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## Note

### Class Certification as a Prerequisite for CAFA Jurisdiction

*Kevin Lampone\**

After a federal court denies class certification, effectively declaring that the case before it is not a class action, should the case remain in federal court when the only basis for jurisdiction is its status as a class action? Despite Congress intending the Class Action Fairness Act of 2005<sup>1</sup> (CAFA) to allow “the exercise of federal diversity jurisdiction over class actions with interstate ramifications,”<sup>2</sup> recent federal appellate decisions hold that CAFA provides federal jurisdiction even over cases that a court determines do not meet class action requirements.<sup>3</sup> As a result, a single plaintiff’s claim, potentially worth less than the filing fee of the case itself, may remain in federal court under CAFA.<sup>4</sup>

Beyond that unintended result, there are many reasons federal courts should not find that CAFA jurisdiction remains

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

2. S. REP. NO. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34.

3. *Buetow v. A.L.S. Enters., Inc.*, 650 F.3d 1178, 1182 n.2 (8th Cir. 2011); *Metz v. Unizan Bank*, 649 F.3d 492, 500–01 (6th Cir. 2011); *United Steel Workers Int’l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009).

4. *See, e.g., Ronat v. Martha Stewart Living Omnimedia, Inc.*, Civil No. 05-520-GPM, 2008 WL 4963214, at \*7 (S.D. Ill. Nov. 12, 2008) (involving a putative class with individual claims worth less than \$120 each).

after denying class certification.<sup>5</sup> Some of those reasons are broad and abstract: federalism,<sup>6</sup> separation of powers,<sup>7</sup> and comity<sup>8</sup> are just a few. Others are more practical, such as reducing the caseload of federal district courts.<sup>9</sup>

For actual litigants, though, the more important reason is that when a federal court retains jurisdiction in these circumstances, it “sounds [a] death knell” for the plaintiffs.<sup>10</sup> Without the potential for class-wide recovery, the individual representative plaintiff(s) in a putative class action remain in federal court without the resources to make continued litigation feasible.<sup>11</sup> If federal courts do not retain jurisdiction, however, cases initiated in state court and removed to federal court through CAFA are remanded to state court, thereby retaining the potential for a favorable outcome for the representative plaintiff(s) and the putative class.<sup>12</sup>

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5. *But see* G. Shaun Richardson, *Class Dismissed, Now What?: Exploring the Exercise of CAFA Jurisdiction After the Denial of Class Certification*, 39 N.M. L. REV. 121, 144–45 (2009) (detailing support for federal courts retaining jurisdiction).

6. *See* Heather Scribner, *Protecting Federalism Interests After the Class Action Fairness Act of 2005*, 51 WAYNE L. REV. 1417 *passim* (2005) (arguing that CAFA solved a horizontal federalism problem, but created a vertical one).

7. *See* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101 (1998) (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.” (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); *United States v. Richardson*, 418 U.S. 166, 179 (1974))); *cf.* Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 1025 (2009) (arguing that fidelity to jurisdictional limits and principles maintains an appropriate balance between Congress and the federal courts).

8. *Cf.* *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (holding that for supplemental jurisdiction, “[n]eedless decisions of state law should be avoided . . . as a matter of comity”), *superseded by statute*, *Judicial Improvements Act of 1990*, 28 U.S.C. § 1367 (2006).

9. *See* *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1189 (2010) (noting belief among judges that federal dockets contained too many diversity jurisdiction cases).

10. *Cf.* *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (concluding that “the denial of class status sounds the death knell of the litigation” for the representative plaintiff, even without implicating jurisdictional issues).

11. *Id.*

12. *See* *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2376–77 (2011) (rejecting the preclusive effect of denying class certification in federal court on the issue of certification in state court, even where the language of the state certification rule replicates the language of the federal rule); *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996) (finding that “the wide

Accordingly, a number of district courts correctly hold that denial of class certification requires the end of subject-matter jurisdiction through CAFA.<sup>13</sup> But the lack of significant analysis by those courts<sup>14</sup> leaves their holdings susceptible to reversal and criticism, especially as a number of federal appellate courts have begun to hold otherwise.<sup>15</sup>

This Note presents the analysis necessary to conclude that class certification must be a prerequisite for continued jurisdiction through CAFA. Part I begins with an overview of class actions and federal jurisdiction, then places the intersection of class certification and CAFA jurisdiction within that context. Part I concludes by detailing the holdings and analyses of courts and scholars that have addressed this issue.

Part II analyzes the faulty assumptions that courts rely upon to find that CAFA jurisdiction remains after denial of class certification: (1) that Congress intended CAFA jurisdiction to irrevocably attach at the moment of filing<sup>16</sup> and (2) that the principle that post-removal events cannot alter jurisdiction applies to class certification.<sup>17</sup> Part II tests those assumptions and concludes that class certification differs from post-removal events that do not alter jurisdiction, consistent with Congress's

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discretion inherent in the decision as to whether or not to certify a class dictates that each court—or at least each jurisdiction—be free to make its own determination in this regard”).

13. *E.g.*, *McGaughey v. Treistman*, No. 05 Civ. 7069(HB), 2007 WL 24935, at \*3 (S.D.N.Y. Jan. 4, 2007).

14. *See, e.g., id.* (“Because Plaintiff’s motion for class certification must be denied, Plaintiff’s action is no longer a class action, and this Court cannot retain subject-matter jurisdiction in diversity over Plaintiff’s action pursuant to the Class Action Fairness Act.”).

15. *See, e.g., Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011) (“Although district courts have relied upon other language in CAFA to determine that they do not retain jurisdiction following denial of class certification, we agree with the [Seventh Circuit’s] contrary interpretation . . . .”); *Mills v. Foremost Ins. Co.*, No. 806-CV-00986-EAK-AEP, 2011 WL 440163, at \*4 (M.D. Fla. Jan. 31, 2011) (citing three circuit courts of appeals as guiding the district court’s decision to retain jurisdiction); *Long v. Dick’s Sporting Goods, Inc.*, Civil Action No. 3:09CV-353-H, 2010 WL 2044524, at \*2 (W.D. Ky. May 21, 2010) (finding “the reasoning espoused by the Seventh, Ninth and Eleventh Circuits more persuasive” and dismissing “that a few district courts have taken the opposite position”).

16. *E.g., Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010).

17. *E.g., id.* at 807 (“Our conclusion vindicates the general principle that jurisdiction once properly invoked is not lost by developments after a suit is filed.” (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293–95 (1938); *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992) (per curiam))).

intent to include class certification as a factor in determining continued CAFA jurisdiction.

Part III explains why CAFA jurisdiction must end when a court denies class certification. When federal courts deny certification to a putative class, CAFA requires that cases initially filed in state court be remanded. This approach complies with Congress's grant of jurisdiction in CAFA, conforms to established precedent, and effectively balances the competing interests implicated by determinations of both jurisdiction and class certification.

### I. CAFA JURISDICTION AND THE ROLE OF CLASS CERTIFICATION

This Part provides background for understanding the interaction between class certification and CAFA jurisdiction. To begin, Part I presents an overview of the purposes and procedures of class actions, then outlines jurisdiction in federal courts generally and specifically in the context of class actions. Briefly, class actions allow multiple parties to jointly bring a claim or defense, subject to certain limitations.<sup>18</sup> In addition to meeting class action requirements, a class action must also meet jurisdictional requirements—to hear any case, all courts must have jurisdiction both over the parties and over the controversy at issue.<sup>19</sup> For many class actions that otherwise could not be heard in federal court, CAFA provides that jurisdiction. With that background in place, Part I concludes by detailing existing approaches to determining CAFA jurisdiction for putative class actions when a court denies certification, rejecting the case's sole basis for federal jurisdiction.

#### A. CLASS ACTIONS

A class action is a procedural device allowing a group too numerous to effectively sue or be sued individually to do so collectively.<sup>20</sup> Class actions allow “those with small claims for

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18. See *infra* Part I.A (discussing class actions).

19. See *infra* Part I.B (discussing federal jurisdiction). Jurisdiction, as used in this Note, refers to subject-matter jurisdiction. CAFA does not implicate jurisdiction over the parties—personal jurisdiction—and this Note's use of the term “jurisdiction” similarly does not refer to personal jurisdiction.

20. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948). While initially only equitable claims qualified for class action treatment, the procedure now applies to all civil actions. *Id.* See generally 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1751 (3d ed. 2005) (detailing the history and purpose of class actions).

whom individual litigation would be economically irrational to band together in group litigation against a common adversary<sup>21</sup> with one or more plaintiffs representing the class.<sup>22</sup> In addition to enabling plaintiffs to bring otherwise economically infeasible claims, class actions are “peculiarly appropriate” for issues and questions of law that apply to a class and “save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.”<sup>23</sup>

To utilize this procedural device, litigants must fit their putative class within a court’s procedural requirements for class actions. In federal courts, Rule 23 of the Federal Rules of Civil Procedure defines those requirements.<sup>24</sup> Rule 23 includes two sets of procedural hurdles putative class actions must clear to proceed in federal court.<sup>25</sup> First, putative class actions may be filed in federal court only if they meet certain prerequisites,<sup>26</sup> commonly referred to as numerosity, commonality, typicality, and adequacy requirements.<sup>27</sup> Second, the putative class must conform to one of three types of class actions<sup>28</sup> based gen-

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21. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1487 (2008). Class actions satisfy other goals as well. 7A WRIGHT ET AL., *supra* note 20, § 1754 (describing the objectives of class actions as “the efficient resolution of the claims or liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits”).

22. See FED. R. CIV. P. 23(a)(4) (requiring representative plaintiffs to “fairly and adequately protect the interests of the class”).

23. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982) (second alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)).

24. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (“[L]ike the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies ‘in all civil actions and proceedings in the United States district courts . . . .’” (quoting FED. R. CIV. P. 1 and citing *Califano*, 442 U.S. at 699–700)).

25. *Id.* at 1437.

26. FED. R. CIV. P. 23(a).

27. See, e.g., *Shady Grove*, 130 S. Ct. at 1437 (“The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation) . . . .”). For further background on these requirements, see generally 7A WRIGHT ET AL., *supra* note 20, §§ 1759–71.

28. FED. R. CIV. P. 23(b).

erally on the relief sought and the individual and collective effect on putative class members.<sup>29</sup>

Before the case may truly qualify as a class action,<sup>30</sup> the court must certify that the class meets those procedural requirements.<sup>31</sup> Class certification, which must occur “at an early practicable time,”<sup>32</sup> requires federal courts to define the class<sup>33</sup> and perform a rigorous analysis to ensure the class, as defined, conforms to the requirements.<sup>34</sup> That rigorous analysis does not allow for assumptions about the validity of the facts satisfying class certification requirements.<sup>35</sup>

Rule 23, as described above, provides the structure and procedure for class actions in federal court. Most states have similar, if not identical, rules for their courts;<sup>36</sup> however, state rules—even those with language identical to the federal rule—often apply more broadly, allowing more putative classes to fit within their requirements than federal courts allow.<sup>37</sup> Regardless of forum, before a putative class may begin making its case for class treatment it must first establish that the court has jurisdiction to hear the case.<sup>38</sup>

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29. 20 WRIGHT ET AL., *supra* note 20, § 77. *See generally* 7AA WRIGHT ET AL., *supra* note 20, §§ 1772–84.1.

30. *See Shady Grove*, 130 S. Ct. at 1438 (stating that both “eligibility and certifiability . . . are preconditions” for class treatment under the federal rule and rejecting the argument that the two are distinct issues); Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1778 (2008) (describing class actions as “constructs approved (indeed, created) by the court’s certification order”).

31. FED. R. CIV. P. 23(c)(1).

32. *Id.* at 23(c)(1)(A).

33. *Id.* at 23(c)(1)(B).

34. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008); *see also* *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

35. *In re Hydrogen Peroxide*, 552 F.3d at 320; *see also Falcon*, 457 U.S. at 160 (“[A]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable.”).

36. *Compare, e.g.*, FED. R. CIV. P. 23(a)–(b) (providing the federal rules for class actions), *with* W. VA. R. CIV. P. 23(a)–(b) (providing West Virginia’s rules for class actions).

37. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2377–78 (2011) (comparing West Virginia’s rule to its federal counterpart); Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2006) (noting plaintiffs’ greater difficulty achieving certification in federal courts than in state courts); Marcus, *supra* note 30, at 1797.

38. 7A WRIGHT ET AL., *supra* note 20, § 1755.

## B. FEDERAL JURISDICTION

Jurisdiction, as used in this Note, refers to the power of a court to hear a case. This form of jurisdiction—subject-matter jurisdiction—presumptively exists for cases filed in state courts.<sup>39</sup> Federal courts, however, are courts of limited jurisdiction and may only hear specifically defined types of cases.<sup>40</sup>

Both the Constitution and Congress provide the limits on federal courts' jurisdiction.<sup>41</sup> The Constitution defines the ultimate bounds of that jurisdiction,<sup>42</sup> acting as a broad federalism-based check protecting individual states.<sup>43</sup> Those bounds are further limited by Congress's power over federal jurisdiction.<sup>44</sup> As a separation-of-powers-based check on the judicial branch,<sup>45</sup> the Constitution authorizes Congress to regulate federal jurisdiction.<sup>46</sup> In practice, Congress must authorize and define con-

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39. See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 7, at 27 (6th ed. 2002); *id.* § 45, at 289; Bloom, *supra* note 7, at 987 & n.96.

40. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("It is a fundamental precept that federal courts are courts of limited jurisdiction."), *superseded by statute*, Judicial Improvements Act of 1990, 28 U.S.C. § 1367; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803) (holding that federal courts may not exercise jurisdiction beyond the limits set by both the Constitution and Congress).

41. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Marbury*, 5 U.S. (1 Cranch) at 173–80.

42. U.S. CONST. art. III, § 2, *amended by* U.S. CONST. amend. XI; Bloom, *supra* note 7, at 987; *see also Marbury*, 5 U.S. (1 Cranch) at 174.

43. Letter from James Madison to Edward Everett (Aug. 28, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 383, 395–98 (Gaillard Hunt ed., 1910).

44. *Ruhrgas*, 526 U.S. at 583; *see also Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512–13 (1868) ("[J]urisdiction . . . is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.'" (citation omitted)); Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097, 1125–27 (1985) (explaining that Congress's power to limit the jurisdiction of lower federal courts is derived from the Constitution).

45. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101 (1998).

46. U.S. CONST. art. III, §§ 1–2, *amended by* U.S. CONST. amend. XI (defining the scope of federal jurisdiction and granting Congress the power to establish federal courts below the Supreme Court and to make exceptions and regulations for the exercise of federal jurisdiction); *Ruhrgas*, 526 U.S. at 583; Bloom, *supra* note 7, at 987; *see also Ex parte McCardle*, 74 U.S. (7 Wall.) at 512–13.

stitutionally permissible jurisdiction before federal courts may exercise it.<sup>47</sup>

### C. CAFA: FEDERAL JURISDICTION FOR CLASS ACTIONS

While some class actions come within federal jurisdiction through the generally applicable grants of federal jurisdiction over cases involving federal laws (federal-question jurisdiction) or citizens of different states (diversity jurisdiction),<sup>48</sup> class actions often do not fit within those grants.<sup>49</sup> For many class actions, CAFA provides jurisdiction to federal courts.<sup>50</sup>

Congress enacted CAFA in response to “the numerous problems with our current class action system.”<sup>51</sup> Because state court procedural rules often allow for certification of more class actions, Congress used CAFA to expand federal jurisdiction to

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47. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). The opposite approach—that federal courts may always exercise jurisdiction over a case permitted by the Constitution unless Congress creates an exception—appears just as sensible, but was rejected by the judiciary. See *Ex parte McCardle*, 74 U.S. (7 Wall.) at 513 (explaining that Congress’s affirmative grant of jurisdiction in the Judiciary Act of 1789, derived from Congress’s power to make exceptions and regulations to federal jurisdiction, implicates the negation of any jurisdiction not congressionally authorized (citing *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810))).

48. U.S. CONST. art. III, § 2, amended by U.S. CONST. amend. XI; 28 U.S.C. § 1331 (2006) (federal question); *id.* § 1332 (diversity).

49. See Michael D.Y. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233, 235 & n.5 (2011), <http://yalelawjournal.org/images/pdfs/945.pdf> (describing barriers to federal jurisdiction over class actions prior to CAFA’s enactment); *cf.* Burbank, *supra* note 21, at 1495 (noting that in the context of torts, only state law frequently applies, eliminating federal-question jurisdiction).

50. Class actions may have independent bases for subject-matter jurisdiction, but in those cases class certification will not affect the basis for jurisdiction. See, e.g., *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 380 (7th Cir. 2010) (noting that CAFA jurisdiction was only implicated after standard diversity jurisdiction was defeated); Burbank, *supra* note 21, at 1450 (noting that CAFA only applies to class actions featuring classes of more than 100 persons and more than \$5 million in controversy). Class actions with fewer than 100 persons are certifiable under Rule 23, but do not qualify for CAFA jurisdiction. See *Phila. Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) (allowing a class of twenty-five plaintiffs under Rule 23). This Note examines the sections of CAFA that comprise “the heart” of the statute, but CAFA also provides a Consumer Bill of Rights and jurisdiction for mass actions—certain types of cases with over 100 plaintiffs—that would not otherwise meet class action requirements. GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005: WITH COMMENTARY AND ANALYSIS 9–22, 32–38 (2005).

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

include most interstate class actions.<sup>52</sup> Simply put, Congress sought to utilize federal class action procedures to effect substantive change in class action litigation; more accurately, Congress expanded federal jurisdiction to allow federal class action procedures to effect those substantive changes.<sup>53</sup>

CAFA effects these changes through an expansion of diversity jurisdiction.<sup>54</sup> While the Constitution allows for federal jurisdiction so long as minimal diversity<sup>55</sup> exists, the generally applicable diversity statute, 28 U.S.C. § 1332, requires complete diversity.<sup>56</sup> CAFA enables federal jurisdiction for class actions with only minimal diversity,<sup>57</sup> so long as more than \$5 million is in controversy and the class contains at least 100 members.<sup>58</sup> CAFA applies the Federal Rules of Civil Procedure's definition of a class action to define cases for which CAFA may provide jurisdiction,<sup>59</sup> but does not make clear if that definition

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52. *Id.* at 4–5, 2005 U.S.C.C.A.N. at 5–7.

53. *See, e.g.*, Marcus, *supra* note 30, at 1788–89 (“[CAFA] was justified on the basis of essentially two jurisdictional policies: it provided that federal class action procedures would be available for handling many state law class action cases, and it ensured a federal forum for cases of national significance.”); David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1310–11 (2007) [hereinafter Marcus, *Erie, CAFA, and Federalism*] (noting that “CAFA simply expands diversity jurisdiction,” but suggesting that “Congress cloak[ed] its substantive goal of limiting liability for state law causes of action in a procedural guise”).

54. *See* S. REP. NO. 109-14, at 5, 2005 U.S.C.C.A.N. at 6.

55. Rather than requiring that all plaintiffs' citizenship differ from all defendants', as with complete diversity, only one plaintiff's and one defendant's citizenship must differ. U.S. CONST. art. III, § 2, *amended by* U.S. CONST. amend. XI.

56. 28 U.S.C. § 1332(a) (2006) (limiting diversity jurisdiction to actions between “citizens of different States”); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (requiring complete diversity under the statute); *see* *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (clarifying that *Strawbridge's* complete diversity requirement derived from the statute, not the Constitution, and reaffirming that the Constitution requires only minimal diversity). *See generally* WRIGHT & KANE, *supra* note 39, § 24, 158–60 (describing implications and evolution of complete and minimal diversity).

57. 28 U.S.C. § 1332(d)(2) (limiting federal jurisdiction to class actions in which “any member of a class of plaintiffs is a citizen of a state different from any defendant”).

58. *Id.* (amount in controversy); *id.* § 1332(d)(5)(B) (numerosity).

59. *Id.* §§ 1332(d)(1)(B), 1711(2); *see also infra* notes 130–36 and accompanying text (arguing that CAFA's use of the Rule 23 definition of class action weighs against determining jurisdiction only at the time of filing suit). Rule 23 sets out the factors courts use to make certification decisions, thereby defining class actions.

should include cases filed as class actions but denied class certification.<sup>60</sup>

For cases meeting its requirements, CAFA allows for jurisdiction both when the case is initiated in federal court and in most cases when the defendant seeks to remove cases initiated in state court.<sup>61</sup> Regardless of which method brings a putative class action to federal court, the court must approve or reject certification.<sup>62</sup> When courts deny certification, CAFA does not provide a clear answer to the question raised by the following cases: what happens to jurisdiction premised on a case's classification as a class action after the court rejects that classification?<sup>63</sup>

#### D. CLASS CERTIFICATION'S ROLE IN CAFA JURISDICTION

Generally, federal courts have reached one of three conclusions about what effect the denial of class certification has on CAFA jurisdiction<sup>64</sup>: (1) that CAFA jurisdiction must end with the denial of certification,<sup>65</sup> (2) that CAFA jurisdiction remains, but the court should not exercise that jurisdiction,<sup>66</sup> or (3) that

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60. See 28 U.S.C. § 1332(d)(8); *Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011) ("CAFA does not specifically address whether a district court may retain jurisdiction following the denial of class certification.").

61. See 28 U.S.C. § 1453(b). For background on removal, see generally Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 61–66 (2008) (types of jurisdictional provisions in removal statutes); Steven Plitt & Joshua D. Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine*, 56 DEPAUL L. REV. 107, 109–13 (2006) (explaining removal).

62. See, e.g., *Clausnitzer v. Fed. Express Corp.*, 621 F. Supp. 2d 1266, 1268–69 (S.D. Fla. 2008) (examining certification decisions both in cases initially filed in federal court and in cases removed to federal court). Remand implicates additional considerations, such as forum-shopping and appellate consequences, however. See *Allen-Wright v. Allstate Ins. Co.*, Civil Action No. 07-cv-4087, 2009 WL 1285522, at \*2 n.6 (E.D. Pa. May 5, 2009).

63. *Metz*, 649 F.3d at 500; *United Steel Workers Int'l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091 (9th Cir. 2010) ("Even though CAFA indisputably creates original federal jurisdiction prior to class certification, the statute does not say whether the post-removal denial of class certification divests the federal courts of jurisdiction . . .").

64. See *Allen-Wright*, 2009 WL 1285522, at \*1 n.5 (contrasting outcomes in eighteen cases that ruled on the issue).

65. See, e.g., *Salazar v. Avis Budget Grp., Inc.*, No. 07-cv-0064-IEG (WMC), 2008 WL 5054108, at \*5–6 (S.D. Cal. Nov. 20, 2008); *Clausnitzer*, 621 F. Supp. 2d at 1269–70; *McGaughey v. Treistman*, No. 05 Civ. 7069(HB), 2007 WL 24935, at \*3 (S.D.N.Y. Jan. 4, 2007).

66. See, e.g., *Giannini v. Schering-Plough Corp.*, No. C-06-06823-SBA, 2007 WL 1839789, at \*2–4 (N.D. Cal. June 26, 2007) (applying supplemental-jurisdiction standards to decline exercise of jurisdiction); see also Richardson,

CAFA jurisdiction remains and the court should continue to exercise it.<sup>67</sup> The following Section examines the reasoning supporting each of these conclusions.

### 1. Courts Denying Class Certification Do Not Retain Jurisdiction Through CAFA

A number of federal district courts across the country hold that denial of class certification ousts jurisdiction through CAFA.<sup>68</sup> Those courts have at times qualified their holdings, for example deciding that jurisdiction is ousted only if “it is clear there is no foreseeable possibility that the plaintiff may obtain certification in the future.”<sup>69</sup> Courts that have made unqualified holdings have provided little support for their findings, as in *McGaughey v. Treistman*: “Because Plaintiff’s motion for class certification must be denied, Plaintiff’s action is no longer a class action, and this Court cannot retain subject-matter jurisdiction in diversity over Plaintiff’s action pursuant to the Class Action Fairness Act.”<sup>70</sup> In contrast, courts holding that jurisdiction remains provide more support and analysis, whether they exercise it or not.

### 2. Courts Denying Class Certification Retain Jurisdiction Through CAFA, but Should Not Exercise It

Some courts have determined, and scholars have argued, that federal courts retain jurisdiction after denial of class certification, but that jurisdiction should not be exercised based on discretionary standards of either supplemental jurisdiction<sup>71</sup> or the abstention doctrine.<sup>72</sup> For example, in *Giannini v. Schering-Plough Corp.*, the Northern District of California held that jurisdiction for CAFA is only measured at the time of filing and therefore determined it retained jurisdiction.<sup>73</sup> The court went on, however, to reason that the original claim supporting jurisdiction was dismissed when the class certification was denied<sup>74</sup>

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*supra* note 5, at 141–47 (arguing for use of abstention to decline exercise of jurisdiction).

67. See, e.g., *Metz*, 649 F.3d at 500–01.

68. E.g., *Salazar*, 2008 WL 5054108, at \*5–6; *Clausnitzer*, 621 F. Supp. 2d at 1269–70; *McGaughey*, 2007 WL 24935, at \*3.

69. *Clausnitzer*, 621 F. Supp. 2d at 1270.

70. *McGaughey*, 2007 WL 24935, at \*3.

71. See, e.g., *Giannini*, 2007 WL 1839789, at \*2–4.

72. Richardson, *supra* note 5, at 141–47.

73. *Giannini*, 2007 WL 1839789, at \*2.

74. See *id.* at \*3.

and analyzed the claim anew in the context of supplemental jurisdiction.<sup>75</sup> Concluding that the elements of supplemental jurisdiction analysis—judicial economy, convenience and fairness, and comity—were best served by remand to state court, the court declined to exercise its jurisdiction.<sup>76</sup>

Another approach is that after denial of class certification, courts retain CAFA jurisdiction, but should decline to exercise it through the abstention doctrine.<sup>77</sup> The abstention doctrine balances the interests of federal courts hearing a case “against countervailing concerns, such as comity and federalism.”<sup>78</sup> In the context of CAFA jurisdiction after a court denies class certification, application of the abstention doctrine acknowledges the minimal interest federal courts have in retaining cases that no longer meet class action requirements.<sup>79</sup> Implicit in this application of abstention is that federal courts always retain jurisdiction after denying class certification.

Though both of these approaches properly conclude that CAFA jurisdiction should not be exercised after a court denies class certification, they only reach that conclusion after finding that certification has no effect on CAFA jurisdiction. In so finding, both approaches rely on the same reasoning as courts following the approach examined in the following subsection.<sup>80</sup>

### 3. Courts Denying Class Certification Retain Jurisdiction Through CAFA, and Should Exercise It

Other courts hold that they retain jurisdiction through CAFA despite denying class certification.<sup>81</sup> These courts tend to rely on two assumptions. One assumption focuses on use of the word “filed” in CAFA’s definition of a class action.<sup>82</sup> The other assumption relies on the general principle that once a court acquires subject-matter jurisdiction, later events do not eliminate

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75. *Id.* at \*3–4. Supplemental jurisdiction grants courts jurisdiction over claims that would not independently establish jurisdiction by latching onto other related claims that do establish jurisdiction. *See* 28 U.S.C. § 1367 (2006).

76. *Giannini*, 2007 WL 1839789, at \*4.

77. *See Richardson*, *supra* note 5, at 141–47.

78. *Id.* at 141.

79. *See id.*

80. *See id.* at 128–29.

81. *Allen-Wright v. Allstate Ins. Co.*, Civil Action No. 07-cv-4087, 2009 WL 1285522, at \*1 n.5 (E.D. Pa. May 5, 2009) (citing eight such cases).

82. *E.g.*, *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010); *Allen-Wright*, 2009 WL 1285522, at \*3.

that jurisdiction.<sup>83</sup> Both of those assumptions are explained in *Cunningham Charter Corp. v. Learjet, Inc.*<sup>84</sup> In that case, the Seventh Circuit overturned a federal district court's remand to state court after the district court had denied class certification.<sup>85</sup>

To come to that decision, the Seventh Circuit first looked to CAFA's definition of a class action.<sup>86</sup> CAFA defines a class action as "any civil action *filed* under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."<sup>87</sup> Though the court recognized some ambiguity in that definition's interaction with other parts of CAFA, it relied on the definition's use of the word *filed* to determine that jurisdiction attaches when the suit is commenced.<sup>88</sup>

After finding that CAFA jurisdiction attached upon commencement of a suit, the court further held that this jurisdiction cannot be ousted by later developments.<sup>89</sup> Calling this holding a "general principle," the court cited *St. Paul Mercury Indemnity Co. v. Red Cab Co.*<sup>90</sup> In *St. Paul Mercury*, the plaintiff filed a complaint in state court that alleged damages sufficient to meet the minimum amount in controversy requirement for federal jurisdiction.<sup>91</sup> After the defendant removed the case to federal court, the plaintiff amended the complaint to lower the alleged damages below the jurisdictional threshold.<sup>92</sup> On review, the Supreme Court held that jurisdiction remained, however, analogizing the issue to when a party changes place of citizenship after a complaint is filed to destroy diversity juris-

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83. *E.g.*, *Cunningham*, 592 F.3d at 807; *Allen-Wright*, 2009 WL 1285522, at \*3–4.

84. *Cunningham*, 592 F.3d at 806–07. While other courts of appeals and district courts have addressed the issue, *Cunningham* includes the relevant analysis from those other similar cases. *See* cases cited *supra* note 3.

85. *Cunningham*, 592 F.3d at 804–05.

86. *Id.* at 806; *see also* *Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011).

87. 28 U.S.C. § 1332(d)(1)(B) (2006) (emphasis added).

88. *Cunningham*, 592 F.3d at 806 ("But remember that jurisdiction attaches when a suit is *filed* as a class action, and that invariably precedes certification."); *see also Metz*, 649 F.3d at 500.

89. *Cunningham*, 592 F.3d at 807; *see also Metz*, 649 F.3d at 500–01.

90. *Cunningham*, 592 F.3d at 807 (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293–95 (1938)); *see also Metz*, 649 F.3d at 500–01.

91. *St. Paul Mercury*, 303 U.S. at 284.

92. *Id.* at 285.

diction.<sup>93</sup> In situations such as these, courts seek to prevent parties from forum manipulation by holding that these actions do not oust jurisdiction.<sup>94</sup> Conversely, where jurisdiction is not yet properly invoked, destroying the basis for jurisdiction and making remand to state court proper.<sup>95</sup> Though the Seventh Circuit recognized exceptions to this principle, and their potential application to CAFA, it found the exceptions were not applicable in *Cunningham*.<sup>96</sup>

*Cunningham* exemplifies the reasoning behind federal courts retaining jurisdiction through CAFA after a federal court denies class certification; but it is just one example. The Sixth, Eighth, Ninth, and Eleventh Circuits<sup>97</sup> have similarly concluded that jurisdiction through CAFA does not depend on class certification.<sup>98</sup> However, this line of reasoning is troubling for the reasons detailed below,<sup>99</sup> making further analysis exploring the two assumptions exemplified by *Cunningham* necessary. The following Part analyzes the reasoning of those federal courts that, like *Cunningham*, find jurisdiction remains through CAFA despite denying class certification.

## II. CAFA JURISDICTION DOES NOT IRREVOCABLY ATTACH AT THE MOMENT OF FILING

Courts holding that CAFA jurisdiction remains despite denying class certification tend to rely on two erroneous assumptions: (1) that CAFA jurisdiction fully attaches when the case is filed as a class action, and (2) that once CAFA jurisdic-

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93. *Id.* at 289–90, 294–95.

94. *See id.* at 294 (finding that “the plaintiff ought not to be able to . . . bring the cause back to the state court at his election,” subjecting the defendant’s right to removal to the plaintiff’s caprice).

95. *Cf. id.* at 295 (when removing defendants are dismissed, leaving only parties involuntarily in federal court, courts should remand to state court).

96. *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010). Examples the *Cunningham* court suggests include mootness arising during litigation, amended pleadings eliminating jurisdiction, or when there never really was jurisdiction to start with. *Id.*; *see also Metz v. Unizan Bank*, 649 F.3d 492, 501 n.4 (6th Cir. 2011).

97. *Buetow v. A.L.S. Enters., Inc.*, 650 F.3d 1178, 1182 n.2 (8th Cir. 2011); *Metz*, 649 F.3d at 500–01; *United Steel Workers Int’l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009).

98. A number of district courts have come to similar conclusions. *E.g.*, *Allen-Wright v. Allstate Ins. Co.*, Civil Action No. 07-cv-4087, 2009 WL 1285522, at \*3–4 (E.D. Pa. May 5, 2009).

99. *See infra* Part II.

tion attaches at filing, it cannot be ousted by later events.<sup>100</sup> These courts, however, have recognized the potential flaws in those assumptions.<sup>101</sup> This Part examines those assumptions and their flaws—both of which weigh against federal courts retaining jurisdiction through CAFA after denying class certification.

#### A. CAFA DOES NOT REQUIRE COURTS TO DETERMINE JURISDICTION SOLELY AT THE TIME OF FILING

To determine that jurisdiction should only be measured at the time of filing, federal courts holding that jurisdiction remains despite denying class certification misapply CAFA's definition of a class action.<sup>102</sup> Because CAFA's definition of a class action uses the phrase "filed under,"<sup>103</sup> these federal courts conclude that upon the *act* of filing a complaint (as a class action) CAFA jurisdiction irrevocably attaches.<sup>104</sup> This conclusion erroneously relies on the word "filed" only meaning "to file,"<sup>105</sup> rather than "on file,"<sup>106</sup> instead.

That meaning, focused solely on the act of filing rather than the continuing status of a case remaining on file, is incorrect for three reasons. First, Congress used the word "com-

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100. See *supra* Part I.C.3.

101. See, e.g., *Cunningham*, 592 F.3d at 806 (noting that 28 U.S.C. § 1332(d)(8) may imply CAFA jurisdiction is limited to cases where courts certify a class and that § 1332(d)(1)(C) may mean the lack of a certification order puts a case outside the definition of a class action); *Allen-Wright*, 2009 WL 1285522, at \*3 (noting that denial of class certification should be addressed differently than changes in citizenship or amount in controversy); cf. *United Steel Workers*, 602 F.3d at 1092 n.3 (recognizing exceptions to the rule of "once jurisdiction, always jurisdiction," including situations where there was "no jurisdiction to begin with because the jurisdictional allegations were frivolous from the start"); *Cunningham*, 592 F.3d at 807 (same).

102. See *supra* Part I.C.3.

103. 28 U.S.C. §§ 1332(d)(1)(B), 1711(2) (2006); see *Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 39–40 (1st Cir. 2009) ("To satisfy CAFA's definition of a class action, a case need only be 'filed under' either Federal Rule of Civil Procedure 23 or some state-law analogue of that rule." (emphasis omitted)).

104. E.g., *Cunningham*, 592 F.3d at 806 (stating that jurisdiction attaches when a suit is *filed* as a class action); see also Richardson, *supra* note 5, at 135, 139–40 ("Under CAFA's plain language, CAFA jurisdiction attaches the moment a pleading featuring class allegations . . . is filed, and . . . an order denying class certification . . . cannot destroy that jurisdiction.>").

105. "To file" meaning the act of "submit[ting] documents necessary to initiate a legal proceeding." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 467 (11th ed. 2003).

106. "On file" meaning "in or as if in a file for ready reference." *Id.*

menced” in the statute to express that meaning and to narrowly focus on the moment of filing. Second, Congress’s other uses of the word “filed” throughout CAFA, and other structural considerations, similarly demonstrate Congress understood the phrase “filed under” to require continuing status as a class action. Last, CAFA’s reliance on Rule 23’s definition of a class action shows Congress did not intend for courts to measure jurisdiction solely at the instant of filing, but instead intended CAFA’s jurisdiction only to apply to a case that remains a class action filed under Rule 23. Each of these reasons is examined below.

First, federal courts finding CAFA jurisdiction remains despite denying class certification mistakenly apply the meaning of the word “commenced”<sup>107</sup> to the phrase “filed under.”<sup>108</sup> For instance, in *Cunningham*, the Seventh Circuit stated: “[CAFA] jurisdiction attaches when a suit is *filed* as a class action, and that invariably precedes certification.”<sup>109</sup> There, the Seventh Circuit forces the word “filed” to mean initiated or begun, as it focuses on a single point in time that must precede certification.<sup>110</sup> But when Congress intended to convey that same meaning (initiated or begun), it used the word “commenced.”<sup>111</sup> To make clear that CAFA would only apply to cases initiated after the statute’s enactment, Congress made clear the statute would only apply to class actions “*commenced* on or after the date of enactment” of CAFA.<sup>112</sup>

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107. “Commence” may be used as a transitive verb meaning “to enter upon: BEGIN” or as an intransitive verb meaning “to have or make a beginning: START.” *Id.* at 249.

108. “File” may be used as a transitive verb meaning “to place among official records as prescribed by law” or “to initiate (as a legal action) through proper formal procedure.” *Id.* at 467. “File” may also be used as an intransitive verb meaning “to submit documents necessary to initiate a legal proceeding.” *Id.*

109. *Cunningham*, 592 F.3d at 806.

110. *Id.*

111. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 14 (codified in scattered sections 28 U.S.C.).

112. *Id.* (emphasis added) (“The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.”). What exactly the word “commenced” meant was itself a matter of great debate, see, e.g., Lonny Sheinkopf Hoffman, *The “Commencement” Problem: Lessons from a Statute’s First Year*, 40 U.C. DAVIS L. REV. 469, 474–509 (2006) (examining issues raised in defining the word “commenced”), but it certainly more precisely means what courts have attempted to define the phrase “filed under” to mean here.

Using both the word “commenced” and the word “filed” shows Congress understood the two words to have different meanings.<sup>113</sup> If Congress intended its definition of cases to which CAFA’s jurisdictional grant applies to mean all cases initiated or begun under Rule 23 of the Federal Rules of Civil Procedure (or a state-law analogue),<sup>114</sup> “commenced” is the word used later in the statute to mean exactly that. Because “certain language in one part of the statute and different language in another” creates an assumption that “different meanings were intended,”<sup>115</sup> CAFA’s use of the word “filed” instead of the word “commenced” in the definition of a class action supports requiring class certification for continued CAFA jurisdiction.<sup>116</sup>

Second, in addition to the filed/commenced distinction, numerous other examples in the structure of CAFA similarly require the word “filed” to mean more than simply the moment of filing. One example is the repeated use of the phrase “originally filed” in other sections of CAFA.<sup>117</sup> While the word “filed” is susceptible to the meaning federal courts have given it in order to retain jurisdiction after denying class certification,<sup>118</sup> there is no need to modify it with “originally” if Congress intended it to mean, or believed it would be interpreted to mean,

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113. The word “filed” is susceptible to the meaning courts like *Cunningham* have imputed to it, *see supra* note 108 (noting that the definition of “file” includes initiating a legal action), but given that the word “commenced” more precisely means the same thing, *see supra* note 107, the same meaning should not unnecessarily be applied to both words. *See infra* note 115 and accompanying text.

114. The inclusion of state-law analogues could suggest Congress’s focus narrowed to the moment of filing, since a class action is never filed under state procedural rules in federal court. *See supra* note 24 and accompanying text. But CAFA could not supply jurisdiction for removal if it *only* applied to cases filed under the federal law, since cases filed in state court could never apply the federal rule without CAFA first providing federal jurisdiction. Therefore, it must apply to cases filed under both state and federal class action rules. *Cf. infra* notes 124–29 and accompanying text (finding that 28 U.S.C. § 1332(d)(8) plays a similar role in creating jurisdiction that would not otherwise exist for cases filed in state court).

115. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:6, at 194 (6th rev. ed. 2000)).

116. *Cf. Hoffman*, *supra* note 112, at 482–83 (comparing conflicting interpretations of “commenced” and finding courts consistently apply the meaning that more “strictly constru[es] the scope of federal jurisdiction”).

117. *E.g.*, 28 U.S.C. § 1332(d)(3), (3)(B), (3)(E), (4)(A)(i)(I), (4)(A)(i)(II)(cc), (4)(A)(i)(III) (2006).

118. *See supra* note 113 (arguing that this definition is not incorrect, but in this context that definition should not be applied as it makes use of the word “commenced” later in the statute unnecessary).

the same thing as the word “commenced.” Just as courts should assume Congress does not intend the same meaning for two different words,<sup>119</sup> courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”<sup>120</sup> If “filed under” already means “originally filed,” adding “originally” in other areas of the statute requires “originally” to have no meaning.

Additional examples found in the structure of CAFA that weigh against measuring jurisdiction only at the moment of filing include 28 U.S.C. § 1332(d)(1)(C), which states CAFA’s definition of a class certification order, and 28 U.S.C. § 1332(d)(8), which states when CAFA’s jurisdictional grant applies. Section 1332(d)(1)(C) defines a class certification order as “approving the treatment of some or all aspects of a civil action as a class action.”<sup>121</sup> The Seventh Circuit recognized in *Cunningham* that “this could mean that in the absence of such an order a suit is not a class action,”<sup>122</sup> and therefore CAFA jurisdiction cannot continue. But, by first focusing on jurisdiction irrevocably attaching at the moment of filing, that court held that a class certification order is unnecessary for continued jurisdiction.<sup>123</sup> Only by first assuming jurisdiction is measured solely at the time of filing, however, does that reasoning hold.

The Seventh Circuit similarly dismissed 28 U.S.C. § 1332(d)(8), which states that CAFA’s jurisdictional grant “appl[ies] to any class action before or after the entry of a class certification order.”<sup>124</sup> Calling this provision irrelevant, the court guessed that “[p]robably all this means is that the defendant can wait until a class is certified before deciding whether to remove the case to federal court” through CAFA.<sup>125</sup> Other courts, however, have recognized that this provision

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119. See *supra* note 115 and accompanying text.

120. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

121. 28 U.S.C. § 1332(d)(1)(C).

122. *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010).

123. *Id.* (“But remember that jurisdiction attaches when a suit is *filed* as a class action, and that invariably precedes certification. All that [the definition] means is that a suit filed as a class action cannot be *maintained* as one without an order certifying the class. That needn’t imply that unless the class is certified the court loses jurisdiction of the case.” (alterations in original)); see also *Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011).

124. 28 U.S.C. § 1332(d)(8).

125. *Cunningham*, 592 F.3d at 806; see also *Metz*, 649 F.3d at 500.

means CAFA requires a certification order to provide continuing jurisdiction.<sup>126</sup>

While the Seventh Circuit considered § 1332(d)(8) irrelevant to class certification's role in CAFA jurisdiction,<sup>127</sup> in fact the provision is necessary for class actions filed directly in federal court. If CAFA only applied after a certification order, it could never provide jurisdiction from the commencement of the suit through that order. Instead, it would *only* provide jurisdiction in the circumstances the *Cunningham* court described (when a case commences in state court, is certified by that court, and then removed by the defendant to federal court). Of course, under the Seventh Circuit's approach, only the moment of filing matters for CAFA jurisdiction.<sup>128</sup> But if only the moment of filing matters in determining CAFA jurisdiction, there is no reason to add that CAFA jurisdiction applies before and after certification. Again, the Seventh Circuit's approach to class certification's effect on CAFA jurisdiction ignores the principle that courts should "give effect, if possible, to every clause and word of a statute."<sup>129</sup>

Lastly, and perhaps most importantly, CAFA's reliance upon Rule 23 of the Federal Rules of Civil Procedure to define class actions<sup>130</sup> militates against measuring jurisdiction only at the moment of filing. Rule 23 contemplates its numerosity, commonality, typicality, and representative adequacy requirements as prerequisites<sup>131</sup> to successfully "filing" a class action. The Supreme Court similarly calls Rule 23's certification factors "preconditions for maintaining a class action;" indeed, the

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126. See, e.g., *Ronat v. Martha Stewart Living Omnimedia*, Civil No. 05-520-GPM, 2008 WL 4963214, at \*7 (S.D. Ill. Nov. 12, 2008) ("In examining the statute itself, it is clear to this Court that CAFA does not provide a basis for subject-matter jurisdiction after a court denies class certification. By its terms, it 'shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.' Under the statute, 'the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action.' This is no longer a class action and so the case ends here." (citations omitted)).

127. See *supra* note 123 and accompanying text.

128. See *supra* note 123 and accompanying text.

129. See *supra* note 120 and accompanying text.

130. See 28 U.S.C. § 1332(d)(1)(B) (2006) (defining a class action as any civil action brought to federal court through Rule 23 or a state-law analogue); *id.* § 1711(2) (same).

131. FED. R. CIV. P. 23(a) (listing the class action requirements in a section entitled "Prerequisites"); see *Ronat*, 2008 WL 4963214, at \*4 ("[T]he Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy . . . are prerequisites to class certification . . .").

Court clearly articulated how Rule 23(a)'s prerequisites impact class allegations: "[T]he line between eligibility and certifiability is entirely artificial."<sup>132</sup> Certification must occur<sup>133</sup> and Rule 23 instructs courts and litigants to determine if a putative class action meets Rule 23's preconditions "[a]t an early practicable time."<sup>134</sup> Until that time, however, the putative class action is no more than that—litigants have no right to proceed as a class if Rule 23's prerequisites are not met, and if the putative class is not certifiable, it was never eligible for class treatment. That length of time, from the moment of filing until certification, explains why 28 U.S.C. § 1332(d)(8) must specify that CAFA supplies jurisdiction before, as well as after, the certification decision. If not, federal courts would exercise jurisdiction without any congressional authorization. Thus, a putative class action is not truly a class action until the inextricably intertwined eligibility and certification questions are answered at certification. Because CAFA relies on that definition and process to determine if its jurisdictional grant applies to a putative class action, CAFA jurisdiction not fully or properly invoked until certification.

Taken together, the above-referenced elements of CAFA lead to the conclusion that jurisdiction should not be measured solely at the instant of filing, but instead also at class certification, when the court determines the case is, in fact, a class action. Courts like *Cunningham*, however, preclude that finding by presuming that the moment of filing is the only instant when jurisdiction must be measured.<sup>135</sup> Similarly, by making that presumption, these courts preclude the finding that the structure of CAFA weighs heavily against measuring jurisdiction only at that instant. And as the following Section shows, these courts' reasoning also leads to misapplication of precedent requiring that once jurisdiction fully attaches it cannot be ousted.

#### B. *ST. PAUL MERCURY* DOES NOT REQUIRE CAFA JURISDICTION TO IRREVOCABLY ATTACH AT THE MOMENT OF FILING

In addition to misinterpreting Congress's use of the phrase "filed under," courts that take the *Cunningham* approach also

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132. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010).

133. *See supra* note 35 and accompanying text.

134. FED. R. CIV. P. 23(c)(1)(A).

135. *See supra* note 123 and accompanying text.

misapply the principle that, after jurisdiction properly attaches, later changes to jurisdictional facts cannot oust it.<sup>136</sup> That principle, derived from *St. Paul Mercury*, appropriately applies to later events or changes that a litigant may control and potentially abuse.<sup>137</sup> By presuming that jurisdiction is properly and fully invoked at the moment of filing, though, the *Cunningham* court failed to question whether changes to the amount in controversy or place of citizenship are appropriate comparisons to class certification, which implicates far less risk of manipulation or abuse by litigants.<sup>138</sup> The following examines that question by comparing and contrasting these jurisdictional determinations. In this context, class certification—and its effect on CAFA jurisdiction—is not a later event or change falling within the ambit of *St. Paul Mercury*, unlike other more common jurisdictional determinations.<sup>139</sup>

*St. Paul Mercury* cannot bear the weight that the Seventh Circuit and other courts have placed on it for a number of reasons. Perhaps most importantly, class certification is not analogous to the events to which *St. Paul Mercury* traditionally applies.<sup>140</sup> *St. Paul Mercury*'s principle applies to the effect of changes to amounts in controversy for purposes of jurisdictional minimums.<sup>141</sup> In that context, courts may presume that the amount a plaintiff pleads in good faith establishes jurisdiction, and “[t]he inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.”<sup>142</sup> But federal courts cannot make similar presumptions based on the pleadings in the class action context. While good-faith pleadings are sufficient to establish the

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136. See *supra* Part I.D.3 (describing how the *Cunningham* court sought to vindicate this principle).

137. *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 294–95 (1938); cf. *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 381 (7th Cir. 2010) (noting that “concerns about forum manipulation . . . counsel against” allowing post-removal events to oust jurisdiction).

138. See *infra* notes 191–93 and accompanying text.

139. Cf. Marcus, *supra* note 30 (describing class actions as “constructs” only created when the court approves the class by defining and certifying it).

140. See, e.g., Richard L. Marcus, *They Can't Do That, Can They?: Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 887 n.148 (1995) (explaining how, until 28 U.S.C. § 1367 codified supplemental jurisdiction, *St. Paul Mercury* could not apply to class actions as it does to other cases due to the existence of absent class members).

141. *St. Paul Mercury*, 303 U.S. at 294–95.

142. *Id.* at 288–89.

amount in controversy, Rule 23 forbids such presumptions to establish a class.<sup>143</sup>

Even if Rule 23 allowed for good-faith class allegations to suffice, class certification remains distinct from the jurisdictional facts to which *St. Paul Mercury* traditionally applies. *St. Paul Mercury*'s principle applies to amounts in controversy;<sup>144</sup> a similar principle applies to diversity of citizenship.<sup>145</sup> Both principles prevent changes to the facts required for jurisdiction from ousting jurisdiction.<sup>146</sup> For instance, if a plaintiff reduces the amount claimed or moves to a different state, these changes or events cannot oust properly invoked jurisdiction.<sup>147</sup> Class certification, however, does not amount to a change in jurisdictional facts at all. Rather, class certification requires the court to examine the facts required for jurisdiction as they stand, and as they stood at pleading.<sup>148</sup> The result of this examination is not a change or later event as contemplated by *St. Paul Mercury*; instead, it is simply a required analysis of the sufficiency and adequacy of the pleadings.<sup>149</sup>

*St. Paul Mercury* itself confirms that when jurisdictional requirements are insufficient or inadequate from the outset, the court's examination to determine the sufficiency of those requirements *can* affect jurisdiction; such an examination does not amount to a change or event that cannot affect jurisdiction.

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143. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (calling certification of "actual, not presumed, conformance" to Rule 23's prerequisites "indispensable"). In some cases, the pleadings may sufficiently allow a court to determine the appropriateness of class treatment. *Id.* But in all cases, even when making the determination goes to the merits of a claim, federal courts must certify that a putative class is properly filed under Rule 23. See *id.* at 161 (reiterating that all class actions must meet Rule 23's prerequisites, as subject to a trial court's "rigorous analysis" through certification).

144. *St. Paul Mercury*, 303 U.S. at 294–95.

145. *Id.* (citing, inter alia, *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824)).

146. *Id.*

147. *Id.*

148. See *Asociacion Nacional de Pescadores v. Dow Quimica de Colombia*, 988 F.2d 559, 565 (5th Cir. 1993) ("Under those circumstances, the court is still examining the jurisdictional facts as of the time the case is removed, but the court is considering information submitted after removal."), *abrogated by* *Marathon Oil Co. v. A.G. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998), *rev'd*, 526 U.S. 574 (1999).

149. See *id.* (distinguishing examination or supplementation of ambiguous jurisdictional fact from the type of change contemplated by *St. Paul Mercury*); cf. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (rejecting argument that there is a distinction between a putative class being eligible and being certifiable).

The Court stated that “[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction,” but qualified that statement that

if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount . . . the suit will be dismissed.<sup>150</sup>

The Court’s qualification makes clear that a facially inadequate basis for jurisdiction is insufficient. A court’s determination of whether a class can be certified is an analogous inquiry into the adequacy of the pleadings, not a subsequent change in events that *St. Paul Mercury* bars from ousting jurisdiction.

For those reasons, courts cannot approach class allegations in the same way they approach amounts in controversy and places of citizenship.<sup>151</sup> Class certification is not a later event or change that cannot affect jurisdiction; under Rule 23, and through CAFA, it is a required jurisdictional determination assessing whether the putative class is in fact entitled to class treatment.<sup>152</sup> As such, CAFA jurisdiction cannot be irrevocably invoked at the moment of filing.

In sum, to retain jurisdiction after denying class certification, federal courts rely on two erroneous assumptions. First, the courts interpret CAFA to only require a case to meet the statute’s definition of a class action at the moment of filing.<sup>153</sup> Second, the courts then misapply the principle that properly invoked jurisdiction cannot be ousted by later events.<sup>154</sup> Both of these assumptions are necessary to hold that jurisdiction remains after a court denies class certification.<sup>155</sup> Relying on those assumptions forces courts to misapply CAFA and wrongly

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150. *St. Paul Mercury*, 303 U.S. at 289–90.

151. *Cf. In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992) (per curiam) (requiring jurisdiction be measured “as of the instant of removal” to federal court). Because a court must certify that a class meets numerosity, commonality, typicality, and representative adequacy requirements to comply with Rule 23, the “instant of removal” is an imprecise, and ultimately unworkable, fiction in this context.

152. *See supra* notes 94–95 and accompanying text (distinguishing between applying *St. Paul Mercury* in cases when jurisdiction is and is not properly invoked).

153. *E.g.*, *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010).

154. *E.g.*, *id.*

155. If the case’s status is relevant beyond the moment of filing, the cases regarding later events would be inapplicable. Similarly, if those cases do not apply, the timing of the case’s status is irrelevant.

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analogize denial of class certification to changes in citizenship or the amount in controversy to allow continued jurisdiction. As the following Part shows, requiring class certification for continued jurisdiction through CAFA better follows CAFA's plain language, fits within *St. Paul Mercury's* reasoning, and meets Congress's goals in enacting CAFA.

### III. FEDERAL COURTS CANNOT RETAIN JURISDICTION THROUGH CAFA AFTER DENYING CLASS CERTIFICATION

This Note asserts that after denying class certification, federal courts lose jurisdiction over cases filed as class actions, making certification a prerequisite for continued CAFA jurisdiction. As described above, the approach that a number of courts of appeals have begun to adopt misapplies CAFA's jurisdictional grant and wrongly applies case law holding that once a case is in federal court, jurisdiction cannot be ousted.<sup>156</sup>

A better approach to jurisdiction after a federal court declines to certify a class must address both of those concerns. Requiring class certification for continued jurisdiction through CAFA better comports with both Congress's grant of jurisdiction and existing case law.<sup>157</sup> Further, this approach meets CAFA's goals, while mitigating concerns about abuses of class actions within the confines of Congress's grant of jurisdiction. After explaining the mechanics of requiring class certification for continued CAFA jurisdiction, this Part demonstrates why this requirement is the correct approach when a court denies certification.

#### A. CLASS CERTIFICATION IS A PREREQUISITE FOR CAFA JURISDICTION

This Note's thesis is that, when a putative class action is brought to federal court through CAFA, Rule 23's requirements for class treatment—which coincide with CAFA's prerequisites for jurisdiction—must be certified for continued jurisdiction.<sup>158</sup> The mechanics of this approach are briefly demonstrated in the following paragraph and further explored in the following Sections.

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156. See *supra* Part II.

157. See *infra* Part III.B–C.

158. FED. R. CIV. P. 23(a).

If the court determines based on the pleadings that the class allegations or other CAFA requirements cannot be met to a legal certainty, CAFA cannot provide jurisdiction.<sup>159</sup> Essentially, a frivolous or inadequately pleaded class allegation cannot be sustained under Rule 23 or under CAFA. If the allegations do meet the prerequisites, the court must then consider certifying the class and enter an order certifying that the proposed class is (or is not) maintainable under Rule 23.<sup>160</sup> CAFA explicitly provides jurisdiction until that order,<sup>161</sup> but if the court denies certification, CAFA ceases to provide jurisdiction. If, however, the court certifies the class, CAFA jurisdiction is fully and properly invoked in the context of *St. Paul Mercury* and later changes to the certification order cannot oust it.

B. CLASS CERTIFICATION AS A PREREQUISITE FOR CAFA JURISDICTION MEETS THE PLAIN LANGUAGE OF CAFA AND PROPERLY FITS WITHIN THE CONTEXT OF *ST. PAUL MERCURY*

This Note's approach—requiring class certification for continued CAFA jurisdiction—effectively conforms to the language of CAFA and fits within the context of *St. Paul Mercury*'s holding that jurisdiction, once properly invoked, cannot be ousted by later events. While Congress could effect the change suggested in the previous subsection by clarifying the language describing CAFA's application,<sup>162</sup> the following explains why the existing statute and precedents support this approach without the need for new or amended legislation.<sup>163</sup>

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159. *Cf. In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (“A class is not maintainable as a class action by virtue of its designation as such in the pleadings.” (citing *Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970))).

160. FED. R. CIV. P. 23(c)(1)(A) (“At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.”).

161. *See* 28 U.S.C. § 1332(d)(8) (2006) (granting jurisdiction until entry of the certification order).

162. *See supra* Part II.A (describing specific instances of conflicting interpretations of language in CAFA).

163. Congress should amend CAFA to effect this interpretation, however, if other courts of appeals continue the current trend. But as both the interpretation exemplified by *Cunningham* and the interpretation suggested by this Note have greater impact on jurisdictional doctrine than actual litigants, there is little pressure to make such a change.

### 1. Class Certification as a Prerequisite for CAFA Jurisdiction Meets the Plain Language of CAFA

Requiring class certification for continued CAFA jurisdiction reflects the plain language of CAFA.<sup>164</sup> This approach respects CAFA's definition of a class action (and CAFA's interaction with Rule 23), as well as the structure of CAFA. Each of these aspects supports jurisdiction being fully and properly invoked only after class certification.

First, CAFA's definition of a class action encourages requiring class certification for continued jurisdiction because it so closely tracks Rule 23's definition of a class action. CAFA defines a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure."<sup>165</sup> Rule 23 requires both (1) that class allegations meet numerosity, commonality, typicality, and representative adequacy requirements<sup>166</sup> and (2) that a court certify that those allegations are met.<sup>167</sup> Applied to CAFA's definition of a class action, if the certification order is denied, the case ceases to be filed under Rule 23 and therefore CAFA jurisdiction ceases to apply.<sup>168</sup> Further, this approach coincides perfectly with Rule 23's approach to class actions.<sup>169</sup> Requiring class certification for continued CAFA jurisdiction makes adequate class allegations a prerequisite for application of CAFA,<sup>170</sup> but recognizes that class certification must occur before jurisdiction is fully and properly invoked.<sup>171</sup>

Second, the structure of CAFA similarly supports requiring class certification to properly invoke CAFA jurisdiction.<sup>172</sup> Since CAFA requires jurisdiction to exist "before or after the entry of a class certification order,"<sup>173</sup> CAFA provides jurisdiction de-

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164. Though some courts have argued that the language is ambiguous, *see, e.g., Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2011 WL 196930, at \*2 (S.D.N.Y. Jan. 21, 2011) ("The statute does not speak directly to the issue of whether class certification is a prerequisite to federal jurisdiction . . ."), this Note posits that those courts' interpretation is incorrect.

165. 28 U.S.C. § 1332(d)(1)(B).

166. FED. R. CIV. P. 23(a).

167. *Id.* 23(c)(1).

168. *See supra* note 30 and text accompanying notes 70 & 132.

169. *See supra* notes 20–38 and accompanying text (explaining the prerequisites to class certification).

170. Otherwise, the action could not be filed under Rule 23 at all.

171. *Cf.* FED. R. CIV. P. 23(a), (c) (defining class action prerequisites and certification order procedures).

172. *See supra* Part II.A.

173. 28 U.S.C. § 1332(d)(8) (2006).

spite the lack of a certification order only before a decision is made on certification.<sup>174</sup> Once a court makes a certification decision, however, CAFA only applies if the court determines the action is maintainable as a class action.

Using this approach, CAFA's grant of jurisdiction is not properly invoked until the class is certified. As the following Section explains, this approach allows application of *St. Paul Mercury's* holding—jurisdiction, once properly invoked, cannot be ousted by later events<sup>175</sup>—to correctly apply only after a class certification decision.

## 2. Class Certification as a Prerequisite for CAFA Jurisdiction Conforms to *St. Paul Mercury*

Requiring class certification for continued CAFA jurisdiction fits the context of *St. Paul Mercury's* principle that jurisdiction, once properly invoked, cannot be ousted by later events. While application of *St. Paul Mercury* at the moment of filing is improper,<sup>176</sup> this Note's approach creates an appropriate analogy to *St. Paul Mercury's* principle. Additionally, since that principle requires continued jurisdiction “unless the law gives a different rule,”<sup>177</sup> and CAFA does in fact give a different rule under this approach, *St. Paul Mercury* requires jurisdiction to end after a court denies class certification. This subsection explains why certification, not filing, is the appropriate moment for *St. Paul Mercury* to apply.

One reason is that *St. Paul Mercury* generally requires continued jurisdiction if a plaintiff's good-faith claim for damages meets the jurisdictional amount,<sup>178</sup> but notes two exceptions to that requirement.<sup>179</sup> First, if on the face of the pleadings “it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed,” the suit should be dismissed.<sup>180</sup> The second exception applies if it becomes apparent “from the proofs . . . that the plaintiff never was entitled to recover that amount.”<sup>181</sup>

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174. *Id.*

175. *St. Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 293 (1938).

176. *See supra* Part II.B.

177. *St. Paul Mercury*, 303 U.S. at 288.

178. Even if the plaintiff is unable to actually recover that amount. *Id.* at 289–90.

179. *Id.* at 288–89.

180. *Id.* at 289.

181. *Id.*

These two exceptions match this Note's approach to CAFA jurisdiction. For the first exception, CAFA jurisdiction must cease if the court determines the class allegations are inadequate from the face of the pleadings.<sup>182</sup> For the second, CAFA jurisdiction must cease if, upon analysis for certification, the court finds the putative class was never entitled to class treatment.<sup>183</sup> In that sense, *St. Paul Mercury* provides an appropriate analogy when applied at certification, whereas it could not at the time of filing.

Another reason certification is the proper time to apply *St. Paul Mercury* is that the Supreme Court in *St. Paul Mercury* held that jurisdiction must continue "unless the law gives a different rule."<sup>184</sup> CAFA does in fact give a different rule.<sup>185</sup> While CAFA grants federal courts jurisdiction to determine, for any case adequately pleaded as a class action, if class treatment is appropriate,<sup>186</sup> it also limits its application after a certification decision to cases a court certifies as class actions.<sup>187</sup> By limiting its jurisdiction after the certification decision, the full invocation of CAFA jurisdiction cannot be determined with certainty until the moment of certification. Until that point, *St. Paul Mercury* cannot apply, as only fully and properly invoked jurisdiction is protected from the effects of later events.<sup>188</sup>

The purpose of *St. Paul Mercury*'s principle is another reason why certification is the proper time to apply *St. Paul Mercury*. Requiring class certification does not raise the same forum manipulation concerns that underlay *St. Paul Mercury*'s holding. The Court in *St. Paul Mercury* noted that "[i]f the

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182. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (stating that, in some cases, "the issues are plain enough from the pleadings to determine" prerequisites to class certification).

183. See *supra* Part III.A.

184. *St. Paul Mercury*, 303 U.S. at 288–89.

185. See *supra* note 177; *supra* text accompanying notes 125–26 (showing how CAFA's limited jurisdiction after certification provides such a "different rule").

186. 28 U.S.C. § 1332(d)(8) (2006).

187. See *id.* (limiting jurisdiction to "before or after" class certification, implying that failed class certification ousts jurisdiction). Any doubts about whether CAFA provides jurisdiction after denial of certification weigh against finding continued jurisdiction. See, e.g., *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) ("[A]ll doubts about jurisdiction should be resolved in favor of remand to state court."); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) ("[R]emoval statutes are construed narrowly; . . . uncertainties are resolved in favor of remand.").

188. *St. Paul Mercury*, 303 U.S. at 294–95.

plaintiff could . . . reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice."<sup>189</sup> Though some courts ruling that jurisdiction continues after denying class certification have expressed similar concerns,<sup>190</sup> this approach, and CAFA's operation, minimize the potential for plaintiffs to abuse class certification and subject the defendant's right of removal to their caprice.

There are three ways that CAFA's operation minimizes that potential. First, the class certification determination is left to the court, not the plaintiff. Though certification is often initiated by motion of a party, courts must raise the issue *sua sponte* when necessary.<sup>191</sup> Second, Rule 23 requires courts to certify the class at an early practicable time.<sup>192</sup> Therefore, concerns about parties waiting until the eve of trial to attempt to oust jurisdiction are unlikely to be realized. Third, the presumption that courts should approve the class before ruling on dispositive motions<sup>193</sup> minimizes concerns about parties abusing

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189. *Id.* at 294.

190. *E.g.*, *Colomar v. Mercy Hosp., Inc.*, No. 05-22409-CIV, 2007 WL 2083562, at \*3 (S.D. Fla. July 20, 2007) ("To litigate the case up to the eve of trial, and then to seek remand [by acting to decertify class] after adverse rulings have issued and summary judgment is briefed, equates to a forum shopping which the traditional rules of removal and remand are designed to preclude.").

191. *See* 7AA WRIGHT ET AL., *supra* note 20, § 1785 ("[T]he court has an independent obligation to decide whether an action brought on a class basis is to be so maintained even if neither of the parties moves for a ruling . . ."); *cf.* *Edmond v. Goldsmith*, 38 F. Supp. 2d 1016, 1020 (S.D. Ind. 1998) ("Although the parties stipulate to the certification, the court has a duty to evaluate independently the proposed class to ensure its compliance with FED. R. CIV. P. 23." (citing *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 599 (7th Cir. 1993))), *rev'd on other grounds*, 183 F.3d 659 (7th Cir. 1999), *aff'd sub nom.* *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

192. FED. R. CIV. P. 23(c)(1)(A). Though even an early practicable time may still be a relatively long time. *See* *Berland v. Mack*, 48 F.R.D. 121, 126 (S.D.N.Y. 1969) (waiting over two years before ruling on certification).

193. *See* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) (holding that federal courts are generally required to satisfy themselves of jurisdiction before ruling on the merits); *Edmond*, 38 F. Supp. 2d at 1019–20 ("[A] court must resolve [the issue of class certification] before it addresses dispositive motions." (citing *DeBruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 463 (7th Cir. 1990))). *But cf.* *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998) ("There is nothing in Rule 23 which precludes the court from examining the merits of plaintiff's claims on a proper Rule 12 motion to dismiss or Rule 56 motion for summary judgment simply because such a motion precedes resolution of the issue of class certification." (quoting *Lorber v. Beebe*, 407 F. Supp. 279, 291 n.11 (S.D.N.Y. 1976))).

these procedures after receiving an unfavorable dispositive ruling. Taken together, it is clear that concerns about abuses and forum manipulation are hypothetical at best.

One final reason that certification, not filing, is the appropriate time for *St. Paul Mercury's* principle to apply is the unique nature of class action procedure. Courts have traditionally treated class actions differently when considering similar issues.<sup>194</sup> The realities of class action litigation require more in-depth procedural and, in CAFA's case, jurisdictional inquiries<sup>195</sup> than for other forms of actions.<sup>196</sup> CAFA further complicates otherwise simple jurisdictional determinations, such as amounts in controversy and places of citizenship, and forces courts to make at-times lengthy and in-depth determinations. For example, at times courts must make exceedingly detailed examinations of places of residence for class members to determine if CAFA jurisdiction is appropriate.<sup>197</sup> Courts have also required similarly detailed examinations into individual claims and individual class members to determine jurisdiction.<sup>198</sup> These types of "preliminary jurisdictional determination[s]"<sup>199</sup> are inherent in determining CAFA jurisdiction.<sup>200</sup> "[G]iven the criti-

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194. See Marcus, *supra* note 140 (explaining how, until 28 U.S.C. § 1367 codified supplemental jurisdiction, *St. Paul Mercury* could not apply to class actions as it does to other cases due to the existence of absent class members).

195. See Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 414–19 (2008) (describing the unique application of jurisdictional burdens of proof for CAFA).

196. See *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 205 (1999) (stating that class certification determination is "enmeshed in the legal and factual aspects of the case" (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978))).

197. See Marcus, *supra* note 30, at 1787 ("Despite the logistical challenges of offering reliable evidence at this preliminary jurisdictional stage, CAFA does not permit the courts to make a citizenship determination on a record bare of any evidence showing class members' [place of citizenship]." (quoting *Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 802 (5th Cir. 2007))).

198. Before CAFA's \$5 million total amount-in-controversy requirement (and the Supreme Court's decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005)), courts were forced to make inquiries into whether each class member exceeded the \$75,000 minimum for diversity jurisdiction found in 28 U.S.C. § 1332(a). See *Allapattah*, 545 U.S. at 554–55 (describing a prior decision in which the Court mandated that "every plaintiff must separately satisfy the amount-in-controversy requirement").

199. *Preston*, 485 F.3d at 812.

200. See Marcus, *supra* note 30, at 1787 ("That determination could require a court either to gather considerable information about those class members' claims or indulge in assumptions that might seem unwarranted given the critical importance of jurisdiction.").

cal importance of jurisdiction,” courts cannot “indulge in assumptions”<sup>201</sup> in examining these jurisdictional issues—courts must engage in more rigorous analysis of jurisdictional questions.

In the certification context, the need for more rigorous analysis becomes even more important. Recent Supreme Court decisions relating to class certification highlight that importance. The opinion in *Shady Grove Orthopedic Associates, PA. v. Allstate Insurance Co.* made clear that there is no distinction between certifiability and eligibility under Rule 23.<sup>202</sup> Therefore, a court must certify, to satisfy both Rule 23’s and CAFA’s requirements, that those prerequisites are, or ever were, met. Simply alleging that those prerequisites are met is inadequate,<sup>203</sup> and therefore not alone sufficient to fully invoke jurisdiction, so courts can and often must “delve beyond the pleadings to determine whether the requirements for class certification are satisfied.”<sup>204</sup> In sum, class action procedure is exceedingly complicated. Requiring courts to apply *St. Paul Mercury* before making these difficult factual inquiries misunderstands the unique nature of class action procedure, in which courts may only discover that the pleadings are insufficient to maintain a class after a rigorous factual determination. The better approach is the one that this Note advocates: class certification is required for continued CAFA jurisdiction.

On the whole, requiring class certification for continued CAFA jurisdiction is more sound than allowing continued jurisdiction if certification is denied. Requiring certification better conforms with the plain language of CAFA and better suits *St. Paul Mercury*’s principle that jurisdiction properly invoked

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201. *Id.*; see also *supra* Part I (describing the relationship between the limits on federal jurisdiction, CAFA’s grant of that jurisdiction, and Rule 23’s operation on class actions).

202. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (stating that eligibility and certifiability are both “preconditions” for class treatment under the federal rule and rejecting the argument that the two are distinct issues); see also Marcus, *supra* note 30, at 1778 (describing class actions as “constructs approved (indeed, created) by the court’s certification order”).

203. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) (stating that prerequisites for Rule 23 are “not mere pleading rules,” and courts must investigate adequacy of class allegations (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–77 (7th Cir. 2001))).

204. *Id.* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001)).

cannot be ousted by later events. As the following Section shows, it also better meets Congress's goals in enacting CAFA.

C. CLASS CERTIFICATION AS A PREREQUISITE FOR CAFA  
JURISDICTION BETTER MEETS CONGRESS'S GOALS IN ENACTING  
CAFA

Congress enacted CAFA to allow federal courts to hear interstate cases of national importance<sup>205</sup> and intended for CAFA to allow federal procedure for class actions to apply to these interstate cases.<sup>206</sup> This Note's approach to jurisdiction following denial of class certification advances that goal.

At first glance, this approach's requirement that federal courts remand or dismiss cases after denying class certification may appear contrary to Congress's stated goal of bringing more class actions into federal courts;<sup>207</sup> in fact, the court in *Cunningham* characterized its holding as bolstered by that same goal.<sup>208</sup> But, as explained below, this Note's approach does more to allow for federal jurisdiction over these class actions than the approach favored by the *Cunningham* court.

This Note's approach creates a number of incentives encouraging litigation of class actions in federal court. As characterized by *Cunningham*, CAFA's purpose is to relax jurisdictional standards to allow for more class actions to more easily be litigated in federal court.<sup>209</sup> Applying class certification as a prerequisite for CAFA jurisdiction effects this goal in a number of ways.

First, this approach may lead to federal courts relaxing the baseline class certification standard to more closely align with

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205. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (codified in scattered sections of 28 U.S.C.).

206. Marcus, *supra* note 30, at 1788–89.

207. As federal courts generally more stringently construe certification requirements, it is possible that a federal court may deny certification, remand the case to state court, and have the state court subsequently certify that same class. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2376–78 (2011); *see Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010) (noting that if “a state happened to have different criteria for certifying a class” than the federal standard, “the result of a remand because of the federal court’s refusal to certify the class could be that the case would continue as a class action in state court”).

208. *Cunningham*, 592 F.3d at 807 (characterizing CAFA’s purpose as “relaxing the requirement of complete diversity of citizenship so that class actions involving incomplete diversity can be litigated in federal court”).

209. *Id.*

state practices.<sup>210</sup> This is not to say that federal procedure must deteriorate to meet the “drive-by” certification standards that led to CAFA’s passage.<sup>211</sup> Relaxing the baseline for meeting, for example, Rule 23’s commonality and typicality requirements, does not affect the increasingly rigorous factual analyses that still must apply.<sup>212</sup> Instead, this means that federal courts must balance Congress’s intent to increase the availability of federal procedure for class actions otherwise filed in state courts<sup>213</sup> with current standards for applying Rule 23’s prerequisites.<sup>214</sup>

Further, this approach effectively balances the availability of both state and federal fora with Congress’s jurisdictional grant in CAFA. Through CAFA, Congress could have, but did not, essentially federalize class actions.<sup>215</sup> Instead, Congress expanded diversity jurisdiction to allow federal courts to hear “interstate cases of national importance”<sup>216</sup> and carved out excep-

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210. See Marcus, *supra* note 30, at 1769 (explaining that CAFA may “empower future federal courts to become more creative in favor of class action treatment,” in ways such as adopting class certification rules similar to those of state courts).

211. See Marcus, *Erie, CAFA, and Federalism*, *supra* note 53, at 1294 (explaining a pre-CAFA practice in Alabama, much maligned by certain CAFA supporters, by which plaintiffs “would file a motion for class certification with the complaint and get a decision before the defendant had a chance to file a responsive pleading”).

212. See Steven R. Peterson & Andrew Y. Lemon, *Rigorous Analysis to Bridge the Inference Gap in Class Certification*, 7 J. COMPETITION L. & ECON. 93, 94 (2011) (“In the past, plaintiffs could satisfy Rule 23 by making a ‘threshold showing’ that they would be able to meet the requirements of Rule 23 at trial. Recently, there has been a movement across the federal appellate courts to require increased proof that the requirements of Rule 23 are met prior to a district court’s decision to certify a class. Although there is no unanimity yet among the federal appellate courts, the Third Circuit’s decision in *In re Hydrogen Peroxide Antitrust Litigation* is emblematic of these new standards that require plaintiffs to present a more rigorous analysis demonstrating that Rule 23 is satisfied. Specifically, the court now requires that district courts make factual determinations that Rule 23 is satisfied, which, by necessity, requires resolving all legal disputes relevant to class certification and consideration of all relevant evidence, including expert testimony, even if there is overlap with merits issues.”).

213. In this context, the application of Rule 23 and precedent requiring more than cursory analysis of the adequacy of class allegations.

214. Here, the dividing line between what constitutes sufficient or insufficient facts to meet Rule 23’s requirements.

215. See Marcus, *supra* note 30, at 1809–13 (discussing use of jurisdiction to achieve substantive objectives, examining two statutes that do just that, and concluding that “Congress went to some pains *not to* undertake any such delegation of lawmaking power in CAFA” (emphasis added)).

216. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (codified at 28 U.S.C. § 1711 (2006)).

tions to prevent CAFA from reaching all class actions.<sup>217</sup> This approach ensures that state courts remain available for cases outside the ambit of CAFA, and ensures that CAFA does not impermissibly work to impose federal class action procedure on state courts.<sup>218</sup> Even without indirectly furthering Congress's purposes in enacting CAFA, the principle that federal courts are courts of limited jurisdiction mandates limiting CAFA to the jurisdictional grant found in the statute's text.<sup>219</sup>

Additionally, this approach may lead to the focus of this type of litigation shifting towards the merits and away from the certification decision. While the approach exemplified in *Cunningham* incentivizes continued challenges to certification, this Note's approach reduces the incentive to continue challenging certification throughout litigation. Under the *Cunningham* approach, defendants can and should challenge certification throughout litigation,<sup>220</sup> winning the certification fight frequently ends the litigation.<sup>221</sup> Under this Note's approach, cases move closer to resolution on the merits without undue prejudice to either party beyond the incentives underlying class actions as a procedural device.<sup>222</sup>

In comparison to the above incentives created by adopting this Note's approach, the approach advocated by the *Cunning-*

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217. 28 U.S.C. § 1332(d)(4).

218. Normatively, state courts should remain available for state law claims, which CAFA inherently affects, if states legislate with state court procedure as a backdrop, and especially for consumer law claims, where the state's interest rests in protecting its residents.

219. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) ("The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined." (alteration in original) (internal quotation marks omitted) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934))).

220. FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

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

222. See *supra* note 20 and accompanying text; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quotations and citations omitted)). For a critique of those incentives, see *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle" regardless of the merits.).

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*ham* court does little to advance CAFA's purpose of providing a federal forum for class actions—when a federal court denies class certification, the case can no longer be considered a class action.<sup>223</sup> Federal courts do little to advance CAFA's stated goal of bringing more class actions to federal court by retaining jurisdiction over a single plaintiff's claim.<sup>224</sup>

Overall, this Note's approach can lead to both a greater number of class actions in federal courts and a greater percentage in federal courts (in relation to state courts). While the *Cunningham* court sought to bolster its approach using this same reasoning, in practice that approach may well be less effective in meeting CAFA's purpose. Similarly, when courts rely on *St. Paul Mercury* to hold that certification does not impact CAFA jurisdiction, those courts effectively eviscerate the purpose of *St. Paul Mercury*'s principle: rather than discouraging litigant manipulation and abuse, those courts make certification an even more powerful tool for defendants to avoid litigation on the merits.

#### CONCLUSION

In cases filed as class actions but denied class certification, the Class Action Fairness Act of 2005 cannot provide subject-matter jurisdiction for federal courts. Continued jurisdiction after denial of class certification violates the principle that federal courts are courts of limited jurisdiction, is contrary to the plain language of the statute, and exceeds Congress's grant of jurisdiction. By remanding these cases to state courts, federal courts correctly interpret *St. Paul Mercury*'s principle that jurisdiction once properly invoked cannot be ousted by later events, since class certification is required to properly invoke CAFA jurisdiction. The Class Action Fairness Act of 2005 is a tool to allow federal courts jurisdiction over many class actions, but it cannot provide jurisdiction for those cases that a court determines are not class actions.

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223. See *supra* note 14.

224. Richardson, *supra* note 5, at 125.