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CAFA Judicata: A Tale of Waste and  
Politics

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### **CAFA Judicata: A Tale of Waste and Politics**

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# CAFA Judicata: A Tale of Waste and Politics

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The Class Action Fairness Act has taken on its real form through construction by the federal judges. That form emerges in this empirical study of judicial activity and receptivity to the Act. Our data comprise the opinions under the Act published during the two and a half years following its enactment in 2005.

CAFA has produced a lot of litigation in its short life. The cases were varied, of course, but most typically the resulting published federal opinion involved a removed contract case, with the dispute turning on the statute's effective date or on federal jurisdiction. Even though the opinions shed some light on issues such as jurisdictional burden and standard of proof, most of the judicial activity was socially wasteful litigation. It emphasized transitional efforts to interpret the sloppily drafted provisions on effective date and on federal jurisdiction.

More interesting, we saw wise but value-laden resistance by judges to CAFA, as they interpreted it in a way to dampen the early hopes of overly enthusiastic removers. Regression analysis confirms the suggestion of percentages of cases decided in favor of a narrow construction of the statute. With the exception of Republican male judges, the federal judiciary has not warmly embraced the statute.

## INTRODUCTION

What happened when the Class Action Fairness Act<sup>1</sup> encountered the federal judges—did the courts match the congressional ardor for class-action reform? In an effort to answer this question, we studied the cases decided under the Act in the two and a half years following its enactment on February 18, 2005. We measured judicial activity and receptivity to the Act. It was not a case of CAFA *ipsa loquitur*; the courts played an important role. By examining the thing adjudged, we saw egregious social waste by litigation, and we saw wise but value-laden resistance by judges.

## I. BACKGROUND

Congress, in enacting the Class Action Fairness Act of 2005, gave it a broad

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<sup>1</sup>Pub. L. No. 109–2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). *See generally* GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005 (2005); 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1756.2 (3d ed. 2005).

scope covering interstate class actions, with the expressed intent of defeating plaintiff lawyers' manipulation of state courts. When President George W. Bush signed it into law, he declared that it "marks a critical step toward ending the lawsuit culture in our country."<sup>2</sup> The statute's purpose was to funnel more class actions away from the state courts and into the federal courts. However, neither the cause of any malady nor the effectiveness of this cure is beyond debate.<sup>3</sup>

Let us run through the 2005 Act, showing in bold the potential points of dispute, for each of which we coded.

The Act contained a few minor **regulatory provisions** aimed at curbing certain class-action abuses.<sup>4</sup> Notably, by what is now 28 U.S.C. § 1712, Congress ratcheted up the judicial scrutiny to be applied to settlement terms, while limiting fee awards, in connection with settlements that provide for a recovery of discount

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<sup>2</sup>*President Signs Class-Action Fairness Act of 2005*, <http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html> (last visited July 15, 2007).

<sup>3</sup>See Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385, 392-405 (2005); cf. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 645, 653-54 (2006) (finding no differences in treatment of class actions between state and federal courts, and observing: "Attorney perceptions of judicial predispositions toward their clients' interests show little or no relationship to the judicial rulings in the surveyed [state and federal class action cases].").

Defense lawyers seem quite content with the effects of the Act. See, e.g., ABA-CLE, *Class Actions and Consumers: Do the Twain Still Meet?*, <http://www.abanet.org/cle/podcast/j07cacpod-reg.html> (John H. Beisner and Donald R. Frederico, saying that state-court class actions and unfavorable settlements are down, while federal decisions are prompt, predictable, and sound). But academics lean the other way, at least in the many law review articles that CAFA has generated. A Westlaw search applying this article's standard search term, ("class action fairness act" or cafa) & da(aft February 17, 2005 and bef August 18, 2007), to the titles of articles in the "jlr" database, and excluding CLE-like materials, yielded 61 articles over the thirty-month period, of which 11 articles were student-written. Of the articles taking a pronounced evaluative position on CAFA, "unfavorable" ran three-to-one against "favorable."

<sup>4</sup>28 U.S.C. §§ 1711-1715 (2006). Class-action abuses were the original target of the bill, but over the years the bill's jurisdictional adjustments grew in relative importance. See Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1594-95, 1614-15 (2006). Although Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 849 (2007), provides some convincing arguments that these sections on abuse are "the most significant provision of the new law," the fact remains that not a single case in our database involved disputes over them. This may be because reformers had exaggerated the degree of the abuse. Evidence of systematic abuse of coupon settlements or other nonmonetary relief was scant. See Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 28, 60 (2004) (finding questionable "soft" relief, such as injunctive relief or coupons, present in 7% of published class actions settlements, while evidence of beneficial soft relief existed in 12% of the settlements); THOMAS E. WILLGING, LAURA L. HOOPER & ROBERT J. NIEMIC, *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 198* (FJC 1996) (finding that settlements of no value to class members were very rare).

coupons by class members.

More important for our purposes was the Act's expansion of federal subject-matter jurisdiction for class actions or **mass actions**<sup>5</sup> that were **commenced** on or after the enactment date. In 28 U.S.C. § 1332(d), Congress bestowed original jurisdiction on the federal district courts for sizable multistate class actions, generally if the plaintiff class contains **at least 100 members** and their claims aggregated together **exceed \$5 million**, exclusive of interest and costs. The Act does not require complete diversity, but rather **minimal diversity**, which means that only one plaintiff member of the class differs in citizenship from any one defendant:

2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

This jurisdiction, by a complicated qualification in **subsection (4)**, does not extend to a class action in which two-thirds or more of the plaintiff members are citizens of the state where the action was filed and either the primary defendants are also local citizens or the case has certain other markers of a local controversy. Under **subsection (3)**, if that fraction falls between one-third and two-thirds, and if the primary defendants are citizens of the state where the action was filed, the district court may discretionarily decline jurisdiction over what it sees as an essentially local case. The statute goes on to **except cases** in subsection (5)(A) (certain actions where the primary defendants are governmental) and subsection (9) (certain securities and

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<sup>5</sup>The statute also creates jurisdiction for “mass actions,” which are actions involving numerous plaintiffs joined by some procedure not technically a class action. 28 U.S.C. § 1332(d)(11) (2006). In our coded database, only two cases involved a mass action, *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007) (declining jurisdiction, in the course of a major opinion), *aff'g* *Lowery v. Honeywell Int'l., Inc.*, 460 F. Supp. 2d 1288 (N.D. Ala. 2006); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006) (declining jurisdiction), and only three other cases discussed mass actions, *Garcia v. Boyar & Miller, P.C.*, Nos. CIV.A.3:06CV1936-D, CIV.A.3:06CV1939-D, CIV.A.3:06CV2236-D, CIV.A.3:06CV1937-D, CIV.A.3:06CV2177-D, CIV.A.3:06CV2241-D, CIV.A.3:06CV1938-D, CIV.A.3:06CV2206-D, 2007 WL 1556961, at \*4 n.3 (N.D. Tex. May 30, 2007) (declining to consider cases as mass action); *Lester v. Exxon Mobil Corp.*, No. CIV.A.06-9158, 2007 WL 1029507 (E.D. La. Mar. 29, 2007) (finding removal petition to be premature, regardless of whether action was a mass or class action); *In re Prempro Prods. Liab. Litig.*, MDL Nos. 4:03CV1507-WRW, 4:06CV00476, 2007 WL 641416, at \*1 (E.D. Ark. Feb. 27, 2007) (“A review of Plaintiffs’ Amended Complaint makes it clear that this is a class action, not a mass action.”).

corporate actions).

In 28 U.S.C. § 1453, Congress further provided that any defendant can **remove** a class action from state court to the local federal district court—but only if the action would be within the original federal jurisdiction of § 1332(d), as one presumes in accordance with the clear legislative history despite the absence of appropriate statutory wording. The statute goes on to provide that the removing defendant can be a local citizen and need not seek the consent of the other defendants.

Upon enactment, all sorts of legal skirmishes and interpretive problems obviously lay ahead for the parties and the courts: what was the meaning of “primary defendants” and the related formulations? how would the one-third and two-thirds numerical tests work, especially for ill-defined classes? More problems lay beyond the words of the statute, including **choice of law**<sup>6</sup> and **venue**.<sup>7</sup> In fact, the Act has already generated much litigation on some other questions, especially the Act’s effective date and on threshold jurisdictional questions, including the **burden** and **standard** of proof thereon. We wanted to systematically explore that case law.

## II. METHODOLOGY

Our technique was to apply the search term (“class action fairness act” or cafa) & da(aft February 17, 2005 and bef August 18, 2007) on Westlaw to its “dct” and “cta” databases. Those databases contain the opinions, published in print and online, of the federal district courts and courts of appeals, respectively.

In many situations, empirical research limited to published opinions is dangerous. To begin with, judicial decisions represent only the very tip of the mass of grievances. From that highpoint of actual judicial decisions, it is sometimes tough to infer truths about the underlying mass of disputes or of what lies below disputes.<sup>8</sup>

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<sup>6</sup>Although CAFA’s choice-of-law possibilities have attracted a fair amount of scholarly attention, *e.g.*, Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924 (2006); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006); Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661 (2006); Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723(2006), our coding turned up only a single case, and more precisely it involved an *Erie* issue regarding the applicability of state-law class-action limitations in federal court. *Bonime v. Avaya, Inc.*, No. 06 CV 1630(CBA), 2006 WL 3751219 (E.D.N.Y. Dec. 20, 2006).

<sup>7</sup>Our coding turned up not a single dispute over venue. This result is less surprising once one realizes that most of these CAFA cases were based on removal, where venue is indisputably proper in and only in the local federal court. *See* 28 U.S.C. § 1446(a) (2006). Original cases were seemingly all brought where a substantial part of the claim arose. *See* 28 U.S.C. § 1391 (2006).

<sup>8</sup>Nevertheless, substantial evidence exists that case characteristics often transcend litigation’s filtering process. That is, studies of subsets of litigated cases can yield insights that transcend the studied subset. *See* Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication:*

More to the point, a rather small percentage of judicial decisions appear as published opinions.<sup>9</sup> Those published opinions are, in fact, a skewed sample of judicial decisions.<sup>10</sup> Nonetheless, here we want to see how the courts have treated CAFA as a matter of doctrine. Published opinions are the decisions that move the law. Accordingly, published opinions are exactly what we wish to look at.

This Westlaw search yielded 382 federal district-court published opinions and 63 courts of appeals published opinions.<sup>11</sup> There is our first interesting result: CAFA

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*Krtizer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 275, 292-93 (1994) (finding that case categories in which plaintiffs do relatively well at the settlement stage are also categories in which plaintiffs do well at the litigation stage); Theodore Eisenberg, *The Relationship Between Plaintiff Success Rates Before Trial and at Trial*, 154 J. ROYAL STAT. SOC'Y ser. A, pt. 1, at 111 (1991) (finding that case categories in which plaintiffs do relatively well at the litigated pretrial stage are also categories in which plaintiffs do relatively well at trial).

<sup>9</sup>In one sense, this shortcoming is becoming more serious. The publication rate of opinions in the Federal Reporter has dipped from almost 50% of decisions in 1976 to just over 20% in 2000. This reduced sample is certainly not representative of all appellate decisions. For example, publication choices skew seriously toward publication of reversals rather than affirmances: federal courts of appeals' civil decisions show an 82% affirmance rate for all appeals from tried judgments, but their Federal Reporter opinions in comparable cases show only a 63% affirmance rate. See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 967-69. Yet, for the courts of appeals today, Westlaw makes accessible and so effectively "publishes" almost all the opinions and decisions that do not make it into the Federal Reporter. See William R. Mills, *Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y. L. Sch. L. Rev. 429, 432-33 (2002-2003) (also distinguishing "publication" in this sense from court rules that limit a decision's precedential effect); Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1001952](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001952), 25-34 (Aug. 2007) (discussing in detail the growth of accessibility through Federal Appendix, electronic databases, and court websites).

Most district-court opinions and decisions, however, still do not appear in print or online. See Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1006101](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1006101) (decrying low rate of publication).

<sup>10</sup>See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75 (2001) ("Understanding these diverse [determinants of publication] is crucial for . . . legal academics and social scientists who rely upon databases of published opinions to track judicial behavior."). The determinants of publication are by no means obvious. See David A. Hoffman, Alan Izenman & Jeffrey Lidicker, *Docketology, District Courts, and Doctrine*, <http://ssrn.com/abstract=982130> (May 21, 2007) (arguing that fear of reversal primarily motivates the rare event of district-court publication, more so than, say, the desire to move the law, make a mark, or signal an audience).

<sup>11</sup>In the district-court database, one decision appears twice, but we counted it only once, *Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006). The allcases database yielded additionally one Supreme Court case inconsequentially noting that CAFA did not yet apply, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571-72 (2005) ("Finally, we note that the Class Action Fairness Act . . . has no bearing on our analysis of these cases. Subject to certain limitations, the CAFA confers federal diversity jurisdiction over class actions where the aggregate

has produced a lot of cases.<sup>12</sup> For comparison purposes, an analogous search for the Private Securities Litigation Reform Act<sup>13</sup> yielded 154 federal district-court opinions and 14 courts of appeals opinions in its first two and a half years of existence; for the Securities Litigation Uniform Standards Act,<sup>14</sup> the numbers were 41 and 6; and for the Multiparty, Multiforum Trial Jurisdiction Act of 2002,<sup>15</sup> the numbers were 4 and 1. CAFA's expansion of the right to appeal immediately from orders granting or denying remand<sup>16</sup> might explain its larger number for court of appeals decisions, but at least the number for the district courts suggests that CAFA, with its wider applicability, made a bigger splash. Relatively and absolutely, CAFA has already generated a mountain of case law.

Of course, not all of the CAFA opinions turning up in our search were consequential treatments. Reading the cases revealed the references to CAFA to be inconsequential or irrelevant in about half of the opinions (at least one referred to each of the Criminal Activity Forfeiture Act, Christians Against Family Abuse, and Citizens Against Forced Annexation). So, we decided to reject any opinion that mentioned CAFA as an aside, but include it if the court resolved, no matter how easily, a Class Action Fairness Act point disputed by the parties. Only 182 of the dct opinions were

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amount in controversy exceeds \$5 million. It abrogates the rule against aggregating claims, a rule this Court recognized in *Ben-Hur* and reaffirmed in *Zahn*. The CAFA, however, is not retroactive, and the views of the 2005 Congress are not relevant to our interpretation of a text enacted by Congress in 1990. The CAFA, moreover, does not moot the significance of our interpretation of § 1367, as many proposed exercises of supplemental jurisdiction, even in the class-action context, might not fall within the CAFA's ambit. The CAFA, then, has no impact, one way or the other, on our interpretation of § 1367."); one inconsequential bankruptcy case, *In re Northwestern Corp.*, Nos. 03-12872 (JLP), 05-52525(JLP), 2005 WL 2847228 (Bankr. D. Del. Oct. 25, 2005); and fifteen state cases, which not surprisingly turn out to contain few illuminating discussions of CAFA, the best being *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007) (refusing to dismiss, given the speculative nature of defendants' contention that plaintiffs could instead maintain a CAFA action).

<sup>12</sup>We could have produced more cases by using other search terms, such as statutory citation rather than statutory name. For example, Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1005477](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005477) (August 7, 2007), in his thorough study of CAFA's jurisdictional exceptions, came up with more cases on point than we did. We nevertheless stuck with our sampling technique in order to avoid biasing our database toward certain kinds of CAFA disputes.

<sup>13</sup>Pub. L. No. 104-67, 109 Stat. 737 (1995).

<sup>14</sup>Pub. L. No. 105-353, 112 Stat. 3227 (1998).

<sup>15</sup>Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (2002). Here we used a three-year window because of this Act's different effective-date provision, as well as broader search terms because of the Act's odder name.

<sup>16</sup>*See* 28 U.S.C. § 1453(c) (2006).

relevant in this sense, with 200 irrelevant. On the cta front, 44 were relevant, 19 not.<sup>17</sup>

Working with this residue of relevant opinions, we coded them. We coded for all the aforebolded disputes that would arise in construing CAFA. And we coded for many other things, including court (and its weighted case filings per authorized judgeship<sup>18</sup>), judge (and the judge's gender, birth year, confirmation year, and party affiliation<sup>19</sup>), subject area of claim, certification status,<sup>20</sup> decision date, who won the decision, and whether the decision was receptive or resistant to CAFA.

### III. OBSERVATIONS

#### A. *Nature of Cases*

In 91% of our district-court CAFA cases, removal brought the case to federal court. The percentage has declined only slightly over the years, coming in at 94% in 2005, 90% in 2006, and 90% in 2007.

These figures appear to clash with the result of the Federal Judicial Center's recent study on the impact of CAFA on federal filings through June 2006.<sup>21</sup> It concluded that CAFA had approximately doubled the number of diversity class actions, with the annual increase comprising between 300 and 400 cases. About three-quarters of the increase asserted state-law contract (including insurance) claims or common-law fraud claims. More startling, about three-quarters of the increase were original federal filings, rather than removed cases. Both removal and original cases spiked right after enactment, but removal then faded and original cases climbed. The authors theorized: "As removal becomes more predictable, plaintiff attorneys might decide to file actions initially in federal court to avoid the costs and delays associated

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<sup>17</sup>A few cases showed up more than once, either as subsequent steps at the trial-court level or on appeal. We counted each published opinion separately.

<sup>18</sup>We obtained the weighted filings from 2005 FEDERAL COURT MANAGEMENT STATISTICS tbl.X-1A, *available at* <http://www.uscourts.gov/judbus2005/appendices/x1a.pdf>, and 2006 *id.*, *available at* <http://www.uscourts.gov/judbus2006/appendices/x1a.pdf>. This statistic accounts for both civil and criminal filings. We had to use the 2006 numbers for the 2007 opinions, because the 2007 numbers are not yet available.

<sup>19</sup>We obtained the judges' attributes from the S. Sidney Ulmer Project's *Attributes of Federal Court Judges*, <http://www.as.uky.edu/polisci/ulmerproject/auburndata.htm> (last visited Aug. 25, 2007).

<sup>20</sup>Usually, the decisions in our database came without class certification having been decided. Class certification, or even a motion for certification, correlates with much higher plaintiff recovery rate. *See* NICHOLAS M. PACE, STEPHEN J. CARROLL, INGO VOGELSANG & LAURA ZAKARAS, INSURANCE CLASS ACTIONS IN THE UNITED STATES xxi-xxii (2007).

† THOMAS E. WILLGING & EMERY G. LEE III, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS (FJC 2007).

with removal. . . . In that way, plaintiff attorneys retain a choice of forum at least to the extent that, in a given case, jurisdiction and venue rules allow filing in more than one federal forum.”<sup>22</sup>

However, our data do not necessarily conflict with the FJC study. Probably the difference merely shows that among CAFA class actions, removed cases are the ones generating pitched battles and hence published opinions, and especially opinions that expressly mention the Class Action Fairness Act or CAFA. The difference between the two studies thus may reflect the danger of relying only on published cases to get a picture of what is going on.

Our study features threshold battles. Meanwhile, the FJC is telling us that practitioners may be seeing a lot of cases proceeding directly to struggles over certification and the merits, without any meaningful pause at the threshold. The result would be that our impression of CAFA litigation would differ from some practitioners’. Nevertheless, our skewed sample of published opinions could still hold some lessons for practitioners.

On the one hand, if certain plaintiffs’ decision to institute suit in federal court has resulted in less litigation over threshold issues, while by contrast those other plaintiffs who choose to file in state court are running into a pretty high number of threshold battles, then we could suggest that those who voluntarily choose to file suit in federal court have engaged in sound strategic decisionmaking, at least in terms of reducing litigation costs and time delays.

On the other hand, these immediate savings might turn out not to be worth it. If the state-court plaintiffs are actually winning a good share of the CAFA battles and getting remanded, while in the cases that stay in federal court the federal judges turn out to be more parsimonious with certification than some state judges (as defendants and the Congress thought they would be, albeit with scant empirical basis<sup>1</sup>), then the short term gain of avoiding the threshold struggles by just suing in federal court might constitute a foolish economy.

In any event, some plaintiffs’ election of federal court sets up a selection effect. Plaintiffs more squarely within the reach of CAFA presumably tend to elect federal court. Unless defendants become more selective as to which state-court cases to remove, the plaintiffs’ selectivity will raise the plaintiff win rate in battles over entry to federal court.

As to the nature of the claims involved, the cases in our database overwhelmingly involved state law and, indeed, were contract (including insurance) cases. Incidentally, our contract category included fraud claims asserted in connection with a contract. So, our results here match the FJC’s results.

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<sup>22</sup>*Id.* at 16-17.

<sup>1</sup>*See supra* note 3.

Table 1: Number of Published District-Court CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	2005	2006	2007	Total
Contract	28	23	23	74
Tort	1	17	10	28
Insurance	11	19	11	41
State labor law	3	8	3	14
Other subject	9	12	4	25
Total	52	79	51	182

Table 2: Number of Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	2005	2006	2007	Total
Contract	4	12	2	18
Tort	1	6	4	11
Insurance	1	4	2	7
State labor law	2	3	2	7
Other subject	1	0	0	1
Total	9	25	10	44

The other noteworthy lesson of Tables 1 and 2 is that the number of published cases is diminishing with time. This trend supports the thesis of social waste. Many of these cases represented transitional costs, which a more carefully drafted statute could have avoided. This sloppily drafted statute<sup>2</sup> created a lot of useless social friction and purely wasteful litigation by not foreseeing things like effective-date problems. We can see this by looking more closely at the nature of the CAFA issues the courts were deciding.

### B. *Nature of Issues*

Most of the early disputes over CAFA involved effective date, with jurisdiction (and jurisdictional amount in particular)<sup>3</sup> coming in second—but finishing

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<sup>2</sup>The winner for sloppiness is CAFA's authorization of immediate appeal from certain jurisdictional decisions by district courts, provided that litigants appeal "not less than 7 days after entry of the order"—when Congress meant "not more than 7 days." See Adam N. Steinman, "*Less*" Is "*More*"? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183 (2007).

<sup>3</sup>We include under "jurisdictional provisions" our codes for disputes over citizenship, class size, jurisdictional amount, and also discretionarily local, mandatorily local, and other excepted

strong.<sup>4</sup> The numbers for “other issue” are low; they proportionately increase for the appellate decisions only because some difficult questions of appellate jurisdiction fall into this category. Incidentally, the numbers in Tables 3 and 4 total more than the number of opinions, because a single opinion can decide multiple issues.

Table 3: Number of Published District-Court CAFA Opinions from February 2005 to August 2007, by Multiple Disputed Issues

Disputed Issue	2005	2006	2007	Total
Effective date	35	37	5	77
Jurisdictional provisions	16	43	35	94
Jurisdictional burden & standard	7	18	8	33
Other issue	6	8	11	25
Total	64	106	59	229

Table 4: Number of Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Multiple Disputed Issues

Disputed Issue	2005	2006	2007	Total
Effective date	8	9	5	22
District-court jurisdictional provisions	1	9	5	15
Jurisdictional burden & standard	1	8	4	13
Other issue	2	16	6	24
Total	12	42	20	74

However wasteful it was, all this litigation has at least managed to shed some light, albeit of variable intensity. Two issues illustrate the different contributions the courts have made. First, the burden of proof on jurisdiction was a matter that CAFA itself failed to treat, although its legislative history nonetheless managed to muddy up the question. The result was a lot of litigation to produce clarification, getting us to

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claims. We separately present disputes over jurisdictional burden and standard of proof because we want to discuss them in special detail below.

<sup>4</sup>Likewise, a study of district-court and courts of appeals published opinions on CAFA at the eighteen-month mark found that of the 151 opinions, 85 (56%) dealt with effective-date problems and 48 (32%) involved jurisdiction. Ashish R. Talati, *The Class Action Fairness Act of 2005: Changing the Class Action Landscape Circuit by Circuit*, 61 FOOD & DRUG L.J. 561, 563 (2006). A one-year review stressed effective-date problems even more. Lonny Sheinkopf Hoffman, *In Retrospect: A First Year Review of the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1135 (2006).

a point where the statute could have started.<sup>5</sup> Second, the standard of proof on jurisdiction has been a longstanding problem, albeit a fine technical point that Congress more understandably ignored completely. This issue has produced much less litigation in our CAFA database, and that lesser litigation has not managed to move the dispute much closer to resolution. We should expand on both issues.

### 1. Burden of Proof

A frequent point of contention in CAFA cases has been who bears the burden of proof on jurisdiction when the defendant removes: the plaintiff who brought suit or the defendant who invoked federal jurisdiction. Burden of proof generated 32 disputes in our district-court cases and 11 in our courts of appeals cases. Consensus has settled on imposing, in conformity with the traditional rule, the burden as to jurisdictional requirements,<sup>6</sup> as opposed to exceptions,<sup>7</sup> on the removing defendant. The most recent of our set of appellate opinions on this point, by the Eleventh Circuit in *Lowery v. Alabama Power Co.*, explained it this way:

Under this traditional rule, the defendants, having removed the case to the district court, would bear the burden of establishing the court's jurisdiction. The defendants contend, however, that this traditional rule frustrates CAFA's motivating congressional purpose of expanded access to the federal courts. . . . The uncertainty surrounding the burden of proof in CAFA cases arises not from the text of CAFA itself—which is silent on the matter—but from a few discrete excerpts of the statute's legislative history. . . .

Although several district courts have followed this apparent congressional intent in shifting the burden of proof onto the plaintiff, the courts of appeals have been reluctant to make the shift from such a “longstanding, near-canonical rule.” *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) . . . . We have recently joined the Second, Third, Seventh, and Ninth Circuits in following the settled practice of placing

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<sup>5</sup>See Lonny Sheinkopf Hoffman, *The “Commencement” Problem: Lessons from a Statute's First Year*, 40 U.C. DAVIS L. REV. 469 (2006).

<sup>6</sup>Commentators early recognized this as a hot-button issue. See, e.g., Georgene M. Vairo, *Is CAFA Working?*, NAT'L L.J., Nov. 14, 2005, at 12; Linda S. Mullenix, *CAFA Proof Burdens*, NAT'L L.J., Dec. 19-26, 2005, at 12. Indeed, it now gets its own page at the McGlinchey Stafford PLLC, *CAFA Law Blog*, <http://www.cafalawblog.com/cat-jurisdictional-burden-of-proof.html>.

<sup>7</sup>See *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1208 n.55 (11th Cir. 2007) (“We note in passing that the law of this circuit shifts the burden of proving the applicability of exceptions to CAFA's removal jurisdiction to the plaintiff seeking a remand.”). For a difficult example, the courts have come uniformly to treat the one-third and two-thirds provisions of § 1332(d)(3)-(4) as exceptions, even though excellent arguments exist that they should form part of the prima facie showing of jurisdiction. See Hoffman, *supra* note 12 (arguing the same for § 1332(d)(5), (9) as well).

the burden of proof on the removing [CAFA] defendant.<sup>8</sup>

## 2. Standard of Proof

The second issue is more difficult. But only 5 of our district cases and 9 of our appellate cases addressed the standard of proof.<sup>9</sup> The context was almost always jurisdictional amount upon removal. Nevertheless, they split badly.

### a. *Non-CAFA Cases*

The background on this latter issue is that under the prevailing *St. Paul* test of “legal certainty,” for the plaintiff to satisfy the jurisdictional amount requirement for original jurisdiction in a diversity case when the complaint pleads a claim for more than \$75,000 against the defendant, the plaintiff need show only a legal possibility that the judgment could exceed \$75,000 under the applicable law, if the plaintiff were to prevail.<sup>10</sup> The plaintiff can pass this test very easily, especially in unliquidated tort cases, because jurisdiction will exist even though a recovery over \$75,000 is on the facts highly unlikely. That is, because here the jurisdictional amount and the merits overlap, courts do not apply the preponderance standard that is usual for issues of pure jurisdiction but instead ask for no more than a very modest factual showing to establish jurisdiction: the plaintiff can rebut legal certainty by establishing merely a legal possibility or, in other words, by establishing that a reasonable factfinder could award more than the jurisdictional amount. In sum, the jurisdictional-amount test, as applied to the damages that might be recovered, is actually a prima facie standard of proof that in essence requires a factual showing of a reasonable possibility of exceeding the floor amount.<sup>11</sup>

However, for the defendant to remove on the basis of diversity, when the plaintiff did not plead any amount or pleaded for \$75,000 or less, and did not make a binding disclaimer of damages in excess of \$75,000, the defendant bears the burden—but the required showing by the defendant has remained unclear.<sup>12</sup> In almost

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<sup>8</sup>Lowery v. Ala. Power Co., 483 F.3d 1184, 1207-08 (11th Cir. 2007) (footnotes omitted) (declining jurisdiction), *aff’g* Lowery v. Honeywell Int’l, Inc., 460 F. Supp. 2d 1288 (N.D. Ala. 2006).

<sup>9</sup>See *infra* notes 42-57.

<sup>10</sup>See *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938).

<sup>11</sup>See Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1008-11 (2006).

<sup>12</sup>See 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3725 (3d ed. 1998 & Supp. 2007) (providing 51 pages of text and 87 pages of supplement on “Amount in Controversy in Removed Actions”); Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff’s Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant’s*

all courts the standard is high, but it ranges from requiring the defendant to show a legal certainty that recovery, if there is one, will exceed \$75,000<sup>13</sup> down the step-scale of probability<sup>14</sup> to requiring a showing that more likely than not the recovery will exceed \$75,000.<sup>15</sup> Some courts have required less, such as a substantial possibility<sup>16</sup>

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*Equal Access to Federal Courts*, 62 MO. L. REV. 681 (1997).

<sup>13</sup>See, e.g., *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3rd Cir. 1999); 14C WRIGHT, MILLER & COOPER, *supra* note 34, § 3725, at 89 n.26. The *Meritcare* approach received endorsement in *Samuel-Bassett v. KIA Motors America, Inc.*, 357 F.3d 392, 396-98 (3rd Cir. 2004), but that later opinion was hopelessly confused. See *Valley v. State Farm Fire & Cas. Co.*, No. CIV A 06-4351, 2006 WL 3718007, at \*3 (E.D. Pa. Dec. 12, 2006) (reading *Samuel-Bassett* to “require remand when it appears to a legal certainty that the plaintiff’s claims do not satisfy the amount in controversy requirement”). Courts do not explain what they mean by “legal certainty” here, but clearly they do not mean it in the *St. Paul* sense. Rather, they mean it in the more usual legal sense of highest probability. Legal certainty conventionally means being virtually or almost certain, which requires proof beyond a reasonable doubt. See Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1118-26 (1987).

<sup>14</sup>Between legal certainty and preponderance, there is conceivably the standard of *high* probability, which would require the defendant to show that recovery *much* more likely than not will exceed \$75,000. See Clermont, *supra* note 35, at 1126-31. This standard appears to get the approval of 15 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 102.107[3] (3d ed. 2007); 16 *id.* § 107.14[2][g][vi], where the authors (Professors Martin H. Redish and Georgene M. Vairo, respectively) approve of the legal-certainty cases but slightly water down the standard by talking of a required showing that an award at the jurisdictional amount would be “outside the range of permissible awards,” presumably meaning that it could not survive a new-trial motion for inadequacy. See Clermont, *supra* note 33, at 1009-10 (disapproving factual standards of this sort).

<sup>15</sup>See, e.g., *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822 (6th Cir. 2006); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005); *Friedman v. N.Y. Life Ins. Co.*, 410 F.3d 1350, 1352-53 (11th Cir. 2005); *James Neff Kramper Family Farm P’ship v. IBP, Inc.*, 393 F.3d 828, 831 (8th Cir. 2005); *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638-39 (5th Cir. 2003); *United Food & Commercial Workers Union, Local 919 v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994) (equating reasonable probability to preponderance); 14C WRIGHT, MILLER & COOPER, *supra* note 34, § 3725, at 90 n.27; *cf.* *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (allowing plaintiff to rebut by showing to a legal certainty that the claim did not meet the jurisdictional amount), *cert. denied*, 127 S. Ct. 2952 (2007); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001) (requiring at least a preponderance showing), *aff’d on other grounds*, 546 U.S. 132 (2005).

<sup>16</sup>See, e.g., *Haley ex rel. Davis v. Ford Motor Co.*, 417 F. Supp. 2d 811, 813 (S.D. Miss. 2006) (“the defendant must demonstrate that the severity of the damages alleged give rise to a reasonable probability that the jurisdictional amount has been met”); 14C WRIGHT, MILLER & COOPER, *supra* note 34, § 3725, at 91 n.28; *cf.* *Jones v. Allstate Ins. Co.*, 258 F. Supp. 2d 424, 428 (D.S.C. 2003) (recognizing “reasonable probability” to be a standard lower than preponderance). Through no fault of our own, these cases require careful parsing. A “reasonable probability” could mean and has meant just about anything. But in those cases where it represents a separate standard, it appears to be an analogue of the standard that some courts apply to flagrant abuse by plaintiffs.

or a reasonable possibility,<sup>17</sup> but such authority is relatively scanty and shaky. Of late, the courts, and especially the appellate courts,<sup>18</sup> markedly appear to be converging on the preponderance-of-the-evidence standard, which requires a more-likely-than-not showing.<sup>19</sup> This still tough approach against removal jurisdiction is oddly incongruent with the anything-goes flavor of the *St. Paul* test for original jurisdiction.

b. *CAFA Cases*

If anything, the CAFA cases have added to the confusion. The Eleventh Circuit in *Lowery*<sup>20</sup> followed its non-CAFA precedent<sup>21</sup> to apply the preponderance standard. Strikingly, however, the court all but ridiculed the rule: “There is a unique tension in applying a fact-weighting standard to a fact-free context. . . . We note, however, that in situations like the present one—where damages are unspecified and only the bare pleadings are available—we are at a loss as to how to apply the

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*See, e.g.,* Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971) (seeming to require, by its analogies to the new-trial test that equates a jury’s clear error to its having decided in the absence of a substantial possibility, a showing of a substantial possibility of exceeding \$75,000); Clermont, *supra* note 33, at 1009-10. Thus, we phrase it as a substantial-possibility standard in the text. Apparently, this is the standard preferred by Noble-Allgire, *supra* note 34, at 724, 728, 754.

<sup>17</sup>*See, e.g.,* Quinn v. Kimble, 228 F. Supp. 2d 1036, 1037 (E.D. Mo. 2002) (“it does not appear to a legal certainty that the controversy between the parties is for less than the jurisdictional amount”), *confirmed on renewed motion*, 228 F. Supp. 2d 1038 (E.D. Mo. 2002); Ball v. Hershey Foods Corp., 842 F. Supp. 44, 47 (D. Conn. 1993) (requiring “reasonable possibility that the plaintiff can recover more than” jurisdictional amount), *aff’d mem.*, 14 F.3d 591 (2d Cir. 1993); Hale v. Billups of Gonzales, Inc., 610 F. Supp. 162, 164 (M.D. La. 1985) (resorting also to double negativity in stating the defendant’s burden this way: “demonstrating that it does not appear to a legal certainty that the plaintiffs’ claim is for less than the requisite jurisdictional amount.”); 14C WRIGHT, MILLER & COOPER, *supra* note 34, § 3725, at 92 n.30. This standard is the so-called inverted legal-certainty test, in that it is the analogue of the *St. Paul* legal-certainty test normally applied to original jurisdiction and so requires only a reasonable possibility that recovery will exceed the jurisdictional amount.

<sup>18</sup>*See* Noble-Allgire, *supra* note 34, at 693.

<sup>19</sup>*See* 14C WRIGHT, MILLER & COOPER, *supra* note 34, § 3725, at 90. Their supplement lists 156 new citations in their footnote for the preponderance standard, but only 37 new citations, and only ones at the district-court level, for the higher legal-certainty standard. *See id.* § 3725, at 45-61 (Supp. 2007). Although their footnote on the reasonable-possibility standard mixes in additional legal-certainty cases, their footnote on the substantial-possibility standard mixes in additional preponderance standard cases. That is, the preponderance standard is clearly in the ascendancy.

<sup>20</sup>*Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1208-11 (11th Cir. 2007) (declining jurisdiction), *aff’g* *Lowery v. Honeywell Int’l, Inc.*, 460 F. Supp. 2d 1288 (N.D. Ala. 2006).

<sup>21</sup>*See supra* note 37. And subsequent non-CAFA cases apply *Lowery* as a precedent. *See, e.g.,* Ellis Motor Cars, Inc. v. Westport Ins. Corp., No. 2:07-CV-20-WKW, 2007 WL 1991573 (M.D. Ala. July 5, 2007).

preponderance burden meaningfully. . . . Regardless, our precedent compels us to continue forcing this square peg into a round hole.”<sup>22</sup> Insightfully, the court suggested that the “unabashed guesswork” in the search for a “readily deducible” amount might in effect push the actual standard toward the higher legal-certainty standard.<sup>23</sup> Curiously, on this particular issue, the court did not cite another panel’s earlier CAFA decision that had routinely applied the preponderance standard.<sup>24</sup>

Similarly, a district court in the Sixth Circuit ruled that “CAFA does not alter” the problem, and so it applied its non-CAFA precedent in support of the preponderance standard.<sup>25</sup> The Second Circuit did the same, without discussion.<sup>26</sup> The Fifth Circuit did too, but in a different context.<sup>27</sup>

Likewise, the Third Circuit followed its non-CAFA precedent,<sup>28</sup> but this meant a legal-certainty standard.<sup>29</sup> Although one of its district courts had earlier found the circuit law on the precise point to be unsettled<sup>30</sup> and the *Morgan* court spoke with little clarity, another district court in the circuit later read its words to mean “that the Defendants must prove the requisite amount in controversy, \$5 million, to a legal certainty.”<sup>31</sup>

New complications, however, arose in the Ninth Circuit. In its most recent CAFA case on the point in our dataset, it abandoned its allegiance in non-CAFA cases to the preponderance standard in favor of the legal-certainty test for CAFA cases.<sup>32</sup>

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<sup>22</sup>*Lowery*, 483 F.3d at 1209-11.

<sup>23</sup>*Id.* at 1211.

<sup>24</sup>*Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11th Cir. 2006) (declining jurisdiction).

<sup>25</sup>*Brown v. Jackson Hewitt, Inc.*, No. 1:06-cv-2632, 2007 WL 642011, at \*2 (N.D. Ohio Feb. 27, 2007) (declining jurisdiction).

<sup>26</sup>*Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (declining jurisdiction).

<sup>27</sup>*Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 485 F.3d 804, 813-14 (5th Cir. 2007) (declining jurisdiction, but here the issue was the uncontroversial standard for proving citizenship).

<sup>28</sup>*See supra* note 35.

<sup>29</sup>*Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006) (declining jurisdiction).

<sup>30</sup>*In re Intel Corp. Microprocessor Antit. Litig.*, 436 F. Supp. 2d 687, 688 (D. Del. 2006) (upholding jurisdiction by applying the Seventh Circuit’s *Brill* approach, discussed *infra* note 57), *confirming* No. MDL 05-1717-JJF, Civ.A. 05-485-JJF, 2006 WL 1431214 (D. Del. May 22, 2006).

<sup>31</sup>*Lamond v. Pepsico, Inc.*, No. CIV 06-3043 (RMB), 2007 WL 1695401, at \*5 (D.N.J. June 8, 2007) (declining jurisdiction).

<sup>32</sup>*Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 998-1000 (9th Cir. 2007) (2-1 decision) (declining jurisdiction).

The *Lowdermilk* court's reasons stressed the limited nature of federal jurisdiction and the idea that the plaintiff is master of the complaint. But the holding may be limited to the facts of that case, wherein the plaintiff pleaded damages below the jurisdictional amount. Shortly before, another panel had applied the preponderance standard in a CAFA case wherein the plaintiff's complaint did not specify damages.<sup>33</sup> Some earlier non-CAFA cases have also distinguished between the plaintiff's not pleading damages and his pleading less than the jurisdictional amount.<sup>34</sup>

Finally, the Seventh Circuit adopted a standard complicated in itself, and did so in the only one of these CAFA cases to develop a standard that upheld federal jurisdiction.<sup>35</sup> The *Brill* court seems to have required merely as a burden of production that the defendant show by a preponderance that the claim exceeded the jurisdictional amount, while saying that this showing would sustain federal jurisdiction unless the plaintiff could come back to show to a legal certainty that the claim did not meet the jurisdictional amount. The court's motivation to complicate matters was the usual concern with the difficulty of applying a factual standard to an undeveloped factual record. Some earlier non-CAFA cases have also deployed the same shifting-burden approach.<sup>36</sup>

### c. *Optimal Approach*

The messy CAFA cases manage at least to generate the incentive to rethink the whole problem. It seems that in measuring jurisdictional amount upon removal, courts find it natural to invoke the phrase "legal certainty" because the Supreme Court in *St. Paul* enshrined it as the very permissive test for the plaintiff's invocation of original jurisdiction.<sup>37</sup> Upon the defendant's invocation of removal jurisdiction, however, the phrase becomes ambiguous.

"Legal certainty" could mean by direct analogy that the defendant has merely to show a reasonable possibility that the jurisdictional amount exists. So, whoever invokes federal jurisdiction, be it plaintiff or defendant, that person has only to show a possibility of being right about jurisdictional amount. This approach treats plaintiffs

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<sup>33</sup>Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 683 (9th Cir. 2006) (per curiam) (declining jurisdiction).

<sup>34</sup>See 16 MOORE, *supra* note 36, § 107.14[2][g][v] (disapproving that distinction).

<sup>35</sup>Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448-49 (7th Cir. 2005) (Easterbrook, J.) (upholding jurisdiction), *followed by* Home Depot, Inc. v. Rickher, No. 06-8006, 2006 WL 1727749, at \*1 (7th Cir. May 22, 2006) (upholding jurisdiction).

<sup>36</sup>See 14C WRIGHT, MILLER & COOPER, *supra* note 34, § 3725, at 94 n.37 (favoring this approach, as embodied in *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411-12 (5th Cir. 1995)).

<sup>37</sup>*Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938).

and defendants equally,<sup>38</sup> and it curtails somewhat plaintiffs' tactical abuse in making lowball claims.<sup>39</sup> However, under the prevailing philosophy of jurisdiction, allowing the defendant to dislodge the plaintiff from state court on as minimal a showing as *St. Paul* allows a plaintiff to invoke federal jurisdiction makes no sense.

Accordingly, most courts applying "legal certainty" have converted it to mean that the defendant must show a virtual certainty that the jurisdictional amount exists. Part of the reason for this conversion was semantic, in that the phrase "legal certainty" carries its own impetus to mean what it says and impose a very high standard rather than a very low standard. But another reason was that this issue on removal arose in an era different from *St. Paul*'s, at a time when enforcing limits on access to the overworked federal courts (especially on the basis of diversity) was quite appealing.<sup>40</sup> In any event, the conversion is not necessarily illogical in relation to *St. Paul*: under this approach, for both original and removal jurisdiction, the plaintiff, as master of forum choice, gets his way if there is a possibility that his position on jurisdictional amount is correct.

Many courts do not feel limited to these two choices. Given the stark choice that the phrase "legal certainty" offers between a pro-defendant approach and a very pro-plaintiff approach, most circuit courts in non-CAFA cases have succumbed to the allure of compromise.<sup>41</sup> And of course the phrase "preponderance of the evidence" is also in the air because it is the usual standard of proof, including for jurisdictional issues that do not overlap the merits.<sup>42</sup> But the compromise of the preponderance standard cannot escape the central incoherence caused by applying a fact-weighting standard to an undeveloped factual record. Although courts are fairly adept at applying the legal-certainty standards, as on motion for summary judgment, without full discovery and without evidentiary hearing, courts find curtailing the opponent's procedural opportunities for factual development to be more questionable as the standard moves from a legal-certainty extreme toward the middle standard of preponderance. Moreover, a middle standard would in theory more often necessitate jurisdictional dismissals during or after trial, when the facts get better developed. These difficulties are huge.<sup>43</sup>

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<sup>38</sup>See *Noble-Allgire*, *supra* note 34, at 699-703, 718-19.

<sup>39</sup>See *id.* at 692, 722.

<sup>40</sup>See 14C WRIGHT, MILLER & COOPER, *supra* note 34, § 3725, at 96.

<sup>41</sup>See, e.g., *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993) ("We conclude that the 'preponderance of the evidence' ('more likely than not') test is the best alternative. We believe that this test best balances the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction.").

<sup>42</sup>See, e.g., *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

<sup>43</sup>See generally *Clermont*, *supra* note 33 (discussing also the need to avoid problems of jury right, *res judicata*, and collateral attack).

The CAFA appellate cases are picking up on this incoherence. *Lowery*, *Morgan*, *Lowdermilk*, and *Brill* all express some degree of repulsion from factual standards and therefore incline toward returning to a legal-certainty approach—and because of the aforementioned weight of authority and policy arguments, these cases mostly lean toward the more demanding of the two versions of the legal-certainty test. Indeed, that workable legal-certainty test, under which the defendant must show to a virtual certainty that the jurisdictional amount exists, still prevails in many district courts and at least one circuit court for non-CAFA cases.<sup>44</sup> Therefore, probably the best approach, and even more so in CAFA cases, is to require that the removing defendant show to a legal certainty that the jurisdictional amount exists.

If the defendant had to meet such a high standard, it would mean that the defendant would often fail in its removal effort.<sup>45</sup> Just as the plaintiff can very easily survive the *St. Paul* test for original jurisdiction, the plaintiff will very easily survive the legal-certainty test applied to removal and so will achieve remand. The standard of proof consistently enables the plaintiff to be the master of forum choice. In short, the standard of proof is determinative of outcome, proving that the parties know what they are doing when they wage battle over this seemingly arcane point that we have now examined at some length.

Thus, doctrine matters. Plaintiffs will suffer disadvantage if the statute and its construction goes one way, and defendants will suffer disadvantage if the rulings go the other way. The party the court sticks with the burden of proof on a spongy jurisdictional determination will suffer.<sup>46</sup> Moreover, prior rulings strongly influence subsequent judicial decisions on doctrine. Prior decisions on the burden of proof produced the CAFA result that the burden as to jurisdictional requirements, as opposed to exceptions, is on the removing defendant.<sup>47</sup> We certainly do not contend

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<sup>44</sup>See *supra* notes 34-41 and accompanying text.

<sup>45</sup>A true test of legal certainty, being comparable to judgment as a matter of law, would be so high that few tort cases could survive it: “It would rarely seem possible that a defendant could prove that the amount of damages would, as a matter of law, have to exceed a certain amount, because few, if any, rules of law require damages of a certain amount to be awarded, such as those limiting amount or kinds of damages in certain situations.” Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 111 (2007)

<sup>46</sup>Lonny Hoffman, in his empirical study of CAFA’s jurisdictional exceptions, concluded that “allocation of the burden of proof is a key determinant in the forum contest’s outcome.” Hoffman, *supra* note 12, at 4. He had observed that the plaintiff heavily tends to win the forum contest when the burden of proof stays on the defendant, but heavily tends to lose when the court, as it usually does, shifts the burden to the plaintiff. Our results are consistent. In our district-court jurisdictional burden of proof cases, the plaintiff win rate was 52% when the dispute concerned jurisdictional requirements (with the burden typically on the defendant), but only 25% in when the dispute concerned jurisdictional exceptions (with the burden typically on the plaintiff).

<sup>47</sup>See *supra* text accompanying notes 28-30.

to the contrary in the remainder of this article. Doctrine affects the parties' fortunes and constrains the judges' freedom. But we still must consider whether judicial attitudes toward CAFA play a role, at least in some restricted realm of wriggle room.

### C. Judicial Reactions

The following data seem to show that both the district courts and the court of appeals have resisted an expansive reading of CAFA. Because so many of the cases in our database were removed cases in which the plaintiff opposed application of CAFA, this resistant attitude among federal judges resulted in a high plaintiff win rate.

We shall look first at the plaintiff win rate, for the reason that so much prior empirical research emphasized this metric; let us define plaintiff win rate as the fraction of plaintiff wins among our database's opinions that went either for plaintiff or defendant, as oppose to decided for neither.

Then we shall shift to our measure of receptive/resistant reaction, in order to look more directly at judicial disposition; let us define resistance rate to measure our database's opinions in which the court took a narrowing view of CAFA, as a fraction of the opinions in which the court took either a narrow or expansive view of CAFA. A court might take a narrow view of CAFA by construing narrowly its requirements or construing expansively its exceptions.

#### 1. District Courts

The plaintiffs succeed in our cases at the unusual rate of almost two-to-one. This high plaintiff win rate could mean that the federal district courts are resisting what they sees as improper use of CAFA by defendants. Some plaintiffs are siphoning off cases squarely within CAFA by suing originally in federal court, and so bringing in state court a larger percentage of nonremovable cases.<sup>48</sup> Yet, defendants are correctly seeing CAFA as a pro-defendant statute, which prompts them to overuse it by unsuccessfully removing or otherwise trying to impose CAFA on the plaintiffs.<sup>49</sup> By resisting this sort of move, the district courts give plaintiffs the lopsided win rate, especially in published opinions, that we see.

Ordinarily, defendants do very well in removed cases, compared to original federal filings.<sup>50</sup> Still, the plaintiff win rate in the CAFA cases might not be surprisingly high. Perhaps plaintiffs, at least in their efforts to resist removal, have a

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<sup>48</sup>See *supra* text accompanying note 22.

<sup>49</sup>See Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 554-55 (2005) (discussing effect of CAFA on erroneous removal).

<sup>50</sup>See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 606-07 (1998).

high win rate. A couple of Alabama districts, for example, exhibit a peculiarly high rate of remand that exceeds 80%.<sup>51</sup> But nationally there is about a 20% remand rate for removed actions,<sup>52</sup> and if in almost half the cases there is no effort to remand,<sup>53</sup> the plaintiffs' success rate would be a middling rate somewhat over 40%.

Therefore, judicial resistance to CAFA might indeed be the better explanation. If so, we would expect the defendants' failures to be concentrated at the beginning of CAFA's existence, as overly enthusiastic defendants flock to the federal haven and the parties have not yet had the chance to adjust to the judicial construction. In fact, the plaintiffs' 76% win rate in 2005 fell to 65% in 2006 and then to the more normal rate of 47% in 2007.

Also, Table 5 gives the percentage of plaintiff wins among our database's opinions that went for the plaintiff, in those cases that involved a particular kind of CAFA dispute. It shows that plaintiffs did extremely well in litigation involving CAFA's effective date. Litigation on this issue was strictly transitional. Thus, defendants' successes mount as the nature of the disputed issue evolves beyond the effective date.

Table 5: Plaintiff Win Rate in Published District-Court CAFA Opinions from February 2005 to August 2007, by Multiple Disputed Issues

Disputed Issue	Plaintiff Win Rate (%)
Effective date	80
Jurisdictional provisions	47
Jurisdictional burden & standard	47
Other issue	56
Overall	63

Thus, plaintiffs did very well in the early going on transitional issues. Since then, the plaintiff win rate has declined to the expected rate around 50%. That early litigation, involving the defendants' losing battles to get cases into federal court, constituted social waste.

Contrariwise, we would not expect the plaintiff win rate to vary much with primary subject area of the claims. Table 6 shows statistically insignificant differences. Recall that the noncontractual categories, which show the most extreme win rates, are the smallest three categories, in number of cases.

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<sup>51</sup>See Eisenberg & Morrison, *supra* note 71, at 568-74 (studying published and unpublished decisions).

<sup>52</sup>See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 121-25 (2002); *see also* Eisenberg & Morrison, *supra* note 71, at 567.

<sup>53</sup>See Eisenberg & Morrison, *supra* note 71, at 571 (noting an effort to remand in about half the removed cases in the high-remand-rate districts of Alabama).

Table 6: Plaintiff Win Rate in Published District-Court CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	Plaintiff Win Rate (%)
Contract	67
Tort	54
Insurance	64
State labor law	71
Other subject	54
Overall	63

We could state all of these results alternatively in terms of the receptive/resistant code, but the story would be the same. Given that most of the cases were removal cases, where a victory for plaintiff was the resistant position, the resistance rate will be similar to the plaintiff win rate. Accordingly, the district courts resisted expansion of CAFA 63.3% of the time over the two and a half years, while they gave the plaintiffs a 62.7% win rate.

## 2. Courts of Appeals

Most of the CAFA appeals resulted in affirmance (68%), just as do most appeals.<sup>54</sup> Ordinarily, plaintiffs see a dismal rate of success on appeal, an effect that we phrased “plaintiphobia” in another article.<sup>55</sup> But in this regard, the CAFA appeals differ strongly from the ordinary.

Tables 7 and 8 show that, in a fashion similar to the district-court CAFA cases, the courts of appeals exhibited elevated plaintiff win rates on CAFA disputes (especially for effective-date issues) but showed no pattern across subject area of claims (for example, the 0% win rate simply means that the plaintiff lost the appeal in *Brill*, involving the Telephone Consumer Protection Act and being the only “other

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<sup>54</sup>See *supra* note 9; Clermont & Eisenberg, *supra* note 74, at 126, 150-52 (finding an overall affirmance rate above 80%, but only just above 60% for published opinions, because reversals are more likely published); Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants’ Advantage*, 3 AM. L. & ECON. REV. 125, 130-34 (2001). The affirmance rate, which is the complement of the reversal rate, means the percentage of appeals that reach a decisive outcome and emerge as affirmed rather than reversed. We narrowly define “affirmed” as affirmed or dismissed on the merits. We define “reversed” as reversed or modified, in part or completely.

<sup>55</sup>See Clermont & Eisenberg, *supra* note 9, at 967 (finding a 29% reversal rate for defendants and 13% for plaintiffs in appeals from all judgments); *see also* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Court? An Empirical Study of State Court Trials on Appeal*, <http://ssrn.com/abstract=988199> (May 2007).

subject” appellate case<sup>56</sup>). The 57% overall plaintiff win rate on appeal reflects who won the appeal, plaintiff or defendant, regardless of who was the appellant. The plaintiffs’ 89% win rate in 2005 fell to 52% in 2006 and then to the more normal rate of 40% in 2007.

Table 7: Plaintiff Win Rate in Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Multiple Disputed Issues

Disputed Issue	Plaintiff Win Rate (%)
Effective date	73
District-court jurisdictional provisions	53
Jurisdictional burden & standard	62
Other issue	55
Overall	57

Table 8: Plaintiff Win Rate in Published Court of Appeals CAFA Opinions from February 2005 to August 2007, by Primary Subject Area

Subject Area	Plaintiff Win Rate (%)
Contract	76
Tort	45
Insurance	29
State labor law	67
Other subject	0
Overall	57

Instead of looking at the plaintiff win rate on appeal, we can compare the rate of reversal when the plaintiff is appellant to the reversal rate when the defendant is appellant. In the CAFA cases the defendants saw a 37% reversal rate, not statistically different from the 29% reversal rate for plaintiffs who appealed. The appellate courts’ concern with CAFA caused them to overcome their usual leanings, which are pro-defendant relative to the district courts,<sup>57</sup> and instead act like the district courts to restrict that statute’s scope. This additional piece of the puzzle tends to show that it

<sup>56</sup>Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448-49 (7th Cir. 2005) (upholding jurisdiction).

<sup>57</sup>See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); Kevin M. Clermont & Theodore Eisenberg, *Judge Harry Edwards: A Case in Point!*, 80 WASH. U. L.Q. 1275 (2002); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 547 (2004).

is opposition to CAFA, rather than any generally pro-plaintiff attitude, that is driving the appellate judges.

Again, we could state all of these results alternatively in terms of the receptive/resistant code, but the story would still be the same. It looks as if judicial resistance to CAFA was at work. In fact, the overall resistance rate in the court of appeals was 60%, quite consistent with the district courts' resistance rate of 64%. CAFA seems to be a matter that unites trial and appellate judges.

#### D. Regression Models

Does the judicial resistance further reveal a judicial inclination that is somewhat political?

On the one hand, it very well could be that the judges were just playing a neutral role. They arguably faced an onslaught of overly enthusiastic defendants by simply applying CAFA's existing restrictions and perhaps by invoking a few "neutral" maxims, such as their duty to construe narrowly any grant of jurisdiction.

On the other hand, the judges, on average, could disapprove of CAFA, in particular.<sup>58</sup> That orientation could affect outcome, on the margin in closely difficult cases, so that the judges' ideology has an impact on win rate.<sup>59</sup> That is, the judicial reaction of favoring plaintiffs might relate to the judges' value-laden view of CAFA. Some of our results do in fact show just how value-laden these CAFA issues are:

- Interestingly, to a statistically significant degree, plaintiffs prevail in the district court more often before Democrats (71%), but even Republicans favor plaintiffs more than half the time (55%).
- As to gender, plaintiffs prevail in the district court slightly more often before females (70%), but even males favor plaintiffs more than half the time (62%). Female Republicans (71%) and female Democrats (68%) showed no real difference, acting like male Democrats (72%). So, male Republicans (48%) are the distinctive group, to a statistically

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<sup>58</sup>Over the years the Judicial Conference expressed opposition to the various earlier versions of the CAFA bill, mainly on grounds of workload and federalism. *See, e.g.*, Letter from Leonidas Ralph Mecham, Sec'y, Judicial Conference of the United States, to Patrick J. Leahy, Ranking Member, Comm. on the Judiciary, United States Senate (Apr. 25, 2003), *reprinted in* 151 Cong. Rec. S1225, S1233 (daily ed. Feb. 10, 2005); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 303-04 (2003). Also, the Conference of Chief Justices, representing the state supreme courts, opposed CAFA. *See* 151 Cong. Rec. S1225, S1248 (daily ed. Feb. 10, 2005); Daniel R. Karon, "How Do You Take Your Multi-State, Class-Action Litigation? One Lump or Two?" *Infusing State Class-Action Jurisprudence into Federal, Multi-State, Class-Certification Analyses in a "CAFA-nated" World*, 46 SANTA CLARA L. REV. 567, 573 n.28 (2006).

<sup>59</sup>*See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).

significant degree.

- The Republican male effect in the district court is most pronounced on issues other than effective date, that is, on issues where ideology arguably matters more or the answer is less clear-cut. If we look at those issues other than effective date, male Republicans give plaintiffs a win rate of 33%, compared to 62% given by other judges. Thus, male Republicans are deciding CAFA cases in a way that expands federal jurisdiction.

These results are important. The Republican male effect is showing up in the district-court published opinions under study, decisions that move the law.<sup>60</sup> In brief, the courts have resisted CAFA, and their motivation appears value-laden.

Our results, developed above one variable at a time, might, however, be explainable by confounding factors. For example, perhaps Republican male judges adjudicate a different mix of CAFA issues than do other judges. Because we lack the benefit of a controlled experiment, or of random assignment given the filtering by the publication decision, we cannot completely eliminate the possibility of confounders influencing our findings.

Nevertheless, we can control for the factors observable in the opinions through regression analysis. In our regression models, the dependent variable is coded

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<sup>60</sup>A recent study likewise shows a pronounced effect of sex in judging. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, <http://ssrn.com/abstract=1001748> (July 2007) (finding that sex discrimination complainants do better before woman judges in published federal appellate opinions). Although that article views itself as bringing “closure” to the debate, we are more cautious. Evidence indicates that the legal system can appear quite different depending on whether one views it from the perspective of the mass of cases or a more filtered set of cases. *See* Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 263-64, 281 (1995); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989). Indeed, previous studies suggest that judicial sex effects that sometimes show up in published opinions do not carry over necessarily to the mass of decisions. One such study is Ashenfelter et al., *supra*, which verified the existence of random assignment in a set of civil rights cases and then exploited random assignment of cases of the same case type to account for case characteristics. Another is Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1453 (1998), which exploited federal district courts’ addressing the same legal issue to control for the principal covariate of concern (strength of cases) in comparing case outcomes across judges in a complete sample of cases addressing the legal issue. Neither Ashenfelter et al. nor Sisk et al. found a judicial sex effect in the mass of decisions.

Boyd et al., *supra*, wrongly deemed use of propensity scores to be essential. In fact, they can be inferior to verified random assignment in controlling for unobserved covariates. Marshall M. Joffe & Paul R. Rosenbaum, *Invited Commentary: Propensity Scores*, 150 AM. J. EPIDEMIOLOGY 327, 327 (1999) (“Absent random assignment, the propensity score is a device for constructing matched pairs or matched sets or strata that balance numerous observed covariates.”). However, Boyd et al. make a substantial contribution to the extent they suggest that observational studies of judges lacking the characteristics of the Ashenfelter et al. and Sisk et al. studies may be improved by considering the use of propensity scores.

“1” if the district-court decision is receptive to federal class action treatment under CAFA and “0” if the decision takes instead a narrow view of CAFA. The explanatory variables include controls for case, judge, and district-level characteristics.

Groups of cases can have substantially different characteristics that lead to varying outcomes and features such as rates of trial and settlement.<sup>61</sup> Three classes of case characteristics that are available in our data are worth noting. First, there is the characteristic of the kind of CAFA issue. As Tables 3 and 5 show, the pattern of CAFA issues varies over time and in outcome. The effective-date issues are the most distinctive type of CAFA dispute, as measured by plaintiff win rate. We therefore include in our regression analysis a dummy variable that equals one if the case involved CAFA’s effective date. Second, subject-area categories, as shown in Tables 1 and 6, also show varying numbers and plaintiff win rates, so we include them in the regressions. But the statistical insignificance of the pattern suggests that this characteristic may not materially contribute to the models. Third, the removed or original genesis of the CAFA filing might be associated with case outcome. We therefore include a dummy variable for the origin of the case, equal to one when the case came to federal court via removal. Additionally, the models include a variable for the date of each opinion’s decision, in order to account for any linear time trend in case outcomes.

Judge characteristics have long been associated with case outcomes, though findings of associations between outcomes and judge characteristics such as political party and gender have been inconsistent.<sup>62</sup> The political party and gender effects reported above suggest including a dummy variable equal to one for Republican male judges. To help control for judges’ age and experience, which might be associated with gender, we also include in the regression models each judge’s birth year and confirmation year.

District characteristics are potentially relevant because, for example, some commentators model judicial behavior as responding to traditional incentives that include desire to minimize workload.<sup>63</sup> If they are right, one would expect judges in busy districts to be less receptive to the increased burden on federal courts resulting from an expansive view of CAFA. We account in the regressions for district-court

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<sup>61</sup>See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1161-72 (1992).

<sup>62</sup>See *supra* notes 81-82.

<sup>63</sup>See, e.g., Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39 (1993) (stating it seems plausible that “judicial effort has a diminishing effect on the satisfactions from judicial voting”).

caseloads by using the district-level measure of weighted case filings per judge.<sup>64</sup>

Table 9 shows the summary statistics for all these variables used in our regression models.

Table 9: Summary Statistics for Regressed District-Court CAFA Cases

Variable	Mean	Std. Dev.	Min.	Max.	Signif.
Judicial receptivity	0.35	0.48	0	1	-
Republican male judge	0.31	0.47	0	1	.019
Republican judge	0.44	0.50	0	1	.095
Female judge	0.26	0.44	0	1	.447
Birth year of judge	1944.47	9.88	1911	1966	.386
Confirmation year of judge	1993.22	7.74	1961	2007	.647
Removed case	0.92	0.27	0	1	.755
District's weighted filings/judge	479.22	112.73	239	927	.336
Decision year	2006.02	0.76	2005	2007	.006
CAFA effective date in issue	0.44	0.50	0	1	.001
Contract case	0.40	0.49	0	1	.999
Tort case	0.15	0.36	0	1	.479
Insurance case	0.24	0.24	0	1	.562
State labor law case	0.08	0.28	0	1	.141
Other type of case	0.12	0.33	0	1	.803

Note: Significance tested in last column is the association between each variable and the dichotomous variable of judicial receptivity; tests are based on Fisher's exact test for dichotomous variables and Mann-Whitney test for continuous variables. N, the number of opinions for which all variables were ascertainable, is 156, representing a set that included opinions from 51 of the 56 districts and 116 of the 133 judges in the full sample of 182.

Table 10 reports regression results for models of judicial receptivity to CAFA, with each model utilizing a different set of variables. The regressions consistently show the Republican male factor to have a significant effect on district-court leaning. The coefficients' size and positive sign mean that such judges are substantially more receptive to an expansive reading of CAFA; the magnitude of the Republican male effect is indeed substantial, with the marginal effect being about a 20% increase in the probability of an expansive CAFA ruling. In addition, whether the case entailed an effective-date dispute consistently had a significant effect (judges appear less resistant to CAFA in later disputes, as the effective-date disputes fade away and the parties adjust to the judicial construction of the statute). Contrariwise, the insignificance of the factor representing docket pressure indicates that judges are not simply resisting CAFA because of a heavy workload. In fact, something is motivating judges other than such narrow self-interest.

<sup>64</sup>See *supra* note 18. Adding dummy variables for the circuit and accounting for district characteristics by use of a multilevel model do not affect these results in any important way.

Table 10: Logistic Regression Results for District-Court CAFA Cases

dependent variable = judicial receptivity			
Independent Variable	(1)	(2)	(3)
Republican male judge	0.836*	0.852*	0.939*
	(2.20)	(2.27)	(2.57)
Birth year of judge	0.039		
	(1.18)		
Confirmation year of judge	-0.044		
	(1.24)		
Removed case	-0.487	-0.446	-0.371
	(0.71)	(0.65)	(0.55)
District's weighted filings/judge	-0.000		
	(0.10)		
Decision date	0.001	0.001	0.001
	(1.18)	(1.23)	(1.47)
CAFA effective date in issue	-0.986*	-1.044*	-0.925*
	(2.16)	(2.28)	(2.18)
Case type (contract = reference)			
tort	0.062	0.002	
	(0.09)	(0.00)	
insurance	0.229	0.258	
	(0.39)	(0.46)	
state labor law	-1.267	-1.197	
	(1.28)	(1.25)	
other subject	-0.150	-0.240	
	(0.20)	(0.32)	
Constant	-10.439	-21.781	-23.188
	(0.22)	(1.23)	(1.49)
Observations	156	156	156
Correctly classified	70.5%	70.5%	72.4%
Reduction in error†	16.4%	16.4%	19.0%
Hosmer-Lemeshow p-value, 10 groups	.501	.862	.636
Akaike information criteria	200.88	196.81	192.19

Note: Logistic regression is appropriate because the dependent variable is dichotomous. Decision date used in models is full date and not merely the year; robust z statistics in parentheses; and standard errors are clustered by district.

† reduction in error = reduction in percent misclassified, compared to 64.7% by the naive model of always predicting against judicial receptivity to CAFA.

+ significant at 10%; \* significant at 5%; \*\* significant at 1%.

This article is not the place to develop our views of the merits of CAFA, beyond noting that its motivation and justification appear to us as questionable<sup>65</sup> and

<sup>65</sup>See *supra* notes 3-4.

that at least initially defendants greeted it with too much enthusiasm.<sup>66</sup> We therefore lean toward finding the judicial resistance to be wise. Of course, we recognize that our evaluation is value-laden, but then so is the judges' reaction.

#### CONCLUSION

CAFA has produced a lot of litigation in its short life. Most typically, the resulting published federal opinion involved a removed contract case, with the dispute turning on the statute's effective date or on federal jurisdiction. Our study of these decisions shows most of the litigation to have been socially wasteful. But the decisions do reveal that trial and appellate judges, with independence and wisdom, have not warmly embraced CAFA.

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<sup>66</sup>*See supra* tbl.5 & accompanying text.