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CONFRONTING THE MYTH OF “STATE COURT CLASS ACTION ABUSES” THROUGH AN UNDERSTANDING OF HEURISTICS AND A PLEA FOR MORE STATISTICS

Patricia Hatamyar Moore*

ABSTRACT

The Supreme Court heard six cases involving class actions this term. One of these cases, *Standard Fire Insurance Company v. Knowles*, brought the Class Action Fairness Act to the Court for the first time. Petitioner insurance company and its numerous business-interest amici repeatedly claimed before the Court that “state court class action abuses” justified removal of the case (which was based on state law and filed in state court) to federal court.

The charge of a “flood” of “abusive state court class actions” echoed the same rhetoric that CAFA’s supporters used a decade ago in their ultimately successful efforts to pass the legislation. Unfortunately for the quality of the debate, then and now, no current data and very little past data about class actions are readily and publicly available, for federal or state courts. In other words, courts in the United States offer **no data** on such basic questions as the number of cases filed as class actions, the percentage of cases designated as class actions that are eventually certified as such, or the ultimate disposition of such cases.

To be sure, government-sponsored and private academic researchers have compiled a few databases that provide partial answers to some of these questions. But these limited efforts are well beyond the resources and skill available to the public, the press, and even to most policy-makers and the Court.

What does the lack of baseline data on class actions mean? A wealth of psychological research has shown that human cognition and judgment are subject to a variety of heuristics and biases. For example, the mantra of “state court class action abuses” has a “priming effect” making it easier to see or imagine such “abuses.” Further, the mind automatically attempts to create a coherent story out of the information it has, even if that information is incomplete or invalid. This manifests itself in the “anchoring effect,” the “availability heuristic,” and the “representativeness heuristic,” which are exploited by those spreading the myth of “state court class action abuses.”

The Court may not have been able to resist the lure of class action mythology as it considered the six class action cases this term. In four of the six cases, the Court reversed the lower court and held against the plaintiff class.

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I. INTRODUCTION

Early this year, counsel for the Petitioner began his oral argument before the United States Supreme Court in *Standard Fire Insurance Company v. Knowles* as follows: “Congress enacted the Class Action Fairness Act of 2005, CAFA, to expand Federal diversity jurisdiction and to protect defendants and absent class members against *the kind of State court class action abuses that are occurring in Miller County, Arkansas.*”¹ In the course of his argument, he referred four more times to these so-called “abuses.”² Large portions of Petitioner’s briefs in the Supreme Court, and even larger portions of the amici briefs supporting the Petitioner, were devoted to chronicling state-court “abuses” as justification for the position that CAFA should allow Petitioner to remove the case to federal court.³

The issue in *Knowles* was whether, in a putative opt-out class action based on state law and filed originally in state court, given the named plaintiff’s stipulation in the complaint that he would not seek damages on behalf of the class in excess of \$5,000,000 (the jurisdictional minimum for diversity jurisdiction under CAFA), the defendant can remove the case to federal court by showing that the amount in controversy without the stipulation exceeds \$5,000,000. During a discussion of whether class counsel would meet the “adequacy” requirement in a state-court class certification proceeding if counsel stipulated to limit damages below \$5,000,000, Justice Scalia suggested, “[T]he state court could find the claim is worth a lot more than 5 million but it’s worth that amount to be in this generous court for these generous juries . . . We’ve got juries and very favorable judges.”⁴ Thus, at least one justice apparently accepted Petitioner’s invitation to question the integrity or competence of state courts handling class actions.

¹ Transcript of Oral Argument at 3, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) (No. 11-1450) [hereinafter *Knowles Oral Argument*] (quoting Theodore J. Boutrous, Jr., counsel for the Petitioner *Standard Fire Insurance Company*) (emphasis added).

² *Id.* at 6 (stating that the class certification requirement that class counsel be adequate “wouldn’t protect [the absent class members] from the problems and abuses that Congress was concerned about”); *id.* at 6-7 (“But what Congress was concerned about in the text of the statute [CAFA], and the Senate report makes this very clear, that with all the abuses that occur in the interim, discovery that has nothing to do with the case – the discovery here goes back 10 years.”); *id.* at 7 (“The Congress was very concerned that cases were being kept in the State courts through abuses and manipulations of the amount in controversy.”); *id.* at 8 (“the kind of abuses that Congress was concerned about”).

³ See *infra* Part I(B).

⁴ *Knowles Oral Argument*, *supra* note 1, at 27.

The *Knowles* case pits the classical "plaintiff is master of the complaint" and "removal statutes should be narrowly construed" doctrines against the clear pro-defendant, pro-removal, anti-state court biases evinced in CAFA.⁵ The same epithets of "state court class action abuses" used a decade ago to justify the need for CAFA were used again to justify the Petitioner's position in *Knowles*.⁶ The Court ultimately held that until the class was certified, plaintiff "lacked the authority to concede the amount-in-controversy issue for the absent class members"; thus, the stipulation was ineffective.⁷ The Court's opinion steers clear of any reference to so-called "state court class action abuses," but it would be remarkable if the Court remained immune to the constant repetition of this phrase in the materials before it.⁸

Is there empirical support for the allegation of "state court class action abuses"? What were the baseline data on class actions before the "abuses" started? What are the data now that CAFA has been in effect eight years to correct the so-called "abuses"? No one knows the answers to these questions.

It is an amazing but true fact that no court, state or federal, in the United States actually compiles, on a regular basis, to be generally distributed to the public, any information about the number, type, or disposition of class actions filed.⁹ The federal courts, despite releasing annually an impressive volume of data, do not release figures on class actions. State courts, which rarely release anything but the most general data on caseloads, may not even keep, let alone release, figures on class actions. The limited data that do exist on class actions have been compiled by government-sponsored and academic researchers.

What does the lack of baseline data on class actions mean? A wealth of psychological research has shown that human cognition and judgment are subject to a variety of heuristics and biases.¹⁰ For example, the mantra of "state court class action abuses" has a "priming effect" making it easier to see or imagine such "abuses." Further, the mind automatically attempts to create a coherent story out of the information it has, even if that information is incomplete or invalid. This manifests itself in many ways, such as the "anchoring effect" – the

⁵ See *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002) ("the plaintiff is the 'master of the complaint'"); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 ("the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal] legislation"). For a brief review of CAFA's major provisions and a sampling of the literature debating CAFA's pros and cons, see Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1544-58 (2008).

⁶ See *infra* Part I(B).

⁷ *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

⁸ See *infra* Part I. A full discussion of the merits of *Knowles* is outside the scope of this article. For a good discussion of the confused case law on the burden of proof of the jurisdictional amount in the removal of diversity class actions under CAFA, see Clermont & Eisenberg, *supra* note 5, at 1572-79.

⁹ See *infra* Parts III(C), (D).

¹⁰ See *infra* Part II.

“anchor” here being the alleged “flood,” “explosion,” and “exponential increase” in state-court class actions. Even with knowledge of the base rate of class action filings or dispositions, it would still be difficult to overcome the “representativeness heuristic” and avoid making judgments about class actions based on negative stereotypical anecdotes. Such base rates, however, are virtually unavailable.

Having actual data on class action filings and dispositions is essential to evaluating the validity of many of the oft-repeated anti-plaintiff assertions about class actions. For example, a common assertion is that class certification exerts “judicial blackmail” over defendants, forcing them to settle unmeritorious lawsuits for fear of crippling class-wide damages.¹¹ Justice Scalia echoed the “judicial blackmail” notion just this term during oral argument of one of the class action cases.¹² But major empirical studies of state-court class actions have found that most settlements of class actions are court-approved *simultaneously with certification*. In other words, defendants were not “blackmailed” into settlement by class certification; instead, they agreed *prior to certification* to settle the case.¹³

The Supreme Court decided six cases involving class actions this term.¹⁴ This follows the Court’s resolution of five other class action cases in the past two terms.¹⁵ As Dean Kane stated in connection with the earlier five cases:

It is not a surprising or particularly insightful observation to note when the United States Supreme Court decides to grant certiorari to a number of cases in the same field within a short period of time, that the Court may be seeking to deliver some important message that may change substantially the way in which litigation in a given area is able to proceed in the future.¹⁶

¹¹ See *infra* Part I(B)(1).

¹² See *infra* notes 99-100 and accompanying text.

¹³ See *infra* notes 101-107 and accompanying text.

¹⁴ *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) (proof of materiality is not a prerequisite to certification of a securities-fraud class action seeking money damages for alleged violations of § 10(b) and Rule 10b-5); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (involving a plaintiff who sued under the opt-in “collective action” provision of the Fair Labor Standards Act [“FLSA”]); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) (arbitrator did not exceed his powers by construing the arbitration clause in a contract to authorize class arbitration).

¹⁵ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

¹⁶ Mary Kay Kane, *The Supreme Court’s Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1016 (2012).

The continuing myths about class actions and the continuing lack of real data on class actions may well have affected the "message" the Court delivered in the cases this term. In four of the six cases, including *Knowles*, the Court reversed the lower court and held against the plaintiff class.¹⁷ In deciding these cases, the Court may have been (consciously or unconsciously) swayed by the ubiquitous myths of class action "abuse."

This Article proceeds as follows. Part I traces the use, in CAFA's legislative history, of negative words such as "abuse," "flood," and "blackmail" to refer to state-court class actions, even though the evidence that CAFA's supporters offered to support such characterizations was marginal at best and misleading at worst. Ten years later, Petitioner and its supporting amici in *Knowles* resurrected the same derogatory concepts, despite the continuing absence of data and contrary to numerous empirical studies.

Part II offers a brief overview of psychological research on heuristics and biases in judgment and decision-making. This research helps explain the tenacity of the "state court class action abuse" myth and the danger that this inaccurate characterization poses to reasoned decision-making in Congress and the Court.

Part III surveys the available empirical evidence of the number, types, and dispositions of class action filings. Before CAFA's passage, there was almost no information available about state-court class action filings and very little information available about federal-court class action filings. After CAFA, there is still a dearth of state-court class action information, except for one-time studies in three states using data that ended in 2008 at the latest. As for federal-court class actions, the Federal Judicial Center found a relatively small increase in diversity class action filings in the first two years after CAFA. The federal courts have not released any data on class action filings since the FJC's report, which used data ending in June 2007. Other factors, such as the development of state-court complex litigation courts and the rise in multidistrict litigation ("MDL") proceedings, are consistent with the lack of a "flood" of diversity class actions following CAFA's passage.

¹⁷ *Knowles*, 133 S. Ct. 1345 (unanimous opinion by Justice Breyer holding that plaintiff class representative lacked the authority to stipulate to classwide damages of less than \$5,000,000 in an effort to avoid federal jurisdiction under CAFA); *Genesis*, 133 S. Ct. 1523 (5-4 opinion by Justice Thomas assuming without deciding that defendants' unaccepted offer of judgment that afforded plaintiff complete relief on her FLSA claim mooted her individual claim, and thus, holding that plaintiff's entire suit was mooted, even though she had filed a collective action alleging that other employees were similarly situated); *Comcast*, 133 S. Ct. 1426 (5-4 opinion by Justice Scalia reversing class certification of an antitrust class on ground that plaintiffs' damages model did not establish that damages were capable of measurement on a classwide basis, thus defeating 23(b)(3) predominance); *Italian Colors*, 133 S. Ct. 2304 (5-3 opinion by Justice Scalia, with Justice Sotomayor taking no part, holding that class-action waiver provision in mandatory arbitration clause in credit-card acceptance agreement was enforceable, and refusing to find that the clause prevented "effective vindication" of plaintiffs' federal antitrust rights even though individual arbitration would cost more to pursue than would be recovered).

The Article concludes by suggesting that federal and state courts improve collection and dissemination of data on class actions. While knowledge of empirical data may not overcome the strength of operative heuristics, at least it offers a start.

II. ABUSE OF THE WORD “ABUSE”

Taken at face value, CAFA expresses as its uncontroversial purposes the appropriate use of class actions and the protection of absent class members.¹⁸ Its primary mechanism was to expand existing boundaries of federal diversity jurisdiction so that more class actions based on state law could be heard in federal court.¹⁹ Thus, CAFA changed existing law by allowing diversity jurisdiction over a class action when there is minimal, rather than complete, diversity, and by allowing class members’ claims to be aggregated to meet the amount-in-controversy requirement. These changes arguably improved the coherence of the jurisdictional basis of diversity class actions.²⁰

But improving jurisprudential coherence was hardly the motivation of CAFA’s supporters. Corporate defendants apparently believed they received more favorable class action outcomes in federal court,²¹ and they drove the statute’s enactment by offering a catalogue of state court and plaintiffs’ lawyer “abuses.”²²

¹⁸ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005).

¹⁹ See 28 U.S.C. §§ 1332(d), 1453 (2012).

²⁰ See Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1770-76 (noting, among other things, that Supreme Court case law had held that diversity of citizenship in a class action could be considered solely by looking to the citizenship of the named plaintiff, while fulfillment of the amount-in-controversy requirement required the claim of every unnamed class member to exceed the jurisdictional amount, and that even this case law was thrown into disarray after passage of 28 U.S.C. § 1367 in 1990 until clarified by the Supreme Court in 2005).

²¹ Interestingly, others believed that plaintiffs preferred federal court or that state courts resolved cases more quickly than federal courts. See, e.g., STEPHANIE MENCIMER, *BLOCKING THE COURTHOUSE DOOR: HOW THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE* 161 (2006) (quoting West Virginia State Supreme Court of Appeals Judge Larry Starcher describing CAFA as “a major effort by big corporations to transfer jurisdiction from state courts, where there is relatively quick resolution of people’s claims, to the dark hole of the federal judiciary, which doesn’t want them[.]”); ALICIA MUNDY, *DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN* 15, 179 (2001) (stating that plaintiff’s attorney in one of the early Fen-Phen cases preferred to file in a Massachusetts state court in order to avoid “lengthy delays in a federal proceeding” and “the gaping maw of the MDL”); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (“[S]tate courts seldom face problems of complex litigation. This is mostly because plaintiffs’ attorneys prefer to litigate in federal court.”). The disagreement is probably a function of local variations in case disposition times.

²² Cf. HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* 255 (2004) (“There is a long history of reforms of the court system being adopted in the wake of newsworthy . . . cases on the assumption that such cases

The word "abuse" is defined as "a corrupt practice or custom"²³ or "improper use or treatment."²⁴ But CAFA's proponents used "abuse" to include proper practices. The targeted forum choices by plaintiffs' attorneys were permissible under the then-governing law and arguably ethically mandated. State courts were bound by their own procedural rules, not the potentially stricter Federal Rules of Civil Procedure.

Nonetheless, the enacted "Findings"²⁵ of CAFA stated that "over the past decade, there have been abuses of the class action device."²⁶ The first "abuse" was that "large fees" were supposedly awarded to class counsel despite little benefit to class members.²⁷ Second, confusing notices were distributed that class members could not understand.²⁸ Third, and most to the point in light of CAFA's purpose of enhancing "Federal court consideration of interstate cases of national importance under diversity jurisdiction,"²⁹

State and local courts [were] (A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.³⁰

The word "abuse" was used thirty-seven times by proponents of CAFA in the Senate Report in reference to state court class actions.³¹ The report blamed "the numerous problems with our current class action system" on the alleged fact that "most class actions are currently adjudicated in state courts."³² The Senate Report asserted that lawyers "game the system"³³ to keep class actions in state court by joining nondiverse defendants to defeat diversity or by stipulating that no class member would seek more than \$75,000.00 (the jurisdictional minimum before CAFA).³⁴ The Senate Report also claimed that "many state court judges are lax about following the strict requirements of Rule 23 (or the state's parallel governing rule),"³⁵ because "a large number of state courts lack the necessary

indicated that the system is out of whack. Often, careful examination, usually post hoc, reveals that the day-to-day operation differed sharply from the perceived problems.").

²³ WEBSTER'S NEW COLLEGIATE DICTIONARY 5 (8th ed. 1977).

²⁴ *Id.*

²⁵ Class Action Fairness Act of 2005, *supra* note 19, § 2(a).

²⁶ *Id.* § 2(a)(2).

²⁷ *Id.* § 2(a)(3)(A).

²⁸ *Id.* § 2(a)(3)(C).

²⁹ *Id.* § 2(b)(2).

³⁰ *Id.* § 2(a)(4).

³¹ S. REP. NO. 109-14 (2005). The Senate Report was released "on the same day that the President signed the measure into law." *Id.* at 79 (additional views of Senator Patrick Leahy).

³² *Id.* at 5.

³³ *Id.* at 10.

³⁴ *Id.*

³⁵ *Id.* at 14.

resources to supervise proposed class settlements properly”³⁶ and “the explosion of state court class actions has simply overwhelmed their dockets. Not surprisingly, abuses are much more likely to occur”³⁷

The Senate Report also generalized that caseload “problems are much worse in state court than in federal court[,]”³⁸ asserting that the average state-court judge is assigned over three times as many new cases per year as the average federal judge.³⁹ Accordingly, the Report asserted that “federal courts are much more speedy in resolving class action issues.”⁴⁰

The discussion of the abuse of the word “abuse” in the lead-up to CAFA’s passage would not be complete without the story of Hilda Bankston. Bankston became such a “poster child” for CAFA that she attended the ceremony in which President George W. Bush signed the bill into law.⁴¹ The former owner of a drug store in Fayette, Mississippi, Bankston testified in hearings on CAFA before the Judiciary Committee of the House of Representatives.

Bankston began her congressional testimony, “I am pleased today to testify about a subject with which I have become all too familiar: *class action lawsuit abuses* in Jefferson County, Mississippi. . . . Bankston Drugstore was named as a defendant in the national Fen-Phen *class action* lawsuit.”⁴² She went on to assert that her drug store, even after she sold it,⁴³ had been named in “hundreds of lawsuits”⁴⁴ in Mississippi state courts, leading to a “nightmare”⁴⁵ of records searches, testimony, sleepless nights, and possibly even her deceased husband’s heart attack.⁴⁶

³⁶ *Id.*

³⁷ *Id.* Bewilderingly, the Senate Report later refuted its own argument that “state court judges are lax” by stating that “the claims of some critics that it is more difficult to have a class certified in federal court than in state court have been disproved,” citing an FJC study that “found that class actions were ‘almost equally likely to be certified’ in the two systems.” *Id.* at 76. *See also id.* at 54 n.149 (“Indeed, there is no evidence that plaintiffs’ counsel believe that they must file in state court in order to succeed. Tobacco class actions prove this point. Of the purported class actions on tobacco issues initiated in recent years, many were originally filed in federal courts. Moreover, *there is no evidence that classes are more likely to be certified in state courts.*”) (emphasis added).

³⁸ *Id.* at 59.

³⁹ *Id.* at 76.

⁴⁰ *Id.*

⁴¹ White House Press Release, Statement by President George W. Bush Upon Signing S. 5 (Feb. 18, 2005) (2005 U.S.C.C.A.N. S3).

⁴² *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the H. Comm. on the Judiciary*, 107th Cong. 34 (2002) (statement of Hilda Bankston) (emphasis added).

⁴³ Mississippi Secretary of State Business Services, <https://business.sos.state.ms.us/corp/soskb/Filings.asp?87289> (last visited May 27, 2013) (indicating that Bankston-Rexall, Inc. was dissolved on December 28, 2001).

⁴⁴ *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the H. Comm. on the Judiciary*, *supra* note 43, at 36.

⁴⁵ *Id.*

⁴⁶ *Id.*

Perhaps because Bankston was an appealing Horatio Alger-type figure (she was a Guatemalan immigrant and a former Marine) and had been recently widowed, no one questioned her testimony. But neither Bankston nor her drug store could possibly have been a defendant in a *class action* lawsuit in Mississippi state court. The state of Mississippi did not, and does not, even allow class actions.⁴⁷ The drug store certainly could have been named as a defendant in a tort action brought by an individual plaintiff. That situation, though, was irrelevant to the legislation being considered, which was meant to address the supposed problem of a local defendant being added to a class action to prevent removal to federal court based on diversity jurisdiction. The Senate Report used Bankston's story as an example of how lawyers "game the system" to keep diversity *class actions* out of federal court by joining one in-state defendant to defeat diversity.⁴⁸

Putting aside the fact that there could not have been a class action against Bankston in Mississippi, her subsequent assertion, "Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers,"⁴⁹ was at least procedurally possible. But finding evidence to support her assertion is difficult. Mississippi state courts have only recently initiated an electronic filing system, and there is no electronic access to court records in Jefferson County, Mississippi, where the drug store was located. A recent Westlaw search of six county courts in Mississippi that do have electronic records turned up only one lawsuit involving Hilda Bankston or her drug store – a lawsuit in which Bankston was plaintiff.⁵⁰ Finally, an investigative reporter who traveled to the Jefferson County courthouse in 2005 to find the records of the "hundreds of lawsuits" against Bankston-Rexall Drugs found only one.⁵¹

The Bankston story, in a nutshell, illustrates the degree to which CAFA's supporters appear to have played fast and loose with the facts in their depictions of "state court class action abuses."⁵² The story also illustrates the difficulty of

⁴⁷ *Fails v. Jefferson Davis Cnty. Pub. Sch. Bd.*, 95 So. 3d 1223, 1227 (Miss. 2012) ("in Mississippi, there are no class actions.").

⁴⁸ See S. REP. NO. 109-14, at 10 (2005).

⁴⁹ *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the H. Comm. on the Judiciary*, *supra* note 43, at 36.

⁵⁰ *Bankston v. Gulf Guaranty Life Ins. Co.*, No. 12001000599 (indicating the lawsuit was filed June 2001, Hinds County, Mississippi Circuit Court). The Westlaw database searched was *Lawsuit Filings - Mississippi (LS-MS)*.

⁵¹ MENCIMER, *supra* note 21, at 165-69 (contrasting Bankston's assertions that her local drug store was named as a defendant "time and again" after she sold the store in 1999 with the author's unsuccessful efforts to find more than one such suit filed in Jefferson County, Mississippi).

⁵² See also Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1420 (1994) (characterizing the legislative history of the Civil Justice Reform Act, another defendant-initiated "reform" effort, as "a masterpiece of dishonesty and dis-information").

finding hard data on class actions (or in Mississippi, individual actions) to counter the “abuse” accusation.

The legislative history and enactment of CAFA were not, of course, the beginning of the “abuse” label in reference to class actions. The American Tort Reform Association, the Chamber of Commerce, and others have disseminated anti-class action propaganda for decades.⁵³ The “abuse” of class actions in both state and federal courts was also asserted in the history and enactment of the Private Securities Litigation Reform Act of 1995⁵⁴ and the Securities Litigation Uniform Standards Act of 1998.⁵⁵

Federal courts, which were cool to the idea of an expansion of their caseloads through an expansion of diversity jurisdiction,⁵⁶ have largely resisted the temptation to repeat the “abuse” moniker. However, not all have been immune to the priming effects⁵⁷ of the constant repetition of the word in connection with state court class actions. Several have dutifully repeated the state-court “abuse” language of CAFA, the PSLRA, and SLUSA, sometimes inserting the word “perceived” before the word “abuse,” possibly signaling their disagreement with the characterization.⁵⁸

⁵³ See, e.g., *Class Action Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/class-action-reform> (last visited May 27, 2013) (asserting that “class actions are now considered a means of defendant extortion and national policy-making by local court judges”). Cf. Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*,” 50 DEPAUL L. REV. 453 (2000) (describing tort reform propaganda generally).

⁵⁴ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 2, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.). See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007) (the PSLRA was “[d]esigned to curb perceived abuses of the § 10(b) private action—nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers”) (internal citations omitted).

⁵⁵ Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.) (the PSLRA “sought to prevent abuses in private securities fraud lawsuits,” but a consequent shift of securities class actions from federal to state court has “prevented [the PSLRA] from fully achieving its objectives”).

⁵⁶ See S. REP. NO. 109-14, at 5 n.1, 82, 88 (2005) (discussing the Minority Views of Senators Leahy, Kennedy, Biden, Feingold, and Durbin).

⁵⁷ See *infra* notes 138-41 and accompanying text.

⁵⁸ E.g., *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011); *Cappucitti v. DirecTV, Inc.*, 611 F.3d 1252, 1254 (11th Cir. 2010); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Shell Oil Co.*, 602 F.3d 1087, 1090 (9th Cir. 2010); *Johnson v. Advance Am.*, 549 F.3d 932, 938 (4th Cir. 2008); *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004); *Newby v. Enron Corp.*, 338 F.3d 467, 472 (5th Cir. 2003) (PSLRA and SLUSA); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 n.4 (2d Cir. 2001) (PSLRA and SLUSA).

A. The Sketchy Evidence of the So-Called "Flood" of State-Court Class Actions

The belief in "abuses" started with the belief in an "explosion of state court class actions."⁵⁹ The Senate Report quoted a law professor who had testified in hearings "that the flood of class actions in our state courts is too well documented to warrant significant discussion, much less debate."⁶⁰ Specifically, the Senate Report alleged that "federal class action filings over the past ten years have increased by more than 300 percent. At the same time, class action filings in state courts have grown . . . by more than 1,000 percent."⁶¹ A decade later, this same law professor filed an amicus brief in *Knowles*, repeating the assertion of a "flood of class actions in . . . state courts," straining the resources of these courts."⁶² His circular authority for that proposition in his amicus brief was the same Senate Report that cited his earlier testimony.⁶³

What was the "document[ation]" that was so overwhelming it did not even "warrant significant discussion"?⁶⁴ There were exactly three citations in the Senate Report purporting to document this "flood" of state court class actions.⁶⁵ An examination of these three sources shows that none of them supported the inference of a nationwide "flood" at the time of CAFA's passage. Even less do these same studies, which were seven to ten years old in 2005, support the inference of a "flood" that was suggested to the Court this year in *Knowles*.

First, the Senate Report cited a seven-year-old survey by the Federalist Society.⁶⁶ The Federalist Society began by noting that it was "struck by the absence of any generally available data respecting business exposure to class action litigation," and it therefore developed a survey that asked basic unanswered questions about class actions.⁶⁷ It sent its survey to 100 companies consisting of "most large employers in Texas" (with annual revenues of at least \$1 billion) and "Fortune 500 companies that have . . . membership in more than one trade organization that monitors litigation reform, including the American

⁵⁹ S. REP. NO. 109-14, at 14.

⁶⁰ *Id.* at 13 (quoting Professor E. Donald Elliot).

⁶¹ *Id.*

⁶² Brief of Amici Curiae Professors E. Donald Elliott and John J. Watkins in Support of Petitioner, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) (No. 11-1450), 2012 WL 5375598 (U.S.), at *19.

⁶³ *Id.*

⁶⁴ S. REP. NO. 109-14, at 13.

⁶⁵ *Id.* at 13 n.41, 14.

⁶⁶ *Analysis: Class Action Litigation – A Federalist Society Survey*, THE FEDERALIST SOCIETY (Oct. 1, 1998), <http://www.fed-soc.org/publications/detail/analysis-class-action-litigation-a-federalist-society-survey> (cited in S. REP. NO. 109-14, at 13 n.41).

⁶⁷ For each of three years (1988, 1993, and 1998), the survey asked the participants such questions as the number of putative class actions pending in federal, state, and Texas state courts, the number of state, federal, and Texas state cases in which classes were certified, and the length of time between class certification and settlement. *Id.*

Corporate Counsel Committee, the Civil Justice Reform Group, and the American Tort Reform Association.”⁶⁸ It received thirty responses.⁶⁹

The Federalist Society candidly admitted that “this survey effort is not intended to be a complete scientific sample or analysis of class action activity.”⁷⁰ The Society could not have claimed otherwise, given the sample size of thirty companies that were non-randomly selected as being either concentrated in Texas⁷¹ or as members of “litigation reform” groups, and which further self-selected to answer the survey. It is in this context that the following statement by the Society must be considered: “*Among the respondents*, the number of pending putative class actions in Texas state courts increased by 820 percent between 1988 and 1998. The number of such actions rose by 1042 percent in all state courts and by 338 percent in all federal courts during that same period.”⁷²

Note that the percentage increases are given but not the underlying raw numbers. If, for example, the respondents reported one class action in Texas state court in 1988 and eight in 1998, that would be an 800% increase, but that would hardly be what most people would call a “flood.” The Society hints at the actual raw numbers here: “in comparing 1993 and 1998 data for cases in state courts—a period during which we recorded an increase of 227 cases—two-thirds of the respondents witnessed an increase of seven cases or less and one-third witnessed an increase of 14-28 cases.”⁷³ In other words, in all fifty states’ courts combined, thirty huge companies self-reported that they had experienced an average of about seven more class actions in 1998 than in 1993. These are the data that the Senate Report called a “flood.”

The second citation for the “flood” of state court class actions was the Preliminary Results of the RAND Study of Class Action Litigation, published in 1997.⁷⁴ Because the Senate Report was published in 2005, it is unclear why its authors did not cite the final version of RAND’s executive summary of the same study (which had been published six years earlier in 1999),⁷⁵ or the book-length

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ As the Society noted, Texas was a leader in “tort reform,” including class action “reform.” *Id.* See generally Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1225-27 (2004) (reporting a 24.8% drop in new tort cases filed in the Texas trial courts from 1995 to 2001, which the authors attributed to “tort reform” efforts).

⁷² *The Incidence of Class Action Activity: Is Class Action Litigation Increasing?* THE FEDERALIST SOCIETY (Oct. 1, 1998), <http://www.fed-soc.org/publications/detail/the-incidence-of-class-action-activity-is-class-action-litigation-increasing> (emphasis added).

⁷³ *Id.*

⁷⁴ Deborah Hensler, et al., *Preliminary Results of the RAND Study of Class Action Litigation* 15 (May 15, 1997), cited in S. REP. NO. 109-14, at 13 n.41 (2005). The “Preliminary Results” document is a reprint of PowerPoint slides used for a presentation to the Advisory Committee on Civil Rules on May 1, 1997.

⁷⁵ Deborah Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice, Monograph MR-969/1-ICJ) [hereinafter *RAND 1999*], 1999 WL

full and final study (which had been published in 2000),⁷⁶ rather than the "Preliminary Results." RAND's overall conclusion about the volume of state court class actions was the same in the "Preliminary Results," the later monograph, and the full-length book. However, RAND provided a much fuller explanation of its conclusions in the latter two works.

RAND's study was limited to a two-year period (1995 to 1996) that occurred ten years before CAFA's passage (now eighteen years ago). Because of its limited time period as well as the lack of available data, RAND "found no quantitative data to permit us to calculate growth trends."⁷⁷ Based on qualitative interviews with both plaintiff and defense counsel, however, RAND was persuaded "that there has been a surge in damage class actions in the past several years, particularly in state courts and in the consumer area."⁷⁸ Some of those interviewed attributed this growth to curbs on securities lawsuits imposed by the PSLRA and the SLUSA, which allegedly prompted plaintiffs' class attorneys to shift their focus to consumer cases.

Again, though, to report that there was a "surge" gives no sense of the absolute incidence of class actions. RAND interviewed counsel at fifteen major corporations, mostly Fortune 100 companies (as well as a dozen plaintiff firms).⁷⁹ "Most of these corporate representatives" reported that "while five years ago," they might have been defending "at most a couple or a half-dozen class action lawsuits, they were now defending one or two dozen."⁸⁰

While an increase from two cases to twelve cases may have seemed like a "surge" to corporate counsel, it does not seem remarkable for a company with anywhere from \$10 billion to \$154 billion in annual revenue⁸¹ to be defending twelve class actions nationwide, in both state and federal courts (apparently those interviewed did not distinguish between them). Further, none of the companies gave RAND "access to their files so that [RAND] could independently count their pending or past class action lawsuits."⁸² RAND was not allowed even to see some of the companies' lists of cases, and was not allowed to copy those lists that it was allowed to see.⁸³

RAND cautiously concluded:

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⁷⁶ DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (RAND Institute for Civil Justice 2000) [hereinafter RAND 2000].

⁷⁷ RAND 1999, *supra* note 75, at 8. See also RAND 2000, *supra* note 76, at 63. Reviewing RAND's preliminary study, the Federalist Society admitted this: "the [RAND] Institute's empirical data is limited to a one-year period, and, therefore, does not reveal any information about changes in class action activity." *The RAND Institute's Class Action Study*, THE FEDERALIST SOCIETY (Oct. 1, 1998), <http://www.fed-soc.org/publications/detail/the-rand-institutes-class-action-study>.

⁷⁸ RAND 1999, *supra* note 75, at 8.

⁷⁹ RAND 2000, *supra* note 76, at 63.

⁸⁰ *Id.* at 64. A few other large corporations reported defending more than that.

⁸¹ See *Fortune 500 Companies for 1995*, CNN.COM, http://money.cnn.com/magazines/fortune/fortune500_archive/full/1995/ (last visited May 28, 2013).

⁸² RAND 2000, *supra* note 76, at 124 n.17.

⁸³ *Id.*

The qualitative data we collected in our interviews suggest that damage class actions are growing in number and diversity. Moreover, the perception of growth is widely shared among representatives of large corporations in different sectors of the economy and among lawyers in different practice areas. However, there are not sufficient caseload data available publicly to validate the qualitative evidence or the perception.⁸⁴

The third and final citation for the “flood” characterization is a 1997 memorandum by Judge Paul Niemeyer to the Civil Rules Advisory Committee, introducing the Advisory Committee’s working papers collected when studying proposed changes to Rule 23 in 1995 and 1996.⁸⁵ The Committee was considering proposed changes to a Federal Rule of Civil Procedure, and state court procedures were not its focus. It is unclear whether the following passage from Judge Niemeyer’s memorandum – the only passage at all regarding the volume of class action filings – refers to class actions in federal or state courts, or perhaps both:

Even though common sense suggests that the aggregated resolution of torts and other claims resulting from the repetitious effects inherent in a mechanized age would be on the increase, the testimony reveals an increase in the last two to three years beyond our reasonable expectations. One witness stated that his company’s exposure to class actions has increased 300% in the last three years; another stated 400-500% in the last two years; another, 500-1000% in the last three years; and yet another 300-400% in the last three years. One financial institution’s counsel stated that his company was involved in 65 class actions in 1996 alone.⁸⁶

Just as in the RAND interviews, the witnesses quoted by Judge Niemeyer gave rough percentage increases instead of raw numbers. Nor did they distinguish between filings in state and federal court.⁸⁷

Such were the dated, limited, and unscientifically collected data that supposedly showed beyond question the “flood of class actions in our state

⁸⁴ *Id.* at 67. Parenthetically, the impression of an increase in class actions in the mid-to-late 1990’s may have been magnified by the impression of a slump in class actions in the 1980’s and early 1990’s from the initial enthusiasm of the 1960’s and 1970’s. *See, e.g.*, STEPHEN N. SUBRIN & MARGARET Y. K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 205-06 (2006).

⁸⁵ ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (May 1, 1997), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol1.pdf>.

⁸⁶ *Id.* at x.

⁸⁷ I suspect, but do not know, that some of these witnesses were from the same Fortune 100 companies that RAND interviewed. An increase from two cases to twelve cases is a 600% increase. *See supra* notes 80-81 and accompanying text.

courts.”⁸⁸ If this sounds familiar, it may be because the myth of a class action “explosion” is a species of the more general myth of a “litigation explosion” that scholars have repeatedly attempted to debunk, with little apparent success.⁸⁹

B. The Myth of “Abuses” Lives on in Knowles

The drum beat of “state court class action abuses” relentlessly sounded from the Petitioner’s briefs and their supporting amici’s briefs in *Knowles*.⁹⁰

- “CAFA Expanded Federal Diversity Jurisdiction To Address Precisely The Class Action Abuses Exemplified By This Case.”⁹¹
- “In the 1990s, class actions were out of control.”⁹²

⁸⁸ S. REP. NO. 109-14, at 14 (2005).

⁸⁹ E.g., Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012); John J. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind “Tort Reform,”* 86 OR. L. REV. 533 (2007); Neil Vidmar, Russell M. Robinson II, & Kara MacKillop, “Judicial Hellholes:” *Medical Malpractice Claims, Verdicts and the “Doctor Exodus” in Illinois*, 59 VAND. L. REV. 1309 (2006); Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 LAW & SOC. INQUIRY 497, 501-502 (1996) (finding that “a very small number of business ‘mega-litigants’ account[ed] for most of the [business litigation] activity” in the federal courts and that “[b]ig business wins overwhelmingly, as plaintiff and defendant, in cases that involve it”); Marc Galanter, *Beyond the Litigation Panic*, 37 PROC. ACAD. POL. SCI. 1, 18 (1988); Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

⁹⁰ The Petitioner’s brief uses the word “abuse” or “abuses” eighteen times. Brief for Petitioner, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) [hereinafter *Pet. Brief*]. Its reply brief uses “abuse” or “abuses” three times. Reply Brief for Petitioner, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) [hereinafter *Pet. Reply Brief*]. See also Brief of Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Washington, and West Virginia as Amici Curiae in Support of Petitioner, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) [hereinafter *18 States’ Brief*] (uses “abuse” or “abuses” twenty-eight times); Brief of 21st Century Casualty Company, 21st Century Insurance Company, 21st Century Insurance Company of the Southwest, and 21st Century Insurance Group as Amici Curiae in Support of Petitioner, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) [hereinafter *21st Century Brief*] (uses “abuse” or “abuses” eleven times); Brief of the Cato Institute as Amicus Curiae in Support of the Petitioner, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) [hereinafter *Cato Brief*] (six times); Brief of Amicus Curiae by Center for Class Action Fairness in Support of Petitioner, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) [hereinafter *CCAF Brief*] (seven times); Brief of the National Association of Manufacturers as Amicus Curiae Suggesting Reversal, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) [hereinafter *NAM Brief*] (four times).

⁹¹ *Pet. Brief*, *supra* note 90, at 12. See also, e.g., *NAM Brief*, *supra* note 90, at 4 (“CAFA addresses [state courts’ alleged] abuses by loosening the requirements for federal courts to exercise jurisdiction over class actions”); *id.* at 22 (“in responding to widespread, systemic abuses that distorted the class action device in plaintiffs’ favor, Congress chose to give defendants greater recourse than plaintiffs to the neutrality of a federal forum”).

⁹² *18 States’ Brief*, *supra* note 90, at 3.

- “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.”⁹³

- Defendants trapped in state court are “forced to settle.”⁹⁴

One amicus brief was largely devoted to complaining about two cases in which the amicus had been named as a defendant in Miller County.⁹⁵

We cannot even answer the question of how many class actions are filed in any given court system. This makes it difficult to evaluate the charges that discovery in those actions is “out of control,” that dispositive motions languish, and that class certifications are granted without analysis. Despite this difficulty, empirical research has already dispelled many of the class action myths on view in *Knowles*.

1. The “Judicial Blackmail” Myth

At bottom of the insurance company’s argument in *Knowles* was that if the case was remanded to state court, the insurance company “could be forced to settle long before anything substantive ever happens in this case.”⁹⁶ This is a reinvention of the “judicial blackmail” argument against easy class certification, formulated in the Senate Report on CAFA as follows:

Certification of a class action, even one lacking merit, forces 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. [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.⁹⁷

The Senate Report asserted directly that “judicial blackmail forces settlement of frivolous cases,” explaining that “when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.”⁹⁸

⁹³ Brief of the Arkansas State Chamber of Commerce as Amicus Curiae In Support of Petitioner at 1, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012).

⁹⁴ *Pet. Reply Brief*, *supra* note 90, at 22.

⁹⁵ *21st Century Brief*, *supra* note 90, at 15-25 (complaining that discovery on their motion to dismiss for lack of personal jurisdiction, class certification discovery, and merits discovery were ordered to proceed contemporaneously).

⁹⁶ *Pet. Reply Brief*, *supra* note 90, at 22 (emphasis added).

⁹⁷ S. REP. NO. 109-14 at 19 (2005). The Report credits Judge Richard Posner with this quotation, but in fact the first sentence of the “quotation” is not from the opinion cited. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

⁹⁸ S. REP. NO. 109-14, at 20-21 (2005).

Justice Scalia espoused the “judicial blackmail” concept at oral argument in another class action case before the Supreme Court this term. In *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, a securities fraud case, the issue was whether the district court should decide, at the class certification stage, whether allegedly false statements are “material,” rather than reserve the question for a later determination, such as on summary judgment or at trial.⁹⁹ Favoring the earlier determination at the certification stage, Justice Scalia stated, “But there is . . . a reason for deciding it earlier, and the reason is the – the enormous pressure to settle once the class is certified. In most cases, that’s the end of the lawsuit. There’s – there’s automatically a settlement.”¹⁰⁰

There are many problems with the “judicial blackmail” argument,¹⁰¹ but the one most pertinent here is that existing empirical data do not support it. The FJC’s study of a representative national sample of terminated cases that had been filed as class actions in state and federal courts found that in 58% of the cases in which a class had been certified, settlement preceded certification.¹⁰² A later FJC study also found that in approximately 59% of diversity class action cases in which a class-wide settlement was approved, settlement also preceded class certification.¹⁰³

A major study of 1294 California state court class actions between 2000 and 2005 found that in 73% of the cases in which there was a certified class,

⁹⁹ See *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

¹⁰⁰ Transcript of Oral Argument at 35, *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 132 S. Ct. 2742 (2013). The Court ultimately held that proof of materiality “is not a prerequisite to class certification.” *Amgen*, 133 S. Ct. at 1191. Justice Scalia dissented, reprising a more subdued “judicial blackmail” argument: “Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high.” *Id.* at 1206.

¹⁰¹ For example, the argument overlooks the many pretrial options available to a defendant who is subject to a “meritless” case: motions to dismiss, motions for summary judgment, even sanctions motions. The “judicial blackmail” argument also ignores the role of class action defendants in collusive settlements. CAFA and its legislative history are replete with references to the incentives for plaintiffs’ lawyers to settle on terms less-than-optimal for class members, but fail to mention the equally perverse incentives for defendants to collude in class action settlements. See RAND 2000, *supra* note 76, at 79-82. See also, e.g., Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377 (2011).

¹⁰² Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys’ Choice of Forum in Class Action Litigation*, FEDERAL JUDICIAL CENTER, 47 (2005), <https://bulk.resource.org/courts.gov/fjc/clact05.pdf> [hereinafter *FJC Choice of Forum 2005*]. The study comprised “class action cases that had been either filed in federal court or removed to federal court between 1994 and 2001 and terminated between July 1, 1999, and December 31, 2002.” *Id.* at 6.

¹⁰³ Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two’s Pre-CAFA Sample of Diversity Class Actions*, FEDERAL JUDICIAL CENTER, 11 (2008), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Preliminary%20Findings%20from%20Phase%20Two%20Class%20Action%20Fairness%20Study%20\(2008\).pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Preliminary%20Findings%20from%20Phase%20Two%20Class%20Action%20Fairness%20Study%20(2008).pdf) [hereinafter *FJC 2008*].

certification occurred simultaneously with settlement.¹⁰⁴ Another study of 368 published opinions from 2003 to 2008 on settlements in class action and shareholder derivative cases in both state and federal courts found that 57% of the cases involved settlement classes (*i.e.*, certification requested simultaneously with approval of a settlement).¹⁰⁵ Still another study of 688 class action settlements—all class action settlements in federal district courts in 2006 and 2007—found that 68% of the settlements involved settlement classes.¹⁰⁶

Thus, empirical studies show that it is simply not true that class certification always causes settlement. In most cases, settlement *precedes* certification, so the defendant's agreement to settle appears more likely to be driven by an assessment of the case's merits than by "blackmail." Class certification as part of a settlement benefits the defendant as much as it benefits the plaintiffs: all class members who do not opt out will be bound by the judgment, preventing relitigation of common issues in repetitive lawsuits.

Further, in the minority of cases in which class certification precedes the disposition of the case, settlement is the most common, but not the only, disposition. The FJC's 2005 study found that in the cases in which the class was certified for litigation (not settlement), almost one-quarter of those cases "did not result in an approved class-wide settlement."¹⁰⁷

Moreover, Petitioner's position in *Knowles* went even farther than the "judicial blackmail" argument's traditional formulation. First, Petitioner faced a lawsuit that sought less than \$5,000,000 – not a suit that sought "hundreds of millions of dollars" entailing a "risk of bankruptcy" if lost. Standard Fire is a wholly-owned subsidiary of The Travelers Companies, Inc.¹⁰⁸ According to Travelers' web site, it "is one of the nation's largest property casualty companies," a "component of the Dow Jones Industrial Average, has more than 30,000 employees, 13,000 independent agents and multiple market segments,"

¹⁰⁴ Hilary Hehman, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation*, JUDICIAL COUNCIL OF CALIFORNIA: ADMINISTRATIVE OFFICE OF THE COURTS, D1-D2 (2010), <http://www.courts.ca.gov/documents/classaction-certification.pdf> [hereinafter *Calif. Second Report*] (210 of the 289 cases with a certified class were certified as part of a settlement).

¹⁰⁵ Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 268 (2010).

¹⁰⁶ Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEG. STUD. 811, 819 (2010). See also Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 U. KAN. L. REV. 809, 842 (2010) (46% of classes certified in Oklahoma were certified for settlement rather than litigation).

¹⁰⁷ *FJC Choice of Forum 2005*, *supra* note 102, at 48 (finding, for example, that 14% of cases in which a class was certified were later dismissed, and 6% of cases in which a class was certified proceeded to trial).

¹⁰⁸ Petition for Writ of Certiorari, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90, at ii (2012).

and operates on three continents.¹⁰⁹ It is unlikely that fear would force it to settle a \$5 million lawsuit.

Second, and more subtly, the Petitioner extended the "judicial blackmail" argument beyond its original notion that certification standards should be more exacting. Instead, Petitioner suggested that it would take too long to get to a certification hearing in state court, and that it did not like what was happening in the meantime: discovery.¹¹⁰ To avoid these inconveniences, the Petitioner asserted, its only option was to settle the case. This brings us to the second myth.

2. The "Languishing in State Court" Myth

The Petitioner and its supporting amici in *Knowles* suggested that if they were not permitted to remove the case to federal court, they would languish for at least six years in Arkansas state court, at a cost of millions of dollars.¹¹¹ These lamentations of the cost and delay of state-court class actions exemplify the broader "cost and delay" narrative in discussions about the civil justice system.¹¹²

It is notoriously difficult to measure the disposition times of civil cases.¹¹³ Disposition times will undoubtedly vary by year and locality, and the lack of data impedes comparisons.¹¹⁴

The limited data available, however, does not suggest that federal courts are generally speedier in resolving class actions than state courts. In a study of all federal class action settlements in 2006 and 2007 (a total of 688 cases), Brian Fitzpatrick found that the average time to reach settlement was 1196 days.¹¹⁵ In contrast, in a study of 1294 California state-court class actions from 2000 to

¹⁰⁹ TRAVELERS, <https://www.travelers.com/about-us/index.aspx> (last visited May 29, 2013).

¹¹⁰ See, e.g., *Pet. Brief*, *supra* note 90, at 10-11; *Knowles Oral Argument*, *supra* note 1, at 7, 19.

¹¹¹ See, e.g., *Knowles Oral Argument*, *supra* note 1, at 50 ("It takes five or six years to get a hearing on anything and then there's no hearing, even on class certification."); *Pet. Brief*, *supra* note 90, at 14 (alleging that the cost of discovery compliance was "potentially . . . tens of millions of dollars"); *Pet. Reply Brief*, *supra* note 90, at 22; *21st Century Brief*, *supra* note 90, at 16, 21 (asserting that Miller County courts "stall resolution of defendants' motions to dismiss and of class certification indefinitely, while plaintiffs' withering discovery abuse grinds them into the ground.").

¹¹² See Reda, *supra* note 90, at 1133, n.221 (suggesting that finding a solution to the supposed "cost-and-delay" of civil litigation is a normative exercise that reflects society's judgment about the role of the courts: "[f]or example, if delay concerns center around judicial case burdens, one solution might involve appointing more judges, rather than finding ways to decrease case filings.").

¹¹³ See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1948 (2009) (with regard to the study of case disposition times, or the time from the filing of a case to its termination, "[p]ure empirical work in this area is rather rare because of the scarcity of data and the inherently complex nature of the relevant research questions. It is unclear even what to measure, no less how to measure in a controlled way."). See generally Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (1999-2000).

¹¹⁴ Cf. Clermont, *supra* note 114, at 1946-51 (discussing studies showing that federal district courts have a longer disposition time for judge-tried cases than jury-tried cases, while state trial courts have the opposite).

¹¹⁵ See Fitzpatrick, *supra* note 106, at 820.

2005, the median time to disposition was 372 days. However, this figure understates the time to final disposition because it includes the times to interim dispositions such as coordination, transfer, and the like.¹¹⁶ Looking only at cases in which a class was certified by any means, the median disposition time was 700 days.¹¹⁷ For cases that were certified as part of a settlement, the median disposition time was 636 days. For cases that were certified through a litigated motion, the median disposition time was 993 days.¹¹⁸ Thus, although data from the two studies are not directly comparable, class actions in California state courts appear to be resolved (at least through settlement) about a year more quickly than class actions in federal courts.

Similarly, a 2004 report on the Complex Litigation Center of the Philadelphia Court of Common Pleas (a division of the Pennsylvania state courts) illustrated that some state courts handle complex litigation more quickly than federal courts. Although the report did not address the disposition times for class actions, it found that “there was consensus that the Philadelphia Court of Common Pleas was able to dispose of mass tort cases far more expeditiously than the US District Court for the Eastern District of Pennsylvania or any federal ‘Multidistrict Litigation’ (MDL) court.”¹¹⁹

3. The “Huge Attorney Fees in State Court” Myth

Another alleged “state court class action abuse” is the award of large, unmerited fees to plaintiff class attorneys.¹²⁰ Petitioner and its supporting amici in *Knowles* continue the tradition of self-righteous indignation over state courts’ fees awards, repeating pre-CAFA anecdotes and asserting new ones.¹²¹

¹¹⁶ See *Calif. Second Report*, *supra* note 104, at 14.

¹¹⁷ *Id.* at 16.

¹¹⁸ *Id.* at 18.

¹¹⁹ NATIONAL CENTER FOR STATE COURTS, CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS: FINAL REPORT 49 (September 2004).

¹²⁰ Pub. L. No. 109-2, § 2(a)(3)(A); S. REP. NO. 109-14, at 15-20 (2005).

¹²¹ See, e.g., *Pet. Reply Brief*, *supra* note 90, at 7 (alleging plaintiffs’ counsel “have been awarded nearly half a billion dollars in attorney’s fees”); Brief of the Manufactured Housing Institute, American National Property and Casualty Company, American National General Insurance Company, ANPAC Louisiana Insurance Company, Pacific Property & Casualty Company, and American National County Mutual Insurance Company, As Amici Curiae in Support of Petitioner, at 10a-13a, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) (chart purporting to demonstrate “awards” of attorneys’ fees in other cases in Miller County); *18 States’ Brief*, *supra* note 90, at 7-8 (repeating pre-CAFA anecdotes about class members receiving coupons, while plaintiffs’ lawyers received millions in fees); *Cato Brief*, *supra* note 90, at 3 (CAFA was enacted to police “plaintiffs’ lawyers who are more concerned with their fees than with the recovery to the class”); *CCAF Brief*, *supra* note 90, at 9 (asserting that state courts allow fees awards that are “several times what federal courts would consider reasonable”); *id.* (claiming Miller County “has been home to at least 26 class action settlements worth more than \$175 million in fees to class counsel, since 2004”).

But once again, the known aggregate data do not support the notion that state courts award plaintiff class action lawyers higher fees than federal courts. Two leading empirical studies of this question – whether state courts or federal courts award plaintiffs' class action lawyers higher fees – have either concluded that federal courts make higher awards,¹²² or that there is no statistically significant difference between the two.¹²³ A 2009 study by Eisenberg and Miller of 689 federal and state class action cases compiled from Westlaw, Lexis, and PACER and involving class action attorneys' fees from 1993 to 2008 (excluding fee-shifting cases) found that state courts awarded, on average, a lower percentage of the class action settlement as attorneys' fees (20%) than federal courts (23%), a result they call "surprising if one believes federal courts are less receptive to class actions than are state courts."¹²⁴

The FJC's study of diversity class actions in federal court contained incomplete information on fee awards, but it found that the average amount of eighteen class settlements on which it could obtain information was \$9,480,967, while the average fee award in twenty-one class settlements was \$3,397,381.¹²⁵ Thus, the FJC's data may suggest that roughly 36% of the class award goes to class attorneys in federal district court diversity cases. Fitzpatrick's study of federal-court class actions calculated a mean award for fees and expenses of 13% of the settlement amount in 2006 and 20% in 2007.¹²⁶ In state-court class actions, other studies have found a lower or similar percentage of the settlement amount going to attorneys' fees (20% in the Eisenberg/Miller study and 27% or 30% in the FJC *Amchem/Ortiz* study).¹²⁷

¹²² Eisenberg & Miller, *supra* note 105.

¹²³ THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF AMCHEM AND ORTIZ ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS, ii (April 2004) [hereinafter *FJC Amchem/Ortiz*] ("Nor was the proportion of monetary recoveries devoted to attorney fees different in a statistically significant way in state and federal court in removed and remanded cases. In the remanded cases, the typical state court awarded 30% of the total monetary recovery as attorney fees; the typical federal court awarded 25%. The average award was 27% in cases remanded to state courts and 29% in cases removed to and retained in federal courts.").

¹²⁴ Eisenberg & Miller, *supra* note 105, at 255.

¹²⁵ *FJC 2008*, *supra* note 103, at 14-15.

¹²⁶ Fitzpatrick, *supra* note 106, at 830-31.

¹²⁷ See also RAND 2000, *supra* note 76, at 442-45; Stuart J. Logan, Jack Moshman, & Beverly C. Moore, *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REP. 167, 167 (2003), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/280/1.pdf> (last visited May 29, 2013) (study of 1,120 class actions found that attorneys' fees and costs represented only 18.4% of the aggregate class recovery; calling this "a pretty good deal for class members relative to paying, say, 40% to an individual personal injury lawyer").

4. The “Frivolous Lawsuit” Myth

The “judicial blackmail” argument is frequently conjoined with the notion that corporate defendants are forced to settle even “frivolous” class actions. But a “frivolous” action is in the eyes of the beholder.¹²⁸

CAFA and its legislative history infrequently and grudgingly acknowledged the possibility that class plaintiffs might in some cases have a meritorious claim.¹²⁹ If the number of class actions is increasing, it seems just as possible that corporate misbehavior is on the rise as that the number of “jackpot seeking” plaintiffs and their lawyers is increasing. As the RAND Institute for Civil Justice remarked in its path-breaking book on class actions, “more class action lawsuits could simply reflect a surge of legitimate suits.”¹³⁰

For example, if consumer cases that allege improper fee-charging are increasing in number,¹³¹ it seems fair to ask whether businesses are increasingly charging consumers improper fees. Similarly, if plaintiff’s lawyers in *Knowles* or other cases filed several actions alleging that insurance companies have failed to pay the full value of the claims covered,¹³² it seems fair to ask why the insurance companies do not change their apparent policy and start paying their policyholders’ claims in the manner plaintiffs assert is appropriate – especially since their alternative is supposedly languishing in state court, spending “millions of dollars” in discovery and “tens of millions of dollars” in fees to class attorneys.

III. HEURISTICS AND BIASES THAT OPERATE IN THE CHARGES OF “STATE COURT CLASS ACTION ABUSES”

The influential work of Nobel laureate Daniel Kahneman on the role of heuristics and biases in judgment and decision-making¹³³ can be profitably applied to the long-running debates about the civil justice system,¹³⁴ including

¹²⁸ See, e.g., Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 451 (2004) (“Americans are in widespread agreement that the nation has too much frivolous litigation but there is also broad disagreement about what falls into that category.”); Nockleby, *supra* note 89, at 536 (“your ‘frivolous lawsuit’ may be my core civil right”).

¹²⁹ E.g., Pub. L. No. 109-2, § 2(a)(1).

¹³⁰ RAND 2000, *supra* note 76, at 62.

¹³¹ Cf. EMERY G. LEE III & THOMAS E. WILLGING, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, FEDERAL JUDICIAL CENTER 4 (2008) [hereinafter FJC FOURTH INT. REP.] (“consumer protection/fraud class actions . . . increased as a percentage of all filings and removals over the study period”).

¹³² See, e.g., Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 2-3, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012).

¹³³ E.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

¹³⁴ Many commentators have applied these concepts of experimental psychology to public

class actions. After decades of research in experimental psychology and behavioral economics, Kahneman asserts, "the idea that our minds are susceptible to systematic errors is now generally accepted."¹³⁵

Why does it matter to catalogue all the instances of the word "abuse" in describing class actions, leading up to the passage of CAFA and now? One could respond that the distortions and outright falsehoods in the legislative history are water under the bridge: get over it. Or one could respond that Supreme Court justices were unlikely to have been influenced in their decision in *Knowles* and other class action cases by the mere repetition of a prejudicial word.

Such responses would ignore much of what has been learned about human cognition. For example, the "priming effect" of hearing or reading a word operates powerfully and subconsciously to enable the listener or reader to see the word again, or to make associations with the word.¹³⁶ Thus, repetition of the word "abuse" in connection with class actions primes the reader or the listener to more easily make negative associations to class actions. These negative associations are "not restricted to concepts and words," but evoke actions and emotions.¹³⁷

The person being primed does not have to be consciously aware of the words causing the priming effect for it to happen. Priming contributes to "cognitive ease," which in turn makes a person more likely to believe what she hears.¹³⁸ As any good propagandist knows, "A reliable way to make people

perception of the civil justice system, but have not specifically applied them to class actions. *E.g.*, Reda, *supra* note 89, at 1119-20; Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 743-44 (1998). *See also* Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 81-89 (2009) (applying political science work on "causal stories" to CAFA).

¹³⁵ KAHNEMAN, *supra* note 133, at 10.

¹³⁶ *Id.* at 52 ("exposure to a word causes immediate and measurable changes in the ease with which many related words can be evoked. If you have recently seen or heard the word EAT, you are temporarily more likely to complete the word fragment SO P as SOUP than as SOAP. The opposite would happen, of course, if you had just seen WASH."). *See also, e.g.*, MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305 (applying the psychological studies of priming to legal advocacy); Michele P. Claiborn, *Making a Connection: Repetition and Priming in Presidential Campaigns*, 70 J. POLITICS 1142 (2008).

¹³⁷ KAHNEMAN, *supra* note 133, at 52-53 (describing famous experiment in which subjects constructed sentences from scrambled words that contained some words associated with the elderly; subjects then walked measurably slower leaving the experiment room, although none of them "reported noticing that the words had a common theme"). *But see* Tom Bartlett, *Power of Suggestion*, THE CHRONICLE REVIEW, Feb. 6, 2013, B6 (describing the skepticism of some other researchers about the priming effect, and the failure of other researchers to replicate the results of this experiment).

¹³⁸ KAHNEMAN, *supra* note 133, at 59. *See also, e.g.*, Scott A. Hawkins & Stephen J. Hoch, *Low-Involvement Learning: Memory without Evaluation*, 19 J. CONSUMER RES. 212 (1992) (experiments revealed subjects associated repeated statements and familiarity with truth).

believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth.”¹³⁹

The idea that plaintiffs’ counsel and state courts “abuse” the class action device has been repeated often enough to become familiar and therefore may be believed regardless of its objective reality.¹⁴⁰ Once that belief is held, a person is subject to “confirmation bias”—in other words, the person will “seek data that are likely to be compatible with the beliefs they already hold.”¹⁴¹ This is one reason that Justice Scalia’s casual references to “generous juries” and “very favorable judges” in state courts is troubling: his comments suggest he already believes that state court outcomes are not based on a case’s merits, and that he would more easily believe the anecdotes and pejorative descriptions of state court proceedings offered up by Petitioner and its amici in *Knowles*.

Further, the lack of baseline data on class action filings and outcomes in this country does not stop anyone from developing strong beliefs about class actions. This is probably due to the human cognitive tendency to create a coherent story out of the information available.¹⁴² The information can be of dubious validity and distressingly sparse, but the mind will create a coherent story out of what it has.¹⁴³ Kahneman calls this phenomenon “What You See Is All There Is,” and it helps explain many biases of judgment and choice.¹⁴⁴ In fact, “it is easier to construct a coherent story when you know little, when there are fewer pieces to fit into the puzzle.”¹⁴⁵

Kahneman gives this example:

Consider the following: “Will Mindik be a good leader? She is intelligent and strong...” An answer quickly came to your mind, and it was yes. You picked the best answer based on the very limited information available, but you jumped the gun. What if the next two

¹³⁹ KAHNEMAN, *supra* note 133, at 62. See also Stanchi, *supra* note 136, at 306-09 (“Priming refers to a process in which a person’s response to later information is influenced by exposure to prior information. Priming is a strong and consistent reaction. . . . Priming works because the stimulus makes certain words, impressions, and feelings more immediate and accessible to the brain. . . . The priming effect increases with the number of times the knowledge category is activated. In other words, the more priming words or stimuli used, the stronger the priming effect.”) (footnotes omitted).

¹⁴⁰ See KAHNEMAN, *supra* note 133, at 128 (“The main moral of priming research is that our thoughts and our behavior are influenced, much more than we know or want, by the environment of the moment.”).

¹⁴¹ *Id.* at 81. See also Reda, *supra* note 89, at 1120 (“confirmation bias would suggest that individuals are more attentive to information that supports the existing belief of the civil justice system as crippled by cost and delay”).

¹⁴² KAHNEMAN, *supra* note 133, at 85.

¹⁴³ *Id.* (“The amount and quality of the data on which the story is based are largely irrelevant.”). See also, e.g., Jennifer Jerit & Jason Barabas, *Bankrupt Rhetoric: How Misleading Information Affects Knowledge about Social Security*, 70 PUB. OPINION Q. 278 (2006).

¹⁴⁴ KAHNEMAN, *supra* note 133, at 85.

¹⁴⁵ *Id.* at 201 (describing the phenomenon of overconfidence in our own judgments).

adjectives were corrupt and cruel? Take note of what you did not do as you briefly thought of Mindik as a leader. You did not start by asking, "What would I need to know before I formed an opinion about the quality of someone's leadership?"¹⁴⁶

This example recalls the debate over CAFA. We did not begin making a decision about Mindik by asking what we would need to know to judge the quality of someone's leadership. We simply heard that she was "intelligent and strong" and constructed a coherent story that she would be a good leader. Similarly, Congress failed to ask what it would need to know about class actions in state and federal courts to judge the need for CAFA.¹⁴⁷ It simply heard some anecdotes of "abuse" offered by corporate interests, and constructed a coherent story of "state courts bad, federal courts good."

One hopes that the Court in *Knowles* did not jump to similar conclusions about the quality of all state courts in the United States, or even in Arkansas, from the hyperbolic description of a few cases that Petitioner and some of its amici are familiar with. The story "state courts bad, federal courts good" may create an "affect heuristic," leading the justices to substitute the heuristic question "How do I feel about state-court class actions?" for the target question, "What do I think about whether CAFA should be interpreted to allow removal of this case?"¹⁴⁸ There is a real danger that the myth of "state court class action abuses" has become a "narrative fallacy," which is a "flawed stor[y] of the past" that "shape[s] our views of the world and our expectations for the future."¹⁴⁹

The "affect heuristic" is an example of the more general heuristic of judgment called "substitution": when called upon to answer a difficult question, we substitute and answer an easier question, often without knowing that we have done so. For example, if the "target question" is "How popular will the President

¹⁴⁶ *Id.* at 85-86.

¹⁴⁷ In hindsight, for example, Congress might have wondered about the following questions regarding the real world of class action litigation: How many class actions per year are filed in federal district court? Of those, how many are filed under diversity jurisdiction? How many class actions per year are filed in state courts? Do some state courts have more class actions than others? How many state-court class actions could have been brought in federal court but for restrictions on diversity jurisdiction? In how many cases initially filed as class actions (in both federal and state courts) does the plaintiff actually move to certify the class? Of those cases in which a party moves to certify the class, how many are actually certified (in both federal and state courts)? What is the average case disposition time for class actions (in both federal and state courts)? In both federal and state courts, in how many cases in which the class has been certified is a settlement later presented for court approval? How many of such settlements do courts actually approve? In both federal and state courts, what is the average settlement amount approved? How many of such settlements involved only coupons, rather than funds, being awarded to class members? What is the average amount of plaintiffs' attorneys' fees awarded?

¹⁴⁸ See KAHNEMAN, *supra* note 133, at 139 ("[t]he affect heuristic is an instance of substitution, in which the answer to an easy question (How do I feel about it?) serves as an answer to a much harder question (What do I think about it?)").

¹⁴⁹ See *id.* at 199.

be six months from now?” then we must, to produce a reasoned answer, consider many difficult issues, such as likely political developments in the next six months. But there is an “alternative to careful reasoning,” which is to substitute the “heuristic question”—“How popular is the President right now?” and answer that instead.¹⁵⁰

Without publicly available data on state court class actions, the heuristic question “What did I think about the last state court class action I have heard about?” replaces the target question “Do state courts certify class actions more readily than federal courts?” And if the class was certified in the last state court class action that comes to your mind, you will probably answer the target question in the affirmative.

The “availability heuristic” is a variant of this process of substituting an easier question for a harder one. When people wish to estimate the frequency of a category—say, how often are class actions filed in state court—they will retrieve particular examples of the category from memory, “and if retrieval is easy and fluent, the category will be judged to be large.”¹⁵¹ Kahneman notes that “[t]he cycle is sometimes sped along deliberately by ‘availability entrepreneurs,’ individuals or organizations who work to ensure a continuous flow of worrying news.”¹⁵² Although he was not referring to the American Tort Reform Association as an “availability entrepreneur,” he could have been. That organization, and others like it, have affirmatively sought out anecdotal “crazy” lawsuits in order to widely publicize (or distort) them.¹⁵³

The “anchoring effect”—a variant of the “priming effect”—is also relevant to the ongoing debate over state court class actions. As Kahneman explains:

[Anchoring] occurs when people consider a particular value for an unknown quantity before estimating that quantity. What happens is one of the most reliable and robust results of experimental psychology: the estimates stay close to the number that people considered – hence the image of an anchor. If you are asked whether Gandhi was more than 114 years old when he died you will end up with a much higher estimate of his age at death than you would if the anchoring question referred to death at 35.¹⁵⁴

¹⁵⁰ *Id.* at 98.

¹⁵¹ *Id.* at 129 (defining the availability heuristic as “the process of judging frequency by ‘the ease with which instances come to mind.’”).

¹⁵² *Id.* at 142.

¹⁵³ See, e.g., MENCIMER, *supra* note 21, *passim*; Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1100-07 (2008); Rhode, *supra* note 129, at 451-52; Galanter, *supra* note 134, at 729.

¹⁵⁴ KAHNEMAN, *supra* note 133, at 119-20. See also, e.g., Christopher Tarver Robinson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 185 (2010) (“Lawyers routinely exploit various psychological heuristics to bias their experts. One such heuristic is the anchor-and-adjust tactic, in which a person faced with a question starts not with a blank slate, but instead with an initial value or hypothesis

As with our tendency to construct a coherent story from sparse and unreliable information ("What You See Is All There Is"), the anchor will be influential even if it is "obviously uninformative," and even if we are determined to resist its influence.¹⁵⁵ As Kahneman explains, "[A] key finding of anchoring research is that anchors that are obviously random can be just as effective as potentially informative anchors."¹⁵⁶

What is the "anchor" in the policy discussions of state court class actions? There is an alleged "flood of class actions in our state courts."¹⁵⁷ An "explosion" of class actions.¹⁵⁸ An "exponential increase in State class action cases."¹⁵⁹ "Legions of corporate defendants . . . unable to escape the pull" of the state court in Miller County, Arkansas.¹⁶⁰

The effect of the "representativeness heuristic" also impacts the state court class action debate. Instead of providing data, CAFA's proponents (and later, Petitioner and its amici in *Knowles*) provided anecdotes. In general, when asked to judge the probability of an event falling into a certain category, we will neglect the base rate of that category if we are given particular information that falls into a representative stereotype leading us to a different category. For example, when asked how likely it was that a particular student, Tom, is majoring in computer science, subjects correctly used base rate information (the percentage of students in that university majoring in computer science) if they were given no other information about Tom. But after they were given a "personality sketch" of Tom that included snippets of nerdy stereotypes, their consideration of the base rate of computer science majors disappeared – they judged it quite likely that Tom was a computer science major. This happened even though the subjects were explicitly told that the "personality sketch" was based on "psychological tests of uncertain validity."¹⁶¹

that biases later, better-informed estimates.").

¹⁵⁵ See KAHNEMAN, *supra* note 133, at 119. See also DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); Robinson, *supra* note 154, at 185 ("In one empirical study of the anchoring heuristic, 'a student from a totally unrelated field gave an estimate about how large the solution to a problem should be to an expert faced with deciding the problem.' Even '[t]his information, received from a low-credibility source, was still sufficient to create an anchor impacting the estimates made by the experts.'") (footnotes omitted).

¹⁵⁶ KAHNEMAN, *supra* note 133, at 125 (relating an experiment finding that German judges making a hypothetical sentencing decision were influenced by a prior roll of the dice). See *id.* at 209 ("The amount of evidence and its quality do not count for much, because poor evidence can make a very good story.").

¹⁵⁷ See *supra*, Part I(A) (emphasis added).

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ 151 CONG. REC. H723-01 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (emphasis added).

¹⁶⁰ *21st Century Brief*, *supra* note 90, at 7 (emphasis added).

¹⁶¹ KAHNEMAN, *supra* note 133, at 146-53. Kahneman provides another "illustration of judgment by representativeness":

[C]onsider an individual who has been described by a former neighbor as follows: "Steve is very shy and withdrawn, invariably helpful, but with little

Rather than presenting base rates on class action filings in state courts (which do not exist), CAFA's supporters instead used anecdotal evidence from a handful of the nation's more than 3000 counties. Calling them "hotbeds of class action activity," the Senate Report and much of the testimony focused on Madison County, Illinois, Mobile County, Alabama, and Miller County, Arkansas. Petitioners and their amici did the same thing in *Knowles*, focusing on the alleged "abuses" they suffered in a handful of cases in Miller County. Even if the Court had base rate data on the incidence and outcome of state court class actions, it could have fallen prey to the representativeness heuristic and concluded that there were many more "lax" and "abusive" state court judges than there actually are. But the Court did not have such base rate data – because it does not exist.

IV. BASE RATES: EMPIRICAL DATA ON CLASS ACTIONS

A. Pre-CAFA Data on State-Court Class Actions

Sources were unanimous in proclaiming a "dearth" of data on class actions filed in state court prior to CAFA's enactment.¹⁶² CAFA's opponents in Congress stated as much.¹⁶³ As described by RAND in 1999:

interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail." How do people assess the probability that Steve is engaged in a particular occupation from a list of possibilities (for example, farmer, salesman, airline pilot, librarian, or physician)? How do people order these occupations from most to least likely? In the representativeness heuristic, the probability that Steve is a librarian, for example, is assessed by the degree to which he is representative of, or similar to, the stereotype of a librarian.

Id. at 420.

¹⁶² *Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts*, FEDERAL JUDICIAL CENTER (Nov. 2007), at 4 ("[R]eliable data on class action activity in most state court systems simply do not exist."); Hilary Hehman, *Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report*, JUDICIAL COUNCIL OF CALIFORNIA: ADMINISTRATIVE OFFICE OF THE COURTS (March 2009), at 22, <http://www.courts.ca.gov/documents/class-action-lit-study.pdf> (last visited June 1, 2013) [hereinafter *Calif. First Report*] (prior to CAFA's passage, "there were essentially no state class action data available for any time period"); Hilary Hehman, *Highlights from the Study of California Class Action Litigation, DATA POINTS* (Nov. 2009), <http://www.courts.ca.gov/documents/datapoints-classactionlit.pdf> (Even basic information on class action litigation in California is difficult to acquire because data specific to these cases are not collected in trial court case management systems.). Cf. Dunworth & Rogers, *supra* note 89, at 500 ("most state courts do not keep case information in such a way as to make statistical analysis feasible"); Eisenberg & Miller, *supra* note 105, at 261 ("Empirical support for CAFA was almost entirely lacking"); Gensler, *supra* note 106, at 810-11 (2010); RAND 1999, *supra* note 76; *FJC Choice of Forum 2005*, *supra* note 102, at 3 ("As to the assumptions that state courts favor plaintiffs and federal courts favor defendants, despite the force with which conclusions have been asserted there has been no quantitative empirical examination of the differences in the treatment of class actions in state and federal courts.").

Enormous methodological obstacles confront anyone conducting research on class action litigation. The first obstacle is a dearth of statistical information. No national register of lawsuits filed with class action claims exists. Until recently, data on the number of federal class actions were substantially incomplete, and data on the number and types of state class actions are still virtually nonexistent. Consequently, no one can reliably estimate how much class action litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis.¹⁶⁴

Even the FJC, in a 2004 report, shunned the task of delving into state court class action filings.¹⁶⁵ However, the FJC did conduct the one notable pre-CAFA study comparing the treatment of class actions by state courts and federal courts.¹⁶⁶ The FJC concluded that its study "lend[s] little support to the view that state and federal courts differ greatly in how they resolve class actions."¹⁶⁷

Finally, the National Center for State Courts ("NCSC") maintains statistics on state court caseloads, and has done so since well before CAFA, but does not maintain statistics on state court class actions. The last year of data publicly available at this writing is for 2010, and the organization of the report for that year is typical.¹⁶⁸ The NCSC reported caseload data for 2010 that was voluntarily submitted by 30 states. Caseloads at the trial court level are reported in five major categories: civil,¹⁶⁹ domestic relations, criminal, juvenile, and traffic/violations. Appellate court caseloads are reported for four major categories: appeal by right, appeal by permission, death penalty, and original proceedings/other appellate matters. Within the general jurisdiction civil caseloads, the NCSC reported, for seventeen states, the number of incoming

¹⁶³ S. REP. NO. 109-14 (2005) (Minority Views).

¹⁶⁴ *RAND 1999*, *supra* note 75, at 4.60.

¹⁶⁵ See *FJC Amchem/Ortiz*, *supra* note 123, at 50 ("Unfortunately to keep the study manageable we did not have the option of including defendants who had chosen to remain in state court: To do so would have required identifying or creating a database of state court class action filings, a task beyond our time and resources.").

¹⁶⁶ *FJC Choice of Forum 2005*, *supra* note 102.

¹⁶⁷ *Id.* at 4. See also Willy E. Rice, *Allegedly "Biased," "Intimidating," and "Incompetent" State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly "Impartial" and "Competent" Federal Courts—An Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts, 1925-2011*, 3 WILLIAM & MARY BUS. L. REV. 419, 515 (2012) (constructing database of 824 published opinions on class actions and finding no statistically significant difference between state and federal trial courts in percentage of cases that class members won and lost).

¹⁶⁸ See R. LaFountain, R. Schaffler, S. Strickland & K. Holt, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* (National Center for State Courts 2012) [hereinafter *State Courts 2012*], http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx.

¹⁶⁹ "In 2010, Civil cases accounted for over 18 percent of the 103.5 million incoming cases processed in state trial courts." *Id.* at 7.

cases in seven subcategories: contract, probate, small claims, torts, real property, mental health, and "all other civil." In 2010, contract cases comprised 61%, and tort cases 7%, of the general jurisdiction civil caseloads of these seventeen states. NCSC does not state in what category or categories class actions might be included (most likely because this information is not provided by the states submitting the data). No data of any kind are reported for class actions, complex litigation courts, or business courts.

B. Pre-CAFA Data on Federal-Court Diversity Class Actions

Nor was there very much official, systematic, publicly available information about class actions, diversity or otherwise, in federal courts before CAFA. The federal courts compile much of their civil caseload statistics from the Civil Cover Sheet, required when filing a civil case in federal district court.¹⁷⁰ Although the Civil Cover Sheet has a box to check indicating whether the suit is brought as a class action, the aggregate information that this box could yield is not included in the voluminous statistics regularly released by the Administrative Office of the United States Courts ("AO").¹⁷¹

The most thorough studies of diversity class actions in federal court have been conducted by the Federal Judicial Center in an effort to gauge CAFA's effect on federal courts' caseload. The FJC first studied class actions filed in the years before CAFA's passage to determine a baseline. The researchers created a

¹⁷⁰ See *Civil Cover Sheet Form*, <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/JS044.pdf> (last visited August 31, 2012).

¹⁷¹ See, e.g., JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2012 REPORT OF THE DIRECTOR, Administrative Office of the United States Courts, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx> [hereinafter JUDICIAL BUSINESS 2012]. In addition, the Integrated Federal Courts Database series ("IDB"), which contains records of every case termination in federal district court, is maintained and distributed by the National Archive of Criminal Justice Data ("NACJD"), the criminal justice archive within the Inter-University Consortium for Political and Social Research. The IDB contains the variable CLASSACT (Class Actions), which purports to indicate whether the action was filed as a class action. E.g., *Federal Judicial Center, CODEBOOK FOR CIVIL PENDING DATA – WITH PLT AND DEF BLANKED*, at 17 (2010) (ICPSR 29281), available at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/29281/documentation> [hereinafter CODEBOOK]. However, there are serious problems with using the CLASSACT variable for research. First, the IDB database series is restricted from general dissemination. A researcher must be approved by the NACJD to gain access to these datasets. See <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies/30401?archive=ICPSR&sortBy=7&permit%5B0%5D=AVAILABLE> ("Users interested in obtaining these data must complete a Restricted Data Use Agreement form and specify the reasons for the request."). Second, even when access to the IDB is granted, the accuracy and completeness of the CLASSACT variable are questionable. *FJC Choice of Forum 2005*, *supra* note 102, at 59 n. 67 ("the Integrated Database (IDB) seriously undercounted the number of class actions in federal courts"); THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 197* (Federal Judicial Center 1996) ("information on class actions reported in the Administrative Office database substantially undercounted class action activity during the study period").

database of approximately 21,000 class actions filed in or removed to federal court between July 1, 2001 and June 30, 2007.¹⁷² Of these, only 600 cases were identified as “having been brought into federal court between February 18, 2003 and February 17, 2005 [the two-year period before CAFA] on the basis of diversity of citizenship jurisdiction.”¹⁷³ Given the FJC’s superior access to data on federal filings, this is probably the definitive estimate of the number of diversity class actions filed in federal courts in 2003 and 2004: about 300 per year.

A 2005 FJC study on choice of forum also used a database of federal class action filings.¹⁷⁴ The database was originally compiled for an earlier study that sought to focus on the type of case that might be affected by the Supreme Court decisions in *Anchem* and *Ortiz*,¹⁷⁵ and it did not consist exclusively of diversity cases.¹⁷⁶ Thus, direct comparisons to the FJC’s later studies are not possible. The final sample in the 2005 study included 1418 class action cases actions that terminated between July 1, 1999, and December 31, 2002 (regardless of when they were originally filed).¹⁷⁷ This translates to approximately 405 such class actions per year filed in or removed to federal district court (1418/3.5). Because the database contains federal question as well as diversity cases, this number very likely overstates the number of filings based on diversity only, and is consistent with the number found in the 2008 FJC study.

C. Post-CAFA Data on State-Court Class Actions

State courts’ publicly available caseload statistics in general range from nonexistent¹⁷⁸ to good.¹⁷⁹ But even those states with good record-keeping and availability of general caseload statistics do not separately account for class actions, at least publicly.¹⁸⁰ For example, the Petitioner in *Knowles* all but

¹⁷² *FJC 2008*, *supra* note 103, at 17 (describing collection and cleaning of data).

¹⁷³ *Id.* at 18. It appears that the diversity class actions were primarily identified by using the IDB, after compiling the more extensive dataset using multiple sources.

¹⁷⁴ *FJC Choice of Forum 2005*, *supra* note 102, at 59.

¹⁷⁵ *FJC Amchem/Ortiz*, *supra* note 123.

¹⁷⁶ *FJC Choice of Forum 2005*, *supra* note 102, at 58-59.

¹⁷⁷ *Id.* at 59-60.

¹⁷⁸ Although Florida state courts are currently implementing an electronic filing system that will someday lead to better access to data, the current situation is so primitive in some Florida counties that the judicial assistant for a complex litigation court judge told my research assistant that they had no way of knowing even the number of cases then pending before the judge. Telephone interview with Loretta Galeener, Florida Second Circuit’s Court Administration Office (July 13, 2012).

¹⁷⁹ *E.g.*, ADMIN. OFFICE OF THE COURTS, FACT SHEET: THE CALIFORNIA WORKLOAD ASSESSMENT, (2007), available at <http://www.courts.ca.gov/documents/cjwa.pdf>; ADMIN. OFFICE OF THE COURTS, CALIFORNIA’S STATEWIDE JUDICIAL NEED, (2007), available at <http://www.courts.ca.gov/documents/judneed.pdf>.

¹⁸⁰ *E.g.*, *Calif. First Report*, *supra* note 162, at 22 (prior to CAFA’s passage, “there were essentially no state class action data available for any time period”); Stephen B. Burbank, *The Class Action*

conceded that data on class actions in Arkansas is virtually unattainable: “We may never know the true number of class actions that have been filed in Miller County, or the true number of out-of-state defendants that have been forced into court there.”¹⁸¹

We sought to determine whether there are currently any more state-court class action data available than there were in 2005, and are fairly confident that (other than the special studies described below in this section), the answer is still no. After conducting a thorough search of each state’s judiciary’s web site,¹⁸² we could find no statistical data on class action filings. On each of these web sites, we located links to state-prepared publications, annual reports, or other statistical reports regarding the judiciary. Many, but not all, states have links to such publications.¹⁸³ Many of the annual reports include narrative information on the state of the judiciary in that particular state as well as general statistics in the form of charts and tables on case filings and dispositions. It is fairly common for these annual reports to present aggregate statistics on case filings, but the information is categorized very generally. A typical example is a table showing case filings for the year in a particular state, broken down by filings in the Civil, Criminal, Juvenile, and Probate divisions of the state courts.¹⁸⁴

We thus conclude that even today, no state reports statistical data on class action cases on a regular basis. But well after CAFA’s 2005 passage, some aggregate data about state-court class actions began to trickle out. The California state courts have conducted an extensive study of class actions, and academic researchers have conducted more limited studies of class actions in Michigan and Oklahoma.

California

The most significant research on state-court class actions has been published by the California Office of Court Research (“OCR”) in two installments.¹⁸⁵ The OCR first identified all cases filed as class actions¹⁸⁶ in

Fairness Act of 2005 in Historical Context: A Preliminary View, 156 U. PA. L. REV. 1439, 1500 (2008) (“I am aware of no reliable data, historical or current, concerning state court class actions”).

¹⁸¹ *Pet. Reply Brief*, *supra* note 90, at 21.

¹⁸² See *infra* Appendix A hereto, which lists the official judiciary web sites for the fifty states.

¹⁸³ See, e.g., DELAWARE STATE COURTS, <http://courts.delaware.gov/AOC/publications.stm> (last visited June 1, 2013); ILLINOIS COURTS, <http://www.state.il.us/court/SupremeCourt/AnnReport.asp> (last visited June 1, 2013); NEW JERSEY COURTS, http://www.judiciary.state.nj.us/annual_reports/index.htm (last visited June 1, 2013).

¹⁸⁴ See, e.g., 2011 N.D. COURT SYS. ANN. REP. 11, <http://www.ndcourts.gov/court/News/AnnualReport2011.pdf>; 2011 ME. JUDICIAL BRANCH ANN. REP. 2, http://www.courts.state.me.us/reports_pubs/reports/annual_reports/annualreport/annual-report-2011.pdf; 2011 MINN. JUDICIAL BRANCH ANN. REP. 20, http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/AR_11_Final2.pdf; 2011 MICH. SUP. CT. ANN. REP. 31, <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Statistics/2011/2011%20Michigan%20Supreme%20Court%20Annual%20Report.pdf>.

¹⁸⁵ *Calif. First Report*, *supra* note 162; *Calif. Second Report*, *supra* note 104. The ongoing research

twelve large California state courts between 2000 and 2005.¹⁸⁷ There were a total of 3711 class actions filed in that period, and the number filed per year increased from 460 cases in 2000 to 751 cases in 2005.¹⁸⁸

Of the total number of class actions identified, the OCR then studied a random sample of 1,525 cases in more depth.¹⁸⁹ The most prevalent case type in this sample (about 29%) was "Employment," and over half of the "Employment" cases alleged violations of the California Labor Code relating to overtime pay and general wage violations.¹⁹⁰

For further analysis of case dispositions, OCR excluded the 273 cases still pending at the time of the study.¹⁹¹ Of the 1294 closed class action cases remaining in the database, 410 cases (32%) were settled.¹⁹² Employment cases and securities cases were most likely to settle, while civil rights cases, antitrust cases, and product liability cases were least likely to settle.¹⁹³

Although 410 class actions were settled, only 256 of those settlements (62%) occurred with a certified class.¹⁹⁴ Thus, 154 of the settlements (38%) occurred without a certified class.¹⁹⁵

has been conducted in collaboration with the University of California Hastings College of the Law and with assistance from the Federal Judicial Center. *Id.* at 3. A third report is planned but has not yet been published. *Id.*

¹⁸⁶ A case was considered to be filed as a class action if the plaintiff selected the checkbox on the civil cover sheet indicating that it was a class action, or included the words "class action" on the face of the complaint, or referred to a class definition in the original filing. *Id.* at 6. It should be noted that California's class action rule differs from Federal Rule of Civil Procedure 23. *See* CALIF. CODE OF CIV. PRO. § 382 ("when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all").

¹⁸⁷ *Calif. First Report, supra* note 162, at 3. These were the Superior Court of California, Counties of Alameda, Contra Costa, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Mateo, Santa Clara, Sonoma, and Ventura. *Id.* at 3 n.3. Together, those twelve courts account for about 75% of all statewide civil filings. *Id.*

¹⁸⁸ *Id.* at 3. In 2004, the year before CAFA, there were 833 cases filed as class actions, which exceeded the number in 2005. *Id.* The researchers noted that "[t]he decline in filings in 2005 may have been unrelated to CAFA." *Id.* at 4.

¹⁸⁹ *Id.* at 5 n.4.

¹⁹⁰ *Id.* at 5. Case types were identified by the category that plaintiff selected on the Civil Cover Sheet. *Id.* at 5 n.4.

¹⁹¹ *Id.* at 10.

¹⁹² *Calif. Second Report, supra* note 104, at D1 (Table D.1). The other dispositions were that 217 cases (17%) were dismissed with prejudice, 163 (13%) were dismissed without prejudice, and 50 (4%) resulted in summary judgment for the defendant. *Id.* Most of the other "dispositions" were not actually final dispositions, but some procedural step taken that in effect ended the litigation in the particular court in which it had been filed: coordination (141 cases, or 11%), removal to federal court (121 cases, or 9%), consolidation with another case (120 cases, or 9%), transfer (40 cases, or 3%), and other less frequent dispositions such as stay or interlocutory appeal. *Id.* Only 9 cases (0.7%) went to a verdict at trial. *Id.* I have rounded the percentages to the nearest whole number.

¹⁹³ *Id.* at B1 (Table B.1).

¹⁹⁴ *Id.* at D1.

¹⁹⁵ *Id.*

Indeed, there was certification activity (such as a motion for class certification or a motion to approve a settlement that included class certification) in only 352 cases (27% of the sample). As shown in Table 1, a class was certified in 289 cases (22% of the sample). Almost three-fourths of the certified cases (212 cases, or 73% of the certified-class cases) were certified as part of a settlement. In only 65 cases (22% of the certified-class cases or 5% of the sample cases) was the class certified by motion.¹⁹⁶ The OCR speculates that one reason for the high rate of certification achieved through settlement rather than motion is that California's extensive Complex Civil Litigation program,¹⁹⁷ where class actions end up, offers close judicial management of the case, which fosters more collaborative processes.¹⁹⁸

Table 1
Certification Activity in Cases Filed As Class Actions
in California State Courts

	<i>All cases in sample</i>	<i>Cases in which there was certification activity</i>	<i>Cases in which class was certified</i>
No certification activity	942 (73%)		
Some certification activity	352 (27%)		
Certification denied		34	
Certification motion not ruled on		29	
Class certified		289	
Class certified as part of settlement			212
Class certified not as part of settlement			77
Total	1,294	352	289

Note: Sample of 1,294 class action cases filed between 2000-2005.

Sources: California First Interim Report, *supra* note 162, at 19-21 & Table C11; California Second Interim Report, *supra* note 104, at D1.

In addition, the overall rate of 22% of all cases filed as "class actions" that are disposed with a certified class masks a steady downward trend in this rate within the study period. In 2000, 33% of the cases in the sample were disposed

¹⁹⁶ *Id.* at B1. In twelve cases, the class was certified by both means (settlement and motion). *Id.*

¹⁹⁷ See, e.g., NATIONAL CENTER FOR STATE COURTS & CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, EVALUATION OF THE CENTERS FOR COMPLEX CIVIL LITIGATION PILOT PROGRAM (June 30, 2003), available at <http://www.courts.ca.gov/documents/compcivilpub.pdf>.

¹⁹⁸ *Calif. Second Report, supra* note 104, at 13.

with a certified class.¹⁹⁹ By 2005, only 15% of the cases in the sample were disposed with a certified class.²⁰⁰

Why was there no movement to certify a class in 73% of cases initially designated as class actions? The OCR offered a partial explanation that a case was considered "disposed" and thus included in the database if it was "disposed" in the original court, but some of these were interim "dispositions" – such as consolidation, coordination, removal, or transfer. Considering only the cases that had reached a final judgment, "there was no certification activity in 43% of those cases."²⁰¹

Michigan

Neil Marchand conducted an unpublished study of class action filings in Michigan state courts from 2000 to 2007.²⁰² Although Marchand's study was limited by his primary reliance on a Westlaw database,²⁰³ he found a declining trend in class action filings in Michigan state courts. He identified 35 cases filed in 2000 and only 6 filed in 2006, and estimated these figures to represent about 20% of all class action filings in Michigan state courts.²⁰⁴ The decline started before 2005,²⁰⁵ so any link to CAFA seems tenuous. Moreover, there appeared to be no corresponding rise in class action filings in federal courts in Michigan over the same time period. In fact, federal class actions filed in Michigan fell from 53 in 2004, to 46 in 2005, to 37 in 2006, to 20 filed in the first half of 2007.²⁰⁶ Thus, Marchand tentatively concluded that "CAFA has not relocated class action activity to Michigan's federal courts."²⁰⁷

Nor did Marchand find that the Michigan state courts were lenient on class actions. He found that Michigan state courts granted 28% of class certification motions, while Michigan federal courts granted 22%. Michigan state courts denied 35% of class certification motions, almost four times the rate of denial (9%) for Michigan federal courts. Finally, Marchand found that in 9% of the Michigan state court cases, no class certification motion was filed, but

¹⁹⁹ *Id.* at A1 (Table A.1).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 7.

²⁰² Neil J. Marchand, *Where's the Party: Do Class Action Plaintiffs Really Prefer State Courts?* SOCIAL SCIENCE RESEARCH NETWORK (Jan. 6, 2009), <http://ssrn.com/abstract=1334923>. Michigan's class action rule is similar, but not identical, to Rule 23. See Michigan Court Rules, Rule 3.501.

²⁰³ Marchand, *supra* note 202, at 4-6.

²⁰⁴ *Id.* at 7. I assume therefore that he would estimate there were approximately 175 class action filings in Michigan state courts in 2000 and thirty such filings in 2006.

²⁰⁵ *Id.* at 7. Marchand found thirty-one class action filings in 2002, sixteen in 2003, nine in 2004, and six in 2005. *Id.*

²⁰⁶ *Id.* at 7. See also *id.* at 27-28 ("In Michigan's federal district courts . . . class action activity has declined by 4.8% from 21 filings in July-December 2001 to 20 actions in January-June 2007.").

²⁰⁷ *Id.* at 28.

there was no class certification motion filed in 45% of Michigan's federal court cases.²⁰⁸

Oklahoma

Professor Steven Gensler conducted an empirical study of class actions in state and federal courts in Oklahoma from 2001 to 2008.²⁰⁹ Gensler's methodology was "likely to have identified nearly every case [filed in Oklahoma state courts] in which class action activity proceeded beyond an initial designation of a case as a class action or beyond the assertion of class allegations in the complaint."²¹⁰

Gensler found an overall decline in class actions in Oklahoma state courts after CAFA, from 58 filings in 2002 to 26 filings in 2008.²¹¹ But he also found a "steep decline" in class action filings in federal courts in Oklahoma after CAFA.²¹² He speculated on possible reasons for these findings. First, lawyers may simply be filing fewer class actions, shifting to nonclass means of aggregate dispute resolution. Second, the decline may be temporary and may even out as time passes.²¹³ Third, class action filings may have increased in either federal or state courts in states other than Oklahoma.²¹⁴

Gensler also found that no class certification was ever sought in 45% of the Oklahoma state court cases.²¹⁵ In the 150 cases in which class certification was sought, the class was certified 53% of the time.²¹⁶ And of the cases in which the class was certified, 74% of them settled.²¹⁷ But similar to what the California and FJC researchers found, Gensler found that 46% of the class certifications occurred in cases that were filed as settlement classes, as opposed to contested "litigation classes."²¹⁸

²⁰⁸ *Id.* at 16. Marchand attributes this difference, in part, to Michigan's rule requiring the parties to move for class certification within 91 days of the complaint's filing. See Michigan Court Rules, Rule 3.501(B)(1)(a).

²⁰⁹ Gensler, *supra* note 106. Oklahoma's class action rule is modeled on Rule 23. See 12 OKLA. STAT. § 2023.

²¹⁰ Gensler, *supra* note 106, at 824.

²¹¹ *Id.* at 825-26.

²¹² *Id.* at 829.

²¹³ *Id.* at 831.

²¹⁴ *Id.* at 832.

²¹⁵ *Id.* at 838. The total number of Oklahoma state court class actions in Gensler's database was 335.

²¹⁶ *Id.* at 839. Certification was denied in 11% of the cases, 12% of the cases were voluntarily dismissed, a defense win occurred precertification in 7%, class treatment was abandoned in 3%, 2% of the cases were dismissed for lack of prosecution, 7% had some "other" disposition, and 7% were still pending at the time of the study. *Id.* at 839-40.

²¹⁷ However, 15% of the certified cases were still pending at the time of the study, so the eventual settlement rate was probably higher. *Id.* at 840.

²¹⁸ *Id.* at 842.

D. Post-CAFA Data on Federal-Court Diversity Class Actions

The tendency to make dire predictions in the absence of data was not confined to the pro-CAFA interests. The federal judiciary, as well as others concerned about CAFA's reach, predicted that CAFA would sweep all state-law class actions into federal court and overwhelm the federal courts with diversity class actions.²¹⁹ But if there was no preexisting "flood" of state court class actions, then we should not expect a resulting "flood" into federal court. And in fact, there is no evidence that the federal courts have suffered anything like the huge influx of diversity class actions that was feared.

The FJC's study of CAFA's effect, released in several installments from 2006 to 2008,²²⁰ did show an increase of about 300 diversity class actions in federal district court per year for the first two years after CAFA. Table 2 displays the FJC's findings.

Table 2
Class Actions Originally Filed in or Removed to Federal District Court
(Average Taken Over Stated Time Period)

Type of class action, time period	Pre-CAFA July 2001 to Feb. 2005	Post-CAFA July 2006 to June 2007
Diversity original filings, monthly	12	36
Diversity removals, monthly	17	18
Diversity total, monthly	29	54
Federal question original filings, monthly	189	258
Federal question removals, monthly	27	31
Federal question total, monthly	216	290
Total diversity, annually	349	649
Total federal question, annually	2,588	3,475

Notes: Figures for monthly filings are rounded to the nearest whole number. Figures for annual filings are computed by multiplying average monthly filings by 12.

Source: FJC Fourth Interim Report, *supra* note 131, at 3-7.

For the period from July 2001 to February 2005 (the month CAFA was passed), the FJC estimates that 349 diversity class actions per year were filed. For the period from July 2006 to June 2007, the FJC estimates that 649 diversity

²¹⁹ See S. REP. NO. 109-14, *supra* note 57. CAFA's proponents minimized such concerns: "the federal court workload is overblown." *Id.* at 56.

²²⁰ See, e.g., FJC 2008, *supra* note 103; FJC FOURTH INT. REP., *supra* note 131. Although the last report, dated November 2008, refers to ongoing efforts and future publications, I have been unable to locate any further reports by the FJC on the effects of CAFA.

class actions per year were filed.²²¹ Putting this increase of 300 diversity class actions per year in perspective, if the diversity class action filings were evenly distributed between the 673 authorized federal district court judgeships²²² (which of course they are not), that means each judge was handling one diversity class action per year post-CAFA, rather than half of one diversity class action per year pre-CAFA. Even recognizing the heavy workload of federal judges, this 300-case increase in diversity class actions cannot reasonably be characterized as a “flood.” The increase in annual federal-question class action filings, from 2588 pre-CAFA to 3475 post-CAFA, is almost three times as large.

All class actions together account for less than 2% of federal civil filings.²²³ In addition, the FJC, in its study of pre-CAFA cases, found that in 76% of cases that were originally filed as class actions, no further class action activity, such as a motion for class certification, ever occurred.²²⁴ This suggests that 300 additional class action filings might yield perhaps 75 additional class certification motions annually, or one for every ninth federal district judge.

The FJC also studied the types of class actions filed before and after CAFA’s passage. Table 3 presents the results. By far the greatest increase in filings occurred in Labor/FLSA class actions, most of them “opt in” cases under the FLSA rather than “opt out cases” under Rule 23.²²⁵ CAFA would not have affected these cases, for which subject matter jurisdiction would be based on federal question rather than diversity. There was also an increase in

²²¹ See also Clermont & Eisenberg, *supra* note 5, at 1562. Cf. Fitzpatrick, *supra* note 106, at 818 (finding a total of 304 class action settlements approved in 2006 and 384 in 2007, the vast majority of which were federal question cases, not diversity cases).

²²² U.S. District Courts, *Weighted and Unweighted Filings per Authorized Judgeship During the 12-Month Period Ending September 30, 2011* (Table X-1A), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/X1ASep11.pdf> (last visited May 30, 2013).

²²³ The estimated 4128 total class action filings for the twelve-month period ending June 2007 is 1.6% of the total 257,507 civil cases filed in federal district court in 2007. In addition, the estimated 649 diversity class actions filed in the twelve-month period ending June 2007 is 0.9% of the 72,619 diversity cases filed in 2007. JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR, Administrative Office of the United States Courts, *U.S. District Courts, Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending September 30, 2006 and 2007*, Table C-2, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/appendices/C02Sep07.pdf> [hereinafter *Table C-2* for the fiscal year in question].

²²⁴ *FJC 2008*, *supra* note 103, at 5. See also *FJC Choice of Forum 2005*, *supra* note 102, at 35 (comparing class actions removed to federal court between 1994 and 2001 and terminated between July 1, 1999 and December 31, 2002, 118 were remanded to state court and 165 remained in federal court; of the 118 cases remanded to state court, 20% were certified, 12% were denied certification, and in 67%, no action was taken on certification before the case resolved; of the 165 removed cases that remained in federal court, 22% were certified, 27% were denied, and 51% had no action taken).

²²⁵ FJC FOURTH INT. REP., *supra* note 131, at 31. Collective actions under the FLSA are authorized by 29 U.S.C. § 216(b). A complaint asserting an FLSA claim might also assert a supplemental claim under a state wage-and-hour law; a class action under Rule 23 might be asserted for the latter claim.

consumer/fraud class actions; the FJC does not state what percentage of these cases were brought under diversity jurisdiction. Finally, there was an increase in Contracts class actions; again, the FJC does not state what percentage of these cases were diversity filings.

Table 3
Number of Class Actions Filed in or Removed to Federal District Courts
(Comparison of Two Six-Month Periods Before and After CAFA)

	<i>Pre-CAFA July to December 2001</i>	<i>Post-CAFA January to June 2007</i>
Labor/FLSA	337	1,104
Consumer/fraud	191	489
Contracts	142	213
Securities	240	85
Civil rights	195	162
Torts – personal injury	52	35
Torts – property damage	33	29
Other/undetermined	180	237
Total (all class actions)	1,370	2,354

Source: FJC Fourth Interim Report, *supra* note 131, at 4-5.

Several other factors are consistent with the FJC's findings suggesting that there was no "flood" of diversity class actions into federal court after CAFA. The total number of diversity case filings increased 55% from 1997 to 2012 (from 55,278 to 85,742 diversity filings). But the two types of cases most responsible for the increase (product liability and real property) are the cases least likely to be brought as class actions. Table 4 shows trends in the types of cases brought under diversity jurisdiction.

Table 4
Types of Diversity Case Filings, 1997-2012

Year	All diversity	Product liability	Torts excluding product liability	Contracts	Real property	All other
1997	55,278	16,132	15,351	21,652	2,049	94
1998	51,992	14,541	14,396	20,363	2,113	579
1999	49,793	11,573	13,931	20,847	2,282	1,160
2000	48,626	10,176	13,418	21,581	2,085	1,366
2001	48,998	10,069	12,548	22,897	2,204	1,280
2002	56,824	15,959	13,217	23,279	3,079	1,290
2003	61,156	20,595	14,187	21,592	3,575	1,207
2004	67,624	31,842	12,077	20,276	2,773	656
2005	62,191	27,212	13,654	19,266	1,622	427
2006	80,370	45,485	11,755	20,970	1,798	362
2007	72,619	34,974	11,463	23,298	2,527	357
2008	88,457	50,995	11,432	23,211	1,839	980
2009	97,209	56,303	12,200	24,500	1,996	2,210
2010	101,202	61,179	11,971	22,570	3,035	2,447
2011	101,366	58,443	11,958	22,505	5,502	2,958
2012	85,742	42,280	12,006	20,693	7,798	2,965

Source: Table C-2, *supra* note 223, for fiscal years 1997 through 2012.

Table 4 shows that of all the major case types comprising diversity filings, only product liability cases and real property cases have increased since 1997. There were 16,132 product liability diversity filings in 1997, growing to 42,280 such filings in 2012. Real property diversity filings almost quadrupled from 1997 (2,049 filings) to 2012 (7,798 filings).

Product liability cases and real property cases are not likely to be brought as class actions.²²⁶ As Table 3 above shows, for a six-month period in 2001, the

²²⁶ Product liability cases, including asbestos cases, are usually brought as individual cases, combined in MDL proceedings. *E.g.*, In re Asbestos Products Liability Litigation, No. MDL-875 (E.D. Pa.), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/Statistics%20as%20of%208.31.12.pdf>. According to AO data, a steep rise in asbestos diversity filings began in 2006, when there were 16,030 such filings compared to 2005, when there were 1,029. *U.S. District Courts, Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending September 30, 2006*, Table C-2; *U.S. District Courts, Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2005*, Table C-2. In fact, 168,932 asbestos cases were transferred to the Eastern District of Pennsylvania between 2006 and 2011. Office of the Clerk of Court, United States District Court Eastern District of Pennsylvania, *MDL-875 Asbestos Products Liability Litigation Caseload Statistics August 1, 2006 – August 31, 2011*, available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/Statistics%20as%20of%208.31.12.pdf>. The shift to MDL in product liability cases follows a history of mostly unsuccessful attempts at class aggregation. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); Deborah R. Hensler,

FJC found only 52 personal injury class actions filed, or 4% of the total. Personal injury class action filings decreased to 35 in a six-month period in 2007, or 1% of the total. Similarly, the FJC found only 33 property damage class action filings in the six-month period in 2001, decreasing to 29 such filings in the 2007 period.

Two other developments in civil litigation are consistent with the lack of a "flood" of diversity class actions after CAFA. The first is the development of state-court complex litigation courts, created in part as an attractive alternative to federal court.

Beginning years before any of the permutations of CAFA had ever been proposed in Congress, states began to establish special court divisions to handle "complex litigation," "business litigation," or "commercial litigation."²²⁷ Seventeen populous states now operate these specialized courts.²²⁸ Though varying in detail, the jurisdictional requirements of these courts generally include a minimum amount in controversy of \$150,000,²²⁹ at least one business litigant, and some additional indication of legal or factual intricacy.²³⁰ Universally, the impetus for the creation of these courts has been a desire for more efficient handling of such litigation, both in terms of case disposition time and greater judicial management, as well as better judicial decision-making through repeated exposure to business issues.²³¹ Many of these courts have proclaimed great

Has the Fat Lady Sung? The Future of Mass Toxic Torts, 26 REV. LITIG. 883, 910-12 (2007). The recent spike in real property diversity filings probably relates to the large number of foreclosures resulting from widespread dislocation in the United States housing market.

²²⁷ My use of the term "complex litigation court" will include business courts and commercial divisions, unless the context otherwise requires. See BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPT. OF JUSTICE, STATE COURT ORGANIZATION 2004, 1 (2006) ("The 2004 edition of State Court Organization continues the attention first given in 1998 to the growing importance of specialized State court forums. Special forums are divisions, dockets, courtrooms or procedures dedicated to a designated set of cases and to which a specific judge has been assigned. Such forums typically are created through local court rules or custom, and carry the label of 'court' as a matter of convenience.").

²²⁸ Arizona, California, Connecticut, Delaware, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and South Carolina. Such specialized courts have also been recommended or authorized, but at this writing are not functioning, in Colorado, Michigan, Ohio, Oklahoma, and Wisconsin. See generally Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147 (2004); Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315 (1998).

²²⁹ E.g., *In re* Reaffirmation of the Creation of Section 40 ("Complex Business Litigation Section") in the Circuit Civil Division of the Eleventh Judicial Circuit of Florida and Modification of Procedures for the Assignment and Reassignment of Cases to This Section, Admin. Order No. 11-04 (2011) (more than \$150,000.00).

²³⁰ E.g., *id.* § 2(a) (breach of contract action between businesses, business torts, claims under the Uniform Commercial Code, surety bonds, franchise disputes, trade secrets, non-compete agreements, dissolution of a business, assignment for the benefit of creditors, intellectual property, securities, antitrust, shareholder derivative suits).

²³¹ E.g., Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1764 (1997) (advocating business courts to provide efficient resolution of complicated commercial

success in accomplishing their goal of streamlining case disposition for the business community.²³²

While the volume of cases handled by these courts is unclear,²³³ it is significant. It seems likely that these specialized state courts have diverted cases, including class actions,²³⁴ from federal courts. For example, in 1995, when the New York state courts began a trial Commercial Division, 6500 new cases were filed in New York County alone.²³⁵ The volume has only continued to grow since then. How many of the cases that are now filed in the Commercial Division are class actions (especially class actions that could have gone to federal court in diversity) is unknown. However, the court-published summaries of cases decided in Commercial Division regularly include class actions,²³⁶ and it

cases). See also *In re* Task Force on Management of Cases Involving Complex Litigation, No. AOSC06-53, at 1-2 (Fla. Sup. Ct. Sept. 19, 2006); *Supreme Court of Florida's Task Force on the Management of Cases Involving Complex Litigation*, REPORT AND RECOMMENDATIONS, 28 (2008), http://www.flcourts.org/gen_public/news/bin/ComplexLitigation.pdf (last visited May 30, 2013) (noting lengthy delays in processing of complex cases in Florida state courts). One could, in fact, question the depth of empirical support for the assertion that state complex litigation courts were needed to reduce case disposition time, since case disposition times for state courts are not generally publicly available. See, e.g., *State Courts 2012*, *supra* note 169 (case disposition times are not included in the state-court statistics reported by the NCSC). In addition, scholars are beginning to question whether judicial specialists necessarily reach results superior to those reached by judicial generalists. E.g., Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 850 (2012).

²³² E.g., THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 2012, available at <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.21889.12.pdf>).

²³³ Appendix A lists the web sites for the judiciaries in every state, including the seventeen states with complex litigation courts. None show the caseload of the complex litigation courts.

²³⁴ See *Calif. Second Report*, *supra* note 104, at 13 (class actions filed in California state courts are usually within the Complex Civil Litigation program).

²³⁵ Commercial Division of the Supreme Court of the State of New York, *Celebrating a Twenty-First Century Forum for the Resolution of Business Disputes*, 3 (Jan. 25, 2006), <http://www.courts.state.ny.us/courts/comdiv/PDFs/ComDivJan06.pdf>.

²³⁶ E.g., THE COMMERCIAL DIVISION OF THE STATE OF NEW YORK, COMMERCIAL DIVISION LAW REPORT (Mar. 1998), http://www.courts.state.ny.us/courts/comdiv/lawreport/Law_Report_Inaugural_Issue.pdf (reporting three class actions; one granted defendant's motion to dismiss, and two denied plaintiffs' motion for class certification); THE COMMERCIAL DIVISION OF THE STATE OF NEW YORK, COMMERCIAL DIVISION LAW REPORT (May 1998), http://www.courts.state.ny.us/courts/comdiv/lawreport/law_report_-_May_1998.pdf (reporting on one class action, in which a motion to certify was denied and motion to dismiss granted); THE COMMERCIAL DIVISION OF THE STATE OF NEW YORK, COMMERCIAL DIVISION LAW REPORT (July 1998), http://www.courts.state.ny.us/courts/comdiv/lawreport/law_report_-_july_1998.pdf (reporting on a class action involving cell phone customers, refusing to approve a proposed settlement after "the hearing had failed to show that more than a portion of the class (current subscribers) would benefit from free air time and even these would not receive proceeds"); THE COMMERCIAL DIVISION OF THE STATE OF NEW YORK, COMMERCIAL DIVISION LAW REPORT (Oct. 1998), http://www.courts.state.ny.us/courts/comdiv/lawreport/law_report_-_october_1998.pdf (reporting on three class actions; one motion for class certification denied and two granted); THE COMMERCIAL DIVISION OF THE STATE OF NEW YORK, COMMERCIAL DIVISION LAW REPORT (Jan. 1999), http://www.courts.state.ny.us/courts/comdiv/lawreport/law_report_-_january_1999.pdf

appears from a cursory glance at a few of the summaries that the Commercial Division is hearing cases that could have qualified for diversity jurisdiction.²³⁷ Moreover, a stated purpose of the Commercial Division was to discourage businesses from "resorting to other forums — the federal courts, Delaware, private ADR — to avoid New York's overburdened state court system."²³⁸

In this connection, note that the FJC's studies of CAFA's impact on the federal courts found that the number of original proceedings in federal district court increased post-CAFA, but the number of cases removed to federal district court post-CAFA did not.²³⁹ It is at least possible that corporate defendants would have removed more diversity class actions in the absence of state complex litigation courts.

The second trend in federal litigation that is consistent with the lack of a "flood" of state-law class actions into the federal courts after CAFA is the rise of multidistrict litigation²⁴⁰ as the dominant means of aggregate dispute resolution.²⁴¹ The annual number of new cases filed and subjected to MDL proceedings has steadily increased over the past fifteen years, from 14,864 in 1997 to 22,319 in 2012.²⁴²

These newly-filed cases combine with cases pending from prior years, so that the total number of cases pending and subjected to MDL proceedings exceeded 100,000 in its apex in 2008.²⁴³ In fact, a surprisingly high percentage of all pending federal civil cases are cases subjected to MDL proceedings. In 2012, for example, 22% of all pending civil cases were subjected to MDL proceedings.²⁴⁴

(reporting on four class actions, in which one settlement was approved, one motion for class certification denied, one involved a *parens patriae* action in a tobacco case, and one approved plaintiff's voluntary dismissal prior to certification).

²³⁷ *E.g.*, *Sbarro, Inc. v. Tukdan Holdings, Ltd.*, 921 N.Y.S.2d 837 (N.Y. Sup. Ct. 2011) (plaintiff was a New York corporation and defendants were an Israeli corporation and an individual residing in Israel).

²³⁸ *2006 Celebration*, *supra* note 248, at 4.

²³⁹ FJC FOURTH INT. REP., *supra* note 131, at 2 (although removals increased in the immediate post-CAFA period, by the end of the study period, "diversity removals were at levels similar to those in the pre-CAFA period").

²⁴⁰ 28 U.S.C. § 1407 (2012).

²⁴¹ *See, e.g.*, Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005); Gensler, *supra* note 106, at 831.

²⁴² UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION, FISCAL YEAR 2012, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-2012-Revised-2-22-2013.pdf [hereinafter MDL STATISTICS 2012].

²⁴³ JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR, *Table S-20, Cumulative Summary of Multidistrict Litigation During the 12-Month Period Ending September 30, 2008 Through 2010*, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/tables/S20Sep10.pdf> (102,545 cases pending and subjected to MDL proceedings as of September 30, 2008).

²⁴⁴ As of September 30, 2012, there were 60,696 pending cases subjected to MDL proceedings. MDL STATISTICS 2012, *supra* note 264, *Summary by Docket of Multidistrict Litigation Pending as of September 30, 2012, or Closed Since October 1, 2011*, <http://www.jpml.uscourts.gov/sites/jpml/>

Each of these individual cases is part of an overall MDL proceeding (also called a "litigation").²⁴⁵ The number of overall MDL "litigations" has more than doubled in the last fifteen years -- from 161 "litigations" in 1997 to 344 "litigations" in 2012.²⁴⁶

V. CONCLUSION

What can be done? Many of the most obvious solutions to the lack-of-data problem require implementation by beleaguered court administrators. First, court administrators in federal and state courts can be urged to clarify the coding standards for class action status indicated on civil cover sheets and other information on class actions that court clerks may enter into computerized databases.²⁴⁷ This would at least illuminate how many cases are actually filed with a class action designation and would allow analysis of filing trends over time and in different court systems.²⁴⁸ Perhaps CAFA could be amended to require such record-keeping in the federal district courts. For state courts, the NCSC might be helpful in setting guidelines.

Second, the NACJD should reverse its recent decision to make the IDB "restricted" from the public.²⁴⁹ After decades of open access, researchers now must proceed through a cumbersome and time-consuming approval process, in which the end result at best is access to databases in which the docket numbers of

files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-2012-Revised-2-22-2013.pdf. As of September 30, 2012, there were 274,365 civil cases pending overall. JUDICIAL BUSINESS 2012, *supra* note 171.

²⁴⁵ MDL STATISTICS 2012, *supra* note 242.

²⁴⁶ *Id.* Many of the cases within MDL "litigations" are themselves class actions. For example, the IDB for 2004 shows that of 6,015 MDL cases terminated that year, 139 were class actions, of which 90 were diversity class actions. *E.g.*, In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005). Indeed, one of the criteria that the MDL Panel uses to decide whether to grant transfer under Section 1407 is whether any of the constituent cases are class actions. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008). However, "[n]o centralized agency is currently in charge of surveying and understanding the interrelationships among multi-district cases, class actions, consolidations, and other forms of aggregation." Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing, Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 212 (1995).

²⁴⁷ For example, the variable TRCLACT in the IDB, for "Termination Class Action," is described only in the Codebook as "[a] code that indicates a case involving allegations of class action," and offers two values to be chosen by the court clerk: Denied or Granted. CODEBOOK, *supra* note 171, at 20. It is unclear whether these options refer to rulings on a motion for class certification or something else. A ruling on a class certification motion does not result in "termination" of the case, so without further explanation, this variable is useless.

²⁴⁸ *Cf.* Thornburg, *supra* note 153, at 1134 ("The kind of basic information that we demand in discussions of other policy issues like the economy, or employment, or education, simply does not exist [for the legal system].").

²⁴⁹ See Federal Court Cases: Integrated Data Base, 1970-2000 (ICPSR 8429), Version History, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies/8429?archive=ICPSR&sortBy=7&permit%5B0%5D=AVAILABLE#avail> (version note for May 22, 2012 states, "All parts are being moved to restricted access and will be available only using the restricted access procedures").

individual cases are redacted.²⁵⁰ Because the databases are composed entirely of material that is publicly available for individual cases on PACER (which is then aggregated in the databases), the current restrictions on the databases appear designed to simply make quantitative research much more inconvenient and inexpensive, rather than to protect confidential information.

Third, many state courts are woefully behind the times technologically in maintaining and disseminating records. Court administrators may respond that worsening court funding crises²⁵¹ prohibit the resource expenditures necessary to make these changes. If this is the case, it is the responsibility of the legislatures to make adequate funding available for the third branch of government. After all, it is the legislatures that have passed numerous laws, including CAFA, that affect class actions. A topic that is important enough to require legislation is important enough to require adequate record-keeping.²⁵²

Better quantity and quality of court data are only the first steps. Policy-makers should also be cognizant of the well-documented heuristics and biases that operate even when base rate data are known. Policy decisions underlie many of the issues in class action cases before the Supreme Court. Base rate data on class actions are not available to inform these policy choices. However, empirical studies do not support the notion that there was or is a "flood" of "abusive" state court class actions. The Court should be wary of the "state court class action abuse" myth as it considers class action cases.

²⁵⁰ See *supra* note 171. See also, e.g., Federal Court Cases: Integrated Data Base, 2010 (ICPSR 30401), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/30401> ("The docket numbers were recoded to 9-fill to protect the confidentiality of individuals involved in the case.").

²⁵¹ See, e.g., Justice Fern A. Fisher, *New York State Courts Access to Justice Program*, iii. (2011) http://www.courts.state.ny.us/ip/nya2j/pdfs/NYA2J_2011report.pdf (describing "profound cuts to the judiciary's budget" in New York state courts in 2011); *ABA President Robinson: The State Court Funding Crisis is a Threat to Our System of Justice*, ABANOW.ORG, <http://www.abanow.org/2012/02/aba-president-robinson-the-state-court-funding-crisis-is-a-threat-to-our-justice-system> (showing ABA President calling state court underfunding "the most pressing issue facing the legal profession" at the mid-year ABA meeting in 2012). The Clerk of Court of Hillsborough County, Florida (Tampa) recently wrote in the blog on her web site: "Beginning July 1, the start of the new fiscal year, the Clerks of Court throughout the state of Florida are facing a combined cut of more than \$30 million, which is a \$2 million cut for Hillsborough County. The worst scenario for our Courts area would be an additional five percent cut. I am hoping that will not happen, but as I write, the prognosis does not look good." Pat Frank, Clerk of the Circuit Court Hillsborough County, Florida, PAT FRANK BLOG (May 25, 2012), <http://www.hillsclerk.com/publicweb/blog.aspx>.

²⁵² Cf. *Commentary*, 24 CLASS ACTION REPORTS 157, 1 (Mar.-Apr. 2003) ("If Congress really wanted to reform class action procedures, it would require a Final Report to be filed in each federal class action detailing (1) the total money paid out by defendants, including whether those costs are paid by the defendant on top of damages or are deducted from the class fund before distribution to class members, and (2) the amount of that total recovery consumed by attorney fees and expenses.").

Appendix A: State Court Judiciary Web Sites

- Alabama Judiciary, <http://judicial.alabama.gov> (last visited Sep. 5, 2012).
Alaska Judiciary, <http://courts.alaska.gov> (last visited Sep. 5, 2012).
Arizona Judiciary, <http://www.azcourts.gov> (last visited Sep. 11, 2012).
Arkansas Judiciary, <https://courts.arkansas.gov> (last visited Sep. 11, 2012).
California Judiciary, <http://www.courts.ca.gov> (last visited Sep. 20, 2012).
Colorado Judiciary, <http://www.courts.state.co.us> (last visited Sep. 20, 2012).
Connecticut Judiciary, <http://www.jud.ct.gov> (last visited Sep. 24, 2012).
Delaware Judiciary, <http://courts.delaware.gov> (last visited Sep. 24, 2012).
District of Columbia Judiciary, <http://www.dccourts.gov> (last visited Sep. 24, 2012).
Florida Judiciary, <http://www.flcourts.org> (last visited Sep. 24, 2012).
Georgia Judiciary, <http://www.georgiacourts.gov> (last visited Oct. 5, 2012).
Hawaii Judiciary, <http://www.courts.state.hi.us> (last visited Oct. 5, 2012).
Idaho Judiciary, <http://www.isc.idaho.gov> (last visited Oct. 23, 2012).
Illinois Judiciary, <http://www.state.il.us/court> (last visited Oct. 23, 2012).
Indiana Judiciary, <http://www.in.gov/judiciary> (last visited Oct. 25, 2012).
Iowa Judiciary, <http://www.iowacourts.gov> (last visited Oct. 25, 2012).
Kansas Judiciary, <http://www.kscourts.org> (last visited Oct. 26, 2012).
Kentucky Judiciary, <http://courts.ky.gov> (last visited Oct. 26, 2012).
Louisiana Judiciary, http://louisiana.gov/Government/Judicial_Branch (last visited Oct. 26, 2012).
Maine Judiciary, <http://www.courts.state.me.us> (last visited Dec. 26, 2012).
Maryland Judiciary, <http://www.courts.state.md.us> (last visited Dec. 26, 2012).
Massachusetts Judiciary, <http://www.mass.gov/courts> (last visited Dec. 26, 2012).
Michigan Judiciary, <http://www.courts.michigan.gov> (last visited Dec. 26, 2012).
Minnesota Judiciary, <http://www.mncourts.gov> (last visited Dec. 27, 2012).
Mississippi Judiciary, <http://courts.ms.gov> (last visited Dec. 27, 2012).
Missouri Judiciary, <http://www.courts.mo.gov> (last visited Dec. 27, 2012).
Montana Judiciary, <http://courts.mt.gov> (last visited Dec. 27, 2012).
Nebraska Judiciary, <http://www.supremecourt.ne.gov> (last visited Dec. 28, 2012).
Nevada Judiciary, <http://www.nevadajudiciary.us> (last visited Dec. 28, 2012).
New Hampshire Judiciary, <http://www.courts.state.nh.us> (last visited Dec. 28, 2012).
New Jersey Judiciary, <http://www.judiciary.state.nj.us> (last visited Dec. 28, 2012).
New Mexico Judiciary, <http://www.nmcourts.gov> (last visited Dec. 29, 2012).
New York Judiciary, <http://www.courts.state.ny.us> (last visited Dec. 29, 2012).
North Carolina Judiciary, <http://www.nccourts.org> (last visited Dec. 29, 2012).
North Dakota Judiciary, <http://www.ndcourts.gov> (last visited Dec. 29, 2012).
Ohio Judiciary, <http://www.supremecourt.ohio.gov> (last visited Dec. 30, 2012).
Oklahoma Judiciary, <http://www.oscn.net> (last visited Dec. 30, 2012).
Oregon Judiciary, <http://courts.oregon.gov> (last visited Dec. 30, 2012).

Pennsylvania Judiciary, <http://www.pacourts.us> (last visited Dec. 30, 2012).
Rhode Island Judiciary, <http://www.courts.ri.gov> (last visited Jan. 2, 2013).
South Carolina Judiciary, <http://www.judicial.state.sc.us> (last visited Jan. 2, 2013).
South Dakota Judiciary, <http://www.sdjudicial.com> (last visited Jan. 2, 2013).
Tennessee Judiciary, <http://www.tncourts.gov> (last visited Jan. 2, 2013).
Texas Judiciary, <http://www.courts.state.tx.us> (last visited Jan. 3, 2013).
Utah Judiciary, <http://www.utcourts.gov> (last visited Jan. 3, 2013).
Vermont Judiciary, <http://www.vermontjudiciary.org> (last visited Jan. 3, 2013).
Virginia Judiciary, <http://www.courts.state.va.us/courts> (last visited Jan. 3, 2013).
Washington Judiciary, <http://www.courts.wa.gov> (last visited Jan. 4, 2013).
West Virginia Judiciary, <http://www.courts.wv.gov> (last visited Jan. 4, 2013).
Wisconsin Judiciary, <http://www.wicourts.gov> (last visited Jan. 4, 2013).
Wyoming Judiciary, <http://www.courts.state.wy.us> (last visited Jan. 4, 2013).