing to acknowledge the proverbial elephant in the room, the Court failed to provide any meaningful guidance on forum shopping to the lower courts. Accordingly, some may question whether the absence of policy considerations in the decision constituted a lack of candor.

Many courts and commentators believe that judges must fully explain the reasoning behind their choices in order for the reader to ascertain their true objectives.[111] Professor Scott Idleman once observed, “the basic rule that judges ought to be candid in their opinions—that they should neither omit their reasoning nor conceal their motives—seems steadfastly to have held its ground.”[112] He went on to defend this approach of judicial legitimacy, stating that “[w]hether justified in terms of enhanced political accountability, improved judicial decisionmaking, increased notice to those who rely on judicial opinions, or any number of other reasons, the normative position that judges ought to be forthcoming in their pronouncements would appear to be virtually unassailable.”[113]

C. Recent Developments: How Have the Lower Courts Interpreted *Knowles*?

Because the holding in *Knowles* was so narrow, lower courts have limited guidance on the amount of evasion permitted under CAFA. As it now stands, plaintiffs’ lawyers clearly cannot make a binding stipulation to limit damages with respect to an entire class, but it is difficult to extract additional direction from the opinion. The lower courts that have addressed CAFA’s pleading requirements in the two years since *Knowles* have reached varying results. Admittedly, CAFA is a complicated piece of legislation, and it is likely that the Court was reticent to issue a grand pronouncement on what litigants can or cannot do under its provisions. It remains to be seen how broadly the federal district courts will interpret the *Knowles* opinion, but it appears that, at least in Arkansas, lower federal courts use *Knowles* to deny plaintiffs’ motions to remand.

In *Basham v. American National County Mutual Insurance Co.*,[114] the defendants sought to remain in federal court on CAFA grounds.[115] They also alleged that judges sitting on the Miller County Circuit Court routinely made unfair procedural rulings.[116] In September 2012, United States District Judge Susan Hickey ruled the “[p]laintiffs ha[d] capped their amount in controversy sufficiently to create a legal certainty that they w[ould] not recover more than the federal jurisdictional minimum,” and she granted the plaintiffs’ motion to remand the case to Miller County Circuit Court.[117] After the United States Supreme Court issued its opinion in *Knowles*, the defendants appealed to the Eighth Circuit Court of Appeals, which vacated the previous ruling.[118] The appeals court remanded the case in order to determine the amount in controversy.[119] Judge Hickey then issued an opinion finding that the amount in controversy exceeded $5 million and ruled the case would remain in federal court.[120] In September 2014, in *Goodner v. Clayton Homes, Inc.*,[121] Judge Hickey used *Knowles* to justify her decision to deny plaintiffs’ motion to remand a class action lawsuit back to state court.[122]

Outside of Arkansas, the Eleventh Circuit Court of Appeals noted in *Day v. Persels & Associates*,[123] a post-*Knowles* decision, that if a class representative could not enter into a binding stipulation regarding damages, then it followed that the class representative could not object to a magistrate judge hearing the case.[124] This ruling demonstrates how courts might consider the broader implications of the narrow *Knowles* opinion.

In addition to lower courts applying the decision, the United States Supreme Court may have revealed a proverbial light at the end of the ambiguous *Knowles* tunnel. In December 2014, the Court issued an opinion in *Dart Cherokee Basin Operating Co. v. Owens*,[125] a case involving an important question of procedure for removing cases to federal court. The case presented the issue of whether a defendant must attach evidence in support of key jurisdictional facts, such as the amount in controversy.[126] The Court held that a defendant’s notice of removal must only include a plausible allegation that the amount in

controversy exceeded the jurisdictional threshold; it need not contain evidentiary submissions.[127] However, the Court declined to address whether a presumption against removal was proper. This ruling lends support to the idea that such notices of removal need not contain evidence of the amount in controversy. Rather, a mere allegation pursuant to the general pleading standard of Federal Rule of Civil Procedure 8(a) may be sufficient. If so, the decision effectively expands *Knowles*.[128] Perhaps the answer to the narrow, and problematic, *Knowles* opinion thus lies only in future Court rulings that will be necessary to advance the unspoken thoughts of the nine Justices regarding forum shopping in class action practice.

IV. Conclusion

Following *Knowles*, it seems clear that the United States Supreme Court is determined to effectuate the intent of Congress in preventing forum shopping in class action lawsuits. Although the holding was narrow, other, post-*Knowles* CAFA jurisdiction cases demonstrate that the federal courts will continue to ensure that the policy behind CAFA is implemented, regardless of whether or not the Court explicitly mentions such policy considerations in its opinions.

Notes

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[1]. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

[2]. § 4, 119 Stat. at 9 (codified at 28 U.S.C. § 1332(d)(2) (2012)).

[3]. § 4, 119 Stat. at 10 (codified at 28 U.S.C. § 1332(d)(6) (2012)).

[4]. 133 S. Ct. 1345 (2013).

[5]. *See id.* at 1350.

[6]. *See* Adam Liptak, *Justices Weigh Intent of a Class-Action Law*, N.Y. Times, Jan. 8, 2013, at B3 (“The case was filed in Miller County, Ark., where courts, according to the company, are notorious for coercing large settlements from out-of-state defendants.”); Gwen Moritz, *Miller County Class-Action Strategy Struck Down by U.S. Supreme Court*, Ark. Bus. (Mar. 19, 2013, 9:39 AM), http://www.arkansasbusiness.com/article/91484/us-supreme-court-rules-for-insurer-in-class-action-lawsuit-by-arkansas-homeowner.html (“The firm and others have routinely managed to keep class-action cases in friendly—and slow moving—state court . . . .”).

[7]. *See* Am. Tort Reform Found., Judicial Hellholes: 2006, at 22 (2006), *available at* http://www.legalreforminthenews.com/Reports/2006_ATRA_HELLHOLES_FINAL.pdf (listing Miller County on a “Judicial Hellhole Watch List” promulgated by the American Tort Reform Foundation (ATRF)).

[8]. Roger Parloff, *High Court Weighs Future of a Class-Action “Hellhole”*, Fortune (Jan. 7, 2013, 12:02 PM), http://features.blogs.fortune.cnn.com/2013/01

/07/supreme-court-class-actions/.

[9]. *See* George D. Brown, *The Ideologies of Forum Shopping—Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. Rev. 649, 650 (1993) (“When confronted with shopping between the state and federal systems, the Court exhibits strong opposition.”).

[10]. Black’s Law Dictionary 770 (10th ed. 2014).

[11]. *See* 304 U.S. 64, 74-75 (1938) (criticizing the *Swift* doctrine that allowed federal judges to ignore state common law on the basis that it enabled “grave discrimination by non-citizens against citizens”); *see also* Note, *Forum Shopping Reconsidered*, 103 Harv. L. Rev. 1677, 1680 (1990) (tracing the Court’s position on the practice to *Erie*).

[12]. *Erie*, 304 U.S. at 78.

[13]. 313 U.S. 487 (1941).

[14]. *Id.* at 496.

[15]. 380 U.S. 460 (1965).

[16]. *Id.* at 468.

[17]. *See id.* at 467-68.

[18]. Wells v. Simonds Abrasive Co., 345 U.S. 514, 521 (1953) (Jackson, J., dissenting) (referring to forum shopping as “the type of evil aimed at in *Erie*”).

[19]. 481 U.S. 1 (1987).

[20]. *Id.* at 24 (Marshall, J., concurring in the judgment).

[21]. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. Rev. 333, 361 (2006) (second alteration in original) (footnote omitted) (quoting *Hanna*, 380 U.S. at 467).

[22]. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1347 (2013).

[23]. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002) (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99 (1987)) (internal quotation marks omitted).

[24]. *Id.* (quoting *Caterpillar, Inc.*, 482 U.S. at 398-99) (internal quotation mark omitted).

[25]. *See, e.g.*, Great N. Ry. Co. v. Alexander, 246 U.S. 276, 282 (1918) (“[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . .”); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) (“Of course the party who brings a suit is master to decide what law he will rely upon . . . .”); Cent. R.R. Co. of N.J. v. Mills, 113 U.S. 249, 257 (1885) (“The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse

party."); *see also* Iowa Cent. Ry. Co. v. Bacon, 236 U.S. 305, 310 (1915) (holding plaintiff could defeat removal by requesting only $1900 in damages even though plaintiff's loss was $10,000 at a time when the threshold for diversity jurisdiction was $2000).

[26]. 303 U.S. 283 (1938).

[27]. *Id.* at 294.

[28]. *See* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 775 (1998) ("In the class action context, however, forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to *counsel's own* (rather than the class members') interests . . . .").

[29]. S. Rep. No. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. "Egregious practices" aside, CAFA also serves a practical purpose. *See id.* ("Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court.").

[30]. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 593 (2006).

[31]. *See* 151 Cong. Rec. 1562 (2005).

[32]. *Id.*

[33]. S. Rep. No. 109-14, at 14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14.

[34]. *Id.*

[35]. *See id.*

[36]. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (2005) (codified at 28 U.S.C. § 1711(a)(4)(B) (2012)) ("Findings and Purposes").

[37]. Remarks on Signing the Class Action Fairness Act of 2005, 1 Pub. Papers 270, 271 (Feb. 18, 2005).

[38]. *See* Bassett, *supra* note 21, at 336-37 ("Congressional efforts to limit forum shopping have portrayed the practice as abusive, devious, and unethical.").

[39]. Press Release, Congressman Trent Franks, Congressman Franks Votes to Reduce Frivolous Lawsuits (Sept. 14, 2004), *available at* http://franks.house.gov/press-release/ congressman-franks-votes-to-reduce-frivolous-lawsuits (referring to the proposed Lawsuit Abuse Reduction Act).

[40]. *Class Action Fairness Act in Senate Week of June 21st*, Bus. Wire (June 18, 2004, 11:02 AM), http://www.businesswire.com/news/home/20040618005279/en/Class-Action-Fairness-Act-Senate-Week-June.html.

[41]. Michael Bobelian, *Supreme Court to Discern Meaning of Class Action Law*, Forbes (Jan. 9, 2013, 1:56 PM), http://www.forbes.com/sites/michaelbobelian

/2013/01/ 09/supreme-court-to-discern-meaning-of-class-action-law/.

[42]. Willging & Wheatman, *supra* note 30, at 593.

[43]. Parloff, *supra* note 8.

[44]. Am. Tort Reform Found., *supra* note 7, at ii. The organization has even trademarked the phrase “Judicial Hellhole.” *See id.*

[45]. Lester Brickman, Manhattan Inst. for Pol’y Res., Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology 1 (2002), *available at* http://www.manhattan-institute.org/pdf/cjr_06.pdf.

[46]. *See* Am. Tort Reform Found., *supra* note 7, at 22.

[47]. Mark Friedman, *Inside the Miller County Class-Action Strategy Invalidated by U.S. Supreme Court*, Ark. Bus. (Mar. 25, 2013, 12:00 AM), http:// www.arkansasbusiness.com/article/91542/miller-county-class-action-strategy-invalidated-by-us-supreme-court.html (“‘All they have to do is find the one friendly jurisdiction. For a long time, it was Madison County in southern Illinois, and now it looks like it’s Miller County.’”).

[48]. *See* Am. Tort Reform Found., Judicial Hellholes: 2004, at 14 (2004), *available at* http://www.legalreforminthenews.com/Reports/Hellholes2004-FINAL.pdf (“When Madison County was named the nation’s Number One Judicial Hellhole last year, the local trial lawyers exclaimed, ‘We’re number one! We’re number one!’ This year, they should be even happier, because when it comes to the big business of trial lawyering, again there is no better place to set up shop than Madison County.”).

[49]. Noam Neusner & Brian Brueggemann, *The Judges of Madison County*, U.S. News & World Rep., Dec. 17, 2001, at 39, 39.

[50]. U.S. Chamber of Commerce & U.S. Chamber Inst. for Legal Reform, The Rogue Courts of Madison County: A Legal Analysis of Egregious Cases in the Courts of Madison County, Illinois 2 (2003), *available at* http:// www.instituteforlegalreform.com/hooks/1/get_ilr_doc.php?fn= madison.pdf.

[51]. Martin Kasindorf, *Robin Hood Is Alive in Court, Say Those Seeking Lawsuit Limits*, USA Today (Mar. 8, 2004, 12:17 AM), http://usatoday30.usatoday.com /news/ nation/2004-03-07-tort-lawsuits_x.htm (internal quotation marks omitted).

[52]. *See generally* Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 Wash. U. J.L. & Pol’y 235 (2004) (providing a comprehensive analysis of the litigation).

[53]. *Madison County, Illinois*, Am. Tort Reform Found., http:// www.judicialhellholes.org/2012-13/madison-county-illinois/ (last visited Feb. 21, 2015).

[54]. U.S. Chamber of Commerce & U.S. Chamber Inst. for Legal Reform, *supra* note 50, at 9.

[55]. *See id.*

[56]. *Id.* at 9-10.

[57]. Greg Stohr, *Class-Action Limits Weighed as Court Hears Claim of Abuse*, Bloomberg (Jan. 7, 2013, 1:19 PM), http://www.bloomberg.com/news/articles

/2013-01-07/class-action-limits-weighed-as-court-hears-claim-of-abuse.

[58]. *Id.*

[59]. *See* Parloff, *supra* note 8.

[60]. *Id.* This report also observed that several law firms filed large class action lawsuits in Miller County shortly before CAFA went into effect in February 2005. *Id.*

[61]. *See* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1350 (2013).

[62]. *Id.* at 1347; *see also* Liptak, *supra* note 6 (discussing the case following oral argument before the United States Supreme Court).

[63]. Knowles v. Standard Fire Ins. Co., No. 4:11-CV-04044, 2011 WL 6013024, at *1 (W.D. Ark. Dec. 2, 2011).

[64]. Moritz, *supra* note 6; *see also* F. Ehren Hartz, Comment, *Certify Now, Worry Later: Arkansas’s Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707, 708 (2009) (“Arkansas now follows a class-certification procedure that . . . fails to ensure that the policies the class action was designed to achieve are protected.”).

[65]. *See* Moritz, *supra* note 6.

[66]. *Id.*

[67]. Friedman, *supra* note 47.

[68]. *Id.*

[69]. Michelle Massey, *‘Failure To Communicate’ Could Lead to $45 M in Discovery Costs*, S.E. Tex. Rec. (Aug. 8, 2007, 11:13 AM), http://www.setexasrecord.com/ news/198990-failure-to-communicate-could-lead-to.html; *see also* Chivers v. State Farm Fire & Cas. Co., No. Civ. 05-4045, 2006 WL 377752, at *4 (W.D. Ark. Jan. 5, 2005) (remanding this particular case to state court).

[70]. Parloff, *supra* note 8; *see also* Brief for 21st Century Cas. Co. et al. as Amici Curiae Supporting Petitioner, Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013) (No. 11-1450), 2012 WL 5388768 (relevant brief); Brief for Manufactured Hous. Inst. et al. as Amici Curiae Supporting Petitioner, *Knowles*, 133 S. Ct. 1345 (No. 11-1450), 2011 WL 9372907 (relevant brief).

[71]. Michelle Keahey, *Judge in Ark. Colossus Class Action Did Not ‘Play’*, Legal Newsline (Apr. 25, 2012, 7:00 AM), http://legalnewsline.com/in-the-spotlight-judge-in-ark.html.

[72]. Brief for Ark. State Chamber of Commerce as Amicus Curiae Supporting Petitioner at 1, *Knowles*, 133 S. Ct. 1345 (No. 11-1450), 2012 WL 5363884.

[73]. *See* Kahan & Silberman, *supra* note 28, at 775.

[74]. S. Rep. No. 109-14, at 4-5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5-6.

[75]. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *see also The Judicial Branch*, White House, https://www.whitehouse.gov/our-government/judicial-branch (last visited Feb. 21, 2015) (“[T]he Court’s task is to interpret the meaning of a law . . . .”).

[76]. *See* Transcript of Oral Argument at 3, *Knowles*, 133 S. Ct. 1345 (No. 11-1450) [hereinafter Transcript] (on file with author).

[77]. *Id.*

[78]. *Id.* at 22-23.

[79]. *Id.* at 51.

[80]. *Id.* at 16.

[81]. *See* Transcript, *supra* note 76, at 49 (“So there are very good reasons why . . . a lawyer would want this case to be in State court and not want it to be removed to Federal court wholly apart from the ad hominem attacks that they make about Miller County, which were not brought to Congress’s attention and in fact are false.”).

[82]. *Case Gives SCOTUS Chance to Rein in Class-Action Extortionists in Once and Future Judicial Hellhole*, Am. Tort Reform Found. (Jan. 8, 2013), http://www.judicialhellholes.org/2013/01/08/case-gives-scotus-chance-to-rein-in-class-action-extortionists-in-once-and-future-judicial-hellhole/.

[83]. Transcript, *supra* note 76, at 28.

[84]. *See id.* at 32 (“Under your argument, the amount that’s demanded seems to be totally meaningless.”).

[85]. *Id.* at 29.

[86]. *Id.* at 30.

[87]. *Id.* at 34.

[88]. Transcript, supra note 76, at 35.

[89]. Alison Frankel, *SCOTUS to Class Action Bar: You Can’t Stipulate Out of Federal Court*, Reuters (Mar. 20, 2013), http://blogs.reuters.com/alison-frankel/2013/03/20/scotus-to-class-action-bar-you-cant-stipulate-out-of-federal-court/.html.

[90]. *See* Lawrence Hurley, *Supreme Court Rules for Insurer in Class Action Case*, Chi. Trib. (Mar. 19, 2013), http://articles.chicagotribune.com/2013-03-19/news/sns-rt-us-usa-court-classactionbre92i0nu-20130319_1_supreme-court-rules-class-action-fairness-act-federal-court (“The ruling is important in the context of class action cases because it will likely prevent plaintiffs’ lawyers from what critics view as an effort to circumvent a federal law aimed at keeping certain cases in federal court.”).

[91]. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1419 (1995) (“[J]udges still use rhetoric to maneuver.”).

[92]. 550 U.S. 544 (2007).

[93]. 556 U.S. 662 (2009).

[94]. *See* Fed. R. Civ. P. 8.

[95]. *Twombly*, 550 U.S. at 550.

[96]. *Iqbal*, 556 U.S. at 666.

[97]. *See id.*; *Twombly*, 550 U.S. at 548-49.

[98]. *See Twombly*, 550 U.S. at 558-59.

[99]. *See Iqbal*, 556 U.S. at 685-87; *Twombly*, 550 U.S. at 558-59.

[100]. Telephone Interview with Theodore Boutrous, Partner, Gibson, Dunn & Crutcher, L.L.P. (Oct. 28, 2013). Boutrous has argued more than seventy-five appeals, including *Wal-Mart Stores, Inc. v. Dukes* and *Hollingsworth v. Perry* before the United States Supreme Court. *See Theodore J. Boutrous, Jr.*, Gibson Dunn, http://www.gibsondunn.com/lawyers/tboutrous (last visited Feb. 21, 2015).

[101]. John T. Noonan, Jr., *The Relation of Words to Power*, 70 St. John’s L. Rev. 13, 19 (1996).

[102]. *See* Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. Rev. 75, 123 (1998).

[103]. *Cf.* Walter F. Murphy & C. Herman Pritchett, Courts, Judges, and Politics: An Introduction into the Judicial Process 477 (1961) (“[T]he desire to mass the Court, or at least a majority, behind a single expression of views can inhibit the power of the Court’s spokesman.”).

[104]. *See* Transcript, *supra* note 76, at 40-42, 48-49.

[105]. *See* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 Wm. & Mary L. Rev. 2021, 2029-30 (2013).

[106]. 131 S. Ct. 2541 (2011).

[107]. *See* Fed. R. Civ. P. 23(b)(2).

[108]. *See Dukes*, 131 S. Ct. at 2557-61.

[109]. *See id.* at 2561-67 (Ginsburg, J., concurring in part and dissenting in part).

[110]. Telephone Interview with Richard Norman, Partner, Crowley Norman, L.L.P. (Oct. 25, 2013). Mr. Norman has represented plaintiffs in dozens of nationwide

class action lawsuits and worked extensively on the briefing for *Knowles*. *See Richard E. Norman*, Crowley Norman, L.L.P., http://crowleynorman.com /firm/richard-e-norman (last visited Feb. 21, 2015).

[111]. *See* John W. McCormac, *Reason Comes Before Decision*, 55 Ohio St. L.J. 161, 166 (1994); *see also* Joseph Goldstein, The Intelligible Constitution: The Supreme Court’s Obligation to Maintain the Constitution as Something We the People Can Understand 19 (1992) (“Whether the justices be activists or passivists, they have a professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest.”).

[112]. Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 Tex. L. Rev. 1307, 1309 (1995).

[113]. *Id.* (footnote omitted).

[114]. No. 4:12-CV-04005, 2012 WL 3886189 (W.D. Ark. Sept. 6, 2012).

[115]. *See id.* at *1.

[116]. *See id.*

[117]. *Id.* at *6.

[118]. *See* Basham v. Am. Nat’l Cnty. Mut. Ins. Co., Nos. 12-8018, 12-8019, 12-8020, 2013 WL 7144182, at *1 (8th Cir. Apr. 12, 2013).

[119]. *Id.*

[120]. *See* Basham v. Am. Nat’l Cnty. Mut. Ins. Co., 979 F. Supp. 2d 883, 891 (W.D. Ark. 2013).

[121]. No. 4:12-CV-4001, 2014 WL 4722748 (W.D. Ark. Sept. 23, 2014).

[122]. *Id.* at *5.

[123]. 729 F.3d 1309 (11th Cir. 2013).

[124]. *See id.* at 1312.

[125]. 135 S. Ct. 547 (2014).

[126]. *Id.* at 551.

[127]. *Id.*

[128]. *See id.* at 554.

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