

WALTZING THROUGH A LOOPHOLE: HOW *PARENS PATRIAE* SUITS ALLOW CIRCUMVENTION OF THE CLASS ACTION FAIRNESS ACT

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This Note explores the applicability of the Class Action Fairness Act's (CAFA) mass action removal provision to parens patriae suits. CAFA amended the federal rules governing aggregate litigation, replacing the complete diversity requirement with a minimal diversity requirement. CAFA's applicability to parens patriae suits, a type of representative lawsuit brought by a state alleging injuries to its citizens, was first addressed in Louisiana ex rel. Caldwell v. Allstate Insurance Co. In Caldwell, the Fifth Circuit held that a parens patriae suit was mislabeled because the real parties in interest—the parties whose interests constitute the basis of the parens patriae standing—represented in the action were the citizens and the suit should have been treated as a mass action for purposes of removal under CAFA. This Note examines CAFA's mass action provision and the concept of parens patriae actions and concludes that the Fifth Circuit's approach to removing mislabeled parens patriae suits is supported by existing jurisprudence and statutory analysis and is consistent with CAFA's intent.¹

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1. For an interesting counterpoint to this Note, see Alexander Lemann, Note, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121 (2011).

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INTRODUCTION

The Class Action Fairness Act of 2005 (CAFA)² was a congressional solution to address abuses of the class action litigation system.³ CAFA expanded federal diversity jurisdiction to include class actions⁴ with minimal diversity,

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

3. S. REP. NO. 109-14, at 4–5 (2005), *reprinted in* 2005 U.S.C.A.A.N. 3.

4. The term “class action,” as used in this Note, will generally include “mass actions.” The Federal Rules Decisions explains why this conflation is appropriate: “CAFA treats a ‘mass action’—defined as a civil action ‘in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs’ claims involve common questions of law or fact—as a class action.” 238 F.R.D. 504, 518 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). Mass actions also “must meet the same jurisdictional requirements as class actions (i.e., minimal diversity and more that [sic] \$5 million in controversy) and [are] subject to the same exclusions and exceptions” as class actions. *Id.* Similarly, courts have held that these two terms can be used interchangeably because “class action” “is used throughout CAFA to describe those actions over which the Act creates expanded diversity jurisdiction” and those actions include “mass actions.” *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1195 n.27 (11th Cir. 2007).

replacing the prior removal rule that required complete diversity.⁵ This relaxed requirement allows defendants to remove cases from state court to federal court more easily, thereby limiting defendants' exposure to "homecooking": the bias against out-of-state defendants that tends to exist in plaintiff-friendly state courts.⁶ Homecooking has led to a disproportionate number of class actions being tried in a select number of state venues⁷ with markedly higher damages awards.⁸ Richard Neely, a former West Virginia Court of Appeals judge, described elected state judges' incentives to homecook:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.⁹

There are, however, important differences between mass actions and class actions, especially relating to *parens patriae* actions. These differences principally concern the certification requirements for parties to participate in the suits. These differences will be discussed in detail *infra* Part I.B.3.

5. Compare *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010) ("In CAFA, Congress opened federal-court doors to state-law-based class actions so long as there is minimal diversity, at least 100 class members, and at least \$5,000,000 in controversy."), with *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 556 (2005) ("As the jurisdictional statutes existed [prior to CAFA], . . . the diversity requirement in § 1332(a) required complete diversity; absent complete diversity, the district court lacked original jurisdiction over all of the claims in the action.")

6. See Alexander T. Tabarrok, *Home Cooking a Class Action*, E. BAY BUS. TIMES (Apr. 5, 2002), <http://www.independent.org/newsroom/article.asp?id=415>.

7. S. REP. NO. 109-14, at 13 (2005) ("The ability of plaintiffs' lawyers to evade federal diversity jurisdiction has helped spur a dramatic increase in the number of class actions litigated in state courts," citing Madison County, Illinois, and St. Clair County, Illinois, as examples of venues with disproportionate class action filings); see also Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 499 (2000) ("[O]ver a recent two-year period, a state court in rural Alabama certified almost as many class actions (thirty-five cases) as all 900 federal districts did in a year (thirty-eight cases).").

8. See Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999). In the realm of tort awards, monetary damage awards against out-of-state corporate defendants were, on average, \$240,000 higher in states that used partisan elections to select judges than in states that employed other judicial selection methods. *Id.*

9. Tabarrok & Helland, *supra* note 8, at 157.

CAFA attempted to guarantee fairer results for defendants involved in class actions by allowing removal to federal courts based on minimal diversity.¹⁰ When there is diversity of citizenship, a defendant may remove a state-court action to federal court.¹¹ Complete diversity means that “all plaintiffs have different citizenship from all defendants.”¹² Minimal diversity is a lower standard, thereby making it easier for parties to seek the greater protections of federal courts. Minimal diversity under CAFA is established when any member of a proposed plaintiffs’¹³ class is a citizen of a different state than any defendant, or when any member of a proposed plaintiffs’ class, or any defendant, is a foreign state or a subject or citizen of a foreign state.¹⁴ In the class action context, complete diversity posed a problem because plaintiffs’ attorneys could evade complete diversity in a national class action simply by naming a citizen from any defendant’s state of residence as a plaintiff.¹⁵ Minimal diversity was Congress’s answer to this problem—Congress viewed federal judges as taking greater care in applying procedural requirements and reviewing proposed settlements, key components making federal court more fair for defendants.¹⁶

However, CAFA’s guarantee of fairer results was challenged in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.* when a *parens patriae* action was unmasked as an attempt to evade federal diversity jurisdiction.¹⁷ The reason that a

10. See S. REP. NO. 109-14, at 14 (2005) (citing greater care in applying procedural requirements and reviewing proposed settlements as key components making federal court fairer for defendants).

11. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005) (parties “may remove an action on the basis of diversity of citizenship”). CAFA amended the diversity requirements for removal to federal court from complete diversity of citizenship to minimal diversity. 28 U.S.C. § 1332(d) (2006).

12. BLACK’S LAW DICTIONARY 547 (9th ed. 2009).

13. As will be discussed in detail, “plaintiff” has a specific meaning in the context of CAFA, especially as contrasted to “person.” See *infra* Part II.B.1. However, for ease of explanation in the introduction, the terms will be used interchangeably until the distinction between the terms is explored below.

14. 28 U.S.C. § 1332(d)(2)(A)–(C). These definitions cover both mass and class actions: “For purposes of this subsection . . . a mass action shall be deemed to be a class action . . . if it otherwise meets the provisions of those paragraphs.” *Id.* § 1332(d)(11)(A).

15. NICHOLAS M. PACE ET AL., *RAND CORP., INSURANCE CLASS ACTIONS IN THE UNITED STATES* 57 (2007) (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)).

16. See *supra* note 10 and accompanying text.

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

parens patriae action could evade diversity jurisdiction is that, as a form of representative suit where state attorneys general bring an action on behalf of aggrieved citizens in their jurisdiction, it resembles a CAFA mass and class action.¹⁸ Like a class action and a mass action under CAFA, a *parens patriae* suit involves a single party representing the interests of many.¹⁹ A mass action is a form of aggregated litigation where all parties to the complaint are plaintiffs and all are involved in the proceedings.²⁰ Similar to a *parens patriae* suit, and unlike a class action, a mass action does not require formal certification.²¹ And because *parens patriae* suits are “an increasingly popular vehicle for state attorneys general to vindicate the rights of their constituents,”²² the similarity between a mass action (which is removable) and a *parens patriae* action (which is not) came to the forefront in *Caldwell*.

This similarity in *Caldwell* was problematic because the Fifth Circuit determined that Louisiana’s *parens patriae* action was actually representing the monetary relief claims of more than 100 private Louisiana residents.²³ Such an action violates a foundational rule of civil procedure: “An action must be prosecuted in the name of the real party in interest.”²⁴ The rule is designed “simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect

18. In modern usage, “*parens patriae*” is defined as: “The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves,” with an example being an attorney general acting as a *parens patriae* at an administrative hearing. BLACK’S LAW DICTIONARY 1221 (9th ed. 2009). As a general doctrine, this involves situations where “a government has standing to prosecute a lawsuit on behalf of a citizen, esp[ecially] on behalf of someone who is under a legal disability to prosecute the suit.” *Id.* Black’s Law Dictionary notes that “[t]he state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit.” *Id.* This limitation will be discussed in detail, *infra* Part I.B.2.

19. See *infra* Part I.B.2.

20. See *infra* notes 99–100 and accompanying text. However, in the context of CAFA, mass actions are given a more specific definition. See 28 U.S.C. § 1332(d)(11)(B)(i) (2006) (defining a CAFA mass action as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact”).

21. See *infra* note 99 and accompanying text.

22. See Lemann, *supra* note 1, at 122.

23. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 429 (5th Cir. 2008).

24. FED. R. CIV. P. 17 advisory committee’s notes.

as *res judicata*.”²⁵ In *Caldwell*, the state did not have an interest of its own in the suit and thus was not a real party to the controversy.²⁶ The court arrived at this conclusion after it “pierced the pleadings” in an effort to determine the real party in interest.²⁷ The court concluded that the citizens, whose alleged injuries formed the basis of the *parens patriae* suit, were the real parties in interest.²⁸ This meant that the suit was a mass action removable under CAFA,²⁹ and the Fifth Circuit therefore affirmed the district court’s refusal to remand to state court.³⁰

In *Caldwell*, the Fifth Circuit closed a loophole in CAFA that had been exploited by Louisiana’s Attorney General when he mislabeled a mass action as a *parens patriae* suit. The loophole created a de facto “attorneys general” exception despite Congress’s explicit rejection of such an exception.³¹ This loophole allowed state attorneys general to waltz past CAFA’s minimal diversity requirement by using their offices to disguise suits that should have been removable to federal court under CAFA, thus keeping the suits in plaintiff-friendly homecooking venues.³² The Fifth Circuit closed this loophole by piercing the pleadings, identifying the real parties in interest, and applying CAFA’s removal provision to the mislabeled suit.³³ However, absent similar rulings in other circuits, this loophole still exists

25. *Id.*

26. *Caldwell* will be discussed in greater detail below, but the Fifth Circuit made this determination based on a claim for treble damages that could only benefit the citizens. *See Caldwell*, 536 F.3d at 429.

27. *Id.* at 424–25. “Piercing the pleadings” in this context means looking past the named parties to the lawsuit and determining who the real parties in interest are. *See infra* notes 127–29. A “real party in interest” is a named party to a suit who “has a ‘real interest’ in the suit or, in other words, is a ‘real party’ to the controversy.” *Carden v. Arkoma Assocs.*, 494 U.S. 185, 200 (1990); *see also* CHARLES ALAN WRIGHT & MARY KAY LANE, *LAW OF FEDERAL COURTS* 492 (6th ed. 2002) (“The real party in interest is the party who, by the substantive law, possesses the right sought to be enforced.”). For more on piercing the pleadings and real parties in interest, *see infra* notes 123–45 and accompanying text.

28. *Caldwell*, 536 F.3d at 430.

29. *Id.*

30. *Id.* The Fifth Circuit affirmed the district court’s decision to pierce the pleadings. However, for purposes of readability, this Note will adopt the practice employed by courts in subsequent cases referring to the Fifth Circuit’s decision not as an affirmation but as actually undertaking the process of “piercing the pleadings.” *See, e.g.,* *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 449 (E.D. Pa. 2010).

31. *See infra* notes 182–88 and accompanying text.

32. *See infra* notes 74–76 and accompanying text.

33. *See infra* Part II.A.

for attorneys general outside the Fifth Circuit.³⁴ In these jurisdictions, attorneys general bringing suits against corporate defendants wield tremendous bargaining clout because *parens patriae* suits might easily represent monetary relief claims of millions of residents, worth potentially billions of dollars.³⁵ Waltzing past CAFA's minimal diversity requirement allows state attorneys general to create aggregate litigation where defendants might settle despite meritorious defenses simply to avoid the risk of a homecooked jury ruling against them at trial.³⁶

The *Caldwell* decision has sparked an intense debate among courts faced with the issue of whether similar *parens patriae* suits are removable under CAFA.³⁷ However, the

34. See *infra* note 37 and accompanying text.

35. See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 916 (2008) ("Few manufacturers, however, are capable and willing to risk trial when the plaintiff is a state (or a consortium of state attorneys general operating in concert) that may collect billions of dollars as a result of harms allegedly suffered by millions of its residents.").

36. Judge Richard Posner has described the "intense pressure to settle" when corporate defendants face major litigation, even without considering the added pressure of homecooking. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

37. To date the Fifth Circuit is the only federal circuit court to address the issue of removability of mass actions. The Fourth Circuit recently decided a CAFA class action case. *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 183 (4th Cir. 2011). Interestingly, the majority and dissenting judges in *CVS Pharmacy* waged a spirited battle over the principles enumerated by the *Caldwell* court. See *infra* notes 219–20, 222, 224, and 227. In addition to *CVS Pharmacy*, a number of district courts have addressed the issue of removability, and the treatment has been mixed. Some courts have declined to follow *Caldwell*. See, e.g., *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009). Others have declined to extend *Caldwell*. See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 10-5711, 2011 WL 560593, at *3 (N.D. Cal. Feb. 15, 2011) (disagreeing with the manner of piercing the pleadings employed by the Fifth Circuit, but not the principle of piercing the pleadings). Other courts have simply distinguished *Caldwell* for a variety of reasons. See, e.g., *Connecticut v. Moody's Corp.*, No. 3:10CV546, 2011 WL 63905, at *3 (D. Conn. Jan. 5, 2011) (distinguishing on grounds of what constitutes a "quasi-sovereign interest" under Connecticut law); *Sample v. Big Lots Stores, Inc.*, No. C 10-03276, 2010 WL 4939992, at *4–5 (N.D. Cal. Nov. 30, 2010) ("*Caldwell* simply recognizes that a *parens patriae* action brought by the state may be deemed to be a class action or mass action under CAFA where the state is seeking to recover damages suffered by private parties. That scenario is not presented here."); *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 298 (S.D.N.Y. 2009) (distinguishing *Caldwell* based on defendants acknowledging that individuals alleged to be part of mass action had no independent statutory right to sue). Still, some courts have either explicitly adopted *Caldwell's* holding, see, e.g., *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 445 (E.D. Pa. 2010), while others have deemed *Caldwell* "instructive" in reaching similar conclusions regarding removability,

holding in *Caldwell* need not be viewed as an invitation to remove all *parens patriae* litigation; it should be interpreted as removing those *parens patriae* suits that are intentionally mislabeled.³⁸ This Note argues that other courts should follow the Fifth Circuit and close the loophole created by intentionally mislabeled *parens patriae* suits.³⁹ Part I first describes the origins of the loophole and explains the procedural and practical reasons for exploiting it. Part I also outlines the three key elements of the loophole: the Class Action Fairness Act of 2005, *parens patriae* suits, and mass actions. Part II explores the Fifth Circuit's conclusion that *parens patriae* suits can be removed under CAFA and then considers two additional justifications for removal. Part III provides a guideline for when federal courts should pierce the pleadings of *parens patriae* suits. This Note concludes that, when appropriate, adopting the Fifth Circuit's approach closes a loophole that poses a small but extant risk to the foundational principles of CAFA.

I. CUING THE MUSIC: EXAMINING THE LOOPHOLE AND ITS THREE ELEMENTS

This Part examines the creation and elements of the *parens patriae* loophole. Part I.A explains the origins of the loophole and then examines the procedural and practical reasons that an attorney general would take advantage of it. Part I.B provides an overview of the elements: I.B.1 maps out a brief history of CAFA; I.B.2 explores the *parens patriae* doctrine; and I.B.3 examines the complicated definition of a CAFA mass action.

Kitazato v. Black Diamond Hospitality Invs., LLC, CV. No. 09-00271, 2009 WL 3824851, at *3 (D. Haw. Nov. 13, 2009).

38. Arguably, based on a textual analysis of interpretation, all *parens patriae* actions might mandate removal. See *infra* Part II.B.1. However, as discussed below, this oversteps the boundaries of CAFA and realizes *Caldwell's* opponents' claims of Eleventh Amendment violations, as well as judicial activism.

39. This Note does not advocate special treatment for corporate defendants, support allowing corporate defendants to evade liability, or generally endorse judicial activism. It simply argues that *Caldwell* supported CAFA's intent by piercing the pleadings and determining that the Louisiana Attorney General's *parens patriae* action was an attempt to evade federal diversity jurisdiction. CAFA's framers intended to open up the federal courts to more representative lawsuits, and *parens patriae* actions offer a mechanism for avoiding CAFA's provisions.

A. *Waltzing Through a Loophole*

The loophole involves an attorney general using a *parens patriae* suit as a type of smokescreen to keep a mass action⁴⁰ within the plaintiff-friendly, homecooking confines of that attorney general's jurisdiction.⁴¹ An attorney general brings a mass action mislabeled as a *parens patriae* suit and, if the court refuses to look past (or "pierce") the pleadings to see whose interests are actually being represented, the court will not apply CAFA.⁴² This keeps a mislabeled mass action in state court instead of removing it to federal court because the attorney general, in a *parens patriae* suit, is able to claim that he or she is representing only one party's interest—the state's—and not the interests of the allegedly injured citizens. This removes the case from CAFA because, for CAFA's mass action provision to apply, a civil action must represent the monetary relief claims of 100 or more persons.⁴³ The interests represented in the suit are crucial because the Supreme Court has held that *parens patriae* suits must represent more than just the private interests of citizens; the state must have "a real interest of its own" to bring a *parens patriae* suit.⁴⁴

If the state does not have a real interest of its own, mislabeling a mass action as a *parens patriae* suit is simply jurisdictional gamesmanship. Without a real interest, the attorney general should not be the only named plaintiff on the complaint. By not naming the injured citizens represented in the suit, an attorney general can claim that the suit neither has "class members"—the "persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action"⁴⁵—nor that it represents the "monetary relief claims of 100 or more persons" in a mass action.⁴⁶ Instead of properly labeling the action as either a mass or class action, which would subject the suit to federal diversity jurisdiction,⁴⁷

40. The same issue applies to mislabeled class actions. *See, e.g.*, *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010). However, this Note will be limited to discussion of the intersection of the mass action provision and *parens patriae* suits.

41. *See infra* text accompanying note 66.

42. *See infra* Part II.A.2.a.

43. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

44. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

45. 28 U.S.C. § 1332(d)(1)(D) (2006).

46. *Id.* § 1332(d)(11)(B)(i).

47. *See id.* § 1332(d)(1)–(2), (11).

the attorney general can keep the same claims in his or her home state's courts. If a court pierces the pleadings, as the Fifth Circuit did in *Caldwell*, this gamesmanship will be exposed and the suit properly removed to federal court.⁴⁸ If a court refuses to pierce the pleadings, there is no way to test the truthfulness of the attorney general's claimed *parens patriae* status, and the loophole remains wide open.

Importantly, the issue is not as simple as piercing the pleadings whenever an attorney general uses a private firm in support of litigation. Attorneys general employ private firms to pursue legitimate state actions.⁴⁹ In certain types of litigation, especially complex litigation and products liability suits, it is relatively common for attorneys general to hire plaintiffs' lawyers to assist them.⁵⁰ Private firms often have the necessary expertise that makes it cost effective for attorneys general offices with limited budgets to outsource particularly esoteric or complex work.⁵¹ Therefore, using private firms and taking advantage of a loophole in CAFA are different. "Using" private firms entails employing specialists for difficult cases. "Taking advantage of a loophole in CAFA" involves applying an

48. See *supra* text accompanying notes 28–30. Note that a defendant's removal of the case from state court will alert the court of a possible need to pierce the pleadings. See, e.g., *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 423 (5th Cir. 2008) (noting that defendants removed the case from state to federal court, where they "urged the district court to look beyond the labels used in the complaint and determine the real nature of Louisiana's claims").

49. See Gifford, *supra* note 35, at 964 ("In most but not all instances of *parens patriae* litigation against product manufacturers, state attorneys general or municipal officials have hired private attorneys . . . to prosecute the litigation for them.").

50. See *id.*; Danny Hakim, *Law Firm Is Big Donor to Attorney General Hopeful*, N.Y. TIMES (May 18, 2010), <http://www.nytimes.com/2010/05/19/nyregion/19rice.html> ("Law firms are also sometimes hired by attorneys general, particularly those with smaller budgets, to help on cases, although this is less common in New York."); see also Anthony J. Sebok, *Should State Attorneys General Use Private Law Firms to Pursue Civil Suits? An Appeal to the California Supreme Court Raises This Hot-Button Issue*, FINDLAW'S WRIT (Aug. 12, 2008), <http://writ.news.findlaw.com/sebok/20080812.html>. Some firms even advertise as having "extensive experience" in "state attorney general actions." See WINSTON & STRAWN LLP, <http://www.winston.com/index.cfm?contentID=205&itemID=22> (last visited October 31, 2011). Given recent rulings that uphold the constitutionality of contingent fee arrangements between private firms and state attorneys general, this is a trend that is unlikely to end soon. See, e.g., *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 33 (Cal. 2010), *cert. denied*, 131 S. Ct. 920 (2011) (holding that "the government was not precluded from engaging private counsel on a contingent-fee basis in an ordinary civil case"); see also Gifford, *supra* note 35, at 964.

51. See *supra* note 50.

attorney general's name to a case in order to keep that case in state court. This was the concern voiced by Senator Chuck Grassley, CAFA's sponsor and one of its key advocates.⁵² Senator Grassley described the dangers of the loophole: "We should not risk creating a situation where State attorneys general can be used as pawns so that crafty class action lawyers can avoid the jurisdictional provisions of this bill."⁵³ However, the risk is not simply that attorneys general will be "used as pawns"; the risk is also that attorneys general will knowingly participate in the jurisdictional gamesmanship.

There are procedural and practical reasons why taking advantage of the loophole is advantageous for both attorneys general and private law firms. The procedural reason is simply that if all *parens patriae* suits brought by attorneys general are subject to a de facto exception from CAFA, these suits will remain in state court. This is problematic because it allows attorneys general to continue to forum shop by keeping cases in homecooking venues despite CAFA's attempts at jurisdictional reforms.

From an attorney general's perspective, there are also several practical reasons for lending a state attorney general office's imprimatur to private firms. First, doing so provides free labor to the attorney general. At no direct cost to his or her office,⁵⁴ an attorney general has a private law firm try potentially lucrative class actions in his or her home state, where the effect of homecooking is presumably the strongest. Second, if a private firm wins a case resulting in a substantial amount of money flowing into state coffers, attorneys general stand to gain politically because they are elected officials.⁵⁵

52. Class Action Fairness Act, S. 5, 109th Cong. (2005), available at <http://www.gpo.gov/fdsys/pkg/BILLS-109s5is/pdf/BILLS-109s5is.pdf> (listing Grassley as CAFA's sponsor). Although Grassley was discussing the "loophole" in the context of an actual (and rejected) Attorneys General exception to CAFA, he was outlining the procedural and practical reasons why an attorney general would take advantage of his or her position as the legal representative of a sovereign entity.

53. 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley); accord Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593 (2008) ("CAFA, like every other major class action development of recent years, was born amidst snide remarks about lawyers' inventing lawsuits and manipulating the system to enrich themselves at others' expense.").

54. See Sebok, *supra* note 50 (discussing the use of contingency-fee arrangements whereby firms were offered fee arrangements that guaranteed "a piece of the recovery if they won, and nothing at all if they lost").

55. See Jean O. Pasco, *Will Deal Boost Capizzi's Political Capital?*, L.A. TIMES (June 21 1997), [http://articles.latimes.com/1997-06-21/news/mn-5589_1_orange-](http://articles.latimes.com/1997-06-21/news/mn-5589_1_orange)

Finally, the private law firms may reward attorneys general by contributing to their reelection campaigns.⁵⁶

The arrangement benefits the private law firms too. The firms get ready-made classes of citizens that require neither the expense of formal certification and notice required for a class action nor the barratry required to find mass action parties. Perhaps most importantly, plaintiffs' lawyers get to try their class suits in state courts: This assures the firms access to favorable state venues with the corresponding presumption of larger settlements.

B. *The Elements of the Loophole*

1. A Brief History of CAFA⁵⁷

CAFA has been described as “the most significant change in class action practice since the federal class action rule (Rule

county (noting the effect of a \$30 million civil settlement on campaign for attorney general: “I think [Capizzi] looks pretty good in this one. . . . To voters in Orange County, \$30 million is a ton of money.”)

56. See, e.g., 151 CONG. REC. S1164 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) (summarizing a Boston Globe exposé revealing that the Massachusetts attorney general, after contracting with private plaintiffs' lawyers to bring class actions and receiving a portion of the settlement money, then accepted campaign contributions made by the private law firms); see also Hakim, *supra* note 50 (detailing how Weitz & Luxenberg, “one of the nation's largest personal injury law firms,” was “pouring money” into the campaign of a candidate for the New York state attorney general).

57. For purposes of this Note, congressional intent will be largely derived from the Report on the Act of the Senate Judiciary Committee, S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.A.A.N. 3. CAFA's legislative history is limited because the bill passed both the Senate and the House without amendment. As a result, there is neither a House nor a Conference Report. See *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 448 n.5 (E.D. Pa. 2010) (“Only the Senate Judiciary Committee's Report on CAFA remains as the primary non-textual indicator of congressional intent towards the legislation.”). There was, however, a House Sponsors' statement, see 151 CONG. REC. H727–29 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner), and a great deal of discussion and debate about the bill on the House floor. Any discussion of legislative history must, of course, carry with it a caveat that floor debates are generally little more than political speeches and therefore should be accorded no weight as legislative history. See *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“We have eschewed reliance on the passing comments of one Member . . . and casual statements from the floor debates.”). Although the debate in the Senate contained a two-sided exchange about including an attorneys general exception, see *infra* Part II.A, the purpose of using the legislative history in this Note is still limited, more or less, to coloring the confusing parts of CAFA's text.

23) was amended in 1966.”⁵⁸ CAFA grew out of perceived shortcomings in the existing class action framework.⁵⁹ Specifically, Congress concluded that plaintiffs’ lawyers were too easily able to funnel class actions with nationwide issues or classes into state court.⁶⁰ This led to state courts “keeping cases of national importance out of Federal court,” evincing “bias against out-of-State defendants,” and “making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”⁶¹ Dissatisfaction with the class action system was not initially shared across party lines, with staunch Democrat opposition weighing against Republican support.⁶² Accordingly, it took several years of “aggressive lobbying and partisan wrangling”⁶³ before CAFA became law on February 18, 2005.⁶⁴ In a sign of solidarity after the extended negotiations, the bill passed through both houses and across President George W. Bush’s desk without amendments or alterations.⁶⁵

Congress had three primary goals in enacting CAFA: (1) to reduce exorbitant payouts to plaintiffs’ lawyers, (2) to reduce the prevalence of homecooking in state courts, and (3) to

58. Edward F. Sherman, *Class Action Fairness Act and the Federalization of Class Actions*, 238 F.R.D. 504, 504 (2007).

59. The first sentence of the “Purposes” section of CAFA evinces the framers’ opinion of the then-existing system: “By now, there should be little debate about the numerous problems with our current class action system.” S. REP. NO. 109-14, at 4 (2005); *accord* Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240, 1243 (10th Cir. 2009) (“CAFA was enacted to respond to perceived abusive practices by plaintiffs and their attorneys in litigating major class actions with interstate features in state courts.”).

60. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4, 5.

61. *Id.*

62. S. REP. NO. 109-14, at 3–4 (2005) (showing voting records showing split between Democrats and Republicans).

63. Guyon Knight, Note, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 FORDHAM L. REV. 1875, 1884 (2010).

64. S. REP. NO. 109-14 at 2–3 (2005); *see also* Seth Stern, *Republicans Win on Class Action*, CQ WKLY., Feb. 21, 2005, at 460 (calling CAFA’s enactment “the capstone of a six-year slog through Congress”).

65. *See* 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley); Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act, and Amended Federal Rule 23*, CAFALAW BLOG (Feb. 9, 2005), <http://www.cafalawblog.com/legal-publications-and-articles-rollo-and-crowson-publish-article-mapping-the-new-class-action-frontier-a-a-primer-on-the-class-action-fairness-act-and-amended-federal-rule-23.html>.

protect corporate defendants from plaintiffs' lawyers.⁶⁶ By expanding federal diversity jurisdiction, Congress sought to reverse the homecooking trend,⁶⁷ where "governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations)," where the "lawyers who bring the lawsuits effectively control the litigation," and where "injured class members . . . are marginally relevant at best."⁶⁸ CAFA's framers derided a system where "consumers are the big losers: In too many cases, state court judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel."⁶⁹

CAFA's framers attempted to solve these issues by expanding the original jurisdiction of federal courts, thus allowing more cases to be removed to federal court.⁷⁰ CAFA's minimal diversity is subject to a series of exceptions, some discretionary, others mandatory. For purposes of this Note, the most relevant is the "local controversy" exception, which grants discretion to district courts to remand ostensibly removable cases back to state court when the primary defendants and a percentage of the proposed plaintiff class that is greater than one-third but less than two-thirds of the plaintiffs are from the same state.⁷¹ However, before remanding a "local controversy" that contains these demographics, CAFA requires that district courts consider the following series of factors:

66. S. REP. NO. 109-14, at 4–5 (2005). For discussion on whether CAFA's framers truly intended for the legislation to be pro-plaintiff, see Knight, *supra* note 63, at 1885 ("Despite CAFA's profession of concern for plaintiffs taken advantage of by lawyers gaming the procedural system, commentators have almost universally labeled the Act pro-defendant.") (citations omitted); see also Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 230 (2004) ("The intent of the Act is obviously more to shield defendants than to protect class members from abuses . . ."). *But cf.* Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1789 (2008) ("[O]ne could even make an argument that in the long run CAFA will inure to the benefit of consumer plaintiffs.").

67. See *supra* notes 6–8 and accompanying text.

68. S. REP. NO. 109-14, at 4 (2005).

69. *Id.*; accord 151 CONG. REC. S1161 (daily ed. Feb. 9, 2005) (statement of Sen. Cornyn) ("We have seen that some of these egregious abuses of the class action procedure have been used to make certain entrepreneurial lawyers very wealthy when the consumers literally get a coupon worth pennies on the dollar.").

70. See *supra* notes 10–16 and accompanying text.

71. 28 U.S.C. § 1332(d)(3) (2006).

(A) [W]hether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.⁷²

These factors reveal the elements of a mass or class action that CAFA's framers thought were important when a district court was deciding whether a case should remain in federal district court. Several of these factors translate into the guidelines that this Note recommends district courts use when determining whether to pierce the pleadings.⁷³

Finally, it is worth noting that CAFA's framers considered but rejected an exception to CAFA for suits brought by attorneys general. This would have been a blanket rule that suits brought by attorneys general could not be removed under CAFA.⁷⁴ CAFA's framers rejected this proposed exception, essentially because it was viewed either as unnecessary⁷⁵ or as creating the very loophole that the Fifth Circuit exposed in *Caldwell*.⁷⁶ The reasons for, and ramifications of, rejecting this exception will be discussed in Part II.A.

72. *Id.* § 1332(d)(3)(A)–(F).

73. *See infra* Part III.

74. *See* 151 CONG. REC. S1158 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor). Senator Pryor introduced the amendment, saying, “[m]y amendment simply clarifies that State attorneys general should be exempt from [CAFA] and be allowed to pursue their individual State’s interests as determined by themselves and not by the Federal Government.” *Id.*

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

76. *Id.* at S1163–64 (statement of Sen. Hatch).

2. *Parens Patriae* Suits: An Evolution from Beneficent Rulers to Real Parties in Interest

The *parens patriae* doctrine stems from a common law concept, rooted in the English constitutional system, called the “royal prerogative,” whereby the King retained certain powers and duties.⁷⁷ “Historically, the term referenced the King’s power as guardian over people who lacked the legal capacity to act for themselves.”⁷⁸ This concept was recognized early on in American courts; however, it took the form of a common law legislative prerogative:

This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.⁷⁹

Parens patriae literally means “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen.”⁸⁰ However, the common law approach “has relatively little to do with the concept of *parens patriae* standing that has developed in American law.”⁸¹ Unlike under the common law, a state may not bring nor enter a suit in order to represent a particular citizen’s interest if that citizen can represent his or her own interest.⁸² The state becomes a “nominal party,” without a real interest of its own, if it represents a citizen who can represent his or her own interest.⁸³ States do not have standing to bring actions under the *parens patriae* doctrine as nominal parties.⁸⁴

In order to have standing in a *parens patriae* action, the state must have either statutory standing or common law

77. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982).

78. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 425 (5th Cir. 2008).

79. *Snapp*, 458 U.S. at 600 (quoting Mormon Church v. United States, 136 U.S. 1, 57 (1890)).

80. BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

81. *Snapp*, 458 U.S. at 600.

82. *See id.*; *see also* BLACK’S LAW DICTIONARY 1221 (9th ed. 2009). Concretely, this means that if citizens are able to bring a suit on their own behalf, they must. The state in which they are residents may not represent their interests.

83. *See Snapp*, 458 U.S. at 600.

84. *Id.*

standing. Statutory standing is a legislatively-created right for the government to bring an action in certain situations.⁸⁵ The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSRA) contains an example of this.⁸⁶ The HSRA provides that:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of . . . this title.⁸⁷

Statutory grants of standing under the *parens patriae* doctrine vary widely. Some are national in scope and, importantly, address issues central to this Note. For instance, the HSRA provides a statutory right for state attorneys general to sue for violations of the Sherman Act.⁸⁸ The HSRA is notable for the protections against abusive practices by attorneys general that it contains. There are both notice and opt-out requirements, similar to class actions,⁸⁹ a corresponding *res judicata*-like bar against damage claims by represented citizens,⁹⁰ and a provision precluding damages for claims that have already resulted in damages (i.e., a provision specifically preventing double recovery).⁹¹ Statutes of other states contain only limited *parens patriae* powers.⁹² However, even when

85. See, e.g., *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 428 (5th Cir. 2008) (noting that Louisiana’s attorney general is vested with “statutory and constitutional authority to bring *parens patriae* antitrust actions” based on Louisiana Revised Statute § 51:138, which “empowers the Attorney General to enforce the Monopolies Act both criminally and civilly, and to seek redress against violators on behalf of both the state and private parties”).

86. 15 U.S.C. § 15c (2006). A subsequent section, § 15h, provides that the Act “shall apply in any State, unless such State provides by law for its nonapplicability in such State.” *Id.* § 15h. “In short, HSRA created a statutory *parens patriae* action for state attorneys general.” *Caldwell*, 536 F.3d at 427 n.5.

87. 15 U.S.C. § 15c(a)(1) (2006).

88. *Id.*

89. *Id.* § 15c(b)(1)–(2).

90. *Id.* § 15c(b)(3).

91. *Id.* § 15c(a)(1)(A).

92. Compare W. VA. CODE ANN. § 47-18-17 (West 2011) (mimicking the HSRA’s broad grants), with LA. REV. STAT. ANN. § 13:5036 (2011) (providing *parens patriae* standing with a single cursory sentence). At issue in *Caldwell* was whether the state could legitimately claim to have a real interest in the suit when the state’s statute was unclear if this power was granted to attorneys general based on text that read, “any person who is injured in his business or property’ under the Monopolies Act ‘shall recover [treble] damages.’ ” *Louisiana ex rel.*

states have statutory provisions, a state must have a real interest in the action in order to bring a *parens patriae* suit.⁹³

Alternatively, common law *parens patriae* standing requires that a state be vindicating a “quasi-sovereign interest.”⁹⁴ What constitutes a quasi-sovereign interest is remarkably ambiguous. The Supreme Court has defined quasi-sovereign interests as the interests a state has “in the health and well-being—both physical and economic—of its residents in general.”⁹⁵ A state must demonstrate a “direct interest” in the outcome of the litigation and cannot “merely seek recovery for the benefit of individuals who are the real parties in interest.”⁹⁶ The effect of the alleged injury must be felt by a “sufficiently substantial segment” of a state’s population—a term that the Court has declined to strictly define.⁹⁷ Absent a clearly defined rule, whether a state has a quasi-sovereign interest turns on a case-by-case analysis.⁹⁸

3. A “Statutory Janus”: Mass Actions Are Class Actions and Are Not Class Actions

Generally speaking, mass actions are a means for individuals—historically those who could not meet the

Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429 (5th Cir. 2008) (quoting LA. REV. STAT. ANN. § 15:137 (2007)).

93. Hood v. F. Hoffman-LaRoche, Ltd., 639 F. Supp. 2d 25, 32 n.9 (D.D.C. 2009) (explaining that “[t]he fact that an attorney general has the authority to proceed as *parens patriae* does not, *ipso facto*, mean that he or she necessarily is the only real party in interest.”); see also Carden v. Arkoma Assocs., 494 U.S. 185, 200 (1990) (O’Connor, J., dissenting) (when testing a court’s diversity jurisdiction, a determination must be made whether a named party “has a ‘real interest’ in the suit or, in other words, is a ‘real party’ to the controversy”). Given that at its core the issue addressed by this Note is whether to apply federal diversity jurisdiction, *Carden* is instructive.

94. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

95. *Id.* at 607.

96. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 396 (1938). The Supreme Court originally set this bar quite high; in Georgia v. Pennsylvania R.R., 324 U.S. 439, 451 (1945), the Court described how:

Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

97. See Snapp, 458 U.S. at 607.

98. See Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 426 (5th Cir. 2008); see generally Cook, 304 U.S. 387 (1938).

strictures of Federal Rules of Civil Procedure Rule 23(b)—to aggregate their claims.⁹⁹ Unlike in class actions, all parties to the complaint are plaintiffs and all participate in the proceedings.¹⁰⁰ Mass actions are commonly used in personal injury cases.¹⁰¹ As discussed in Part II.B.1, much of the confusion caused by CAFA's mass action provision can be traced to the use of "persons" instead of "plaintiffs" in the definition.¹⁰² This creates an inference that all *parens patriae* actions seeking monetary relief—i.e., not merely seeking injunctive or declarative relief—brought on behalf of one hundred or more citizens must be a mass action. Part III discusses how courts can limit this overbroad inference.

Under CAFA, a mass action is considered a class action¹⁰³ but also is *not* a class action.¹⁰⁴ Courts have held that in the context of CAFA the terms are interchangeable insofar as "class action" "is used throughout CAFA to describe those actions over which the Act creates expanded diversity jurisdiction."¹⁰⁵ This "peculiar drafting" gives mass actions what the Eleventh Circuit called "the character of a kind of statutory Janus; under CAFA, a mass action simultaneously *is* a class action (for CAFA's purposes) and *is not* a class action (in the traditional sense of Rule 23 and analogous state law provisions)."¹⁰⁶

CAFA defines a mass action as:

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

99. See Nicole Ochi, Note, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 965–66 (2008).

100. *Id.* (citing ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 15 (3d ed. 2007)). Contrast mass actions with Rule 23(b) class actions, where represented parties do not have to actively bring or participate in claims.

101. *Id.* at 966.

102. See *infra* Part II.B.1.

103. 28 U.S.C. § 1332(d)(11)(A) (2006).

104. *Id.* § 1332(d)(11)(B)(i).

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

106. *Id.* (emphasis in original).

plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).¹⁰⁷

Section 1711(2) defines class actions.¹⁰⁸ Thus, by its plain language, CAFA defines “mass action” specifically to *exclude* formal class actions. However, CAFA also states that “a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.”¹⁰⁹ The referenced paragraphs in section 1332(d) detail when a class action is removable under CAFA. Predictably, these provisions “cover a variety of terrain.”¹¹⁰ Some of the incorporated paragraphs make sense in the context of a mass action.¹¹¹ Others do not.¹¹² Therefore, CAFA truly acts as a statutory Janus.

Section 1332(d)(2) does, however, contain two key provisions that apply to mass actions: Mass actions must have minimally diverse parties and must meet a \$5 million amount in controversy requirement.¹¹³ Thus, by “combining the requirements drawn from § 1332(d)(11)(B)(i)’s definition of a mass action and those drawn from § 1332(d)(11)(A)’s incorporation of CAFA’s class action requirements into the

107. 28 U.S.C. § 1332(d)(11)(B)(i) (2006) (emphasis added).

108. 28 U.S.C. § 1711(2) (2006) defines “class action”:

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

109. *Id.* § 1332(d)(11)(A).

110. *Lowery*, 483 F.3d at 1199–1200.

111. For instance, the “local controversy” exception makes sense; this exception limits CAFA’s federal diversity jurisdiction for purely local cases. *See supra* notes 71–72 and accompanying text. Another exception that makes sense creates additional limitations to CAFA’s expansion of diversity jurisdiction in suits against states and state officials. 28 U.S.C. § 1332(d)(5)(A) (2006).

112. Some, however, “despite being incorporated into the mass action context by § 1332(d)(11)(A), seem to have no application to mass actions.” *Lowery*, 483 F.3d at 1200. For example, these provisions include one that addresses the timing of class certification, 28 U.S.C. § 1332(d)(8) (2006), and another that restricts the applicability of earlier provisions when “the number of members of all proposed plaintiff classes in the aggregate is less than 100,” *id.* § 1332(d)(5)(B). The application of these is limited because, by definition, a mass action is not a certified class, so incorporating section 1332(d)(8) about the timing of class certification makes little sense; and given that a mass action *requires* the monetary relief claims of *100 or more persons*, the section 1332(d)(8) provision for proposed classes with fewer than 100 plaintiffs seems inapplicable.

113. *Id.* § 1332(d)(2).

mass action context,” one arrives at the following requirements for a mass action: (1) an amount in controversy requirement of an aggregate of \$5 million in claims; (2) minimal diversity; (3) at least 100 plaintiffs with monetary claims; and (4) common questions of law or fact shared among the plaintiffs.¹¹⁴

CAFA’s legislative history suggests that the label given to a particular action is less important than the substance of the underlying claim and that prior to CAFA mass actions were subject to greater abuse than class actions. CAFA’s framers referred to mass actions as “class actions in disguise”¹¹⁵ and recognized that mass actions were “subject to many of the same abuses” as class actions.¹¹⁶ CAFA’s framers may even have thought that abuses of mass actions were *worse* than abuses of class actions: Mass actions, according to CAFA’s framers, allow lawyers to join unrelated claims arising from different interactions with defendants and to “confuse a jury into awarding millions of dollars to individuals who have suffered no real injury.”¹¹⁷ Given that Congress wanted class action defined broadly to avoid “jurisdictional gamesmanship,”¹¹⁸ it follows that the potentially more-abusive mass actions should be construed just as liberally. Support for this position comes from the Judiciary Committee, which noted,

[T]he definition of “class action” is to be interpreted liberally. Its application should not be confined solely to lawsuits that are *labeled* “class actions” by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purposes of applying these provisions.¹¹⁹

Not confining lawsuits to labels is where *parens patriae* suits and mass actions intersect in CAFA. Both are representative suits. Both avoid the formalities required of a Rule 23(b)(3) class action, in which damages claims require that “questions of law or fact common to class members

114. See *Lowery*, 483 F.3d at 1202–03.

115. S. REP. NO. 109-14, at 47 (2005).

116. *Id.* at 46; see also 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

117. S. REP. NO. 109-14, at 47; see also 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

118. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008).

119. S. REP. NO. 109-14, at 35 (2005) (emphasis added).

predominate over any questions affecting only individual members,” and that a class action be “superior to other available methods for fairly and efficiently adjudicating the controversy.”¹²⁰ Given the potential for abuse unmasked in *Caldwell*, it appears that the Fifth Circuit adhered to CAFA’s framers’ intent when it exposed Louisiana’s *parens patriae* suit as a mass action in disguise.

II. STOPPING THE MUSIC: REMOVING *PARENS PATRIAE* SUITS IS JUSTIFIED UNDER CAFA

This Part considers the arguments made for and against removal of *parens patriae* suits and argues that the Fifth Circuit’s decision in *Caldwell* was justified under CAFA. Part II.A.1 explores *Caldwell*’s conclusion that *parens patriae* suits are removable under CAFA. Part II.A.2 then examines the principal arguments advanced by critics of *Caldwell*. Part II.B provides two additional justifications for why courts should pierce pleadings to determine the real parties in interest: (1) CAFA’s text and (2) CAFA’s structure.

A. *Exploring the Caldwell Decision*

1. Why the Fifth Circuit’s Decision Was Justified Under CAFA

On November 7, 2007, Louisiana’s then-Attorney General Charles C. Foti, Jr., along with counsel from four private law firms, filed a *parens patriae* action in Louisiana state court seeking enforcement of the state’s Monopolies Act.¹²¹ Foti alleged that several out-of-state corporate defendants in insurance and related fields colluded “to form a ‘combination’ that illegally suppressed competition” in the wake of

120. FED. R. CIV. P. 23(b)(3).

121. *Caldwell*, 536 F.3d at 421–22 & n.2. Under the well-established rules of the federal courts, the subsequent Louisiana attorney general, James D. “Buddy” Caldwell, was automatically substituted for former Attorney General Foti when he lost his bid for reelection. Bill Barrow, *Foti Out as Attorney General*, THE TIMES-PICAYUNE (Oct. 21, 2007), http://www.nola.com/elections/index.ssf/2007/10/attorney_general_agriculture_r.html. See *Caldwell*, 536 F.3d at 421 n.1; see also FED. R. APP. P. 43(c)(2) (“When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer’s successor is automatically substituted as a party.”).

Hurricanes Katrina and Rita.¹²² The essence of the claim was that a group of insurance companies allegedly used a strategy devised by a corporate consultancy and furthered by actuarial service providers to undervalue and underpay insurance claims resulting from Hurricanes Katrina and Rita.¹²³ Louisiana brought an action against all of the companies allegedly involved in the scheme, seeking forfeiture of illegally-obtained profits, treble damages, and injunctive relief.¹²⁴

What followed changed this seemingly routine claim into a landmark decision on CAFA. The defendants removed the claim to federal court, contending that it was mislabeled as a *parens patriae* action and that the substance of the claim required classification as a mass action under the provisions of CAFA.¹²⁵ Louisiana's attorney general filed a responsive motion, seeking to remand the claim as a *parens patriae* suit back to state court.¹²⁶ At a hearing on the removal issue, the federal district court judge focused on identifying the real parties in interest.¹²⁷ Echoing Federal Rule of Civil Procedure 17,¹²⁸ the judge explained his rationale for this: "[I]t's the Court's responsibility to not just merely rely on who a plaintiff chose to sue, or, in this case, how the plaintiff chose to plead [but to] look at the specific substance of . . . the complaint

122. *Caldwell*, 536 F.3d at 422. The defendants were: Allstate Insurance Company; Lafayette Insurance Company; Xactware Solutions, Inc.; Marshall & Swift/Boeckh, LLC; Insurance Services Office, Inc.; State Farm Fire and Casualty Company; USAA Casualty Insurance Company; Farmers Insurance Exchange; the Standard Fire Insurance Company; and McKinsey & Company, Inc. *Id.*

123. *Id.* The alleged collusion between the defendants started in the 1980s. The specific claims were that the defendants "manipulated Louisiana commerce by rigging the value of policyholder claims and raising the premiums held" and by "conspir[ing] . . . to horizontally fix the prices of repair services utilized in calculating the amount(s) to be paid under the terms of Louisiana insureds' insurance contracts with insurers for covered damage to immovable property." *Id.* at 422–23.

124. *Id.* at 423.

125. *Id.*

126. *Id.*

127. *Id.*

128. FED. R. CIV. P. 17. This rule requires that "[a]n action must be prosecuted in the name of the real party in interest." *Id.* The Advisory Committee's Notes to the 1966 Amendment note that, "[i]n its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name." FED. R. CIV. P. 17 advisory committee's notes. The Notes continued: "That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as *res judicata*." *Id.*

. . . .”¹²⁹ The judge concluded that Louisiana was only a nominal party to the suit and that the citizen policyholders were the real parties in interest.¹³⁰ After Louisiana filed an interlocutory appeal,¹³¹ the Fifth Circuit affirmed the district court’s order.¹³² The Fifth Circuit determined that the action was a CAFA mass action, which meant that the individual insurance policyholders were thereafter to be added to the suit, presumably as plaintiffs (the Fifth Circuit left the logistics of the decision in the hands of the district court).¹³³

The Fifth Circuit advanced two primary justifications for its decision to uphold removal under CAFA. First, the court noted that CAFA was designed to “prevent ‘jurisdictional gamesmanship.’”¹³⁴ The court cited Senator Orrin Hatch’s prophetic warning that “enterprising plaintiffs’ lawyers will surely manipulate [the loophole] in order to keep their lucrative class action lawsuits in State court . . . by [an attorney general] simply lend[ing] the name of his or her office to a private class action”¹³⁵ As evidence that there might have been jurisdictional gamesmanship afoot, the *Caldwell* court noted that the Louisiana attorney general brought the suit alongside private counsel.¹³⁶ The Fifth Circuit also noted that the same group of lawyers had brought several other similar aggregate actions that were pending before the same federal district court in Louisiana, all with nearly identical claims as those alleged in the attorney general’s suit.¹³⁷

The second justification the *Caldwell* court advanced was that Louisiana did not have a quasi-sovereign interest in the treble damages sought in the suit. The court applied the quasi-sovereign interest analysis promulgated by the Supreme Court

129. *Caldwell*, 536 F.3d at 423.

130. *Id.*

131. Generally, federal courts of appeals may not review district court remand orders. *See* 28 U.S.C. § 1447(d) (2006). However, CAFA contains an exception that allows courts of appeals to accept an appeal from a district court order granting or denying a motion to remand a mass/class action to state court. *See* 28 U.S.C. § 1453(c)(1) (2006); *see also* BP Am., Inc. v. Oklahoma *ex rel.* Edmondson, 613 F.3d 1029, 1032 (10th Cir. 2010); Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 38–39 (1st Cir. 2009).

132. *Caldwell*, 536 F.3d at 432.

133. *Id.* at 430.

134. *Id.* at 424.

135. *Id.* (quoting 151 CONG. REC. S1157, at 1163–64 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch)).

136. For analysis of this fact in the context of *parens patriae* suits, *see infra* Part II.A.2.

137. *Caldwell*, 536 F.3d at 423.

in *Snapp*.¹³⁸ The Fifth Circuit concluded that Louisiana had a quasi-sovereign interest in seeking injunctive relief,¹³⁹ but that “as far as the State’s request for treble damages is concerned, the policyholders are the real parties in interest.”¹⁴⁰ The court reasoned that the state would benefit from the cessation of the predatory practices allegedly committed by the defendants.¹⁴¹ Thus, the claim for injunctive relief was the type of quasi-sovereign interest that supports a *parens patriae* action; no citizen is going to bring a mass or class action suit for injunctive relief on behalf of all Louisiana insurance policyholders. However, the Fifth Circuit rightly held that the claim for treble damages did not represent a quasi-sovereign interest, because the Louisiana statute did not provide for it¹⁴² and because the interests represented by this claim belonged exclusively to the individual policyholders.¹⁴³ The court based this reasoning on the repeated references in the complaint to the individual policyholders, as well as the general purpose of treble damages, which the court summarized as designed to “encourage private lawsuits by aggrieved individuals for injuries to their businesses or property.”¹⁴⁴ Because the relief sought in the complaint operated only in favor of the policyholders who were affected by the defendants’ allegedly unlawful conduct, the policyholders were the real parties in interest.¹⁴⁵

The *Caldwell* court’s analysis is consistent both with black letter law¹⁴⁶ and with the encouragement of CAFA’s framers to look past the labels of suits.¹⁴⁷ First the district court and then the Fifth Circuit found a lawsuit that resembled a class action requiring removal under CAFA’s provisions by undertaking an

138. *Id.* at 425–28; see also *supra* notes 94–98 and accompanying text.

139. *Caldwell*, 536 F.3d at 430.

140. *Id.* at 429.

141. *Id.* at 430.

142. LA. REV. STAT. ANN. § 51:137 (2011) (“Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him.”). Note that persons who are injured may sue; the statute does not provide for suits by the attorney general.

143. *Caldwell*, 536 F.3d at 429–30.

144. *Id.* (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972)).

145. *Id.* at 429.

146. See WRIGHT & LANE, *supra* note 27 (“The real party in interest is the party who, by the substantive law, possesses the right sought to be enforced.”) Here, the right sought to be enforced was the collection of treble damages which, as noted above, *supra* note 142–43, belonged to the Louisiana citizens.

147. See *supra* note 119 and accompanying text.

analysis of the substance of the pleadings.¹⁴⁸ Analyzing the pleadings to determine whether jurisdiction is proper complies with well-established Supreme Court precedent requiring courts to “look to the substance of the action and not only at the labels that the parties may attach.”¹⁴⁹ Looking past the labels is called “piercing the pleadings”¹⁵⁰ and requires courts to determine the real parties in interest.¹⁵¹ Determining the real parties in interest matters because of the foundational rule that parties without an interest in a case cannot prompt a court to remand the case from the federal system.¹⁵² In determining jurisdiction, federal courts must examine the substance of the action brought, not just the labels affixed to the case.¹⁵³ This rule exists because “a federal court must disregard nominal . . . parties and rest jurisdiction only upon the citizenship of real parties to the controversy.”¹⁵⁴

However, it is unclear when and how courts should pierce the pleadings. The dispute centers on the level of specificity with which courts should conduct this analysis: viewing the complaint as a whole or examining individual claims.¹⁵⁵ For instance, in *Illinois v. SDS West Corp.*, after surveying the post-*Hickman*¹⁵⁶ history, the court noted that most courts have “viewed the complaint as a whole” but also noted that some, including the *Caldwell* court, have taken a more granular look at the pleadings.¹⁵⁷ Viewing the complaint as a whole causes fewer courts to pierce the pleadings because *any* state interest evident on the face of the complaint will insulate the complaint from greater scrutiny. As a concrete example, in *Caldwell*,

148. *Caldwell*, 536 F.3d at 423, 428.

149. *Id.* at 424 (citing *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185–86 (1907)).

150. *Id.* at 424–25 (“This court has recognized that ‘defendants may pierce the pleadings to show that the . . . claim has been fraudulently pleaded to prevent removal.’”) (citations omitted).

151. *See* *United States v. Johnson*, 319 U.S. 302, 303–04 (1943).

152. *See* *Wood v. Davis*, 59 U.S. 467, 469 (1855); *see also* *Smallwood v. Illinois Cent. R.R.*, 385 F.3d 568, 573 (5th Cir. 2004) (“[T]here are cases, hopefully few in number, in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder. In such cases, the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.”)

153. *See Wecker*, 204 U.S. at 185–86.

154. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980).

155. *See* *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1052 (C.D. Ill. 2009).

156. *Mo., Kan. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59–61 (1901) (establishing that courts must look past the labels of case when state does not have real interest in controversy).

157. *SDS W. Corp.*, 640 F. Supp. 2d at 1052.

Louisiana asserted a claim for injunctive relief. The Fifth Circuit concluded that Louisiana had a quasi-sovereign interest in seeking injunctive relief.¹⁵⁸ Therefore, if the Fifth Circuit had viewed the complaint as a whole, the claim for injunctive relief would have insulated the impropriety of bringing the treble damages claim and the court would not have taken a closer look at the complaint. This would let a claim for injunctive relief obscure the fact that four private law firms were using the Louisiana attorney general's title to keep a CAFA mass action in Louisiana state court.

An approach where courts are able to look at the individual claims is therefore preferable. A determination about whether a named party “has a ‘real interest’ in the suit or, in other words, is a ‘real party’ to the controversy,”¹⁵⁹ was necessary in the *Caldwell* decision; the treble damages claim was the crux of the suit.¹⁶⁰ Under CAFA's definition, the *Caldwell* case was a mass action rather than a *parens patriae* action: The monetary relief claims (for treble damages) of one hundred or more persons (thousands of Louisiana policyholders) were proposed to be tried jointly (in a single complaint) on the ground that the plaintiffs' (the Louisiana policyholders') claims involved common questions of law or fact (the alleged conspiracy by the corporate defendants).¹⁶¹ And the determination that the policyholders were the real parties in interest¹⁶² is consistent with the rule that to determine who “the real party in interest is,” courts should look to the “essential nature and effect of the proceeding.”¹⁶³ The *Caldwell* court correctly followed well-established rules and applied them properly to the facts.

158. See *supra* note 139 and accompanying text.

159. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 200 (1990) (O'Connor, J., dissenting).

160. It is possible to view *Caldwell* narrowly, reading the holding as applicable only to instances where the grant of *parens patriae* authority derives from common law and not statutory authority. However, the court anticipated this argument and stated that it would have ruled the same way even if *Caldwell* had been based on statutory authority. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 429 (5th Cir. 2008) (stating that the court would arrive at the same outcome “[e]ven assuming *arguendo* that the Attorney General has standing to bring such a representative action”).

161. See 28 U.S.C. § 1332(d)(11)(B)(i) (2006). The additional jurisdictional amount requirements specified under section 1332(d)(11)(A), e.g., an amount in controversy requirement of an aggregate of \$5 million in claims and minimal diversity, also were satisfied.

162. *Caldwell*, 536 F.3d at 429–30.

163. *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir. 1981) (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)).

2. The Critics' Perspective

The controversy surrounding *Caldwell* is broader than how the Fifth Circuit elected to analyze the *Caldwell* case. Critics claim that *Caldwell* improperly applied CAFA to a *parens patriae* suit.¹⁶⁴ This argument has three parts: (a) CAFA does not specifically reference either *parens patriae* suits or real parties in interest, (b) federalism concerns stemming from the Eleventh Amendment preempt removal, and (c) the legislative history provides some evidence that Congress did not intend *parens patriae* suits to be subject to CAFA.

a. *No Specific Reference to Parens Patriae Suits or Real Parties in Interest in CAFA*

Critics of *Caldwell* argue that, because there is no reference to *parens patriae* suits in CAFA, removal of even mislabeled suits is improper. Academic works support the dissenting judge's opinion in *Caldwell*, claiming that while "a 'parens patriae' action may resemble a class action in that an attorney general is representing a state's citizens" because the action "is not filed as a class action, CAFA does not apply even if for all intents and purposes it resembles one."¹⁶⁵ But this argument ignores both the framers' intent to look beyond labels¹⁶⁶ and the jurisprudence on piercing the pleadings.¹⁶⁷ Holding that the *parens patriae* label immunizes suits from removal under CAFA allows Senator Hatch's "enterprising plaintiffs' lawyers" to manipulate a loophole and to do so with

164. See, e.g., Lemann, *supra* note 1, at 138–42 (compiling criticisms of *Caldwell*). The principal case cited for the idea that CAFA does not include *parens patriae* suits, *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749 (D.N.J. 2005), predates *Caldwell*. The *Harvey* court surveyed CAFA's legislative history and concluded that it was not Congress's intent to encroach upon states' authority to bring *parens patriae* actions. *Id.* at 752–54. As discussed *infra* in Part II.B.3, there is a battle over the legislative history and what should be concluded from it. See Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. CHI. L. REV. 345, 353–57, 360 (2011).

165. Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 122 (2006) (citing *Tedder v. Beverly Enters.*, No 3:05CV00264SWW, 2005 U.S. Dist. LEXIS 38694, at *5 (E.D. Ark. Dec. 12, 2005)); accord *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 434 (5th Cir. 2008) (Southwick, J., dissenting) (stating the "definitive aspect" of removability is "a statute or rule of procedure that authorizes a representative action").

166. See *supra* notes 115–19 and accompanying text.

167. See *supra* note 150 and accompanying text.

judicial blessing. For similar reasons, the critics' arguments that neither the statute nor legislative history mentioned "real parties in interest" are unpersuasive.¹⁶⁸ The absence of discussion of "real parties in interest" in CAFA's legislative history does not change the fact that federal courts must apply the Supreme Court's jurisprudential guidance on piercing the pleadings.¹⁶⁹ Congress need not explicitly require federal courts to examine the real parties in interest. This is something that courts are required to do in every case by Federal Rules of Civil Procedure Rule 17(a).

b. Eleventh Amendment Concerns

Critics of *Caldwell* also claim that removing states' *parens patriae* actions abrogates states' rights under the Eleventh Amendment because Congress did not directly authorize removal. The Eleventh Amendment grants states sovereign immunity from suit in federal court: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹⁷⁰ Further, the Supreme Court has held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."¹⁷¹ The grant of sovereign immunity is

168. See Knight, *supra* note 63, at 1913 ("[T]he Senate Report does not discuss, or even mention, real parties in interest. Nor did this concept arise during debate in the House or Senate. Interestingly, 'real party in interest' was mentioned in the legislative history of previous versions of CAFA, but only with respect to class actions. In sum, the connection between 'real party in interest' and the mass action is not immediately plain.").

169. See *supra* notes 149–54 and accompanying text.

170. U.S. CONST. amend. XI. There are perils associated with placing too much emphasis on the plain language of the Eleventh Amendment. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.") (internal quotation marks omitted). Despite the staggering amount of literature on the Eleventh Amendment, a detailed examination of the Eleventh Amendment is beyond the scope of this Note. See PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 1025 (6th ed. 2008) ("The literature on the Eleventh Amendment is voluminous, and much of it is of rare quality.").

171. *Seminole Tribe*, 517 U.S. at 56 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227–28 (1989)). *Seminole Tribe* also stands for the proposition that Congress

so broad that the Supreme Court has read into the Constitution a definition that extends beyond the language of the text.¹⁷² While CAFA admittedly is “devoid of a statement of congressional intent to force a state to litigation [sic] in the courts of another sovereign,”¹⁷³ Eleventh Amendment protection generally extends only where the state is a defendant, not a plaintiff.¹⁷⁴ Even if the Eleventh Amendment protects states as plaintiffs and defendants, *Caldwell*'s holding need not be viewed as an invitation to remove all *parens patriae* litigation; rather, it should be interpreted as removing those *parens patriae* suits that are mislabeled.¹⁷⁵ This serves two purposes. First, it upholds the federal courts' “virtually unflagging obligation . . . to exercise the jurisdiction given them”¹⁷⁶ by CAFA.¹⁷⁷ Second, this avoids gamesmanship by “prevent[ing] a state from wearing two hats in an attempt to disguise itself as the real party in interest for claims for which the true real parties in interest are individual consumers.”¹⁷⁸

cannot abrogate state sovereign immunity through legislation enacted under the Commerce Clause. Congress can abrogate state sovereign immunity only through the exercise of section 5 of the Fourteenth Amendment, and Congress did not enact CAFA under section 5.

172. See Virginia F. Milstead, *State Sovereign Immunity and the Plaintiff State: Does the Eleventh Amendment Bar Removal of Actions Filed in State Court?*, 38 J. MARSHALL L. REV. 513, 515 (2004).

173. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 431 (5th Cir. 2008) (quoting Louisiana's brief); accord Lemann, *supra* note 1, at 143.

174. See *Caldwell*, 536 F.3d at 431 n.12 (collecting cases).

175. See *Sample v. Big Lots Stores, Inc.*, No. C 10-03276 SBA, 2010 WL 4939992, at *5 (N.D. Cal. Nov. 30, 2010) (“*Caldwell* does not stand for the proposition that all representative actions necessarily are ‘class actions’ subject to removal under CAFA. Rather, *Caldwell* simply recognizes that a *parens patriae* action brought by the state may be deemed to be a class action or mass action under CAFA where the state is seeking to recover damages suffered by private parties.”). For indications of when a *parens patriae* suit might be mislabeled, see *infra* Part III.

176. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

177. *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 449 (E.D. Pa. 2010) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) (“[A] federal court must rigorously examine a matter removed under CAFA to ensure that it does not prematurely preclude a class action (in all but name) from the court's jurisdiction.”).

178. *Id.*

c. *The Much-Debated Legislative History of CAFA*

Academics and courts hotly contest the value of CAFA's legislative history and yet each side of the *Caldwell* debate claims that the legislative history supports its respective position.¹⁷⁹ *Caldwell's* critics cite CAFA's legislative history to support the claim that removal is improper because an exception to CAFA for *parens patriae* suits was deemed "unnecessary" because these suits are neither mass actions nor class actions.¹⁸⁰ *Caldwell's* supporters counter by pointing out that CAFA was designed to stem the tide of abusive litigation practices. And a *parens patriae* exception was excluded not simply because it was thought to be unnecessary; it was excluded because of concerns about creating a loophole.¹⁸¹ Given the intent of the law and the attempted exploitation of the loophole, *Caldwell's* proponents have the more compelling argument.

When drafting CAFA, Congress specifically addressed *parens patriae* suits.¹⁸² The Senate considered an amendment

179. For scholarly treatment, compare Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1444 n.12 (2008) (arguing that CAFA's framers "sought to answer many of those questions [caused by ambiguous phrases and undefined terms] in legislative history," and noting that "much of the 2005 Senate Report was contained in a 2003 Senate Report. See S. REP. No. 108-123 (2003)"), with H. Hunter Twiford, III, Anthony Rollo, & John T. Rouse, *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 17 n.28 (2005) (citing 151 CONG. REC. S978 (daily ed. Feb. 3, 2005) for the proposition that the Senate Committee Report "was submitted to Congress before CAFA became law"). For a judicial perspective, compare *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) (endorsing consideration of CAFA's legislative history: "While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, [2005] — while that body was considering the bill."), with *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("[T]he Senate Report was issued ten days after the enactment of the CAFA statute, which suggests that its probative value for divining legislative intent is minimal."), and *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (citing *Pierce v. Underwood*, 487 U.S. 552, 566–68 (1988)) (rejecting the use of the Senate Report because "naked legislative history has no legal effect"). Whatever weight one chooses to give to it, the legislative history still provides a record of, at the very least, what motivated the victorious party to pass the legislation.

180. See *infra* note 187 and accompanying text.

181. See *infra* notes 190–92 and accompanying text.

182. See generally 151 CONG. REC. S1157 (daily ed. Feb. 9, 2005).

to CAFA that would have made representative actions¹⁸³ filed by state attorneys general *exempt* from removal to federal courts under CAFA.¹⁸⁴ The rationale for this proposed amendment was essentially a federalism argument: The “Pryor Amendment,”¹⁸⁵ named after its sponsor, Senator Mark Pryor, called for the change so that states could “pursue their individual . . . interests as determined by themselves and not by the Federal Government.”¹⁸⁶ However, Congress rejected the amendment as unnecessary. For instance, Senator Grassley concluded, “because almost all civil suits brought by State attorneys general are *parens patriae* suits, similar representative suits or direct enforcement actions, it is clear they do not fall within this definition [of a mass or class action]. That means that cases brought by State attorneys general will not be affected by this bill.”¹⁸⁷ Courts have pointed to these colloquies as a justification for remanding *parens patriae* actions.¹⁸⁸

Basing a view of the legislative history on this point ignores the larger reasons behind CAFA’s enactment. CAFA

183. Although the principal actions relevant to this Note brought by attorneys general are *parens patriae* actions, state attorneys general may also head up class actions as well as direct enforcement actions. *See, e.g., id.* at S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley); *see also* West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 183 (4th Cir. 2011) (Gilman, J., dissenting) (noting that West Virginia’s consumer protection act “clearly contemplates that the Attorney General can fairly and adequately protect the interests of West Virginia’s [citizens] by bringing this type of lawsuit on behalf of the class”).

184. 151 CONG. REC. S1804 (daily ed. Feb. 9, 2005). Congress recently considered and again rejected codifying this exemption. *See* Securing Protections for the Injured from Limitations on Liability Act, H.R. 5503, 111th Cong. (2010), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05503:@@R>. Thanks in large part to protests of House Republicans, the House of Representatives removed a provision that would have added an exception to CAFA’s mass and class action provisions specifically excluding “an action brought by a State or subdivision of a State on behalf of its citizens.” H.R. REP. NO. 111-521, at 2 (2010).

185. 151 CONG. REC. S1157 (daily ed. Feb. 9, 2005) (statement of Sen. Specter).

186. *Id.* at S1805 (statement of Sen. Pryor). Senator Pryor introduced the amendment, saying, “[m]y amendment simply clarifies that State attorneys general should be exempt from S. 5 and be allowed to pursue their individual State’s interests as determined by themselves and not by the Federal Government.” *Id.* Senator Pryor, a former attorney general, added: “In the simplest terms, this amendment allows [attorneys general] to seek State remedies to State problems. I hope we can all agree infringement on State rights should not be a result of this bill.” *Id.* Senator Pryor noted that forty-six attorneys general had formed a bipartisan group who shared his concern that this could potentially hamstring protection of the “poor, elderly, and disabled.” *Id.*

187. *Id.* at S1163–64 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley).

188. *See* Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 424 (5th Cir. 2008).

was intended to address abusive litigation practices.¹⁸⁹ Senator Grassley's concession that CAFA would not affect *parens patriae* actions meant *properly labeled parens patriae* actions. Senator Grassley opposed the exclusion because of the risk it posed for exploitation: "That [proposed exclusion] creates a very serious loophole in this bill."¹⁹⁰ Senator Specter warned of this exclusion creating "latitude for the attorney general to deputize private attorneys to bring their class actions," thus creating a "pretty broad loophole."¹⁹¹ Senator Hatch foresaw the situation that the Fifth Circuit faced in *Caldwell* even more clearly:

At best, [a *parens patriae* amendment] is unnecessary. At worst, it will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action.¹⁹²

The amendment ultimately was rejected and the concerns of both Senators Grassley and Hatch were borne out. Actions brought by attorneys general where the states are real parties in interest are properly characterized as *parens patriae* actions and do not fall within the ambit of CAFA's mass action provision.¹⁹³ However, when the states are not the real parties in interest but still bring suits as *parens patriae* actions, whether "manipulated" by "enterprising plaintiffs' lawyers" or not, the states are exploiting Senator Hatch's loophole.¹⁹⁴

189. See *supra* note 59.

190. 151 CONG. REC. S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Grassley).

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

192. *Id.* at S1163–64 (statement of Sen. Hatch). Senator Hatch then directed attention to an article from the Boston Globe that detailed how the Massachusetts attorney general had contracted with private plaintiffs' lawyers to bring class actions, with the attorney general collecting a portion of the settlement money. *Id.* Senator Hatch cited the article's uncovering of alleged campaign contributions made by the private law firms to the attorney general's campaign fund as particularly troubling. *Id.* at S1164.

193. See *In re Edmond*, 934 F.2d 1304, 1310 (4th Cir. 1991); see also *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011).

194. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 423–24 (5th Cir. 2008).

Caldwell offers the paradigm for what these instances of exploitation can look like: Private law firms, employing the imprimatur of a state's attorney general, veil the true nature of a mass action in the guise of a *parens patriae* suit, and are thus able to waltz through a loophole that allows the law firms to keep lucrative lawsuits in state court. Accordingly, the legislative history and the decision to reject an amendment that exempted state attorneys general from CAFA's provisions support *Caldwell's* holding that mass action suits should not be exempted from removal under CAFA simply because they are incorrectly labeled as *parens patriae* suits.

B. Two Additional Justifications

Because of the suspicious facts in *Caldwell*,¹⁹⁵ the Fifth Circuit did not address all of the justifications for removing mislabeled *parens patriae* suits. The additional justifications include (1) CAFA's text and (2) CAFA's structure.

1. Statutory Text—Claims of Persons Not Claims by Plaintiffs

Whether a lawsuit is a mass action under CAFA depends on whether the lawsuit involves the monetary relief claims of 100 or more persons. Some critics of *Caldwell* interpret this requirement to mean that there must be 100 or more named plaintiffs. However, this reading violates fundamental principles of statutory interpretation.¹⁹⁶ Giving CAFA's text its ordinary meaning shows that mass actions must be based on "people" and not "plaintiffs." This may require that a court pierce the pleadings if a state brings persons' claims but lacks a real interest in the underlying matter; although there is only one named plaintiff—the attorney general—courts nonetheless should consider the citizens whose claims underlie the action.

Statutory interpretation begins with the plain text of a statute.¹⁹⁷ It is a fundamental rule of statutory interpretation that, when a word is not defined by statute, courts normally

195. See *supra* Part II.A.1.

196. See *infra* notes 206–09 and accompanying text.

197. *United States v. Gonzales*, 520 U.S. 1, 4 (1997) ("Our analysis begins, as always, with the statutory text.").

construe it in accord with its ordinary or natural meaning.¹⁹⁸ When Congress uses different terms in the same statute, courts normally presume that Congress “intended its different words to make a legal difference,” and “act[ed] intentionally and purposely in the disparate inclusion or exclusion.”¹⁹⁹

Applying these rules of interpretation reveals that Congress based the CAFA mass action provision on claims of persons, not claims by plaintiffs. A mass action is based on a numerosity requirement: “any civil action . . . in which monetary relief claims of 100 or more *persons* are proposed to be tried jointly . . .”²⁰⁰ Neither “of” nor “person” is defined in section 1332(d). “Of,” employed here as a preposition, is “used as a function word indicating a possessive relationship.”²⁰¹ “Person” is defined as “a human being.”²⁰² According ordinary meanings to these terms, a mass action simply must comprise the monetary relief claims possessed by or belonging to 100 or more human beings.²⁰³

Courts that have effectively translated “persons” to mean “plaintiffs” have not afforded “claims of . . . persons” its ordinary meaning.²⁰⁴ “Plaintiff” is also used in the CAFA

198. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 38 (1996) (courts must apply the plain language, or “ordinary English,” of statutes); *Smith v. United States*, 508 U.S. 223, 228 (1993).

199. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62–63 (2006).

200. 28 U.S.C. § 1332(d)(11)(B)(i) (2006) (emphasis added).

201. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1565 (Philip B. Gove ed. 2002).

202. BLACK’S LAW DICTIONARY 1257 (9th ed. 2009).

203. Chief Judge Frank Easterbrook made a telling distinction in *Bullard v. Burlington N. Santa Fe Ry.*, 535 F.3d 759, 762 (7th Cir. 2008), dismissing an argument advanced by plaintiffs seeking remand to state court after removal based on CAFA. The argument was addressing what Chief Judge Easterbrook confusingly called “class actions” when citing the “mass action” provision but nonetheless evinces how “claims of 100 or more persons” means just that:

A proposal to hold multiple trials in a single suit (say, 72 plaintiffs at a time, or just one trial with 10 plaintiffs and the use of preclusion to cover everyone else) does not take the suit outside § 1332(d)(11). Recall the language of § 1332(d)(11)(B)(i): any “civil action . . . in which monetary relief *claims* of 100 or more persons are proposed to be tried jointly” is treated as a “class [sic] action” (emphasis added). The question is not whether 100 or more plaintiffs answer a roll call in court, but whether the “claims” advanced by 100 or more persons are proposed to be tried jointly.

Id.

204. *See Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 947 (E.D. Mo. 2010) (“[T]he Court finds this suit is not a ‘mass action’ because the Missouri Attorney General has not joined 99 additional *plaintiffs*, as would be required by 28 U.S.C. § 1332(d)(11)(B)(i).”) (emphasis added). Note how

section that defines a CAFA class action.²⁰⁵ Like “persons,” “plaintiffs” is also undefined in section 1332(d). According to Black’s Law Dictionary, “plaintiff” means “[t]he party who brings a civil suit in a court of law.”²⁰⁶ Note the disparity between the class action section and the mass action section: CAFA’s mass action text does not require that the monetary relief claims belong to “plaintiffs” or “named plaintiffs,” nor that the monetary relief claims be brought by “plaintiffs” or “named plaintiffs.” Instead, CAFA’s text refers to the “monetary relief claims of 100 or more persons.”²⁰⁷ Interpreting the text to hold that “persons” means “plaintiffs” would contravene the holding of *Burlington Northern*: “Congress intended its different words to make a legal difference,” and “[w]here words differ[,] . . . Congress act[ed] intentionally and purposefully in the disparate inclusion or exclusion.”²⁰⁸

In the *parens patriae* cases where courts have refused to pierce the pleadings, courts have effectively held that only the claims of attorneys general mattered: The court counts the claims of one person, not the underlying claims of the affected citizens.²⁰⁹ This is not giving “monetary relief claims of . . . persons” its ordinary meaning. Persons are not plaintiffs, and only the monetary relief claims of persons matter in the context of CAFA. Only counting the attorney general’s claim avoids a logical textual argument suggesting that most, if not all, *parens patriae* suits are removable. The syllogism is simply this: *parens patriae* suits are brought on behalf of both the state itself and its affected citizens. CAFA requires removal when it is proposed that monetary relief claims of one hundred or more persons are tried jointly. So when an attorney general aggregates monetary relief claims of one hundred or more citizens into a *parens patriae* action and any recovery will be returned to the citizens, the action should be removed. This

the court uses the terms interchangeably, obliquely referring to the attorney general as a “plaintiff” and assuming, incorrectly, that 99 additional “plaintiffs” need to be joined to constitute a mass action.

205. 28 U.S.C. §§ 1332(d)(2)(A)–(C) (2006).

206. BLACK’S LAW DICTIONARY 1267 (9th ed. 2009).

207. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

208. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62–63 (2006).

209. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 429–30 (5th Cir. 2008) (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972)).

logic appears in both *Caldwell*²¹⁰ and the dissent's argument in a recent Fourth Circuit decision on a closely related matter.²¹¹

In *Caldwell*, the court based its decision, in large part, on the fact that the attorney general was seeking treble damages. According to the *Caldwell* court, this showed that the real parties in interest behind the action were the citizens: "We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest."²¹² The court based its analysis on the text of the Louisiana Monopolies Act, which "plainly states that 'any person who is injured in his business or property' under the Monopolies Act 'shall recovery [sic] [treble] damages.'"²¹³ This is the critical question in these cases: Whom do these claims belong to under the relevant substantive law, the state or the citizens? Because only individual citizens were entitled to enforce this provision in *Caldwell*, only the citizens, not the state, stood to gain.²¹⁴ To put this in the language of CAFA, the Louisiana attorney general was proposing to try jointly the monetary relief claims of more than one hundred Louisiana residents. Therefore, what was presented to the court as a *parens patriae* action was actually a CAFA mass action.

The dissenting judge in *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.* reached a similar conclusion based on the West Virginia attorney general including a claim that, if substantiated, would result in damages necessarily being paid directly to the citizens.²¹⁵ Citing *Caldwell*, Judge Gilman noted that "the West Virginia Attorney General here does not have a quasi-sovereign interest in the refunds that the [defendants] will be required to pay directly to the affected consumers if they are found to have violated the WVCCPA."²¹⁶ Just as the *Caldwell* court dismissed the fact that the Louisiana attorney general was bringing some claims properly classified as *parens patriae* actions,²¹⁷ Judge Gilman admitted that the West Virginia attorney general was "seeking civil penalties and injunctive relief, these being the type of claims clearly within

210. See *infra* note 212 and accompanying text.

211. See *infra* note 215 and accompanying text.

212. *Caldwell*, 536 F.3d at 429.

213. *Id.* (alteration in original).

214. *Id.*

215. *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 181 (4th Cir. 2011) (Gilman, J., dissenting).

216. *Id.* at 182.

217. *Caldwell*, 536 F.3d at 430.

the state's *parens patriae* authority."²¹⁸ But again, like the *Caldwell* court,²¹⁹ Judge Gilman viewed the claims for monetary relief to be "the primary focus of this case," and the claims for civil penalties and injunctive relief to be "subsidiary claims that will be considered by the trial court only if the primary claim of reimbursement to the allegedly overcharged consumers is successful."²²⁰

As explained above, textual analysis of CAFA's mass action provision can logically support that any time an attorney general brings a *parens patriae* action seeking monetary relief for affected citizens, a court could invoke CAFA. However, as a blanket rule, this seems to close the loophole even more tightly than CAFA's framers intended. For instance, one of the chief opponents to the Pryor Amendment, Senator Grassley, stated that legitimate *parens patriae* suits should be litigated in state court; he did not say that *parens patriae* actions should exclude claims for monetary relief.²²¹ A blanket rule comes uncomfortably close to realizing the fears of Senator Pryor²²² and *Caldwell's* critics²²³ of encroachment on the states' abilities to bring *parens patriae* actions. Therefore, a blanket rule is probably unworkable: it would go too far to require every *parens patriae* action to be removed to federal court. But the opposite rule, one modeled on the Pryor Amendment that exempts *any* actions brought by a state, leaves open a massive loophole that has been, and assuredly would continue to be, taken advantage of by state attorneys general. Therefore, courts need to have a methodology for ferreting out which cases are true *parens patriae* actions and which cases are mass actions disguised as *parens patriae* actions. This Note suggests a series of elements that courts should examine, detailed below in Part III.

218. *CVS Pharmacy, Inc.*, 646 F.3d at 182 (Gilman, J., dissenting).

219. *Caldwell*, 536 F.3d at 430 (calling the treble damages "the central issue in this appeal" and noting "that the purpose of antitrust treble damages provisions are to encourage private lawsuits by aggrieved individuals for injuries to their businesses or property").

220. *CVS Pharmacy, Inc.*, 646 F.3d at 182 (Gilman, J., dissenting).

221. See *supra* note 187 and accompanying text.

222. See *supra* note 186 and accompanying text.

223. See *supra* Part II.A.2.b and accompanying text; see also *CVS Pharmacy, Inc.*, 646 F.3d at 178 ("Were we now to mandate that the State was not entitled to pursue its action in its own courts, we would risk trampling on the sovereign dignity of the State and inappropriately transforming what is essentially a West Virginia matter into a federal case.").

Caldwell's critics, however, do not see this argument as cut-and-dry. For instance, one critic notes that the Senate Report refers to “mass actions” as “suits that are brought on behalf of numerous named plaintiffs”²²⁴ Moreover, the Senate Report further states that CAFA addresses situations in which “100 or more named parties seek to try their claims.”²²⁵ The House Record reflects the same terminology: Representative James Sensenbrenner referred to mass actions as being initiated by “a complaint in which 100 or more plaintiffs are named”²²⁶

However, this ignores two important counterpoints. The first, and the more persuasive, is simply that the final statutory language contains no reference to “named plaintiffs.”²²⁷ As noted above, statutory interpretation begins with the plain text of a statute,²²⁸ and when a word is not defined by statute, courts normally construe it in accordance with its ordinary or natural meaning.²²⁹ This obviates analysis of the legislative history of the use of the term “person” instead of “plaintiff.” However, assuming *arguendo* that a court decides to consider the legislative history, there is counterbalancing evidence in the legislative history that supports a purely textual analysis. For instance, the House Report also recommended that there be separate definitions for “class action” and “plaintiff class action.”²³⁰ The Report defined the latter as a “class action in which class members are plaintiffs,” whereas it defined regular class members as “the *persons* (*named or unnamed*) who fall within the definition of the proposed or certified class in a class action.”²³¹ Perhaps then, the legislative history on “persons” versus “plaintiffs” is inconclusive. However, proponents of *Caldwell* do have the weight of the statutory text to support their argument.

224. Amy Spencer, Note, *Once More Into the Breach Dear Friends: The Case for Congressional Revision of the Mass Action Provision in the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1067, 1081 (2006) (citing S. REP. NO. 109-14, at 46 (2005)) (concluding that “if courts interpret ‘mass actions’ according to the plain language of the statute,” then “a complaint naming one hundred or more plaintiffs” is required).

225. S. REP. NO. 109-14, at 46 (2005).

226. 151 CONG. REC. 2639 (2005) (statement of Rep. Sensenbrenner).

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

228. See *supra* note 197.

229. See *supra* note 198.

230. H.R. REP. NO. 109-7, at 4 (2005).

231. *Id.* (emphasis added).

2. CAFA's Structure—Unnamed Persons are Included

The structure of CAFA confirms that “claims of persons” in the mass action provision is intended to include the claims of unnamed parties and that courts should pierce the pleadings to find these parties. There is, as noted in Part I.B.3, substantial interplay between the class action and mass action sections of CAFA. For instance, a mass action is considered a class action “removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.”²³² Embedded in this cross-referencing provision are clues to Congress’s intent to encourage a court to pierce the pleadings. Paragraphs (2) through (10) refer to “members of a class.”²³³ CAFA defines “class members” in paragraph (1) as “the *persons (named or unnamed)* who fall within the definition of the *proposed* or certified class in a class action.”²³⁴

Paragraph (1) is not included in the definition of a mass action. However, it would seem anomalous to limit mass actions strictly to “named plaintiffs” without explicitly including this in CAFA, especially when Congress broadly defined “class member” to include unnamed persons in the class action section upon which the mass action provision largely depends. Inclusion of unnamed persons in uncertified representative actions therefore lends support to the proposition that Congress intended for courts to look for unnamed parties in the pleadings when determining whether the action should be remanded to state court. This in turn supports removal under CAFA when the pleadings in a *parens patriae* suit are pierced and the suit is shown to be mislabeled.

III. THE COURT AS CONDUCTOR: EXAMINING WHEN COURTS SHOULD PIERCE THE PLEADINGS

While the Fifth Circuit explained why it is necessary to pierce the pleadings,²³⁵ it did not clarify when courts should do so. This Part offers a five-element checklist designed to expose suspicious facts present in a *parens patriae* suit.

232. 28 U.S.C. § 1332(d)(11)(A).

233. *See id.* § 1332(d)(2)(A)–(C).

234. *Id.* § 1332(d)(1)(D) (emphasis added).

235. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 423 (5th Cir. 2008).

Courts need guidelines in order to avoid having to pierce the pleadings in each *parens patriae* suit. Each *parens patriae* suit poses a small but extant risk that jurisdictional gamesmanship is afoot. To faithfully enforce CAFA, courts arguably should pierce the pleadings in each *parens patriae* suit. However, even putting aside Eleventh Amendment concerns, piercing the pleadings in each *parens patriae* suit would result in judicial inefficiencies by unnecessarily consuming time and resources. Therefore, courts need guidelines for when to pierce the pleadings.

CAFA provided guidelines for other discretionary actions by district courts, most notably the “local controversy” exception. This exception allows district courts to remand cases to state courts based on consideration of several factors.²³⁶ The “local controversy” exception and the relevant factors are summarized as follows:

CAFA . . . contains a complicated “local controversy” exception that gives courts the right, but not the duty, to decline jurisdiction based on the citizenship of the parties and the nature of the action. Among the factors that a court should consider are, whether the claims are of “national or interstate interest”; choice of law issues; [*whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction*]; whether a “nexus” exists among the plaintiffs, harm suffered, and the defendants; [how many citizens of the state where the injury occurred are in the suit and how “dispersed” the plaintiffs are generally;] and whether similar class actions have been filed within the past three years asserting similar claims on behalf of “the same or other persons.”²³⁷

Several of these factors translate into workable guidelines for district courts to use when determining whether to pierce the pleadings in a *parens patriae* suit.

There are five indicators that, when present, should raise red flags for a court reviewing a *parens patriae* suit: private plaintiffs’ attorneys, parallel civil suits, valuable individual claims, a limited number of underlying claims, and suspect

236. 28 U.S.C. § 1332(d)(3)(A). The exclusion applies to “a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed . . .” *Id.* § 1332(d)(3).

237. Knight, *supra* note 63, at 1886 (emphasis added) (citing 28 U.S.C. § 1332(d)(3) (2006)).

language in the pleadings. Although no single factor is necessary, any one of these factors should be sufficient to cause a court to pierce the pleading.

The first factor is obvious post-*Caldwell*: the presence of private plaintiffs' attorneys in the suit. This sends a clear, if rebuttable, signal that the state might be attempting to keep a mass action out of federal court.²³⁸ This might indicate that jurisdictional gamesmanship is afoot or it might simply evince an attorney general in need of specialized assistance. The content and context of the complaint should provide clues that can rebut this signal. The second factor is the existence of parallel civil suits. This draws both from *Caldwell*²³⁹ and from the local controversy exception.²⁴⁰ Evidence that individual parties are simultaneously litigating the same underlying action calls into question why a *parens patriae* suit is necessary. This element is surprisingly common.²⁴¹ But this too could be rebutted; an attorney general could be seeking only equitable relief or could demonstrate that his or her suit sought damages for a broader subset of citizens than was represented in the private actions.

The third factor is if an attorney general brings valuable individual damages claims. The archetypal *parens patriae* suit is a "negative value" suit,²⁴² where the injury to individual citizens is so minor that citizens are unlikely to bring suits individually because the cost of litigating the matter is greater than the potential return.²⁴³ Bringing a *parens patriae* action

238. See *supra* notes 40–43 and accompanying text.

239. See *Caldwell*, 536 F.3d at 423.

240. See 28 U.S.C. § 1332(d)(3)(F).

241. See *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 182 (4th Cir. 2011) (Gilman, J., dissenting) (noting that "some of the same private attorneys representing the Attorney General here are simultaneously representing individuals who have filed essentially identical claims against the same defendants in Michigan and Minnesota"). Parallel suits appear in other recent CAFA decisions, though not all involve private attorneys litigating private citizens' claims. See, e.g., *Illinois v. AU Optronics Corp.*, 10-CV-5720, 2011 WL 2214034, at *10 (N.D. Ill. June 6, 2011) (citing "congruent" suits being brought by other states against the defendant).

242. See *Smith v. Georgia Energy USA, LLC*, 259 F.R.D. 684, 697 (S.D. Ga. 2009) ("A 'negative value' suit is one in which putative class members would expend more money by litigating their suits individually than they would stand to gain in damages on an individual basis.>").

243. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981). The *Maryland* Court, in upholding a *parens patriae* action in a suit alleging a conspiracy by Louisiana to keep natural gas prices high, explained that the situation was ripe for a *parens patriae* action because

[A] great many citizens in each of the plaintiff States are . . . consumers

when the potential individual recoveries are substantial is a strong indication of jurisdictional gamesmanship. The fourth factor is a corollary to the third factor: Courts should pierce the pleadings when *parens patriae* actions represent a limited number of underlying claims. Like the third factor, this is unusual in a *parens patriae* suit;²⁴⁴ a negative value suit is generally employed to aggregate a larger volume of small value claims. Therefore, having a small volume of high value claims is inherently suspicious because, logically, the aggrieved citizens should be motivated to pursue the claims on their own. The fifth factor risks stating the obvious. If, after reviewing the record, a court finds either evidence of jurisdictional gamesmanship²⁴⁵ or a complaint that is “rife with statements” that make it clear that the citizens whose interests are represented by the attorney general are the real parties in interest, as in *Caldwell*, the court should pierce the pleadings.²⁴⁶ Although this seems self-evident, simply being aware that this loophole exists, and that a complaint might evidence exploitation of this loophole, merits including this factor.

Weighing the minimal time required to check for these factors against the risk of double recovery against the defendants should make apparent the usefulness of this exercise. If one or more of these factors are present, then a court should adopt the *Caldwell* approach and pierce the pleadings to determine if removal is appropriate.

CONCLUSION

When appropriate, courts should adopt the Fifth Circuit’s approach of applying CAFA to close the loophole created by

. . . and are faced with increased costs aggregating millions of dollars per year. . . . [I]ndividual consumers cannot be expected to litigate . . . given that the amounts paid by each consumer are likely to be relatively small.

Id. This theme of many citizens with small individual dollar claims can be found in other Supreme Court and federal appellate decisions. *See, e.g.,* Texas v. New Mexico, 482 U.S. 124 (1987); Kansas v. Colorado, 206 U.S. 46 (1907); *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 30 (2d Cir. 1981) (“Congress enacted the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c–15h (1976), to provide a meaningful remedy for small consumers injured by antitrust violations.”).

244. *See supra* note 243 and accompanying text.

245. *See* 28 U.S.C. § 1332(d)(3)(C).

246. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429 n.9 (5th Cir. 2008).

mislabeled *parens patriae* actions. Courts should apply a five-factor checklist and, if any of the factors are present, should look past the labels of *parens patriae* suits and determine who are the real parties in interest. This way courts can close the loophole foreseen by CAFA's framers and laid bare in *Caldwell*. Failure to do so risks cuing the music for "some enterprising plaintiffs' lawyers" and a willing attorney general to waltz through the loophole. This prevents removal of cases over which federal courts have original jurisdiction. Consider again Judge Neely's description of the effect of homecooking in his decisions:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.²⁴⁷

Congress intended CAFA to provide protection for the defendants who face the greatest risk from homecooking. By piercing the pleadings and applying CAFA when necessary, courts can stop the waltz and close the loophole.

247. See Tabarrok & Helland, *supra* note 8, at 157.