The Multistate Problem in Consumer Class Actions and Three Solutions

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INTRODUCTION**

Consumers across the country pay extra for an advanced braking system, but the car company misdescribes how the technology works, creating a safety risk. Several consumers sue the manufacturer, and the class actions are

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** Editors' Note: The author was one of the attorneys for plaintiffs in the following cases cited in this Article: *In re* JUUL Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig., No. 19-md-02913-WHO (N.D. Cal.); *In re* Woodbridge Invs. Litig., No. 2:18-cv-00103-DMG-MRW (C.D. Cal.); *In re* MacBook Keyboard Litig., No. 5:18-cv-02813-EJD (N.D. Cal.); *In re* FieldTurf Artificial Turf Mktg. & Sales Practices Litig., No. 3:17-md-02779-MAS-TJB (D.N.J.); *In re* Generic Pharms. Pricing Antitrust Litig., No. 16-md-2724 (E.D. Pa.); *In re* HP Printer Firmware Update Litig., No. 5:16-cv-05820-EJD (N.D. Cal.); *In re* U.S. Office of Pers. Mgt. Data Sec. Breach Litig., No. 1:15-mc-01394-ABJ (D.D.C.); *In re* Experian Data Breach Litig., No. SACV 15-1592 AG (DFMx) (C.D. Cal.); *In re* Checking Acct. Overdraft Litig., No. 1:09-md-02036-JLK (S.D. Fla.); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 3:07-md-01827-SI (N.D. Cal.); *In re* Abbott Labs. Norvir Antitrust Litig., No. C 04-1511 CW (N.D. Cal.); Sullivan v. DB Invs., Inc., No. CIV.A. 04-2819 SRC (D.N.J.). For ease of accessibility in electronic format, at the author's request, the legal citations in this

consolidated before a single federal judge. Can a consumer who bought or leased a car with the system in one state represent those who transacted in other states?

In a 2012 case involving similar allegations, a divided Ninth Circuit panel answered "no." The majority held that the law of the state where each transaction occurred governed the accompanying claim, and that the differences among the various state laws meant that individual questions of law predominated, preventing a plaintiff from representing class members in other states.[1]

Under this reasoning, even when identical products and marketing reach consumers in various states, none of which permits fraud, similarly misled consumers cannot recover their losses through a single verdict.[2] Negative effects—some apparent, some less visible—result from these certification decisions and their emphasis, for choosing the law that applies, on the place of transacting over the place the defendant made its business decisions. Deterrence fades and inefficiencies result, contrary to the policies of the class action rule, Federal Rule of Civil Procedure 23.[3] Part I diagnoses the facets of this multistate problem; Part II presents three realistic ways of solving it.

Article depart in minor respects from norms of *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n *et al.* eds., 21st ed. 2020).

[1] Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012), *overruled on other grounds by* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022).

[2] The majority's effort to limit its holding to "the facts and circumstances of this case" did little to cabin the effects of the decision's reasoning on class action practice over the next decade. *Compare Mazza*, 666 F.3d at 594 ("Under the facts and circumstances of this case, we hold that each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place."), *with In re* Seagate Tech. LLC, 326 F.R.D. 223, 240 (N.D. Cal. 2018) (finding "no meaningful distinction between this case and *Mazza* as to choice of law."), Kowalsky v. Hewlett-Packard Co., No. 5:10-CV-02176-LHK, 2012 WL 892427, at *7 (N.D. Cal. Mar. 14, 2012) (holding that "*Mazza* controls and forecloses the certification of the proposed nationwide class."), Cover v. Windsor Surry Co., No. 14-CV-05262-WHO, 2016 WL 520991, at *5 (N.D. Cal. Feb. 10, 2016) (stating that "[i]n analogous cases, *Mazza* is 'not only relevant but controlling,' even at the pleading phase.") (citation omitted), *and* Kaupelis v. Harbor Freight Tools USA, Inc., No. SACV 19-1203 JVS (DFMx), 2020 WL 5901116, at *13 (C.D. Cal. Sept. 23, 2020) (reading *Mazza* as establishing a "clear rule" that the "place of wrong"—in a false advertising case, where a person saw the advertising—dictates the state law that applies to that transaction); *see also infra* notes 18–34. R

[3] *See* FED. R. CIV. P. 23(b)(3) (providing that "[a] class action may be maintained if Rule 23(a) is satisfied," common questions "predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for *fairly and efficiently* adjudicating the controversy.") (emphasis added); FED. R. CIV. P. 23(b)(3) advisory committee's note (1966) (stating that "(b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

I. The Problem

A. Class Action Policies in the Multistate Context

Class actions brought by citizens emerged in the late twentieth century as the most potent form of representative governance through the court system. With government enforcers limited both in priorities and funding, the threat of having to pay a large group in civil litigation became one of the few checks on overweening corporate behavior. When the court certifies a damage class under Rules 23(a) and 23(b)(3), it determines that the claims are sufficiently similar for a judgment on the representative plaintiff's claim to fairly bind the broader class of those exposed to the alleged violations, relative to the defendant.[4] Denying certification, however, generally prevents victims from recovering their losses because rational consumers (and lawyers) do not sue individually for small losses, leaving violations unaddressed.[5] So the defendant's ability to avoid a class-wide judgment undermines deterrence from private enforcement.[6] And it does so with an ironic twist when an abundance of state laws accounts for the successful defense: The farther a company's marketing and sales extend geographically, the less likely it will be

[4] *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (describing the "predominance" inquiry under Rule 23(b)(3)); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–49 (2011) (holding that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.") (citations omitted); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) (noting preclusive effect of a class-wide judgment); Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 459–60 (2013) (stating that a properly certified class "will prevail or fail in unison.").

[5] *See* Fed. Jud. Ctr., Manual for Complex Litigation § 11.213 (4th ed. 2004) ("Denial of class certification may effectively end the litigation."); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("[T]his lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (class actions exist "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action") (citation omitted); Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 744 (7th Cir. 2008) ("The class action is an ingenious device for economizing on the expense of litigation and enabling small claims to be litigated."); *infra* notes 147 & 217.

[6] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (concluding that "private suits provide a significant supplement to the limited resources available to the [DOJ] for enforcing the antitrust laws and deterring violations."); Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 475–78 (2013) (noting deterrent effect of securities fraud class actions) (citing, *inter alia*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007)); Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 677–78 (7th Cir. 2013) (emphasizing that "[a] class action, like litigation in general, has a deterrent as well as a compensatory objective" and may serve as a "wake-up call" for the defendant and others); *see also infra* notes 147 & 217; William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. Rev. 709, 723–25 (2006) (arguing that small-claims class actions produce four kinds of positive "externalities": (1) decree effects; (2) settlement effects; (3) threat effects; and (4) institutional effects); Brian T. Fitzpatrick, The Conservative Case for Class Actions 68, 109–13 (2019) (finding that "the lion's share of studies *support* the theory of general deterrence" and arguing that "[e]ven if we are not part of a class action, we are made better off by it because, every time one company is sued, others know that they, too, could be sued; this fear deters companies from stealing from us in the first place.") (emphasis in original); *cf. infra* note 108.

forced to pay aggregate damages for business conduct affecting consumers that strays into illegality.

The procedural hook for the multistate class action defense is the predominance requirement of Rule 23(b)(3). The inquiry compares the common questions in the case to questions affecting only individual members, asking which issues are more prevalent or important in the cause of action or controversy.[7] This inquiry occurs against the backdrop of the other provisions and policies of the rule. The Rules Enabling Act separately protects a defendant's substantive rights under state law, including the ability to assert defenses that may apply only to individual class members.[8] When individuals in many different states must sue under their own state laws, courts have rejected a class action as unmanageable—as a result of varying jury instructions or verdict forms, increased burdens from pretrial case management, or other factors.[9] But manageability problems by themselves should not defeat certification;[10] according to Judge Posner, "a class action has to be unwieldy

[7] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016); Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011); *see also* Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1234 (11th Cir. 2000) ("Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action.").

[8] *See* 28 U.S.C. § 2072(b); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (given the Rules Enabling Act, "a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims."). Just as the rule asks about prejudice to the defendant, it also prescribes consideration of "class members' interests in individually controlling the prosecution or defense of separate actions." FED. R. CIV. P. 23(b)(3)(A). On the theory that the greater the claim, the greater the individual interest in maintaining control, larger claims tend to be less suited for class certification, and large controversies involving physical harm are treated as mass torts rather than as class actions. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (1966); *infra* note 108 (citing criticism of class actions). At the same time, "the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high[.]" *Amchem*, 521 U.S. at 617. Class actions not only aggregate small claims that otherwise would not be pursued; they also avoid duplicative discovery and trials and promote consistent outcomes. Thus, where the rule's requirements are otherwise satisfied, "even in large claim situations, class actions will be a superior form of litigation if aggregation serves efficiency goals and/or pretermits inconsistent outcomes." 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4:67 (6th ed.).

[9] *See, e.g.*, Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 746 (7th Cir. 2008) (reversing class certification in part because the plaintiff "want[ed] to litigate in a single federal district court half a million claims wrested from the control of the courts of the 29 jurisdictions in which those claims arose and the laws of which govern the claimants' entitlement to and scope of relief. The instructions to the jury on the law it is to apply will be an amalgam of the consumer protection laws of the 29 jurisdictions"); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action."); *see also infra* notes 18–29. R

[10] *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1131–32 (9th Cir. 2017) (citing *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.), *overruled on other grounds by In re* IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006), *and superseded by statute on other grounds as stated in* Attenborough v. Construction & Gen. Bldg. Laborers' Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006); Klay v. Humana, Inc., 382 F.3d 1241, 1272–73 (11th Cir. 2004) (holding that a manageability "concern will rarely, if ever, be in itself sufficient to prevent certification of a class."), *abrogated in part on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008).

indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all."[11] In most class actions, economic damages can be formulaically calculated based on transaction data for a defined set of purchasers.[12]

While the risks and potential misuse of class actions are unmistakable,[13] the Supreme Court has also recognized the general suitability of class treatment when a large group sustained a common financial loss, holding that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[14] Defense arguments based on state sovereignty, addressed in greater depth in Part II.C.5 below, tend to overstate substantive differences in state law and unduly discount a class action's broader utility in combining claims that otherwise would go unpursued. When probing to uncover legal differences, some are naturally found; yet they are mostly outweighed by the shared objectives and baseline prohibitions of business-practice laws and the Uniform Commercial Code. All states have compelling interests in maintaining markets in which the large economic actors comply with the prohibitions against breaching contracts, committing fraud or theft, marketing dangerous products, fixing prices with competitors, and other predatory conduct.[15] The general policies, recognized by every state, of remediation and deterrence are thwarted if the only reason a class cannot proceed or be made whole is that its members live in different parts of the country.

B. Negative Effects of CAFA

Ever since the Class Action Fairness Act of 2005 ("CAFA")[16] shunted most state-law class actions to federal court, defendants have repeatedly defeated class certification by arguing a case involves too many different state laws. Corporations have thereby avoided accountability for alleged deceptive practices, marketing of shoddy goods, price fixing, privacy invasions, and

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[11] Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

[12] *See* 4 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 12:5 (6th ed.) (referring to the "well-established" practice of an expert calculating aggregate damages through a formula "derived from the facts of the case that can be applied generally to all class members," and noting that "formulae based on records tend to be simple and mechanical such that if properly designed, courts will rarely deny certification").

[13] *See infra* note 108; Coinbase, Inc. v. Bielski, 143 S. Ct. 1915, 1921 (2023) (stating that "potential for coercion is especially pronounced in class actions, where the possibility of colossal liability can lead to . . . 'blackmail settlements.'") (citation omitted).

[14] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997); *see also* FED. R. CIV. P. 23(b)(3) advisory committee's note (1966) (advising that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 795 (10th Cir. 1970) (monopolization claim).

[15] *See* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 3, 20–24 (2019).

[16] Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

other infractions having a widespread effect. CAFA leaves many consumer plaintiffs with no choice but to assert claims under multiple states' law in a single federal forum. Even before CAFA, however, courts "overwhelmingly rejected class certification when multiple states' laws must be applied."[17] Post-CAFA, other than in a settlement context, "an increasing number of multistate class actions involving state-law claims have been denied certification due to choice-of-law problems."[18] These procedural outcomes prevent the group from banding together in litigation, depriving citizens of the substantive protections of important state laws designed to protect them. Ironically, certification denials can frustrate the very state interests in whose name these rulings are justified, by defeating enforcement of common prohibitions.

Mazza[19] and other circuit-level authorities reflect a trend. In 2007, referring to "glaring" conflicts in state warranty standards, the Fifth Circuit overruled nationwide class certification of claims brought by owners of recalled Cadillacs whose side air bags could unexpectedly deploy.[20] In 2010 the Eleventh Circuit overturned a six-state class certification where plaintiff hospitals alleged the defendant HMO underpaid for medical services provided to veterans.[21] The court faulted the district court in part for having conducted "no serious analysis of the variations in applicable state law relative to Humana's affirmative defenses."[22] Also in 2010, the Fifth Circuit held that variations as to what qualifies as a trust relationship defeated predominance in a case by low-income borrowers against Fannie Mae for self-dealing concerning the proceeds of loans secured by multi-family homes.[23] In 2014 the Third Circuit affirmed a denial of class certification on claims of routine overbilling by a medical testing company, as the plaintiffs failed to analyze "how the grouped state laws might apply to the facts."[24] In 2018 the Second Circuit reversed certification of an 18-state class of purchasers of allegedly mislabeled baby products, requiring "more precise and greater depth of anal-

[17] Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 698–99 (Tex. 2002); *see also In re* Currency Conversion Fee Antitrust Litig., 230 F.R.D. 303, 311 (S.D.N.Y. 2004) (stating that "courts routinely deny class certification because plaintiffs' claims would require application of the substantive law of multiple states."); Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (deriding "a kind of Esperanto [jury] instruction, merging the negligence standards of the 50 states"). *Compare infra* notes 140, 192 & 216 (authorities recognizing propriety of nationwide certification under the law of one state).

[18] 2 McLaughlin on Class Actions § 6:3.

[19] Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012), *overruled in part by* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022).

[20] Cole v. Gen. Motors Corp., 484 F.3d 717, 724–30 (5th Cir. 2007).

[21] Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1180–83 (11th Cir. 2010).

[22] *Id.* at 1180.

[23] Casa Orlando Apts., Ltd. v. Fed. Nat'l Mort. Ass'n, 624 F.3d 185, 194–96 (5th Cir. 2010).

[24] Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 184 (3d Cir. 2014).

ysis" of the state consumer protection laws at issue.[25] In 2019 the Eighth Circuit reversed, on choice-of-law grounds, a nationwide class certification of claims that the defendant falsely advertised its vacuum cleaners.[26] In 2020 the Fifth Circuit reversed, for failure to analyze state-law variations, a multistate certification of claims against an insurance company based on its alleged uniform practice of charging policyholders excessive fees.[27] And in 2021 the Ninth Circuit, again pointing to state-law differences, reversed certification of a nationwide class of consumers holding claims of anticompetitive patent misuse.[28]

Many federal district courts, taking their cue from these appellate rulings, have cited differences in state law as a basis for denying motions to certify consumer classes.[29] In *Burkett v. Bank of America, N.A.*, the defendant bank had enrolled the plaintiffs in a forbearance program sponsored by the federal government for borrowers who were or would soon be in default on their mortgages, even though they never signed up for the program.[30] The defendant, which had an interest in earning servicer fees from the unauthorized sign-ups, then admittedly caused delinquencies by failing to apply the full amount of borrowers' loan payments and charged late fees.[31] The court denied class certification.[32] It reasoned in part that the plaintiffs "missed the point" with their "argument that state law variances can be overcome because [Bank of America's] 'policies and procedures did not differ by state' . . . . It is difficult to fathom how common issues could predominate in light of the numerous state law claims," the court explained.[33] Inequities and inefficien-

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[25] Langan v. Johnson & Johnson Consumer Cos., Inc., 897 F.3d 88, 97–99 (2d Cir. 2018).

[26] Hale v. Emerson Electric Co., 942 F.3d 401, 404 (8th Cir. 2019).

[27] Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020). The court deemed insufficient a "chart addressing state laws on certain interpretation issues" and held that plaintiffs must submit "'an extensive analysis' of state law variations to reveal whether these pose 'insuperable obstacles.'" *Id.* at 254–55 & n.13 (internal quotation marks and citations omitted); *see also infra* notes 54, 58–59 & 220.

[28] Stromberg v. Qualcomm Inc., 14 F.4th 1059 (9th Cir. 2021); *see also infra* notes 204–216 & accompanying text (further discussion of *Qualcomm* and *Mazza*).

[29] *See* Webster v. LLR, Inc., No. 2:17CV225, 2018 WL 10230741, at *9 (W.D. Pa. Aug. 20, 2018) (finding that "when district courts have faced the problem of nationwide classes which seek to apply state consumer protection laws, those courts have refused to certify a class."); Schwartz v. Lights of Am., No. CV 11-1712-JVS MLGx, 2012 WL 4497398, at *7–9 (C.D. Cal. Aug. 31, 2012) (denying class certification on grounds that "the last event necessary to create false advertising liability was the communication of advertisements to the plaintiffs, and thus the 'wrongs' occurred in the various foreign states . . . . It follows that each foreign state has a 'predominant interest' in applying its own false advertising laws."); Agostino v. Quest Diagnostics Inc., No. 04-4362 (SRC), 2010 WL 5392688, at *4–13 (D.N.J. Dec. 22, 2010) (concluding that "[c]lass treatment of the statutory consumer fraud claims is simply impracticable."); *see also supra* note 2; *infra* notes 30–34. R

[30] No. 1:10CV68-HSO-JMR, 2012 WL 3811741, at *1–2 (S.D. Miss. Sept. 4, 2012) (Bank of America did not "contest that borrowers, including Plaintiffs, were enrolled in the HSF Program, despite not executing a HSF Forbearance Agreement or otherwise consenting.").

[31] *Id.* at *2.

[32] *Id.* at *10.

[33] *Id.* at *7–8.

cies have arisen along with this trend[34] of rejecting certification, simply because of the multiplicity of state laws, of classes of consumers who were exposed to the same business conduct.

1. Unfairness

Recent decisions denying multistate certification may be unsurprising, having come during a period of creeping constraints on the availability of class actions.[35] But there can be no denying that denying class certification of the claims of consumers in one state, simply because parallel claims of consumers in *other* states must proceed in the same court, is unjust. This outcome prevents plaintiffs from vindicating the rights of class members whose claims may have been certified had they proceeded in isolation, in a forum unpolluted by claims under other states' laws.[36] Denying certification in this

[34] *See supra* notes 2, 18–33; *see also, e.g.*, McKinney v. Corsair Gaming, Inc., No. 22-CV-00312-CRB, 2022 WL 17736777, at *5–8 (N.D. Cal. Dec. 16, 2022); Nazos v. Toyota Motor Corp., No. CV 22-2214 PA (Ex), 2022 WL 17078882, at *7 (C.D. Cal. Oct. 13, 2022); Huber v. BioScrip Infusion Servs., No. CV 20-2197, 2021 WL 1313411, at *8, *10 (E.D. La. Apr. 8, 2021); Banh v. Am. Honda Motor Co., Inc., No. 2:19-CV-05984-RGK-AS, 2020 WL 4390371, at *12–13 (C.D. Cal. July 28, 2020); De Lacour v. Colgate-Palmolive Co., No. 16-CV-8364 (KMW), 2019 WL 4359554, at *3–4 (S.D.N.Y. Sept. 12, 2019); *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 579–80 (S.D.N.Y. 2018); Czuchaj v. Conair Corp., No. 13-CV-1901-BEN (RBB), 2016 WL 1240391, at *4 (S.D. Cal. Mar. 30, 2016); Stitt v. Citibank, No. 12-CV-03892-YGR, 2015 WL 9177662, at *4 n.4 (N.D. Cal. Dec. 17, 2015); Coe v. Philips Oral Healthcare Inc., No. C13-518 MJP, 2014 WL 5162912, at *4 (W.D. Wash. Oct. 14, 2014); Holt v. Globalinx Pet LLC, No. SA CV 13-0041 DOC, 2014 WL 347016, at *7 (C.D. Cal. Jan. 30, 2014); Cochran v. Volvo Grp. N. Am., LLC, No. 1:11-CV-927, 2013 WL 1729103, at *2–3 (M.D.N.C. Apr. 22, 2013); Hale v. Enerco Grp., Inc., 288 F.R.D. 139, 146–47 (N.D. Ohio 2012); Blessing v. Sirius XM Radio Inc., No. 09 CV 10035 HB, 2011 WL 1194707, at *12 (S.D.N.Y. Mar. 29, 2011); True v. ConAgra Foods, Inc., No. 07-00770-CV-W-DW, 2011 WL 176037, at *8–9 (W.D. Mo. Jan. 4, 2011); Cullen v. Nissan N. Am., Inc., No. 3:09-0180, 2010 WL 11579748, at *3–6 & n.4 (M.D. Tenn. Mar. 26, 2010); DA Air Taxi LLC v. Diamond Aircraft Indus., Inc., No. 09-60157-CIV, 2009 WL 10668159, at *4–5 (S.D. Fla. Nov. 5, 2009). Even before these rulings, "[i]n case after case, the decision whether to certify a class turn[ed] on the manageability concern as to which law should apply and whether a unified trial would be possible given the constraints." Samuel Issacharoff, *Getting Beyond Kansas*, 74 UMKC L. REV. 613, 620 (2006). The ensuing wave of litigation confirmed that "class action law has largely been cast into the legal limbo, known as choice of law." *Id.* **R**

[35] *See* Richard M. Brunell & Andrew I. Gavil, *Editors' Note, Symposium: Perspectives on Indirect Purchaser Litigation: Time for Reform?* 84 ANTITRUST L.J. 309, 311 (2022) (stating that the Supreme Court has become "increasingly hostile to class actions generally" and "[t]he consequence has been ever more demanding standards for class certification"); *see also, e.g.*, *Coinbase*, 143 S. Ct. at 1921. The Court issued 5-4 decisions in favor of defendants on class action questions in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In addition, "in a feat of jurisprudential jujitsu," the 5-4 majority in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), held that the Federal Arbitration Act preempts state-law unconscionability defenses to arbitration provisions in adhesive consumer contracts—so "[n]ow, any time a corporation can get you into a contract, it can get you to waive your right to be part of a class action." FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 16, 127.

[36] Before CAFA, in contrast, some courts in rejecting nationwide class certification took comfort that state courts could dispense justice to their own affected residents. *See, e.g.*, *In re*

circumstance abrogates the core policy of the Supreme Court's *Erie* doctrine insofar as the happenstance of a federal forum operates to deny substantive relief under state law.[37]

This anomalous result did not go unmentioned in the Senate's debates on CAFA: Senator Jeff Bingaman (D-NM) identified this very "flaw . . . that . . . could leave many properly filed multistate consumer class actions without a forum in which those cases could be heard. . . . If we are going to take away the right of State judges to hear a class action, it is incumbent upon us to make sure the Federal judge is not able to not certify the class because too many State laws would apply. That would be an unfair result."[38] But the Senate rejected an amendment to CAFA that would have addressed this problem.[39] As things stand, with limited exceptions, federal jurisdiction under CAFA is mandatory.[40] And having claims under many different state laws in a single federal case "makes the litigation look like the kind of unmanageable, nationwide class to which federal courts routinely deny certification," as one consumer advocate testified to Congress.[41]

Plaintiffs' attorneys have responded by trying, often unsuccessfully,[42] to find a federal statute that applies to the alleged violations. Failing that,

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Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002); *see also In re* Sch. Asbestos Litig., 789 F.2d 996, 1002 (3d Cir. 1986) (stating concern that class certification in a diversity action could result in an "intrusion into the autonomous operation of state judicial systems.").

[37] *See* Guaranty Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945).

[38] 151 Cong. Rec. S1157-02, S1167–1168, 2005 WL 309648 (daily ed. Feb. 9, 2005). Senator Dianne Feinstein (D-CA), joined by Senator Bingaman, proposed an unsuccessful amendment to fix this "catch-22. You send a consumer class action to Federal court, the judge says it is unmanageable, will not certify it, the case cannot go back to State court and it sits in oblivion." *Id.* at S1166; *see also infra* note 136. My proposal for amending CAFA is informed by the intervening generation of case law. *See infra* Part II.C.

[39] *See supra* note 38; *infra* note 136.

[40] My co-authors and I analyzed the limited exceptions to federal jurisdiction under CAFA in "Navigating CAFA's Exceptions," THE CLASS ACTION FAIRNESS ACT: LAW AND STRATEGY (American Bar Ass'n, 2d ed. 2022).

[41] Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 REV. LITIG. 721, 784 (2013) (citing statement of Thomas Sobol); *see* Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 543, 564–65 (2006) ("The prospect of analyzing and reconciling variations among the states' laws . . . can lead to the conclusion that the class action mechanism does not provide the 'superior' available alternative under Rule 23(b)(3)."); Ward v. Dixie Nat. Life Ins. Co., 257 F. App'x 620, 628–29 (4th Cir. 2007) ("In a class action potentially governed by the laws of multiple states, identifying the applicable body or bodies of state law is critical because variations in state law may swamp any common issues and defeat predominance.") (internal quotation marks and citation omitted); Senne v. Kansas City Royals Baseball Corp., 934 F.3d 918, 928 (9th Cir. 2019) (acknowledging that "potentially varying state laws may defeat predominance" under Rule 23(b)(3) and that the Ninth Circuit has "been particularly concerned about the impact of choice-of-law inquiries in nationwide consumer class actions and products liability cases") (internal citations omitted), *disapproved of on other grounds by* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022).

[42] For example, claims under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, "stand or fall with the express and implied warranty claims under state law," Gould v. Helen of Troy Ltd., No. 16 CIV. 2033 (GBD), 2017 WL 1319810, at *5 (S.D.N.Y. Mar. 30, 2017) (citations omitted), and civil claims under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), require a multi-person "enterprise" and other

plaintiffs seek out a common-law claim with similar elements from state to state[43] or take the more conservative route of proposing class certification on a state-by-state basis, meaning the class trial would concern only the claims of consumers who transacted in the home states of the representative plaintiffs.[44] Since the defendant's exposure is measured on a state-by-state basis, class counsel spend time and effort seeking to be retained by plaintiffs in as many states as possible—because only by having a client from New York, say, can the case seek damages based on transactions occurring in New York.[45] These professional resources are expended superfluously if the conduct in question had widespread effects.

Under this state-by-state regime, the defendant faces only partial exposure based on the relevant commerce in the named plaintiffs' states. Although the defendant has an interest in precluding claims under any law,[46] and is alleged to have violated the laws of numerous states, the plaintiff can only take the defendant to trial under the law of a discrete state or set of states. Consequently, the plaintiff's bargaining power for a national settlement class is artificially curtailed and a defendant negotiating a settlement seeks a national release of liability that is overbroad as compared to the defendant's more limited exposure in the actual case.[47] Then, once class actions involving nationwide commerce settle nationally (no surprise), the release of claims under multiple states' laws lends fodder to the class action objector

unique showings. *See* Boyle v. United States, 556 U.S. 938, 944–49 (2009); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

[43] *See infra* Part II.B (discussion of unjust enrichment); note 173 (breach of contract); note 174 (breach of the implied warranty of merchantability); note 176 (fraudulent concealment). **R**

[44] *See, e.g.*, Pella Corp. v. Saltzman, 606 F.3d 391, 392–93, 396 (7th Cir. 2010) (affirming Rule 23(b)(3) certification of six state subclasses of purchasers of defective windows who had paid for replacement windows); *In re* McCormick & Co., Inc., Pepper Prods., Mktg. & Sales Practices Litig., Misc. No. 15-1825 (ESH), 2019 WL 3021245 (D.D.C. July 10, 2019) (certifying three statewide classes with respect to statutory claims of consumer fraud); *In re* MacBook Keyboard Litig., No. 5:18-CV-02813-EJD, 2021 WL 1250378, at *1 (N.D. Cal. Apr. 5, 2021) (certifying seven statewide classes of consumers who purchased laptops with an allegedly defective component); *see also infra* note 56.

[45] The 1,721-page, 7,479-paragraph operative consolidated complaint in the GM ignition-switch multidistrict litigation ("MDL") included plaintiffs from all 50 states who brought corresponding state-law claims. *In re* Gen. Motors LLC Ignition Switch Litig., No. 1:14-md-02543-JMF (S.D.N.Y. Nov. 27, 2017), ECF No. 4838. The 575-page, 1,406-paragraph consolidated consumer complaint in the Equifax data breach MDL included plaintiffs from all 50 states and corresponding state-law claims. *In re* Equifax, Inc. Customer Data Sec. Breach Litig., No. 1:17-md-2800-TWT (N.D. Ga. May 14, 2018), ECF No. 374. However, the Federal Rules require a "short and plain statement" of the grievance. FED. R. CIV. P. 8(a)(2).

[46] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) ("Whether it wins or loses on the merits, [the defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata").

[47] *See* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1138 (2010) (noting that "[s]ettlements, not trials, have long comprised the dominant endgame in class actions, as in civil actions generally."); *cf.* Willis L. M. Reese, *The Law Governing Airplane Accidents*, 39 WASH & LEE L. REV. 1303, 1305 (1982) (describing settlement talks in airplane accident mass torts and concluding that, "[i]f some certainty and precision could be brought to choice of law, attention could be directed more speedily and more efficiently to the important substantive issues.").

bar in the practice of holding up settlement approvals (and recoveries)[48] by asserting class counsel unfairly traded off stronger state claims to settle weaker ones.[49]

2. Inefficiencies

In addition to causing misalignments and making class certification and approval of settlements harder to obtain, this state-by-state regime has also caused substantial waste. It is not just a matter of redundant client retentions: attorneys and judicial law clerks have spent untold hours in CAFA cases cataloging fine distinctions in state law. As a practitioner I have helped create lengthy appendices surveying, among other state-law doctrines, the contractual doctrine of unconscionability,[50] the economic loss rule denoting the line between contract and tort,[51] and the trespass to chattels[52] and aiding and abetting[53] torts. Dredging the sea of case law, the attorneys on both sides "may spend weeks generating applicable law charts for the fifty states, a highly tedious and unpleasant task" that can lend a "'theatre of the absurd' quality to the applicable law question as it applies to multistate class actions."[54]

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[48] *See* Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 975 (E.D. Tex. 2000) ("Professional Objectors . . . seek out class actions to simply extract a fee by lodging generic, unhelpful protests"); BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 15, 31 (Fed. Jud. Ctr., 2d ed. 2009) (advising federal judges to "[w]atch out . . . for canned objections filed by professional objectors."); Barnes v. FleetBoston Fin. Corp., No. CA 01-10395-NG, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006).

[49] *See, e.g.*, Corrected Reply Brief of Appellants David R. Watkins and Theodore H. Frank, *In re* Equifax Inc. Customer Data Sec. Breach Litig., No. 20-10249, 2020 WL 6054964 (11th Cir. Oct. 9, 2020) (contesting fairness of settlement providing at least $380.5 million for data-breach victims around the country because "many class members . . . have unique causes of action with superior statutory-damages provisions"); *In re* Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539 (9th Cir. 2019) (en banc) (reinstating certification and vacating panel decision that would have rejected a nationwide class settlement based on state-law differences). When the court considers class certification for settlement purposes, the trial manageability factor of Rule 23(b)(3)(D) drops out of the analysis, making differences in state law less of a concern. *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 302–03 (3d Cir. 2011) (en banc) (citing, *inter alia*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997)).

[50] *In re* Checking Acct. Overdraft Litig., No. 1:09-md-02036-JLK (S.D. Fla. Feb. 19, 2013), ECF No. 3262-1 at pp. 46–66 of 97.

[51] *In re* U.S. Office of Pers. Mgt. Data Sec. Breach Litig., No. 1:15-mc-01394-ABJ (D.D.C. June 30, 2016), ECF No. 82-1.

[52] *In re* HP Printer Firmware Update Litig., No. 5:16-cv-05820-EJD (N.D. Cal. Feb. 7, 2018), ECF No. 91 at pp. 34–41 of 42.

[53] *In re* Woodbridge Invs. Litig., No. 2:18-cv-00103-DMG-MRW (C.D. Cal. Apr. 16, 2021), ECF No. 170-2.

[54] Linda S. Mullenix, *Gridlaw: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 651, 654 (2006); *see* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 reporters' notes, cmt. a (2010) (noting defendants' "incentive to catalogue in microscopic detail each legal or factual variation suggesting the existence of individual questions."); *In re* Pharm. Indus. Average Wholesale Price Litig., 252 F.R.D. 83, 94 (D. Mass. 2008) (stressing that plaintiffs "proposing to certify a class requiring the application of the laws of numerous jurisdictions . . . must shoulder the *herculean* burden of conducting an *extensive* review of state law variances") (emphases added); *In re* Polyurethane Foam Antitrust Litig.,

Hence for many years, "competing accounts of the compatibility or incompatibility of varying state laws" have marked "the fault line in the battles over class certification."[55] Performing a now-familiar script, plaintiffs argue that the differences are minor or can be sorted into a limited number of patterns such that the states can be grouped into manageable subclasses, with corresponding verdict forms and jury instructions at the class trial.[56] Defendants respond that these distinctions matter for purposes of adjudicating the case—often regarding elements of causation, intent, or reliance or a case-specific affirmative defense—making it neither manageable nor fair for a plaintiff in one state to pursue a judgment obligating the defendant to pay class members in other states. No matter how the state-law differences play out, researching how numerous states apply the same legal doctrine can seem pointless. When choice of law is contested, the court must decide not only *which* law applies but *how* it applies; and when the law of many jurisdictions applies, surveying similar applications of a doctrine quickly gets redundant. But, even where the standard is substantially identical, this state-by-state exercise generates seemingly endless "issues" to argue over and decide. What else can one expect from lawyers? Overloaded federal judges[57] then get into

No. 1:10 MD 2196, 2014 WL 6461355, at *73 (N.D. Ohio Nov. 17, 2014) (granting certification where plaintiffs "presented analysis of the relevant state laws suggesting any differences that might exist among the various state statutes are minimal and can be addressed with special verdict forms."); *supra* note 27; *infra* notes 58–59 & 220.

[55] Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1860 (2006).

[56] *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05 (2010) (providing that the court may approve aggregate treatment of multiple claims in a class action if the different bodies of law that apply "are the same in functional content" or "are not the same in functional content but nonetheless present a limited number of patterns that the court . . . can manage by means of identified adjudicatory procedures," such as grouping similar claims according to subclasses); *see, e.g.*, Butler v. Sears, Roebuck & Co., 727 F.3d 796, 802 (7th Cir. 2013) (stating that "[c]omplications arise from . . . separate state warranty laws, but can be handled by the creation of subclasses."); *In re* Checking Acct. Overdraft Litig., 307 F.R.D. 630, 646 (S.D. Fla. 2015) (finding that plaintiffs "met their burden of showing that common issues of fact and law will predominate within the subclasses they have proposed for each of their claims."); *see also supra* note 44; Aldapa v. Fowler Packing Co., Inc., 323 F.R.D. 316, 326–27 (E.D. Cal. 2018) (discussing the law of subclassing under Rule 23(c)(5) and commenting in part that "subclasses may be used to more efficiently resolve common issues during the proceeding") (citing, *inter alia*, American Timber & Trading Co. v. First Nat'l Bank of Or., 690 F.2d 781, 787 n.5 (9th Cir. 1982)).

[57] In a November 2021 amicus brief, retired federal judges expressed alarm that "federal district courts are badly overburdened" and "overworked," highlighting the "unnerving asymmetry" that has arisen from Congress' failure to create new judgeships to keep pace with accelerating case filings. Brief of Retired Federal Judges as Amici Curiae in Support of Respondents, Garland v. Gonzalez, No. 20-322, 2021 WL 5769562, at *3, *13–15 (U.S. Nov. 29, 2021). Earlier in 2021, Senators Todd Young (R-IN) and Chris Coons (D-DE) introduced bipartisan legislation to create 77 new district court judgeships, recognizing that "overburdened" district courts around the country are "struggling to keep up with growing caseloads." Press Release, Young and Coons Reintroduce JUDGES Act to Address Judicial Emergencies (July 29, 2021), https://www.young.senate.gov/newsroom/press-releases/young-and-coons-reintroduce-judges-act-to-address-judicial-emergencies. As of February 2023, the Administrative Office of the United States Courts reported 31 "judicial emergencies" resulting from vacancies on the federal bench where immediate assistance is needed to relieve unsustainably high workloads. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL EMERGENCIES, U.S.

the weeds, analyzing how the courts of different states treat, would treat, or have varyingly treated, for instance, the traditional privity requirement in warranty[58] or the economic loss rule in tort.[59] What's the point here?

This "Gridlaw"[60] traffic drains resources and delays adjudications, particularly in multidistrict litigations ("MDLs").[61] The hodgepodge of state claims and uncertainties about governing law distract counsel, diverting attention away from the actual merits of the case.[62] The sweep of the state-law analyses also exacerbates the problem of federal judges directing the development of substantive state law at a time of increased economic concentration and accelerating technological change.[63] Early in a case, too, courts confront questions regarding a class plaintiff's standing to assert claims under a state law other than the law of the plaintiff's own claim.[64] The collective distor-

COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies; *see also* Andrew S. Boutros *et al.*, *The Collision of the Speedy Trial Clock with the Coronavirus's Slowdown Realities*, 35 CRIMINAL JUSTICE 49 (Fall 2020) (describing the pressure exerted on the federal judiciary from COVID-19-related slowdowns and the consequent impairment of criminal defendants' Sixth Amendment right to a speedy trial).

[58] *See, e.g.*, Darisse v. Nest Labs, Inc., No. 5:14-CV-01363-BLF, 2016 WL 4385849, at *12 (N.D. Cal. Aug. 15, 2016); *see also supra* notes 27 & 54; *infra* notes 59 & 220.

[59] *See, e.g.*, *In re* Cap. One Consumer Data Sec. Breach Litig., 488 F. Supp. 3d 374, 393–401 (E.D. Va. 2020); *see also* Cole v. Gen. Motors Corp., 484 F.3d 717, 726–30 (5th Cir. 2007); Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1181–83 (11th Cir. 2010); Allen v. ConAgra Foods, Inc., 331 F.R.D. 641, 660–71 (N.D. Cal. 2019); Vista Healthplan, Inc. v. Cephalon, Inc., No. 2:06-CV-1833, 2015 WL 3623005, at *27–29 (E.D. Pa. June 10, 2015); Gianino v. Alacer Corp., 846 F. Supp. 2d 1096, 1100–02 (C.D. Cal. 2012).

[60] Linda S. Mullenix, *Gridlaw: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 651 (2006); *see also* Senne v. Kansas City Royals Baseball Corp., 934 F.3d 918, 962 (9th Cir. 2019) (Ikuta, J., dissenting) ("No doubt the analysis of the intersection between Rule 23(b)(3)'s predominance inquiry and California's choice-of-law inquiry is multi-layered and complex"), *disapproved of on other grounds by* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022).

[61] *See, e.g.*, Casey Cep, *Damages: Johnson & Johnson and the New War on Consumer Protection*, The New Yorker, Sept. 19, 2022, at 54 (reporting that "M.D.L.s can take years" and "plaintiffs and defendants alike complain about the sluggishness of the enterprise."); Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices From the Crowd*, 107 CORNELL L. REV. 1835, 1844 (2022) (stating that "MDLs last almost four times as long as the average civil case, making it somewhat predictable that 73% of respondents [in the authors' survey] found the delays unreasonable.").

[62] *See* Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. at 1840 ("Under the current doctrinal muddle, the exact same transaction giving rise to the exact same injury may result in the application of different substantive laws between the exact same parties, based on the fortuity of where the plaintiff chooses to file suit and what the prevailing choice of law rule is in that state. As a result, it is difficult to invoke any concept of settled expectations as to what the choice of decisional law might be for any particular claimed conduct.").

[63] My previous article on a related topic, *Cooperative Federalism in Class Actions*, 86 TENN. L. REV. 1 (2018), discusses how federal judges routinely decide novel or indeterminate questions of substantive state law in class actions. A more recent example of this trend is *Ramirez v. Paradies Shops, LLC*, 69 F.4th 1213, 1219 (11th Cir. 2023), in which a Florida federal judge authored a published Eleventh Circuit opinion analyzing the scope of Georgia negligence law "[w]ithout clear guidance from Georgia courts on the asserted duty to safeguard" the plaintiff employee's personally identifiable information.

[64] *See* Nuwer v. FCA US LLC, 343 F.R.D. 638, 647–48 (S.D. Fla. 2023) (analyzing divergent reasoning); Langan v. Johnson & Johnson Consumer Cos., Inc. 897 F.4d 88, 92–96

tions from this litigation structure undermine CAFA's own goal of streamlining resolution of national controversies[65] and the Federal Rules' paramount policy that cases be efficiently resolved on their merits.[66]

C. Key to the Solutions: A Shared Cause of Action

Consolidating the grievance under a single cause of action overcomes the problem muddying the waters in these cases where the laws of several jurisdictions are being litigated. If only one cause of action, or the law of just one state, applies, expectations are settled, the legal analysis becomes considerably more focused, and verdict forms and jury instructions can be streamlined. Simplifying the choice of law in multistate class actions will allow parties and courts to hone in more on the facts and how best to achieve a fair and expeditious result. Bargaining will progress on a more level playing field as the plaintiff's leverage will match the defendant's true settlement interest and exposure. Most of all, when companies face a real risk of a nationwide class action under a single law, no matter where in the country transactions occur, companies have an increased incentive to ensure they are complying with the rules and norms of competitive markets, which do not meaningfully vary. The balance of this *Law and Policy* Article therefore presents these three proposals for reform:

- Congress should add a private right of action to the FTC Act;
- Judges should consider claims arising under universal principles in equity when plaintiffs seek multistate class certification;
- Congress should add a choice-of-law presumption to CAFA that, absent a contractual choice-of-law clause, gives plaintiffs the option of proceeding under the law of the defendant's home state.

Each of these solutions responds directly to the source of the problem—the multiplicity of laws—by highlighting a potential cause of action available to all class members in the country. Each shared claim can be used by Ameri-

(2d Cir. 2018) (noting "considerable disagreement over this question in the district courts" and holding that "variations in state law present a class certification problem and not a constitutional standing problem") (citing, *inter alia*, Morrison v. YTB Int'l, Inc., 649 F.3d 533, 535–36 (7th Cir. 2011); Murphy v. Olly Pub. Benefit Corp., — F. Supp. 3d —, No. 22-CV-03760-CRB, 2023 WL 210838, at *15 (N.D. Cal. Jan. 17, 2023) (citing "flurry of recent cases on this issue, generally either concluding that this is a standing issue or that it is a Rule 23 isssue.").

[65] *See* S. Rep. 109–14 at 23, 60 (2005) (stating that CAFA brings related class actions "under one single judge to promote judicial efficiency and ensure consistent treatment of the legal issues . . . . [F]ederal courts can also resolve duplicative class actions more efficiently by consolidating them."); *see also infra* notes 199–202 & accompanying text (further discussion of Senate Report on CAFA).

[66] FED. R. CIV. P. 1; *see also* Ballou v. Vancouver Police Officers' Guild, No. C09-05086-RBL, 2009 WL 1916073, at *2 (W.D. Wash. July 2, 2009) ("[T]he Federal Rules of Civil Procedure support the policy that cases should be decided on their merits, not on procedural technicalities."); Coats v. Bank of Am., No. CIV.A. 09-0380-KD-B, 2009 WL 5066773, at *2 (S.D. Ala. Dec. 16, 2009) ("[T]he federal rules favor allowing a determination on the merits").

can citizens to combine their interests and provide a credible check on harmful business conduct in the economy at large.

II. Three Solutions

Providing a single claim for citizens alleging business or marketplace violations will promote decisions on the merits, conserve resources, and resolve party expectations. The three solutions are complements, not substitutes: any or all would alleviate the unfairness and inefficiencies from the multistate problem. The first and the third solutions will require legislative action, while the second is up to case participants. The third solution—Congress amending CAFA with a choice-of-law presumption—is both the most feasible and the most complex, and therefore takes up more room in the discussion toward the end.

A. Let Consumers Sue for Violations of the FTC Act

First, when plaintiffs have access to a federal cause of action, multistate class actions can proceed and resolve more efficiently for all Americans who were subject to the alleged violations. The Telephone Consumer Protection Act,[67] which prohibits robocalls and texts without consumer consent, provides an example in point. The same substantive standards apply to the TCPA claim of each class member, wherever they may live. This streamlines the litigation and prevents mischief about which laws apply and their varying effect, allowing the parties and court to focus on whether the facts meet the applicable standards.[68] The same benefits also exist in class actions under other federal statutes regulating aspects of commerce, such as the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Stored Communications Act.[69] But unlike these laws, and unlike even more analogous federal laws like RICO[70] and the Clayton Act,[71] the Federal Trade

[67] 47 U.S.C. § 227 ("TCPA").

[68] *See, e.g.*, Ira Holtzman, C.P.A., & Assocs. Ltd. v. Turza, 728 F.3d 682, 684 (7th Cir. 2013) ("Class certification is normal in litigation under § 227"); Brinker v. Normandin's, No. 5:14-cv-03007-EJD, 2017 WL 5495980, at *3 (N.D. Cal. Nov. 16, 2017) ("[T]he question of law and fact common to all class members is whether Defendants violated the TCPA by placing autodialed calls to cell phones without the recipients' consent."); Cabrera v. Gov't Emps. Ins. Co., No. 12-61390-CIV, 2014 WL 11894430, at *5 (S.D. Fla. Sept. 29, 2014) ("The question of whether [defendant] made the calls at issue and whether it did so using an automated dialing system or an artificial or pre-recorded voice are the central and predominate issues" whose resolution "will have a direct impact on each class member's claims; indeed, if those issues are answered in the affirmative, each class member will have established liability under the TCPA.").

[69] *See, e.g.*, Harris v. comScore, Inc., 292 F.R.D. 579 (N.D. Ill. 2013) (certifying a nationwide class with respect to claims under the Stored Communications Act, the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act).

[70] 18 U.S.C. § 1964(c); *see also supra* note 42.

[71] 15 U.S.C. § 15(a); *see also infra* note 207.

Commission Act[72] does not provide for a private right of action. Only the FTC can enforce the FTC Act[73]—which established the agency in 1914 and forbids "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce."[74]

These general prohibitions make the FTC Act the utility infielder of consumer law.[75] "Unfair methods of competition" include not just actual but also incipient violations of the antitrust laws[76] as well as business activity that violates their policies or "spirit."[77] The Act's open-ended prohibition of "unfair" practices considers public policy and forbids conduct that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[78] A practice is "deceptive" and runs afoul of the Act "if (1) it is likely to mislead consumers acting reasonably under the circumstances; and (2) it is 'material,' that is, likely to affect consumers' conduct or decisions with regard to a product or service."[79] Deceptive or unfair practices vary widely[80] but may be enumerated[81] and include such recurring

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[72] 15 U.S.C. § 41 *et seq.* ("FTC Act").

[73] 15 U.S.C. § 45(m); Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

[74] 15 U.S.C. § 45(a).

[75] *See* AMY KLOBUCHAR, ANTITRUST 115 (2021) (explaining that the FTC's "mission is to prevent fraudulent or anticompetitive business practices and to protect consumers against everything from false and deceptive advertising to monopolistic behavior. It also is tasked with protecting the privacy rights of Americans.").

[76] F.T.C. v. Texaco, Inc., 393 U.S. 223, 225 (1968) ("Congress enacted s 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition."); F.T.C. v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (similar).

[77] F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 243–44 (1972); *see also* In the Matter of Rambus, Inc., No. 9302, 2006 WL 8266094 (F.T.C. July 31, 2006) (Leibowitz, Comm'r, concurring). The FTC's latest guidance on the meaning of "unfair methods of competition" that violate section 5 of the Act, 15 U.S.C. § 45(a), supersedes its prior interpretations and distills two general criteria, to be evaluated on "a sliding scale": (1) the extent to which the conduct at issue is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature"; and (2) "the conduct must tend to negatively affect competitive conditions." F.T.C., *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202, at 8–10 (Nov. 10, 2022) (footnotes omitted). Significantly, the defendant's market power need not be shown. *Id.* at 10; *see also Texaco*, 393 U.S. at 230 (reinstating injunction against Texaco for coercing its gas station dealers, who depended on a supply of its gasoline, to use only Goodrich tires, batteries, and other accessories when Goodrich was paying Texaco for the exclusive deal: "The nonsponsored brands do not compete on the even terms of price and quality competition" and "[i]t is enough that the Commission found . . . unfairly burdened competition for a not insignificant volume of commerce.").

[78] Matter of Civ. Investigative Demand to Intuit Inc., No. 192-3119, 2020 WL 5037437, at *4 (F.T.C. Aug. 17, 2020) (citing 15 U.S.C. § 45(a)); *see also* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (recognizing that "'[t]he standard of unfairness' under the FTC Act is, by necessity, an elusive one").

[79] F.T.C. Letter, 2005 WL 1950765, at *1 (Mar. 15, 2005); *see also* In the Matter of Zango, Inc. f/k/a 180solutions, Inc., No. 52-3130, 2007 WL 809634, at *13 (F.T.C. Mar. 7, 2007); CHARLES R. MCMANIS, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION IN A NUTSHELL 435 (6th ed. 2009) ("Neither knowledge that an act or practice is deceptive nor intent to deceive need be shown.").

[80] *See* Gregg v. Ameriprise Fin., Inc., 245 A.3d 637, 647–48 (Pa. 2021) (holding that "deception is a broader concept of misconduct than common law fraud"); Wilner v. Allstate

frauds as bait-and-switch,[82] strikethrough or false discount,[83] slack-fill,[84] buy one get one free,[85] timeshare,[86] pyramid,[87] and Ponzi.[88]

In the 1960s most states enacted "little FTC Acts" that encourage private enforcement by providing for a private right of action and for a prevail-

Ins. Co., 71 A.D.3d 155, 160–61 (N.Y. App. Div. 2010) (discussing scope of section 349 of New York's General Business Law); Walker v. Dominion Homes, Inc., 842 N.E.2d 570, 578 (Ohio Ct. App. 2005) (finding genuine issues of material fact as to whether the actions of a lender and home builder concerning a mortgage buydown program were deceptive within Ohio's broad prohibition of unfair or deceptive practices); *see also* Am. Airlines, Inc. v. N. Am. Airlines, Inc., 351 U.S. 79, 85 (1956) (stating that "'[u]nfair or deceptive practices or unfair methods of competition'. . . are broader concepts than the common-law idea of unfair competition."); *infra* notes 81, 105, 107 & 116; *cf.* Carpenter v. United States, 484 U.S. 19, 27 (1987) ("[T]he words 'to defraud' in the mail fraud statute," 18 U.S.C. § 1341, "have the common understanding of wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.") (citations and internal quotation marks omitted); McMANIS, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 417 (section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides a federal cause of action "for a wide variety of common-law palming off claims, including deceptive product imitation, deceptive packaging and trade dress, deceptive imitation of unregistered marks and names, deceptive association of non-competing products, deceptive literary and artistic titles.").

[81] *See infra* note 107; "The Federal Trade Commission: Powers and Law Governing Deceptive Acts," *Government Regulation and the Legal Environment of Business*, https://saylordotorg.github.io/text_government-regulation-and-the-legal-environment-of-business/s20-unfair-trade-practices-and-the.html (noting that common law prohibits, as harmful to competition or consumers, "passing off one's products as though they were made by someone else, using a trade name confusingly similar to that of another, stealing trade secrets, and various forms of misrepresentation."); PROSSER & KEETON ON TORTS 1014–15 (4th ed. 1984) (citing unfair competition cases involving "defamation, disparagement, intimidation or harassment of the plaintiff's customers or employees, obstruction of the means of access to his place of business, threats of groundless suits, commercial bribery and inducing employees to commit sabotage.") (footnotes omitted); *see also supra* note 80; *infra* notes 105 & 116.

[82] *See* 16 C.F.R. § 238.4; Veera v. Banana Republic, LLC, 211 Cal. Rptr. 3d 769, 780 (Ct. App. 2016) (explaining that "when the deception is revealed, the consumer, now invested in the decision to buy and swept up in the momentum of events, nonetheless buys at the inflated price, despite his or her better judgment.").

[83] *See* 16 C.F.R § 233.1; People v. Overstock.com, Inc., 219 Cal. Rptr. 3d 65, 79–82 (Ct. App. 2017) (affirming verdict based in part on false marketing of online price reductions).

[84] *See* 21 C.F.R. § 100.100(a); Hawkins v. Nestle U.S.A. Inc., 309 F. Supp. 3d 696, 702 (E.D. Mo. 2018) (upholding complaint alleging that Raisinet packages made of opaque, non-pliable cardboard were nearly half empty).

[85] *See* 16 C.F.R § 251.1; Stewart v. Albertson's, Inc., 481 P.3d 978, 980–81 (Or. Ct. App. 2021) (reinstating class damage claims that asserted misleading "buy one, get one free" meat promotions).

[86] *See* David A. Bowen, *Timeshare Ownership: Regulation and Common Sense*, 18 LOY. CONSUMER L. REV. 459 (2006).

[87] Pyramid schemes involve "payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users." In the Matter of Koscot Interplanetary, Inc., 86 F.T.C. 1106 (1975); *see also* United States v. Gold Unlimited, Inc., 177 F.3d 472, 479–82 (6th Cir. 1999).

[88] A Ponzi scheme entails "payment of purported returns to existing investors from funds contributed by new investors," such that "money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments." U.S. Securities & Exchange Commission, *What Is a Ponzi Scheme?* (July 11, 2019), https://www.sec.gov/spotlight/enf-actions-ponzi.shtml; Janvey v. Alguire, 647 F.3d 585, 597 (5th Cir. 2011) (quoting BLACK'S LAW DICTIONARY 1198 (8th ed. 2004)).

ing plaintiff to recover a reasonable attorney's fee.[89] These state laws, also known as the state consumer protection or UDAP statutes—UDAP stands for unfair or deceptive acts or practices—are invoked in virtually every class action brought by a consumer, whether arising from misleading advertising or other fraud, contractual breaches imposing excessive fees or interest rates, price fixing, tying or other coercive business conduct, intrusions on privacy, or a concealed product defect.[90] Courts liberally construe these consumer laws,[91] following the FTC's interpretations.[92] Reflecting their reach, these laws have been litigated in matters ranging from COVID-19 refund cases[93] to the Wells Fargo phony account scandal[94] to the Sandy Hook mass shooting.[95] And courts have recognized that claims of unfair practices are "ideal for class certification" because they focus on the defendant's conduct and not class members' individual interactions.[96] Likewise, courts have deemed claims of deceptive practices "particularly suited to class treatment" given the objective "likely to mislead" and "materiality" standards.[97] For these reasons, if Congress creates a private right of action, nearly every consumer class action will invoke the FTC Act, counteracting the multistate problem and promoting efficiency in regulation of mass marketing.[98]

So too would "private enforcement of § 5 of the FTC Act . . . take much of the enforcement burden off the FTC," which could then "concentrate its limited resources on developing policy through informal proceedings and rulemaking"[99] along with its targeted enforcement. FTC Chair Lina

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[89] *E.g.*, Cal. Bus. & Prof. Code § 17203; Tex. Bus. & Com. Code § 17.50; Fla. Stat. § 501.211; N.Y. Gen. Bus. Law § 349(h); 815 Ill. Comp. Stat. 505/10a.

[90] *See* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 912 (2017) ("State consumer protection statutes, known as state UDAP laws or state 'little FTC acts,' provide a stronghold of effective consumer protection in the United States.").

[91] *E.g.*, Tex. Bus. & Com. Code § 17.44(a); Utah Code § 13-11-2.

[92] *See, e.g.*, Davis v. Powertel, Inc., 776 So.2d 971, 974 (Fla. Dist. Ct. App. 2000); Mellon v. Regional Tr. Serv. Corp., 334 P.3d 1120, 1126–27 (Wash. Ct. App. 2014).

[93] *E.g.*, Rothman v. Equinox Holdings, Inc., No. 2:20-cv-09760-CAS-MRWx, 2021 WL 1627490 (C.D. Cal. Apr. 27, 2021); *see also* Siegal v. GEICO Cas. Co., 523 F. Supp. 3d 1032 (N.D. Ill. 2021).

[94] Jabbari v. Farmer, 965 F.3d 1001 (9th Cir. 2020); Consol. Am. Complaint, Jabbari v. Wells Fargo & Co., No. 3:15-cv-02159-VC (N.D. Cal. July 30, 2015), ECF No. 37.

[95] Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262 (Conn. 2019).

[96] Bradach v. Pharmavite, LLC, 735 F. App'x 251, 254 (9th Cir. 2018) (citation omitted).

[97] Brickman v. Fitbit, Inc., No. 3:15-CV-02077-JD, 2017 WL 5569827, at *6 (N.D. Cal. Nov. 20, 2017); *see also* Kabbash v. Jewelry Channel, Inc. USA, No. A-16-CA-212-SS, 2017 WL 2473262, at *10 (W.D. Tex. June 7, 2017) (citing doctrine that reliance "may be presumed on a class-wide basis 'when the same material misrepresentations have been actually communicated to each member of a class.'") (citations omitted).

[98] *See* Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 677 (2006) (reflecting that "[n]ational markets might well demand national law."); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1418–20 (2006) (discussing instability provoked by CAFA and the likelihood of stabilization from uniform federal substantive law).

[99] Michael Isaac Miller, *The Class Action (Un)fairness Act of 2005: Could It Spell the End of the Multi-State Consumer Class Action?*, 36 PEPP. L. REV. 879, 928 (2009); *see also* Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 236 (2004) (quoting RAND study that found "[m]any believe that [class action] lawsuits serve important

Khan said the agency is "severely" understaffed and underfunded, resulting in "significant strain" and "very real tradeoffs" when making enforcement decisions.[100] Greater agency funding can only go so far, however, and cannot replace the socially beneficial entrepreneurial energies harnessed by private enforcement.[101] Congress can mitigate concerns about private actions under the FTC Act lessening the FTC's authority by guaranteeing the agency the right to intervene in any such action.[102] Private plaintiffs, unlike the FTC,[103] must demonstrate Article III standing[104] and therefore must plead and prove that the alleged violations caused them injury—that is, an "ascertainable loss," following the state statutory model.[105] Finally, the new provision can instruct courts to apply existing FTC Act precedent to questions of law and

public purposes by supplementing the work of government regulators whose budgets are usually quite limited and who are subject to political constraints.") (citing DEBORAH R. HENSLER *et al.*, Class Action Dilemmas: Pursuing Public Goals For Private Gain 69 (2000)).

[100] Joshua Fineman, "FTC Head Khan Sees a 'Fierce Sense of Urgency' to Her Job at the Antitrust Agency," *Seeking Alpha* (Jan. 19, 2022), https://seekingalpha.com/news/3789295-ftc-head-khan-sees-a-fierce-sense-of-urgency-to-her-job-at-the-antitrust-agency.

[101] *See* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 13, 31–44 (2019) (stating the truism that "the government won't enforce the law as much as the private bar does" and arguing that conservatives should favor private law enforcement given their preferences for smaller government, self-help, better incentives, better resources, less bias, and less centralization); *supra* note 6; *infra* note 217. R

[102] "State law often augments rather than undermines the FTC's enforcement efforts," MCMANIS, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 430, and "[a] better way to involve the government is to allow it merely to opine on big lawsuits like class actions rather than to allow it to block them." FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 53; *see also* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999 (D.C. Cir. 1973) (in analyzing the FTC Act's silence regarding whether private parties can sue to enforce its protections, the court acknowledged that its concerns over the FTC losing control over development of standards under the Act "[p]erhaps . . . could be remedied in part by FTC intervention in private proceedings"); F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972) (the FTC has "broad powers to declare trade practices unfair.") (citation omitted).

[103] *See, e.g.*, In the Matter of Zango, Inc. f/k/a 180solutions, Inc., No. 52-3130, 2007 WL 809634, at *13 (F.T.C. Mar. 7, 2007) (the FTC "does not need to allege injury to consumers when pleading deception."); F.T.C. v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005) ("Neither proof of consumer reliance nor consumer injury is necessary"); *see also* Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 62 (2d Cir. 1983) ("The Justice Department, of course, need not demonstrate private injury to establish a violation of the antitrust laws.").

[104] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

[105] For example, the New Jersey Consumer Fraud Act requires "an ascertainable loss" and "a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." Rapoport v. Caliber Home Loans, Inc., No. CV 20-20197, 2022 WL 3009791, at *2 (D.N.J. July 28, 2022) (citing Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., 929 A.2d 1076, 1086 (N.J. 2007)). In *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52 (W.Va. 2003), the West Virginia Supreme Court held that consumers can prove "ascertainable loss" by showing that they purchased something "that is different from or inferior to that for which [they] bargained[.]" *Id.* at 75. The new FTC Act provision should refer to causation, but not reliance, including because not all violations of the Act involve fraudulent conduct. *See In re* Tobacco II Cases, 207 P.3d 20, 39 (Cal. 2009) (reliance is causal mechanism for fraud). Section 5 of the Act, 15 U.S.C. § 45(a), prohibits unfair *or* deceptive trade practices; conduct can be unfair without being misleading. *See* Tucker v. Sierra Builders, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005) ("The concept of unfairness is even broader than the concept of deceptiveness, and it applies to various abusive business practices that are not necessarily deceptive."); Klem v. Wash. Mut. Bank, 295 P.3d 1179, 1187 (Wash. 2013).

fact[106] and to treat cases decided under parallel state statutes as persuasive authority.[107]

However Congress may frame this provision, adding a private right of action to the FTC Act will not be easy. For one thing, because jurisdiction over the Act lies with the Senate Commerce Committee, rather than the Judiciary Committee, committee members and staff may be less immediately concerned with the consequences of the multistate class action problem for the federal judiciary. What's more, the prospect of a new federal springboard for class actions will be opposed by the U.S. Chamber of Commerce, other business lobbies, and their Senate allies.[108] Yet this FTC Act proposal is not

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[106] Already with federal enforcement agencies, "[i]n analyzing a particular act or practice, the agencies will be guided by the body of law and official interpretations for defining unfair or deceptive acts or practices developed by the courts and the FTC." Board of Governors of Federal Reserve System & Federal Deposit Insurance Corporation, *Federal Trade Commission Act—Section 5, Appendix: Statement on Unfair or Deceptive Acts or Practices by State-Chartered Banks* 7 (June 2008), https://www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf.

[107] Supporting this distinction in the effect of FTC Act and state law authorities, many state consumer laws are narrower than the FTC Act, reaching only certain enumerated deceptive trade practices. *E.g.*, Ala. Code § 8-19-5; Colo. Rev. Stat. Ann. § 6-1-105; Ga. Code Ann. § 10-1-393; Ind. Code Ann. § 24-5-0.5-3; Md. Code Ann., Com. Law § 13-301; N.H. Rev. Stat. Ann. § 358-A:2; 73 Pa. Cons. Stat. Ann. § 201-3; Tenn. Code Ann. § 47-18-104.

[108] *See, e.g.*, Statement of Sen. Ted Cruz (R-TX) on S. 2992, The American Innovation and Choice Online Act, Senate Judiciary Committee (Jan. 20, 2022) (stating that "it is usually my Democratic colleagues who are proposing private rights of action, and it is usually Republicans who are expressing concerns about additional litigation. . . . [F]rom my perspective the abuses of Big Tech are so egregious that I am more than happy to unleash the trial lawyers."), https://www.judiciary.senate.gov/meetings/01/14/2022/executive-business-meeting at 2:45:30–2:46:05; Brief for Chamber of Commerce of the United States of America *et al.*, Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317, 2014 WL 108360, at *4–5 (U.S. Jan. 4, 2014) (arguing that "the easy certification of plaintiff classes has predictably led to excessive securities fraud litigation and the *in terrorem* settlement of insubstantial claims. The excess of class action litigation puts a significant economic drain on U.S. public companies"); Oral Argument, Coinbase, Inc. v. Bielski, No. 22-105 (U.S. Mar. 21, 2023) (Justice Kavanaugh expressing concern about corporate defendants being "coerced into a massive settlement because of the discovery"); Petition for a Writ of Certiorari, StarKist Co. v. Olean Wholesale Grocery Coop., Inc., No. 22-131, 2022 WL 3284604, at *28 (U.S. Aug. 8, 2022) (complaining of "the enormous pressures for settlement as soon as a class is certified, regardless of how strong a defendant's defenses to the claims may be"); Brief of the Chamber of Commerce of the United States of America and National Federation of Independent Business as Amici Curiae in Support of Petitioner, TransUnion LLC v. Ramirez, No. 20-297, 2021 WL 533219, at *23 (U.S. Feb. 8, 2021) (contending that "abuse of the class-action device imposes deeply unfair burdens on both absent class members and defendants").

Professor Fitzpatrick, himself a conservative, debunked many of these critiques in his book, arguing in part that "[i]f meritless class actions were such a big problem, surely the critics would have hundreds and hundreds of examples to share with us, right? Wrong." FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 77; *see also* Peter Coy, *The Politics of Litigation May Be Changing*, N.Y. TIMES, July 25, 2022. A recent Supreme Court dissent refers to consumer class actions as being "important (and often costly)[.]" Home Depot U. S. A., Inc. v. Jackson, 139 S. Ct. 1743, 1751 (2019) (Alito, J., dissenting). All can agree that the flaws inherent in the class action procedure demand vigilance from case participants. *See* Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 744–45 (7th Cir. 2008) (describing diverging incentives of class counsel and class members); S. Rep. No. 109-14, at 24 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 24–26 (stating concern that "persons with legitimate injuries will be lumped in with the average, often meritless claims and will not be given individual

new[109] and is needed now to piece together the fragmented, ineffective multistate enforcement regime. Infusing the FTC Act with a private right of action is overdue and will supply a powerful, unifying claim.

B. Certify Multistate Classes Under the Equitable Doctrine of Unjust Enrichment

Second, even without any congressional action, federal judges can turn to equity and certify multistate classes under the doctrine of unjust enrichment if proposed by plaintiffs not bound by an express contract.[110] This doctrine returns a defendant's unjustifiable gains at the plaintiff's expense, making restitution. "To this day," Professor Ward Farnsworth commented, "the origins of restitution in notions of good conscience give it a useful flexibility and versatility as well as an attractive moral footing. . . . [I]ts reach is vast and covers a lot of situations that come up often enough."[111] The breadth and universality of unjust enrichment make it a worthwhile option to consider for multistate class certification. Courts have concluded that unjust enrichment is a "universally recognized cause[ ] of action that [is] materially the same throughout the United States."[112] Application of the doctrine

attention for their grievances.") (quotation marks omitted); Pella Corp. v. Saltzman, 606 F.3d 391, 393–94 (7th Cir. 2010) (noting "the risk of error in having complex issues that have enormous consequences decided by one trier of fact rather than letting a consensus emerge from multiple trials.") (citing, *inter alia*, *Thorogood*, 547 F.3d at 745); *see also supra* note 8. **R**

[109] *See* Stephanie L. Kroeze, *The FTC Won't Let Me Be: The Need for a Private Right of Action Under Section 5 of the FTC Act*, 50 VAL. U. L. REV. 227 (2015); Michael Isaac Miller, *The Class Action (Un)fairness Act of 2005: Could It Spell the End of the Multi-State Consumer Class Action?*, 36 PEPP. L. REV. 879, 919–29 (2009).

[110] *See* Hanjy v. Arvest Bank, 94 F. Supp. 3d 1012, 1034 (E.D. Ark. 2015) ("Generally, unjust enrichment has no application when an express written contract covering the subject matter exists."); Clean Harbors Servs., Inc. v. Illinois Int'l Port Dist., 309 F. Supp. 3d 556, 568 (N.D. Ill. 2018) ("As a general rule, parties may not bring unjust enrichment claims where a contract governs."); *In re* Takata Airbag Prods. Liab. Litig., 464 F. Supp. 3d 1291, 1316 (S.D. Fla. 2020); Longest v. Green Tree Servicing LLC, 74 F. Supp. 3d 1289, 1302 (C.D. Cal. 2015) ("[U]nder both California and Florida law, a party may not pursue a quasi-contract claim for unjust enrichment or restitution when an express contract governs the same subject matter.").

[111] WARD FARNSWORTH, RESTITUTION: CIVIL LIABILITY FOR UNJUST ENRICHMENT 7 (2014).

[112] Singer v. AT&T Corp., 185 F.R.D. 681, 692 (S.D. Fla. 1998). The plaintiffs in *In re Mercedes-Benz Tele Aid Contract Litigation* alleged Mercedes sold cars with an emergency response system that it knew would soon be obsolete and therefore lacked the promised value. The court certified a nationwide unjust enrichment class, concluding that, "[w]hile there are minor variations in the elements of unjust enrichment under the laws of the various states, those differences are not material and do not create an actual conflict. . . . In all states, the focus of an unjust enrichment claim is whether the defendant was unjustly enriched. At the core of each state's law are two fundamental elements—the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. The focus of the inquiry is the same in each state." 257 F.R.D. 46, 58 (D.N.J. 2009) (citation omitted), *abrogated on other grounds by* Maniscalco v. Brother Int'l (USA) Corp., 709 F.3d 202, 210 (3d Cir. 2013); *see also* Pa. Emp. Benefit Trust Fund v. Zeneca, Inc., 710 F. Supp. 2d 458, 477 (D. Del. 2010) (court saw no need to conduct a choice-of-law analysis, having "determined that the basic elements [of unjust enrichment] required under the relevant states' laws do not create an actual conflict."); Rapoport-Hecht v.

has a "universal thread,"[113] and the claim can be well suited to multistate class treatment by virtue of its uniform availability and its focus on the defendant's gain, which "lends itself inherently to easier calculation of classwide monetary relief."[114] Still, a defendant opposing class certification can always seek to shift the focus to plaintiffs' individual circumstances, as through an unclean hands defense.[115] What companies may view as an unduly vague standard—how does one decide if a benefit was "unjustly" conferred?—judges may see

Seventh Generation, Inc., No. 14-CV-9087 (KMK), 2017 WL 5508915, at *3 (S.D.N.Y. Apr. 28, 2017) ("[W]hile states' laws may differ on unjust enrichment with respect to issues such as whether the plaintiff must prove an actual loss or impoverishment or confront the availability of various defenses, those differences do not materially affect the two fundamental elements of an unjust enrichment claim—that the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff") (internal quotation marks and citations omitted); *infra* notes 113–14, 118–19 & 123–24.

A competing line of authority finds significant differences, preventing multistate class certification, in how the courts of different states have construed unjust enrichment doctrine. *See* Hughes v. The Ester C Co., 317 F.R.D. 333, 353 (E.D.N.Y. 2016) (denying nationwide certification where defendants "identif[ied] multiple variations in State laws regarding unjust enrichment."); *In re* ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 696–98 (N.D. Ga. 2008) (detecting "important variances, namely state of mind, the effect of implied warranties, and direct benefit requirements" in the law of unjust enrichment); Spencer v. Hartford Fin. Servs. Grp., Inc., 256 F.R.D. 284, 304 (D. Conn. 2009) (citing differences in unjust enrichment standards); *see also infra* notes 120–21.

[113] *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004). Unjust enrichment doctrine derives from principles in equity: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other. A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust. A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money. Ordinarily, the measure of restitution is the amount of enrichment received." RESTATEMENT (FIRST) OF RESTITUTION § 1 & cmt. a (1937). While certain jurisdictions also require that the defendant "appreciated" the benefit, plaintiffs typically can obviate a conflict by covering that element with allegations or evidence. *See, e.g.*, *In re* Checking Acct. Overdraft Litig., 307 F.R.D. 630, 653 (S.D. Fla. 2015).

[114] 3 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 10.3 at p. 481 (4th ed. 2002); *see also In re* Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 698 (S.D. Fla. 2004) ("As is the nature of unjust enrichment claims, this common evidence [of whether the defendant unjustly received a benefit] will focus on the defendant's gain and not on the plaintiff's loss. Accordingly, it is evident that success or failure in proving this unjust enrichment claim will mean success or failure for the class as a whole, not for individual class members."); Beck-Ellman v. Kaz USA, Inc., 283 F.R.D. 558, 568 (S.D. Cal. 2012) ("[U]njust enrichment claims are appropriate for class certification as they require common proof of the defendant's conduct and raise the same legal issues for all class members."); *supra* notes 112 & 113; *infra* notes 118 & 123–24.

[115] *See, e.g.*, Cohn & Berk v. Rothman-Goodman Mgmt. Corp., 125 A.D.2d 435, 436 (N.Y. App. Div. 1986) (holding that "the plaintiff is barred from seeking the equitable remedy of recovering moneys obtained through unjust enrichment by the doctrine of unclean hands—i.e., one may not obtain equitable relief where he himself has engaged in inequitable or unconscionable conduct connected with the matter"); TRW Title Ins. Co. v. Sec. Union Title Ins. Co., 153 F.3d 822, 829 (7th Cir. 1998) (citing Mills v. Susanka, 68 N.E.2d 904, 907 (Ill. 1946)); Mona v. Mona Elec. Group, Inc., 934 A.2d 450, 474–80 (Md. Ct. Spec. App. 2007) (trial court properly applied unclean hands defense to preclude recovery for minority stockholder who claimed unjust enrichment in dividend dispute); Compass Bank v. Petersen, 886 F. Supp. 2d 1186, 1199–1200 (C.D. Cal. 2012) (borrowers' unclean hands barred their claim of unjust enrichment); *see also supra* note 112 (case authorities granting and denying multistate unjust enrichment class certification). R

as a boon.[116] In fact, the equitable nature of restitution conforms with the class action's historical origin as an equitable device that empowered the chancellor to do justice, even between persons absent from the suit.[117] To date, however, federal courts presiding in class actions have approached unjust enrichment more as a "safety valve" to open when other causes of action present problems of proof or otherwise do not squarely fit the issues.

The end-payor plaintiffs in *In re Abbott Laboratories Norvir Antitrust Litigation* alleged that a pharmaceutical company raised the wholesale price of an HIV booster drug by 400 percent.[118] Where the single-firm conduct raised antitrust problems, the plaintiffs proposed nationwide class certification based on principles of unjust enrichment. The court granted the motion in part, certifying a 48-state class and explaining that "[c]ommon to all class members and provable on a class-wide basis is whether Defendant unjustly acquired additional revenue or profits by virtue of an anti-competitive premium" on the drug.[119] In contrast, the Eleventh Circuit in *Vega v. T-Mobile USA, Inc.* took a dim view of class certification under the law of unjust enrichment.[120] It characterized unjust enrichment claims as "rarely" susceptible to certification because, "before it can grant relief on this equitable claim, a court must examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist."[121] Yet wrongful conduct may entitle everyone affected by it to be made whole without regard to their specific circumstances.[122] In another case, borrowers "overcharged when they were entitled to a discounted rate would be in exactly the same position"—so, whether the title insurance charge was "unjust" was a question "common to all . . . members and appropriate for class treat-

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[116] Consumer law is replete with such flexible standards, like that embodied in the implied duty of good faith and fair dealing for contractual performance, which "excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981). Similarly, "[c]ourts have long noted that common law unfair competition is a flexible and evolving concept, not confined to any particular form of unethical behavior." Maguire v. Gorruso, 800 A.2d 1085, 1091 (Vt. 2002); *see supra* notes 80–81 & 105. One legal historian came to the "view . . . that the particular standard that governs an area of tort law is less important than the retention of opportunities to balance the equities in a given case." G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 237 (1985). The U.S. Constitution itself was framed amid a prevailing sentiment that "[w]hat was needed was simply the enactment of a few plain general rules of equity, leaving their interpretation to the courts." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 303 (1969).

[117] In the early republic, old Equity Rule 48, amended in 1912 as Equity Rule 38, recognized a precursor to the class action. *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853); *see also* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1303–07 (1932).

[118] No. C 04-1511 CW, 2007 WL 1689899 (N.D. Cal. June 11, 2007).

[119] *Id.* at *9.

[120] 564 F.3d 1256, 1274–75 (11th Cir. 2009).

[121] *Id.* at 1274.

[122] *See* Cross v. Berg Lumber Co., 7 P.3d 922, 935–36 (Wyo. 2000) (application of unjust enrichment principles "is more appropriate where the defendant's conduct is especially egregious.").

ment."[123] Similarly, in *Williams v. Martorello*, the Fourth Circuit affirmed class certification of unjust enrichment claims asserting a high-interest lending scheme.[124] In *Vega*, although the salesman plaintiff alleged T-Mobile wrongfully reclaimed commission payments, the court held that "whether or not a given commission charge back was 'unjust' w[ould] depend on what each employee was told and understood about the commission structure and when and how commissions were 'earned.'"[125]

Unjust enrichment seems to be gaining momentum in the information age. A 2020 appellate decision holds that an unjust enrichment claim can support Article III standing even where the alleged injury is intangible.[126] The Ninth Circuit rejected Facebook's argument that its alleged profiting from secretly tracking users' browsing histories could not establish cognizable harm unless the plaintiffs planned to sell their data or it lost value on account of Facebook's practices.[127] The plaintiffs had the necessary personal stake, the court reasoned, because "California law requires disgorgement of unjustly earned profits regardless of whether a defendant's actions caused a plaintiff to directly expend his or her own financial resources or whether a defendant's actions directly caused the plaintiff's property to become less valuable."[128]

In re JUUL Labs, Inc., Marketing, Sales Practices and Products Liability Litigation[129] shows that class plaintiffs can certify equitable claims like unjust enrichment alongside legal claims, reserving an election of remedies for trial.[130] The common questions there, for unjust enrichment purposes, were "whether defendants received benefits through their fraudulent and youth-focused marketing, whether the retention of those benefits would be unjust, and whether the benefits defendants received were at the expense of class members."[131] In certifying two California classes of e-cigarette users, the court rejected defense arguments that the restitution sought by plaintiffs

[123] Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 560 (D. Idaho 2010) (internal quotation marks omitted); *see also supra* notes 112–14.

[124] 59 F.4th 68, 91–92 (4th Cir. 2023).

[125] *Vega*, 564 F.3d at 1275.

[126] *In re* Facebook Inc. Internet Tracking Litig., 956 F.3d 589 (9th Cir. 2020).

[127] *Id.* at 599.

[128] *Id.* at 600.

[129] 609 F. Supp. 3d 942 (N.D. Cal. 2022).

[130] *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805 (1999) ("Our ordinary Rules recognize that a person may not be sure in advance upon which legal theory she will succeed, and so permit parties to 'set forth 2 or more statements of a claim or defense alternatively or hypothetically,' and to 'state as many separate claims or defenses as the party has regardless of consistency.'") (quoting FED. R. CIV. P. 8(d)); Coldwell Banker Comm. Grp., Inc. v. Nodvin, 598 F. Supp. 853, 856 (N.D. Ga. 1984) (plaintiff must elect between inconsistent remedies before entry of judgment), *judgment aff'd*, 774 F.2d 1177 (11th Cir. 1985); Prudential Oil Corp. v. Phillips Petroleum Co., 418 F. Supp. 254, 258 (S.D.N.Y. 1975); Paxton v. Desch Bldg. Block Co., 146 F. Supp. 32, 37 (E.D. Pa. 1956) (plaintiff "does not have to make any final decision as to the election of which remedy he will pursue until either at the pre-trial conference or at the trial.").

[131] *In re* JUUL Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig., 609 F. Supp. 3d at 960.

overlapped with the damages sought under their legal claims such that they had an adequate remedy at law and were therefore barred from equity.[132]

For all its potential, the unjust enrichment solution to the multistate problem depends on judicial action, instead of being an enactment like the other two solutions presented, and as such will develop more slowly over time. Also worth considering, another judicial technique for reducing super-sized CAFA litigation to bite-sized pieces borrows from mass torts: the court directs the parties to confer and propose proceeding initially under a handful of "bellwether" plaintiff states.[133]

C. Enact a CAFA Presumption That the Law of the Defendant's Home State Applies, Except if the Plaintiff Declines the Presumption or a Choice-of-Law Clause Applies

Third, the most effective way to fix the multistate problem engendered by CAFA is to tackle the problem at its source by amending CAFA itself. A statutory vacuum opened because "CAFA provides no substantive choice of law provisions."[134] So the federal courts analyze choice of law by applying the rules of the forum state, examining state-law nuances, and ferreting out conflict.[135] These efforts are unwieldy, unnecessary, and counterproductive. My proposed amendment will settle expectations and provide clear guidance and other benefits in these diversity suits. It allows the plaintiff to proceed under the law of the defendant's home state:

Section 1332(d) of title 28, United States Code, is amended by adding at the end the following:

> (12)(A) CHOICE OF LAW.—Except as provided in subparagraph (B), in a civil action described in paragraph (2), the law that applies to the claims against a defendant that arise under or by virtue of the law of a State shall be—
>
> (i) if the defendant is a corporation or other form of business enterprise, the law of the State where the defendant maintains its principal place of business; or
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> (ii) if the defendant is a natural person, the law of the State in which the defendant is domiciled; and

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[132] *Id.* at 997–99 (distinguishing Sonner v. Premier Nutrition Corp., 971 F.3d 834 (9th Cir. 2020), where the case was on the eve of trial).

[133] *See, e.g.*, *In re* Experian Data Breach Litig., No. SACV 15-1592 AG (DFMx), 2016 WL 7973595 (C.D. Cal. Dec. 29, 2016), ECF No. 147 (C.D. Cal. Apr. 8, 2016) & ECF No. 164 (C.D. Cal. May 31, 2016) (the court directed the parties to agree on four bellwether states, and in its motion to dismiss opinion addressed how those states' laws applied); *cf.* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008) (discussing benefits of bellwether approach for managing mass tort litigation); *supra* notes 44 & 56 (subclassing authorities).

[134] Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 998 (2011).

[135] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that *Erie* doctrine requires a federal court to apply the choice-of-law rules of the state in which it sits).

(iii) if there are multiple defendants, subparagraphs (A)(i) and/or (A)(ii) shall apply to each defendant individually.

(B) Subparagraph (A) shall not apply if—

(i) the plaintiff requests that the law of a State other than a State described in subparagraph (A) apply; or

(ii) a valid contractual choice-of-law clause applies.[136]

1. Overview and Rationale

The amendment creates a conclusive presumption with two exceptions that return case participants to the default choice-of-law analysis under the forum state's rules. The presumption is that the law of the defendant's home state governs all state-law claims brought against it in a CAFA class action. If the law of a single state or, when multiple defendants are headquartered in different states, of a limited number of states applies, the work of judges and parties in these cases will be simplified because numerous state standards no longer need to be assessed and the evidence will be developed and tested under fewer laws. A rule that the defendant's home state's law applies, subject to the two exceptions, will settle expectations and "facilitate the judicial task."[137] In addition, the likelihood of a company's home state's law being applied across the board could go a good ways toward addressing the business community's complaint of facing a patchwork quilt of different state

[136] My proposal differs from the CAFA choice-of-law amendment proposed in 2005 by Senators Dianne Feinstein (D-CA) and Jeff Bingaman (D-NM). My amendment dictates a presumptively applicable law, that of the defendant's home state. By contrast, the Feinstein-Bingaman amendment would have prohibited denying class certification based on state-law differences and mandated specific procedures under Rule 23:

> CHOICE OF STATE LAW IN INTERSTATE CLASS ACTIONS.—Notwithstanding any other choice of law rule, in any class action, over which the district courts have jurisdiction, asserting claims arising under State law concerning products or services marketed, sold, or provided in more than 1 State on behalf of a proposed class, which includes citizens of more than 1 such State, as to each such claim and any defense to such claim—
>
> (1) the district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied;
>
> (2) the district court shall require each party to submit their recommendations for subclassifications among the plaintiff class based on substantially similar State law; and
>
> (3) the district court shall—
>
> (A) issue subclassifications, as determined necessary, to permit the action to proceed; or
>
> (B) if the district court determines such subclassifications are an impracticable method of managing the action, the district court shall attempt to ensure that plaintiffs' State laws are applied to the extent practical.

151 Cong. Rec. S1157-02, S1166, 2005 WL 309648 (daily ed. Feb. 9, 2005). The Senate defeated the amendment by a 61-38 vote. *Id.* at 1184; *see also supra* note 38.

[137] Willis L. M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 316–17 (1972); *see also In re* Pizza Time Theatre Sec. Litig., 112 F.R.D. 15, 18 (N.D. Cal. 1986) ("Certainly the California corporation defendant and the California resident defendants have no cause to be surprised by application of California law.").

laws.[138] This presumption should be quite welcome when choice of law in general has been far too murky for far too long, having bedeviled untold numbers of lawyers and jurists.[139]

A number of courts have applied the law of a single state to the claims of a nationwide class; my proposal follows this line of cases.[140] Applying the

[138] *See, e.g.,* Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners, *In re* W. States Wholesale Natural Gas Antitrust Litig., No. 13-271, 2014 WL 4804045, at *7 (U.S. Sept. 24, 2014) (warning of "a 50-state mishmash of antitrust regimes" regulating natural gas markets); Brief for the Chamber of Commerce of the United States of America in Support of Plaintiffs-Appellees, 23-34 94th St. Grocery Corp. v. N.Y.C. Board of Health, No. 11-91, 2011 WL 3007168, at *19 (2d Cir. July 15, 2011) (contending "[u]niformity of commercial regulations is especially important today because, more than any other period in history, the Nation's economy is interconnected."); Supplemental Brief on Rehearing En Banc of Defendants-Appellees the AES Corporation *et al.*, Comer v. Murphy Oil USA, No. 07-60756, 2010 WL 3693593, at *2–3 (5th Cir. Apr. 30, 2010) (urging affirmance of dismissal on basis that, otherwise, "federal courts would be compelled to formulate a nationwide regulatory policy on acceptable levels of GHG emissions through an ad hoc patchwork quilt of state tort lawsuits."); Senne v. Kansas City Royals Baseball Corp., 934 F.3d 918, 960 (9th Cir. 2019) (Ikuta, J., dissenting) (opining in wage-and-hour class action that "a rule requiring that the law of the situs [of the underlying work] always applies would require employers to research and comply with various states' laws whenever their employees traveled for short conferences or business meetings."), *disapproved of on other grounds by* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022); Petition for a Writ of Certiorari, Shell Oil Co. v. Pedraza, No. 91-959, 1991 WL 11177487, at *29 (U.S. Dec. 5, 1991) (arguing that "[v]arious states have imposed different standards for product design liability, confronting manufacturers with a patchwork quilt of state regulation via tort with which no manufacturer could hope to manage except by large investments in liability insurance").

[139] *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999) ("Choice of law is a mess."); William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371 (1997) (choice of law is "universally said to be a disaster."); William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) (expounding that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires" and "[t]he ordinary court, or lawyer, is quite lost when engulfed and entangled in it."); Soo Line R.R. v. Overton, 992 F.2d 640, 649 (7th Cir. 1993) (Ripple, J., dissenting) (calling choice of law a "complex and murky area"); Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. at 1851 (describing choice of law as signifying "almost a secret code among the cognoscenti. These rules combine technical exigency and impenetrable logic such that the practitioners of this arcane art can challenge the mere mortals among lawyers and judges who need a simple answer"); Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 403 (2009) (noting that American courts, unlike their foreign counterparts, "must engage in a multifaceted and laborious choice-of-law analysis and comparison of many relevant factors and policies, all without much certainty regarding the final outcome."); Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts,* 74 UMKC L. REV. 543, 554 (2006) (critiquing that "the available choice-of-law doctrines are largely qualitative and subjective; factor is piled upon factor and can be used to justify absurd results; and of course, last but not least, there are conflicts in the laws of the states on conflicts of laws.") (citing Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996)).

[140] *See, e.g.*, Fresco v. Auto Data Direct, Inc., No. 03-61063-CIV, 2007 WL 2330895, at *2–4 (S.D. Fla. May 14, 2007) (certifying nationwide class under Florida consumer protection statute); Chavez v. Blue Sky Nat. Bev. Co., 268 F.R.D. 365, 379 (N.D. Cal. 2010) (rejecting the defendants' argument "that the law applicable to the proposed nationwide class is not uniform because California consumer protection laws do not apply to nonresident plaintiffs."); Estrella v. Freedom Fin. Network, LLC, No. C 09-03156 SI, 2010 WL 2231790, at *6 (N.D. Cal. June 2, 2010); *In re* Mercedes-Benz Tele Aid Contract Litig., 267 F.R.D. 113, 119–23, 162–63 (D.N.J. 2010) (certifying nationwide class under New Jersey consumer protection stat-

law of a company's domicile to claims against it involving its business decisions within that jurisdiction is neither arbitrary nor unfair, comporting with constitutional limitations.[141] In practice, the "conduct" that gives rise to most consumer class actions is tied to action (or inaction) initiated or approved by management at the defendant's headquarters. The concept of extraterritorial application itself breaks down when one recalls that the money that will be used to pay a judgment, the defendant's litigation and underlying business decisions, and its tax payments are all made or controlled inside the state of its headquarters.[142]

The defendant's forum state has a compelling interest in regulating its resident firm.[143] Out of all the states, the forum state's interests are likely to be the most impaired if its law is not applied.[144] The actions of Atlanta-based Equifax and Coca-Cola affect consumers across the nation, but Georgia is substantially more invested in regulating their operations than any other state. And, if the law of a company's headquarters is not applied to claims stemming from its decisions made there, the company becomes "free to avail itself of the benefits offered by [its forum state] without having to answer to allegations by consumers nationwide that it has violated the consumer protection laws of its forum state."[145]

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ute); Kelley v. Microsoft Corp., 251 F.R.D. 544, 549–50 (W.D. Wash. 2008) (certifying nationwide class under Washington consumer protection statute); Clay v. CytoSport, Inc., No. 3:15-CV-00165-L-AGS, 2018 WL 4283032, at *17 (S.D. Cal. Sept. 7, 2018); Smith v. Pathway Fin. Mgmt., Inc., No. SACV 11-01573 JVS (MLGx), 2012 WL 12884448, at *6 & n.8 (C.D. Cal. Nov. 26, 2012) (certifying nationwide class under California law, which would govern even absent an applicable choice-of-law provision "[g]iven that [the defendant's] headquarters are located in California, its employees conduct operations from within California, and a significant portion of its clients are located in California"); *see also infra* notes 192 & 216.

[141] *Infra* Part II.C.4; *see also* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1849, 1869–70 (2006) (constitutional constraints in this area are "mild").

[142] *See* Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010).

[143] *See In re* AXA Equitable Life Ins. Co. COI Litig., 595 F. Supp. 3d 196, 239 (S.D.N.Y. 2022) (noting that "New York has a compelling interest in regulating the conduct of insurers based here"); Africano v. Atrium Med. Corp., No. 17-CV-7238, 2021 WL 4940976, at *3 (N.D. Ill. Oct. 4, 2021) (finding that "New Hampshire, Defendant's home state, clearly has a more significant interest in determining whether and how to punish its own corporations."); Ning Xianhua v. Oath Holdings, Inc., 536 F. Supp. 3d 535, 558 (N.D. Cal. 2021); Estrella v. Freedom Fin. Network, LLC, No. C 09-03156 SI, 2010 WL 2231790, at *6 (N.D. Cal. June 2, 2010) (certifying a nationwide class under consumer law of California, which "has a substantial interest in having its own laws applied here."); Armadillo Distrib. Enters., Inc. v. Clavia DMI AB, No. 8:09-CV-466-T-30MAP, 2009 WL 3584344, at *6 (M.D. Fla. Oct. 28, 2009) (recognizing a state's "strong interest in resolving disputes involving a resident corporation."); Ristaino v. D.C. Bates Equip. Co., No. CIV.A. 03-1178, 2004 WL 1171247, at *2 (Mass. Super. Ct. May 12, 2004) (concluding that Massachusetts law applied to the defendant domiciled in that state, even without any resident plaintiff); Diamond Multimedia Sys., Inc. v. Super. Ct., 968 P.2d 539, 556–57 (Cal. 1999); *see also supra* note 140; *infra* notes 192 & 216.

[144] *See* Mazza v. Am. Honda Motor Co., 666 F.3d 581, 598 (9th Cir. 2012) (D. Nelson, J., dissenting) (citing Clothesrigger, Inc. v. GTE Corp., 236 Cal. Rptr. 605, 609, 614 (Ct. App. 1987)).

[145] *Id.*

My legislative proposal causes no overriding impairment to the interests of other states.[146] Americans are better off, as compared with recovering nothing,[147] if they can recover damages incurred from the defendant's violations of its own state law. Plaintiffs may still choose to sue under their home state laws, and those who accept the law of the defendant's state presumably do so because it is *more* protective of their own states' residents. The Ninth Circuit's choice-of-law class certification opinions in *Mazza* and *Qualcomm* overprioritize a state's supposed interest in attracting business by enacting more lenient rules and regulations for commerce within its borders. Most class actions seek to enforce common norms of free trade, and no business can fairly complain about being held to its own local standards. Nothing prevents Congress from enacting a presumption that the law of a defendant's domicile applies to the claims brought against it in interstate class actions in federal court.

2. Demise of Lex Loci Delicti

In CAFA cases, the choice-of-law question usually comes down to which law should apply: that of (a) the place of transacting (where a particular plaintiff or class member resides), or (b) where the defendant company's relevant decisions or conduct occurred (usually at its business hub). The *lex loci delicti* approach, which permeates most CAFA multistate analysis, selects the law of the jurisdiction where the last event necessary to the injury (completion of the transaction) occurred. Nevertheless, that approach accords too much weight to the place of transacting and too "little consideration to the multistate and local law policies that are likely to be involved in a choice of law question in tort or contract."[148] Though federal judges have embraced *lex loci* in class actions, the overall trend of jurisprudence since the Restatement (Second) of Conflict of Laws (1971) has been decidedly against the *lex loci*

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[146] *Infra* Part II.C.5.

[147] Class actions are the primary way that people who pay anticompetitive overcharges or incur other loss due to marketplace infractions can get all or some of their money back. *See, e.g.*, *supra* notes 5–6; *infra* note 217. The Justice Department typically does not seek restitution for victims of antitrust violations, as "treble damages are available in actual or potential civil causes of action." U.S. Dep't of Justice, *An Antitrust Primer for Federal Law Enforcement Personnel,* at 10 (Apr. 2022); *see, e.g.*, United States' and LG Display's Joint Sentencing Memorandum ¶ 3, United States v. LG Display Co., Ltd., No. 3:07-md-01827-SI (N.D. Cal. Dec. 8, 2008), ECF No. 749 ("The United States will not seek restitution in light of the civil cases . . . which potentially provide for a recovery of a multiple of actual damages."). Similarly, the FTC Act does not authorize the FTC to obtain restitution for victims of "unfair methods of competition" and only allows the FTC to pursue recoveries for victims of "unfair or deceptive acts or practices" if it orders the defendant to cease and desist and then "satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent[.]" 15 U.S.C. § 57b(a)(2); *see* Ivy Johnson, *Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to Illinois Brick*, 57 WASH. & LEE L. REV. 1005, 1010 (2000) (noting that, in contrast, 15 U.S.C. § 53(b) "does not expressly provide for equitable monetary relief."). **R**

[148] Willis L. M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 320 (1972).

approach.[149] Even earlier in the twentieth century, *lex loci* "created problems where redress was sought for nonphysical injuries" as "[l]ocating the place of harm . . . was not always easy in cases of . . . invasion of privacy, unfair competition, and fraud."[150] Deferring to the location of the transacting consumer fills the void left by the multi-factor approaches of the Second Restatement, which "neither state[ ] how a particular choice of law question should be decided in light of these factors nor what relative weight should be accorded them."[151] (The factors inform the ultimate determination of which state has the "most significant relationship" to the action—the amorphous standard in the Second Restatement's tests for both contract and tort claims.[152] Largely oriented toward preserving judges' discretion, this malleable methodology often "may be used to rationalize whatever law the judge feels inclined to apply."[153])

Settling expectations in the other direction, away from place of transacting, by tying the presumptively applicable law to the defendant's primary

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[149] *See* EUGENE E. SCOLES & PETER HAY, CONFLICT OF LAWS 578 & n.5 (2d ed. 1992) (noting that "[t]he *lex loci* rule, as the exclusive test for choice-of-law in tort, has been rejected by most states which have considered its application in recent years" and that this trend was "still very much in flux" in the early 1990s); Symeon C. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 TULANE L. REV. 1, 48 (2017) (finding that "more than forty jurisdictions . . . [now] have abandoned the traditional *lex loci delicti* rule.").

[150] SCOLES & HAY, CONFLICT OF LAWS 577.

[151] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 315.

[152] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 188 (1971). The tort factors are: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.* § 145. The Second Restatement "has been much criticized, particularly the amorphous multi-factor test that prompts an inquiry for the 'most significant relationship' bearing on a case or issue involving choice of law." Michael Traynor, *Conflict of Laws, Comparative Law, and the American Law Institute*, 49 AM. J. COMP. L. 391, 397 (2001); *see, e.g.*, Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999) (criticizing this test for "list[ing] a dizzying number of factors with no hint as to their relative weight."); *see also In re* Synthroid Mktg. Litig., 264 F.3d 712, 719 (7th Cir. 2001) (disparaging "a list of factors without a rule of decision" as being "just a chopped salad."); *infra* note 153.

[153] DeVeaux, *Lost in the Dismal Swamp*, 79 GEO. WASH. L. REV. at 1037; *see* William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1388–89 (1997) ("The scholars have savaged the Second Restatement" including "for its . . . invitation to open-ended or indeterminate decisionmaking."); Willis L. M. Reese, *The Law Governing Airplane Accidents*, 39 WASH & LEE L. REV. 1303, 1304–05, 1322 (1982) (perceiving that choice-of-law analyses in air crash cases "do not state the real reasons which led the court to the particular decision. It seems almost certain that by and large the judges first decided upon the result they wished to reach and only then thought of a rationale that would more or less support their conclusions."); Symeon C. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 TULANE L. REV. 1, 48 (2017) (stating that the Second Restatement's "extreme of excessive flexibility" led to "increased litigation costs, waste of judicial resources, increased danger of judicial subjectivism, and dissimilar handling of similar cases."); Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. at 1841 ("Unfortunately, the Restatement approach . . . is long on flexibility and short on predictability in its application[,]" "yield[ing] few settled expectations except for the predictable frustration felt by practitioners and judges seeking to apply it.").

place of business follows the direction of current law-reform efforts to clarify choice of law in tort cases. Under the draft Restatement (Third) of Conflict of Laws, "[w]hen the relevant parties have central [personal] links to different states [based on domicile], and conduct and injury occur in different states, the law of the state of *conduct* will presumptively govern an issue of loss allocation" except if the plaintiff is affiliated with the state of injury and *seeks* to apply its law, and the injury was objectively foreseeable.[154] This rule is sensible because "the state where a person acts will almost certainly have the greatest concern in the application of its tort rule relating to standards of conduct, provided that the act did not measure up to the pertinent standard."[155] Thus my proposed presumption fits comfortably with the conduct-regulation area of conflict of laws, which recognizes that "with respect to the question whether the defendant's conduct was tortious, the applicable law will, almost surely, be that of the state where the defendant acted if either (a) this law would so hold the conduct, or (b) the plaintiff's injury also occurred in the state."[156] Needless to say, the defendant's alleged conduct figures prominently in most class actions and accounts for common issues when certification is granted.[157]

U.S. companies conduct all kinds of business in their states of domicile. Congress is free to make the policy determination that these contacts, as compared to the contacts derived from where the purchaser or user is located, have sufficiently grown in importance to justify a presumption given the needs of the interstate system. With an integrated national market dependent on remote digital transactions, the location of the transacting consumer matters less. Subjecting companies to the law of their own state, instead of the laws of the many jurisdictions where consumers transacted,

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[154] Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 TULANE L. REV. at 17, 31–33 (emphasis and second alteration added).

[155] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 328; *see also* Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 353 (2009) (reporting that "most courts that joined" "[t]he choice-of-law revolution, which ended the reign of lex loci as the exclusive and inexorable rule[,]" "have opted for the law of the state of conduct" when it favors the plaintiff).

[156] SCOLES & HAY, CONFLICT OF LAWS 569 (emphasis added) (citation, alterations, and internal quotation marks omitted); *see also infra* notes 170 & 171.

[157] *See, e.g.*, 7AA WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1781 (3d ed. 2005) (whether an unlawful monopoly or anticompetitive conspiracy existed "is a common question that is thought to predominate."). Also, courts applying Rule 23(c)(4) have ordered bifurcated proceedings with the class portion to focus on the nature and effects of the defendant's alleged wrongful conduct. Such an "issue" class may be certified when "it will materially advance the litigation," Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 416 (6th Cir. 2018), as when it will serve to "accurately and efficiently resolve the question of liability, while leaving the potentially difficult issue of individualized damage assessments for a later day." Kamakahi v. Am. Soc'y for Reprod. Med., 305 F.R.D. 164, 176 (N.D. Cal. 2015); *see also* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453–54 (2016); *see, e.g.*, Navelski v. Int'l Paper Co., 244 F. Supp. 3d 1275, 1309 (N.D. Fla. 2017) (certifying issue class because "the core factual and legal issues with respect to liability in this case—whether or not Defendant's conduct caused the Dam to fail, whether or not the Dam's failure caused flooding in the subject neighborhood, and, if so, to what extent Defendant should be held liable—are resolvable by proof that is common to all class members.").

better fits current economic conditions. Markets created by the internet, home computer, and smartphone have long since displaced the economic conditions of the traveling salesman era[158] and a large proportion of U.S. companies market goods and services that can be purchased or consumed anywhere in the country.[159] As countless internet-era students of civil procedure have learned, this more diffuse commercial reality makes it less relevant, when assessing personal jurisdiction, whether the corporation "deliberately 'reached out beyond'" its state to market goods or services.[160] Conversely, the defendant's location takes on *greater* comparative weight in determining the applicable law in a platform-based economy where purposeful direction of commerce into particular states has receded. Moreover, even if a defendant's home state may not be the state most concerned with the subject matter of a case, "application of the relevant local law rule of the state of greatest concern is only one of several choice of law policies and not necessarily the most important."[161] It properly falls to Congress to enact legislation that prioritizes one policy over others for the multistate class actions that substantially regulate the interstate economy.[162]

A company is appropriately focused on the need to comply with the laws of its forum state. Noncompliance with one state's law in another state weakens the first state's policies; applying a state's law wherever the effects of its resident companies' activities are felt promotes compliance.[163] The mobility of firms restrains overzealous lawmaking in that a company can move to another state and avoid the first state's law as it might apply to operations in other states. But a "race to the bottom" by businesses to states that enact more lenient consumer laws is unlikely. First, plaintiffs wishing to avoid a

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[158] *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 321 (1945).

[159] In a recent personal jurisdiction case, Justice Alito remarked from the bench that "[w]e are applying a 1945 standard adopted by the Court when it put on its fair play hat and said this is fair play as we understand the world in 1945. But the world in 2020 is completely different." Oral Argument, Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., Nos. 19-368, 19-369, 2020 WL 6203594, at *49 (U.S. Oct. 7, 2020); *see also* Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. at 1871 ("*Erie* assumed a world in which controversies arose within a state and faithful application of a state's laws could reasonably settle the expectations of all concerned persons. But in a society in which people, goods, and services cross state lines with abandon, the premise of *Erie* seems a fleeting memory.").

[160] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (citing Walden v. Fiore, 571 U.S. 277, 285 (2014)).

[161] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 322.

[162] According to the Second Restatement, "[p]robably the most important function of choice-of-law rules is to make the interstate and international systems work well." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. d (1971); *see* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 259, 331 (1992) (noting "predictably chaotic" results of "federal abdication" in the area of choice of law, which "leaves no disinterested umpire to resolve an important class of interstate disputes," and declaring that "[t]he failure of Congress . . . to deal with choice-of-law problems is a major abdication of responsibility.").

[163] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 328 (explaining that "conformity with such standards will be encouraged if tort liability is imposed upon those who do not conform and as a consequence cause injury either in the state where they acted or elsewhere.").

defendant's more lenient forum law could always seek to proceed under the laws of their own states. As a result, any company that moved would still face the same effective risk from a multistate class action. Second, most CAFA cases implicate established judge-made doctrines that have slowly evolved over time and whose application by federal judges is not influenced by enactments or lobbying of state legislatures.[164]

My proposed black-letter system, with a rule and defined exceptions, for choosing the law in interstate class actions is much more workable than the discredited multi-factor tests and difficult policy weighing that have bogged down so many courts. The presumption will bring more "certainty and predictability, important factors not only for those planning future transactions but also for those confronting . . . lawsuits or problems of how much to offer or accept by way of settlement."[165] Further, as Professor Reese observed, this kind of rule-and-exception analytical structure has the "equally important advantage" of "greatly facilitat[ing] the judicial task."[166]

3. How the Presumption Works

Looking to a corporation's "principal place of business" to define the presumptively applicable law adopts the same standard used to evaluate citizenship for diversity jurisdiction.[167] Thus, the Supreme Court's analysis of this proxy for domicile will guide courts and parties in applying the provision: "[P]rincipal place of business" means "the place where a corporation's officers direct, control, and coordinate the corporation's activities."[168] This "should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.,* the 'nerve center[.]'"[169]

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[164] *Cf.* Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. at 1868 (advocating a similar choice-of-law presumption for interstate class actions even while positing that "[i]t could have the effect of inducing home corporations to lobby fiercely for laws that would shield them from liability in their home jurisdictions.").

[165] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 316; *see also* Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. at 1844, 1868–71 (concluding that a default rule subjecting a CAFA defendant to its home state's law would be "a sensible choice of law rule that corresponds to the identified national scope of the underlying conduct, the jurisdictional predicate for cases brought into federal court under CAFA[,]" and that such a rule "would allow consideration of the merits of legal claims under an established regime of substantive law. That is far preferable to procedural jousting over makeweight law.").

[166] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 316–17; *see also* Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 670 (2006) (certification of nationwide consumer classes based on the law of the defendant's principal place of business "has considerable practical significance, even though the courts certifying nationwide classes on the basis described remain a minority").

[167] *See* 28 U.S.C. § 1332(c)(1) (providing that "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business").

[168] Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010).

[169] *Id.* at 93.

The first exception lets the plaintiff override the presumption. Giving the plaintiff the choice replicates the choice of law that would result from courts' traditional tendency to "appl[y] whichever law favored the plaintiff."[170] Although plaintiffs may be able to find a suitable cause of action under the law of the defendant's state, to avoid prejudice they should be able to advocate for application of their own state's law. When chosen, this option directly advances their own state's interests in preventing and redressing illegal conduct within its borders.[171] If the law of the defendant's forum includes relevant limitations that must be respected—as with the subset of state consumer statutes that reach only in-state residents or transactions[172]—

[170] Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. at 343; *accord* Willis L. M. Reese, *The Law Governing Airplane Accidents*, 39 WASH & LEE L. REV. 1303, 1305, 1308–09 & n.27 (1982); Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 1025–28 (2009) (surveying the myriad international jurisdictions that either require the court to apply the law most favorable to a tort victim or allow the victim to choose the applicable law, and observing that "[t]he common denominator" is that these rules "are all designed to level the conflicts field between presumptively strong parties and presumptively weak parties, such as tort victims"); *see also supra* note 156; *infra* note 171; Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1335 & n.27, 1350 (2012) (noting that "parties have considerable freedom to choose which substantive law to apply to their dispute.").

[171] Adapting a useful table designed by Professor Symeonides, the first exception in this proposed CAFA amendment allows plaintiffs to pursue relief under their own more favorable state law—"Y" in the bottom right corner:

Pattern	Description	Conduct	Injury	Applicable Law
1	P and D in same state	X	X	X
2(a)	P and D in different states, with materially identical standards	X	Y	X
2(b)	P and D in different states, and D's law is more favorable to P	X	Y	X
2(c)	P and D in different states, and P's law is more favorable to P	X	Y	Y

Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L. J. 437, 454 (2000). This approach has prevailed in certain other advanced economies; German courts, for instance, "have applied the law that is most favorable to the plaintiff (Günstigkeitsprinzip)" "[i]n determining the place of wrong in products liability cases where the negligent act and the resulting injury are located in different jurisdictions[.]" Gunther Kühne, *Choice of Law in Products Liability*, 60 CAL. L. REV. 1, 10 (1972); *see also supra* notes 156 & 170.

[172] *E.g.*, Ala. Code § 8-19-3(8) (consumer protection statute meant to govern only trade or commerce "affecting the people of [Alabama]"); Idaho Code Ann. § 48-602(2) (consumer protection statute intended to govern "trade" or "commerce . . . directly or indirectly affecting the people of this state"); Ky. Rev. Stat. § 367.110(2); Me. Rev. Stat. Ann. tit. 5, § 206(3); Mass. Gen. Laws Ann. ch. 93A, § 1(b); Miss. Code Ann. § 75-24-3(b); Mo. Rev. Stat. § 407.010(7); Mont. Code Ann. § 30-14-102(8); N.M. Stat. Ann. § 57-12-2(C); Or. Rev. Stat. Ann. § 646.605(8); 73 Pa. Stat. Ann. § 201-2(3); R.I. Gen. Laws § 6-13.1-1(5); S.C. Code § 39-5-10(b); Tex. Bus. & Com. Code Ann. § 17.45(6); *see also* Cal. Civ. Code §§ 1792, 1792.1, 1792.2, 1793.3 (California's Song-Beverly Consumer Warranty Act applies only to sales of goods "in this state"). Unlike these substantive limitations, state rules restricting

plaintiffs can choose either the (multistate) *status quo* or the common law of the defendant's state, which everywhere recognizes claims for breach of contract,[173] breach of implied warranty,[174] unjust enrichment,[175] and fraudulent concealment.[176] To fulfill the amendment's purpose of simplifying multistate class actions, plaintiffs representing a discrete class should decide whether to accept the choice-of-law presumption for the class as a whole. The decision whether to accept or reject the presumption will be made by the representative plaintiff's attorney or, in larger controversies, by interim lead counsel appointed under Rule 23(g)(3).[177]

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the availability of class actions do not apply in federal court. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

[173] *See, e.g.*, Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 233 n.8 (1995) ("Because contract law is not at its core diverse, nonuniform, and confusing, we see no large risk of nonuniform adjudication") (internal quotation marks and citation omitted); Klay v. Humana, Inc., 382 F.3d 1241, 1263 (11th Cir. 2004) ("A breach is a breach is a breach"), *abrogated in part on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); *In re* Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig., 270 F.R.D. 521, 529 (N.D. Cal. 2010) (similar); Ellsworth v. U.S. Bank, N.A., No. C 12-02506 LB, 2014 WL 2734953, at *20–25 (N.D. Cal. June 13, 2014) (granting multistate class certification based on "realistic plan to group the breach of contract classes into two subclasses to address differences in state law.").

[174] Relevant in product defect cases are state versions of U.C.C. § 2-314 that codify the implied warranty of merchantability. *See* James Brandon McWherter, *The Aftermath of* Owens *and* Whitehead*—Products Liability & Comparative Fault in Tennessee*, 32 U. MEM. L. REV. 443, 454–55 (2002) (implied warranty of merchantability is "more common" than implied warranty of fitness for a particular purpose in products liability actions); Lucille M. Ponte, *Getting A Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and A Proposal for Improving the Quality of These Online Consumer "Products"*, 26 OHIO ST. J. ON DISP. RESOL. 119, 156 & n.231 (2011) (describing how the "earlier common law requirement for goods"—that they be of sufficient quality to pass without objection in the trade—"was later codified under the U.C.C."); KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 298 (1988) (explaining that, "[b]y holding sellers to the standard that they *should* know what they sell, the law establishes incentives for them to discover such knowledge."). *Compare In re* IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599, 603 (7th Cir. 2014) (citing U.C.C. remedies provision and reversing order that had rejected certification of proposed eight-state class in multidistrict product defect case), *with In re* Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II), No. CIV.A. 03-4558, 2012 WL 379944, at *2, *21–34 (D.N.J. Feb. 6, 2012) (denying certification of five states' "implied warranty claims, which derive from each state's version of UCC § 2-314," in light of multistate analysis that found "individual issues of actual injury and causation predominate" for each state's claim).

[175] *Supra* Part II.B.

[176] Fraudulent concealment in every jurisdiction "includes a similar set of elements: (1) misrepresentation or omission of a material fact, (2) a duty to disclose, (3) intent to induce reliance and/or defraud, (4) some form of reliance, and (5) resulting damages." *In re* Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg. & Sales Practice Litig., No. 1:16MD2743 (AJT/TRJ), 2017 WL 2911681, at *7 (E.D. Va. July 7, 2017); *see also In re* FieldTurf Artificial Turf Mktg. & Sales Practices Litig., No. 3:17-md-02779-MAS-TJB, 2023 WL 4551435, at *8 (D.N.J. July 13, 2023) (concluding "the elements of fraudulent concealment are similar nationwide."); *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 315 (3d Cir. 1998). Another court held that "factual disputes arising from the fraudulent concealment doctrine can be properly resolved on a class-wide basis by the jury in deciding the remaining class-wide issues, notwithstanding slight variations in state law as to how certain of the elements are described." Allapattah Servs., Inc. v. Exxon Corp., 188 F.R.D. 667, 673 (S.D. Fla. 1999), *aff'd*, 333 F.3d 1248 (11th Cir. 2003), *and aff'd*, 545 U.S. 546 (2005).

[177] Designating interim counsel "clarifies responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting

The second exception voids the presumption if the parties entered a contract that chooses a particular state's law for claims asserted in the case. Courts normally enforce these provisions if they (a) appear in a properly formed contract and (b) apply to the claims at hand. If either party in a CAFA class action disputes either contractual question, the court can decide it under existing principles.[178]

By referencing "*the* claims against a defendant" under state law, Section (A) makes clear that the plaintiff's decision whether to accept the presumption applies to all state-law claims against that defendant.[179] Section (A)(iii) applies if there is more than one defendant and directs the court, when the plaintiff accepts the presumption, to subject each respective defendant to the law of its own home state. Section B also modifies the entirety of Section A to allow a plaintiff to accept or reject the home state presumption with respect to any defendant in the case. Consider, for example, a price-fixing case in which Defendant N is headquartered in New Mexico, which allows indirect consumer purchasers to recover for antitrust violations,[180] and Defendant T is headquartered in Texas, where such purchasers cannot recover.[181] In that situation, the plaintiffs can proceed nationwide under New Mexico law against N while simultaneously proceeding on a state-by-state basis against T to the extent permitted under the laws of plaintiffs' states. It bears mentioning, as well, that defendants sued for conspiring in the same economic sector may be domiciled in the same state, as in the Auto Parts MDL pending in Detroit,[182] the General Pharmaceuticals MDL proceeding against drug companies based in New Jersey,[183] and financial cartel cases against Wall Street firms.[184]

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any necessary discovery, moving for class certification, and negotiating settlement." FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 21.11 (4th ed. 2004).

[178] *See* Hutchins v. Hutchins, 430 P.3d 502, 509 (Mont. 2018) (ruling that trial court erred by overriding choice-of-law provision in prenuptial agreement); Ministers & Missionaries Ben. Bd. v. Snow, 45 N.E.3d 917, 919 (N.Y. 2015) (reciting "basic premises that courts will generally enforce choice-of-law clauses and that contracts should be interpreted so as to effectuate the parties' intent"); Cardoni v. Prosperity Bank, 805 F.3d 573, 580–83 (5th Cir. 2015) (enforcing contractual choice-of-law clause while also discussing public policy exception to "the default position . . . that [such clauses] are enforceable"); Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co., 82 So.3d 73, 80 (Fla. 2012) ("An agreement between parties to be bound by the substantive laws of another jurisdiction is presumptively valid, and this Court will enforce a choice-of-law provision unless applying the chosen forum's law would contravene a strong public policy of this State."); State *ex rel.* McKeage v. Cordonnier, 357 S.W.3d 597, 600 (Mo. 2012).

[179] *See* Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts*, 88 OR. L. REV. at 1028 (under Oregon's choice-of-law statute, "if the plaintiff exercises that right, the choice must be for 'all claims and issues against the defendant.'") (citation omitted).

[180] N.M. Stat. Ann. § 57-1-3(A).

[181] Tex. Bus. & Com. Code § 15.01 *et seq.*; Abbott Labs. v. Segura, 907 S.W.2d 503 (Tex. 1995).

[182] *In re* Auto. Parts Antitrust Litig., No. 12-md-2311 (E.D. Mich.).

[183] *In re* Generic Pharms. Pricing Antitrust Litig., No. 16-md-2724 (E.D. Pa.).

[184] *E.g.*, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 Civ. 2613 (NRB) (S.D.N.Y.); *In re* NASDAQ Market-Makers Antitrust Litig., No. 94 Civ. 3996 (RWS) (S.D.N.Y.).

4. Constitutionality

The legislative proposal comports with the Due Process and Full Faith and Credit Clauses. Just as a person "is subject to general jurisdiction in [their] place of domicile,"[185] so, too, is the person subject to application of their own state's law. The defendant's domicile is inherently a significant contact[186] and, even when state laws materially conflict,[187] "the Due Process Clause requires only that the state whose law applies have a significant contact or significant aggregation of contacts to the claims . . . to ensure that the choice of that state's law is not arbitrary or unfair."[188] Thus, by aligning choice of law with the defendant's domicile, the amendment respects "[t]he only real Constitutional limitation"—"that the law chosen be the law of the state having some significant 'contact' or relation with the transaction."[189]

In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that a single court applying the law of a single state can bind a nationwide class but that Kansas law could not constitutionally apply to the out-of-state defendant because its in-state contacts were insignificant: "[O]nly a few leases in issue [were] located in Kansas."[190] This outcome reflects the principle that when a state law has no significant relationship or contact with the parties or occurrence, its law may not be applied to modify the parties' rights or duties.[191] However, a defendant's "principal place of business" alone creates "significant contacts" with the case such that applying that state's law to transactions related to the defendant's business is "neither arbitrary nor fundamentally unfair."[192] Instead, because of corporate America's hierarchical system of

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[185] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021); *see also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

[186] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. m (1971) (noting that "the law of a person's domicil determines many of his important interests"); *see also supra* note 192.

[187] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) (indicating there is no constitutional problem absent a material conflict in the laws being considered for application); Sun Oil Co. v. Wortman, 486 U.S. 717, 730–31 (1988); RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.02 cmt. a (Tentative Draft No. 3, 2022) (explaining "[a] difference is material if the laws direct different outcomes with respect to a particular issue.").

[188] *Shutts*, 472 U.S. at 819–22. The Ninth Circuit held in an antitrust action that applying California law to purchases outside California would not offend the Due Process Clause because "more than a *de minimis* amount" of the "defendant's alleged conspiratorial activity leading to the sale of price-fixed goods to plaintiffs took place in California." AT & T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106, 1113 (9th Cir. 2013).

[189] EUGENE E. SCOLES & PETER HAY, CONFLICT OF LAWS 87, 92 (2d ed. 1992) (adding that "the fact that another state has an interest, or that a different choice of law rule or theory would refer to the law of another state or would produce a fairer or better result[,] is not a Due Process question.").

[190] *Shutts*, 472 U.S. at 819–20.

[191] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981); Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930).

[192] Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc., 111 F.3d 1386, 1394 (8th Cir. 1997) (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion)); Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel, 346 F.3d 360, 366 (2d Cir. 2003); *see* Chavez v. Blue Sky Nat. Beverage Co., 268 F.R.D. 365, 379 (N.D. Cal. 2010) (reasoning that the defendants were "headquartered in California and their misconduct allegedly originated in

management, a defendant company's headquarters is typically connected to the events or transactions giving rise to business litigation.

The Full Faith and Credit Clause "is less demanding with respect to choice of laws" than in prescribing recognition of state court judgments.[193] The clause permits Congress to enact choice-of-law rules for diversity suits according to its policy judgments based on the needs and conditions of interstate commerce and judicial administration.[194] Hence, the Supreme Court accepted that "[i]f current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, . . . it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause."[195] The amendment proposed here will create a shortcut based on the legislative determination that, for diversity actions arising under CAFA, a company's place of domicile presumably has the most significant relationship to the claims.

5. State Sovereignty and Federalism

The amendment will serve the interests of our federal system by curtailing the ongoing, pervasive scattered or shallow development of state law by federal judges, who may be unfamiliar with it.[196] Far from abridging state sovereignty, the amendment consolidates and strengthens it. Deliberation and analysis will concentrate on the law of a single state, leading to a more focused and coherent jurisprudence. Every state has the same objective of maintaining markets free of deceptive marketing, overcharging of consumers, sales of dangerous products, rigging of transaction prices, and other unfair trade practices. Compliance is promoted to the extent lines of legal accountability are settled and clear.

Presuming the defendant's home state's law applies, subject to the plaintiff's decision, is a reasonable approach that does not offend the interests of any other state. It is unclear what tangible harm could result when a

California. With such significant contacts between California and the claims asserted by the class, application of the California consumer protection laws would not be arbitrary or unfair to defendants."); *In re* Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74, 84 (D. Md. 1991) (finding application of Maryland law to the claims of a nationwide class "neither arbitrary nor unfair" because the defendant was headquartered in Maryland and hence many of its allegedly false and misleading statements emanated from that state); *see also supra* note 140; *infra* note 216.

[193] Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 258, 282 (1992) (concluding that, "[a]s matters stand, the Full Faith and Credit Clause means almost nothing" and "[o]ne uniform set of federal choice-of-law rules can be binding on the states and applied to all transactions wherever they may be litigated.").

[194] U.S. CONST., ART. IV, § 1; *see also* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 266 ("Plenary power is given to Congress to resolve such conflicts by the second sentence of the full-faith-and-credit clause.").

[195] Sun Oil Co. v. Wortman, 486 U.S. 717, 729 (1988).

[196] *See generally* Jordan Elias, *Cooperative Federalism in Class Actions*, 86 TENN. L. REV. 1 (2018).

given state's residents seek to *benefit* from application of a coordinate state's law, at the plaintiff's election. "[E]ach state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders,"[197] but when a plaintiff allegedly injured by that conduct accepts the law of the defendant's home state, the interests of the plaintiff's state are neither frustrated nor defeated as its residents presumably are receiving *more* protection. Neither is there any prejudice to the residents of other states who otherwise would recover nothing upon a denial of certification.

When representative plaintiffs can choose the law under which protection is sought, they advance their states' law enforcement interests either directly or through an alternative standard. Similarly, federal law often sets a floor, rather than a ceiling, of consumer protection—absent congressional intent or valid agency action to the contrary, enforcement of a more stringent state-law standard neither abridges nor is preempted by federal law.[198] Moreover, because the presumptively applicable law is that of the defendant's own domicile, my proposed system avoids the "false federalism" reflected in the pre-CAFA custom of "hellhole" state courts of certifying nationwide classes in lawsuits against non-resident firms.[199] The Senate Report asks rhetorically, "Why should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?"[200] Multistate class actions now proceed in federal court, and if the defendant in that hypothetical were an Alabama company, the court could reasonably apply Alabama law, subject to superseding federal or other pertinent limitations. My proposal thus differs in kind from the pre-CAFA situation because a defendant will not be held to the law of a single *foreign* state for transactions occurring in many states. Applying the law of the defendant's own state is altogether fair and consistent with legitimate expectations,[201] whereas the "hellhole" courts had no basis even to assert personal jurisdiction over an out-of-state defendant that engaged in no forum activities related to the claims.[202]

Even when state laws conflict, "it is difficult to see how th[e] second state could have a legitimate interest in exculpating the defendant for an act done outside its territory or how it could reasonably object to the injured plaintiff being granted greater protection than he would receive under its

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[197] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

[198] *See* Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1677–78 (2019) (discussing Wyeth v. Levine, 555 U.S. 555, 570–74 (2009)); Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323, 335 (2011).

[199] S. Rep. No. 109-14, at 24–26 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3.

[200] *Id.* at 24.

[201] *See* Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts*, 88 OR. L. REV. at 1030 (finding "nothing unfair in subjecting tortfeasors to the law of the state in which they acted because it is a state with which they voluntarily associated themselves and which, more often than not, is also their home state. . . . The tortfeasor's conduct is just as bad . . . regardless of whether the injury materializes within or outside that state.") (internal quotation marks and citation omitted).

[202] *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 137 S. Ct. 1773, 1780 (2017).

own law."[203] Why would Montana have any interest in preventing its citizens from recovering overcharges through application of California law against a California company? The Ninth Circuit in *Stromberg v. Qualcomm Inc.* expressed concern that applying California antitrust law to transactions in other states affected by the defendant's conduct would infringe those states' interest in attracting business.[204] Specifically, various states have refrained from enacting *Illinois Brick* "repealer" statutes that would have permitted indirect purchasers to recover damages under the state's antitrust law.[205] According to *Qualcomm*, building on *Mazza*, nationwide class certification under the law of a repealer state like California, even if it benefits injured residents of non-repealer states, "ignor[es] or giv[es] too little attention to each state's interest in promoting business."[206] The Ninth Circuit criticized the district court for having "improperly impaired non-repealer state policy by allowing California to set antitrust enforcement policy for the entire country."[207] In fact, the class certification would have furthered California's substantially greater interest in the matter through enforcement of its laws governing its own resident corporations.[208] More attenuated, in comparison, are whatever interests other states may have in *denying* their own citizens recovery from an out-of-state company supposedly to "attract business."[209]

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[203] Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 329; *see also* Randle v. Spectran, 129 F.R.D. 386, 394 (D. Mass. 1988) (concluding that "the interest of each jurisdiction in having the injuries of its citizens litigated and compensated outweigh any interest in applying its own law."); *Clothesrigger*, 236 Cal. Rptr. at 610 ("California's more favorable laws may properly apply to benefit nonresident plaintiffs when their home states have no identifiable interest in denying such persons full recovery.").

[204] Stromberg v. Qualcomm Inc., 14 F.4th 1059 (9th Cir. 2021).

[205] *See id.* at 1064.

[206] Mazza v. Am. Honda Motor Co., 666 F.3d 581, 592–93 (9th Cir. 2012).

[207] *Qualcomm*, 14 F.4th at 1074. The Ninth Circuit in *Qualcomm* counseled against certifying a nationwide class under California's antitrust law, the Cartwright Act, instructing that "[t]he non-repealer laws should control those purchases occurring in non-repealer states and class members with purchases in non-repealer states should be carved out of the 23(b)(3) class." 14 F.4th at 1074. Before *Qualcomm*, some district courts allowed non-Californians to maintain claims under the Cartwright Act even where their home states did not provide for indirect purchaser standing. *See, e.g.*, *In re* Domestic Drywall Antitrust Litig., No. 15-CV-1712, 2019 WL 3326030, at *2 (E.D. Pa. July 24, 2019). *Qualcomm* cements a fragmented antitrust enforcement regime in which only half the country's citizens can recover anticompetitive overcharges passed down the distribution chain. *See* Joshua P. Davis & Anupama K. Reddy, *Unintended Consequences of Repealing the Direct Purchaser Rule*, 84 ANTITRUST L. J. 341 (advocating congressional repeal of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), so that all purchasers along the chain of distribution can pursue damages under the Clayton Act).

[208] *See* Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. at 328 (observing that "the state where a person acts will almost certainly have the greatest concern in the application of its tort rule relating to standards of conduct, provided that the act did not measure up to the pertinent standard."); *Mazza*, 666 F.3d at 598 (D. Nelson, J., dissenting) (emphasizing a state's "compelling interest in regulating the conduct of corporations operating within the state and availing themselves of the state's privileges.").

[209] The district court reasoned in this vein that "Qualcomm is the only defendant and is a resident of California, not one of the states that would forbid a damages suit to proceed. Thus, the other states have no interest in disallowing the suit to proceed against Qualcomm." *In re* Qualcomm Antitrust Litig., 328 F.R.D. 280, 314 (N.D. Cal. 2018), *vacated and remanded sub nom.* Stromberg v. Qualcomm Inc., 14 F.4th 1059 (9th Cir. 2021).

Not only is Congress best positioned to calibrate these interstate policies, but it is in fact implausible to presume in the manner of *Mazza*[210] that companies, when deciding whether to do business in Ohio, for instance, take into account that they won't have to pay consumer damages for antitrust violations on Ohio transactions. Any company at the margins setting marketing or manufacturing strategy based on differing state liability standards is probably asking for trouble under its own state's law.[211]

While class certification under one state's law is not likely to hinder commerce in other states, a CAFA choice-of-law presumption likely will lead to faster and fairer resolution of class actions. A commentator posited, however, that "[i]f California were to require cigarette manufacturers to print a conspicuous skull and crossbones on their magazine advertisements . . . a tobacco company headquartered in California should be empowered to label ads distributed in other states pursuant to local law."[212] The extreme hypothetical just underscores that most class actions involve general common-law prohibitions that do not meaningfully differ,[213] and state laws with only "idiosyncratic" variations,[214] and that any differences become immaterial if the conduct violates all pertinent standards.[215] At the end of the day, subjecting a corporation to the law of the state where it makes business decisions, pays taxes, owns or rents property, manages costs and revenue, and employs workers is not unfair and in fact can have a stabilizing effect on operations.[216]

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[210] *See Mazza*, 666 F.3d at 592 (suggesting that some states seek to "attract[ ] foreign businesses, with resulting increase in commerce and jobs," by forgoing "[m]ore expansive consumer protection measures [that] may mean more or greater commercial liability, which in turn may result in higher prices for consumers or a decrease in product availability.").

[211] *Cf.* Richard Posner, *A Theory of Negligence*, 1 J. LEG. STUDIES 29, 75 (1972) (arguing that tort law is "not responsible for major innovations in safety methods").

[212] Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1059 (2011). The hypothetical cigarette-labeling law would be preempted by federal requirements. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 78–79 (2008).

[213] *See supra* notes 173–76.

[214] *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022–23 (9th Cir. 1998) (determining that the remedies under applicable state laws were "local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties . . . . Thus, the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims.").

[215] *See, e.g.*, Henderson v. Bank of N.Y. Mellon, N.A., 332 F. Supp. 3d 419, 429 (D. Mass. 2018) ("[T]he bank has not pointed to a single state statute that would even arguably permit the bank to charge the undisclosed tax-fee markup alleged in the complaint.); *In re* iPhone 4S Consumer Litig., No. C 12-1127 CW, 2013 WL 3829653, at *7 (N.D. Cal. July 23, 2013) (defendant failed to show "how any such [state-law] differences would also be material to the facts of the instant litigation.").

[216] *See* Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts*, 88 OR. L. REV. at 1030 ("Having violated the standards of that state, tortfeasors should bear the consequences of such a violation and should not be allowed to invoke the lower standards of another state."); Reese, *The Law Governing Airplane Accidents*, 39 WASH & LEE L. REV. at 1310 ("Permitting the plaintiff to choose either the law of the state of manufacture or design or of the producer's principal place of business would surely not be unfair to the producer. It could naturally be expected to comply with all the requirements of these laws and to insure against any liability it might incur for failure to do so. Also, these states have a real interest in the producer and in how it conducts its affairs."); Diamond Multimedia Sys., Inc. v. Super. Ct.,

Conclusion

State-law causes of action in national controversies have been proceeding in front of a single federal judge, rather than separately in state or other federal courts, as a result of CAFA's vast expansion of diversity jurisdiction. Many federal courts have denied class certification based on the prevalence of state-law claims and the presence of conflicts among the state laws, finding the cases unmanageable or holding that individual questions of law predominate even when the claims concern the same course of business conduct. As a result, class actions do not go forward even though they could have proceeded and conferred recoveries in a standalone proceeding, on an individual, state-by-state basis. The only reason that such claims, certifiable in isolation, are not certified under CAFA is that they present many different state laws in a single case. Democratic Senators flagged this unfairness problem during the CAFA debates. By foreclosing large-scale redress, denying certification by deferring to the law of the place of transacting reduces the deterrent effect of class actions.[217] That approach, as pointed out by the dissenting judge in *Mazza*, "allow[s] corporations to take advantage of a forum state's hospitable business climate on the one hand, while simultaneously discounting the potential for litigation by nationwide consumers in response to a particular profit-motivated but harmful action on the other. If the harm to individual consumers is small enough to create a disincentive to individual litigation, and if a nationwide class action is not a potential consequence, corporations can choose increased revenues over the consumer with impunity."[218] So when, due to CAFA, the accident of forum serves to deny

968 P.2d 539, 556–57 (Cal. 1999) (recognizing California's "clear and substantial interest in preventing fraudulent practices in this state which may have an effect both in California and throughout the country."); *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 251 (D. Del. 2002) (holding that, "[w]here the defendant's headquarters are located in Delaware and the alleged deceptive acts originated in Delaware, it is proper to apply the Delaware consumer fraud statute to a nationwide class."), *aff'd*, 391 F.3d 516 (3d Cir. 2004); *supra* notes 140 & 192.

[217] *See* Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269, 287 (6th Cir. 2016) ("Consumer class actions, furthermore, have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources."); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172, 178–79 (3d Cir. 2013) (assessing options for distributing settlement funds in relation to "important deterrent value" of class actions); *see also* 1 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 1:8 (6th ed.); *supra* notes 5–6, 108 & 147. R

[218] *Mazza*, 666 F.3d at 599 (D. Nelson, J., dissenting); *see also* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (stating that "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.").

relief,[219] it not only causes injustice but also weakens deterrence of corporate misconduct.

Even when state-law claims proceed concurrently on behalf of proposed state subclasses, damages from the affected commerce in a state can only be recovered if there is a plaintiff from *that* state, in spite of the alleged conduct having broad effects. Freeing up the professional resources now devoted to interviewing and signing up clients from as many states as possible will optimize private enforcement by allowing more time for work on other matters. As it is, MDL and other class actions involving interstate commerce take longer to resolve or settle on the cheap because the artificially limited state-by-state damage coverage compromises plaintiffs' negotiating leverage, reducing recoveries. The mismatch between the defendant's exposure under a subset of state claims and its interest in obtaining a national liability release creates further unhelpful tensions, particularly when it comes to ensuring adequate compensation for all class members and responding to settlement objectors. Under this state-by-state model, too, parties submit extensive argumentation and charts cataloging differences, however minute, among the state laws at issue. Federal judges in turn undertake the same elaborate analyses.[220] The work spent on these comparative surveys is a drag on the system, extending delays and distracting case participants from the merits and facts. The scope of these analyses also exacerbates the federalism problem of federal judges making too much substantive state law.[221]

Despite the fundamental mismatch between the mass national market and the multistate consumer law regime, there remains no general law under which American citizens can sue for false advertising, schemes to defraud, other unfair competition, defective products, mass breaches of contract, and other tortious harms such as invasion of privacy.[222] The universal prohibitions, essential to the proper functioning of free markets, that dominate consumer class actions do not meaningfully vary. Depriving injured citizens of recoveries merely because they live in different states defies sense and logic. Providing access to a unitary or nationwide cause of action will dispense with this multistate problem. Just as its distortions have interrelated negative effects, so will removing the problem yield compounding benefits. And, just as the negative effects are both clearly evident and unseen, so will each proposed solution have the immediate effect of streamlining case resolution while also producing less perceptible benefits, such as relieved workloads for bench and bar, settled expectations, more focused legal analysis, and closer

[219] *Contra* Guaranty Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (holding that "[t]he nub" of *Erie* policy "is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.").

[220] *See supra* notes 58–59; *In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 19-2875 (RBK/SAK), 2023 WL 1818922 (D.N.J. Feb. 8, 2023).

[221] *See* Elias, *Cooperative Federalism in Class Actions*, 86 TENN. L. REV. 1.

[222] *See supra* notes 15 & 42. R

alignment of party incentives.[223] Each of the three solutions will consolidate various types of class cases under the banner of a single cause of action available to citizens anywhere in the nation, restoring equilibrium in the administration of class actions and promoting compliance in U.S. markets. Of the three solutions, the third—adding a choice-of-law presumption to CAFA—strikes at the heart of the problem and merits prompt attention in Congress.

[223] *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (stating that an animating concern of the *Erie* doctrine, which governs the federal courts' application of state law in diversity cases, is to avoid "debilitating uncertainty in the planning of everyday affairs."); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549–50 (1996) (reporting that "almost every commentator who has discussed complex litigation" has supported "adoption of uniform federal tort or contract law.").