The Class Action Fairness Act of 2005: The Story behind the Statute

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Class actions were created to “enable those with small claims for whom individual litigation would be economically irrational to band together in group litigation against a common adversary.”¹ On the other hand, conventional wisdom is that class actions are “Frankenstein monsters”² whose very existence allows plaintiffs to engage in judicial blackmail inducing defendants to settle frivolous claims. Thus, we have two views of class actions. On the one hand, they are essential to protect certain public rights. They allow lawsuits to be consolidated to preserve court time and plaintiff expense. They allow lawsuits to be brought to right a wrong where the interest of no single plaintiff would justify initiation of a lawsuit. On the other hand, they allow lawsuits to be brought when the interest of no single plaintiff would justify a lawsuit. Thus, they contribute to the skyrocketing number of lawsuits filed. Given the small amount that each individual plaintiff has at stake in the lawsuit, no one benefits but the lawyers who bring the lawsuits. They are viewed as nothing more than “money generators” for lawyers.³ Two competing views of class action lawsuits form the debate around class action abuses. In many ways, policy debates are conflicts about which alternative view of a problem correctly defines the condition.⁴

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¹ “The most erroneous stories are those that we think we know best—and therefore neither scrutinize nor question.” Stephen Jay Gould.

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³ “Political debates on policy issues are often portrayed as a conflict over competing definitions of a social condition.” DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION-MAKING 309 (1997). Deborah Stone argues that getting an issue onto the public policy agenda is “a struggle to control which
Public policy literature tells us that how a public policy problem is defined is an important component of policy formulation. To begin with, many argue that what separates a problem from a condition is the fact that problems are amenable to human intervention.\(^5\) In other words, a dire condition can be accepted if there are no viable alternatives to ameliorating the condition. Only when feasible solutions are identified does the condition become a public policy problem.

Problem definition affects whether the problem makes it to the public policy agenda,\(^6\) it affects the solutions proposed and it affects the likelihood of any policy action being endorsed and implemented.\(^7\) Recognition that public issues are malleable, or open to competing interpretations as well as factual distortion,\(^8\) is not new. It is generally accepted that “mismatches often exist between measures of the seriousness of a problem and the level of attention devoted to it.”\(^9\) For example, although the data reveal that punitive damages are rarely awarded,\(^10\) questions surrounding punitive damage awards have received considerable attention both from the courts and from legislatures.\(^11\)
Agenda-setting involves a "struggle to control which images of the world govern policy." It is well recognized in the public policy literature that one effective way to control the image accepted is through the use of causal stories.

The purpose of this paper is to consider the extent to which problem definition impacted enactment of the Class Action Fairness Act of 2005 (CAFA). Termed a "monumental legislative victory for corporate defendants," CAFA provides an illustration of how the solution adopted was affected by the story used to define the problem. In this article, I will retell the causal story to illustrate both the way in which the problem was defined and the solution that was adopted. In Part I, I will discuss the public policy literature on problem definition. In Part II, I will discuss how the problem was defined in a way that led to enactment of CAFA. This part will discuss how the story that has been accepted has led to tort reform in general and to enactment of CAFA specifically.

In Part III, I will provide a brief overview of CAFA and link the specific provisions of CAFA to the rhetoric discussed in Part II. In Part IV, I

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12. Deborah L. Rhode, Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution, 54 DUKE L.J. 447, 451 (2004). A content analysis of a widely cited pro-reform book reveals that the "evidence" offered to support the factual assertions made includes 272 anecdotes, 1 case study and 6 citations to statistical studies. Rhode recounts a number of cases where the "skewed spin" differs from the facts and concludes that "facts fall by the wayside to make a better story, and the public misses what the real story should be... Stories are easier to sell than statistics, so descriptions of what the ATRA [American Tort Reform Association] terms 'lawsuit abuse' are frequently long on folklore and short on facts." Id. at 455-456. See also HALTON & MCCANN, supra note 1, 7-10 (discussing the realist response to misstatements about tort reform). According to Halton and McCann, the realist uses statistics to demonstrate that the "tort reform campaign has been built on 'baseless fictions' and unrepresentative stories." Id. at 7. They cite as examples evidence that plaintiffs rarely win large judgments in products liability actions and evidence that the volume of products liability and medical malpractice suits have not increased in recent decades. Id. Halton and McCann offer a number of reasons for why the realist approach is not very effective, including the fact that the results of their research are typically published in scientific and legal journals that are not widely read. Id. See generally Elizabeth G. Thornburg, Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia, 110 W. VA. L. REV. 1097, 1101 (2008) (summarizing the results of studies discounting the "rhetoric of crisis"). She notes the inaccuracy of the rhetoric, noting that oftentimes the stories are "merely fabricated and then repeated until they seem to be factual." Id. at 1102.

13. The importance of the narrative has also been recognized in legal commentary. See, e.g., Benjamin Baez, The Supreme Court and Affirmative Action: Narratives about Race and Justice, 18 ST. LOUIS U. PUB. L. REV. 413 (1999).

14. William C. Roedder, An Introduction to the Class Action Fairness Act of 2005, 56 FDCC Q. 443, 463 (2006). CAFA has also been characterized as one of the "trio of 'tort reform' measures" sought by the Bush Administration that have been coupled with "unrelenting attacks on lawyers in general and plaintiffs' lawyers in particular..." Burbank, supra note 1, at 1441.

15. Recognition of the role of problem definition in tort reform is not new. See, e.g., Daniels & Martin, supra note 6; Rhode, supra note 12, at 447. Daniels and Martin consider the empirical question posed by Michael Rustad, "[W]hy the accepted wisdom of a punitive damages explosion persists when there is no empirical data supporting it." Rustad, supra note 10, at 45 (1992). Daniels and Martin offer problem definition as their answer to this question.
will conclude by showing that the public policy justifications for CAFA are questionable. This part will rely on empirical data and argue that alternative causal stories were every bit as plausible but were rejected. This part will consider the fact that there are two views of class actions—hero and villain.

I. PART I: PROBLEM DEFINITION

Q: What’s wrong with lawyer jokes?
A: Lawyers don’t think they’re funny and other people don’t think they’re jokes.16

We all know the stories. A person is injured. The best stories are when he is injured because of his own carelessness. Examples of this abound. He is using his lawnmower as hedge clippers,17 she spills hot coffee in her lap,18 or he becomes a milk-a-holic and suffers a stroke.19 Then, instead of accepting responsibility for his/ her own actions, he becomes a plaintiff. He seeks to shift responsibility for his actions onto a hapless defendant. It is like winning the lottery. Sometimes the plaintiff is seeking damages for absurd injuries. She is asking to be compensated because a CAT scan destroyed her psychic powers.20 Luckily, he is able to enlist the help of the most likely of all villains—a greedy attorney, and they are all greedy. An attorney is willing to take his case without payment. He will only accept payment if he wins the case, but then he will ask for an excessive amount. This story has two villains—the greedy plaintiff and the greedy lawyer. It has two victims—the hapless defendant and the plaintiff who is forced to pay his co-conspirator an unfair portion of the lottery award. Most importantly, the story tells us, we all suffer. We are forced to pay higher prices, we cannot find doctors when we need them and American competitiveness abroad suffers.

We all know the stories. They form the basis for countless “lawyer jokes.”22

17. See Rustad, supra note 10; Daniels & Martin, supra note 6. This story is not actually based on a real case. A causal story does not need to be based in fact to be effective. Fiction is often stranger, and more persuasive, than fact.
19. HALTOM & MCCANN supra note 1, at 64. Haltom and McCann provide a number of examples of tort tales, including a man who sued Sears because he pulled so hard trying to start his lawnmower that he had a heart attack. See id. at 67. See also Rhode, supra note 12, at 448-449 (providing examples of what she terms “loony litigation”).
20. See HALTOM & MCCANN, supra note 1, at 1–2. Haltom and McCann call this a “widely circulated narrative.” What the story fails to reveal is that the case was dismissed without any judgment.
21. The story totally ignores the fact that the hapless defendant is often a million dollar corporation with its own legal team. It also ignores the fact that more times than not the plaintiff is also a million dollar corporation. See Rhode, supra note 12, at 457 (discussing the fact that “disputes between businesses are the largest and fastest growing category of civil cases”). See also John T. Nockleby & Shannon Curreri, 100 Years of Conflict: The Past and Future of Tort Retrenchment, 38 LOY. L.A. L. REV. 1021, 1080-1081 (2005) (“One of the unheralded developments in civil litigation during the last thirty years has been a dramatic increase in business-against-business tort litigation.”).
22. See generally MARC GALANTER, LOWERING THE BAR: LAWYER JOKES & LEGAL CULTURE (2005). There are so many lawyer jokes that Marc Galanter has been able to write an entire book filled with lawyer jokes.
As such, they appear to harmless fun. However, these "tort tales,"23 provide a causal story that fuels claims for tort reform. They define the problem and attach solutions to the problem. As such, they have been critical in the tort reform movement.

Public policy formulation is often viewed as a chronological or linear process. Problems are identified, solutions are proposed, the best alternative is selected, policy is formulated and then implemented. The so-called "rationality perspective"24 assumes a rational process of decision-making leading to policy formulation.25 Some political scientists, however, question the linear process of the policy formation process, most notably, Professor John Kingdon. Kingdon sees problems as floating in a "primeval soup," waiting to encounter policies suited to these problems and the ideal political environment.26 While less linear than the rational perspective, this view of the policy formation process sees solutions as being coupled with clearly defined problems. Others argue that oftentimes the solution begets the problem. In other words, issues are identified, and recognized as problems, only when they are attached to clearly defined solutions.27 Under this approach, problems are purposefully defined in ways as to point to already supported solutions.

All agree that how the problem is defined determines the likelihood of it ending up on the public policy agenda and the likelihood of any eventual public policy formulation. Moreover, the way in which a problem is defined28

23. See HALTOM & MCCANN, supra note 1, at 5-6.
24. Rochefort & Cobb, supra note 8, at 56.
25. The rational model of decision-making assumes that policy-makers “first define their goals rather clearly and set the levels of achievement of those goals that would satisfy them. Then, they would canvass many (ideally, all) alternatives that might achieve these goals. They would compare the alternatives systematically, assessing their costs and benefits, and then would choose the alternatives that would achieve their goals at the least cost.” See generally JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 78 (1995) (explaining this model and then concluding, “such a model does not very accurately describe reality.”
26. Id. at 116-117. Kingdon based his work on the “garbage can” model of decision making promoted by Cohen, March and Olsen. See generally Michael Cohen, James March & Johan Olsen, A Garbage Can Model of Organizational Choice, 17 ADMIN. SCI. Q. 1 (1972). Under Kingdon’s view, there are three separate “streams” relevant to agenda setting: problems, policies and politics. Specifically, “[p]eople recognize problems, they generate proposals for public policy changes, and they engage in such political activities as election campaigns and pressure group lobbying,” KINGDON, supra note 25, at 87. He sees these streams as operating separately, but hypothesizes that they come together, or “couple” during “policy windows of opportunity.”
27. AARON WILDAVSKY, SPEAKING TRUTH TO POWER 42 (1979). See Stone, supra note 6, at 298 (“Like the famous six characters in search of an author, people with pet solutions often march around looking for problems that need their solutions.”).
28. BRIAN W. HOGWOOD & LEWIS A. GUNN, POLICY ANALYSIS FOR THE REAL WORLD 108 (1984). Problem definition has been defined as “the processes by which an issue (problem, opportunity, or trend), having been recognized as such and placed on the public policy agenda, is perceived by various interested parties; further explored, articulated, and possibly quantified; and in some but not all cases, given an authoritative or at least provisionally acceptable definition in terms of its likely causes, components, and consequences.” Julie Davies, Reforming the Tort Reform Agenda, 25 WASH. U. J.L. & POL’Y 119, 147-58 (2007). Problem definition “provides the frame through which current conditions are perceived to be in conflict with treasured social values.” Houston & Richardson, supra note 5, at 485. For example, Professor Davies argues that integrating consideration of the problem of the uninsured onto the agenda for tort reform might be a way to “gain political traction” and move the health care issue onto the public policy agenda successfully.
is affected by the rhetoric used to discuss the issue. Professor Stone sees problem definition as a "process of image making" and highlights the importance of the narrative in making that image one that is amenable to placement on the public policy agenda. Most importantly for the purposes of this article, she asserts that:

Conditions, difficulties, or issues thus do not have inherent properties that make them more or less likely to be seen as problems or to be expanded. Rather, political actors deliberately portray them in ways calculated to gain support for their side. They compose stories that describe harms and difficulties, attribute them to actions of other individuals or organizations, and thereby claim the right to invoke governmental power to stop the harm.

In her now classic work on causal stories, Professor Stone argues that political actors use "narrative story lines and symbolic devices to manipulate so-called issue characteristics, all the while making it seem as though they are simply describing facts."

A story can be constructed in a way that will move the perceived problem onto the public policy agenda and in a way that will make action more likely. What characteristics of the story are important? First, the story must be contrived in a way that attributes blame or culpability in an explanation of the causes of the problem. If the story is constructed in a way in which the problem is perceived to be caused by purposeful action, as distinguished from unguided actions such as machine failure, with intended consequences, as distinguished from inadvertent consequences, the problem is most amenable to policy intervention.

29. Rochefort & Cobb, supra note 8, at 56 (“Rhetoric can help lodge a particular understanding of a problem in the minds of the public and protagonists.”).
30. Stone, supra note 5, at 282 (“Problem definition is a process of image making, where the images have to do fundamentally with attributing cause, blame, and responsibility.”).
31. Id.
32. Id. Stone explains how one version of the narrative, the horror story, can be offered to "represent the universe of cases" and used "to build support for changing an entire rule or policy that is addressed to the larger universe," in spite of the fact that often "these stories are not only atypical, but also highly distorted." Id. at 146.
33. DAVID A. ROCHEFORT, AMERICAN SOCIAL WELFARE POLICY 133-36 (1986). Professor Rochefort argues that every policy problem has four distinct elements: causation, the extensiveness of the problem, the nature of the problem and the characteristics of the group affected by the problem.
34. See generally Stone, supra note 5. Professor Stone created a typology of causal stories which uses two dimensions to understand the nature of causal stories. By categorizing facts along these two dimension, examining action as either unguided or purposeful and by examining the consequences as either intended or unintended, she breaks all problems into four categories. All problems are categorized as either mechanical cause, intentional cause, accidental cause or inadvertent cause. The two strongest boxes are accidental cause and intentional cause. Problems categorized as accidental include natural disasters such as hurricanes, tornadoes, droughts. Because we typically consider problems of this type as accidents and beyond human control, it is difficult to move a problem perceived as accidental onto the public policy agenda. By direct contrast, problems categorized an intentional are ones in which a public policy approach is most called for. Here the action was purposeful and lead to an intended, albeit undesirable, consequence. Stone offers John Manville’s conduct in hiding the dangers of asbestos while
Second, the severity of the problem is important. It makes sense that an issue is more likely to be perceived as a problem worthy of policy attention if it is perceived as being a serious problem. If it affects a large number of people it is more likely to get attention than if it affects a small number. Serious effects on a small number of people can also move an issue from a condition to a problem. Global warming provides a good example. The Bush I Administration acknowledged the existence of a global warming problem, but characterized the problem as relatively minor, not worthy of policy measures that would protect the environment at the expense of the economy. Here, statistics are typically offered to support the conclusion that a problem exists and it is severe, or as in the case of global warming, that the effects were minor and, therefore, a public policy response is not needed.

Third, the scope or magnitude of the problem in terms of people affected is an important component of problem definition. Here, the change over time is also an important factor. In other words, if the problem is growing, rather than remaining stable or declining on its own, it is more likely to be one seen as a problem worthy of public policy attention. Stone notes that most discussions of problems “begin with a recitation of figures purporting to show that a problem is big or growing, or both.” A story that highlights a problem that is increasing in intensity, and uses evidence to support that story, is most effective. If a problem can be characterized as a “crisis” it is even more likely to move up on the public policy agenda.

Fourth, an issue can gain attention if it is seen as “hitting close to home” or continuing to expose their employees to asbestos as an example of a problem that fits within this box. Problems that fit within the inadvertent box (purposeful action; unintended consequence) are also likely to be amenable to public policy. Problems that are categorized in this box by Stone include consequences that are unforeseen or caused by carelessness. See infra notes 64–74 and accompanying text discussing how the narratives in the tort tales have been discussed in a way that attributes blame and describes causation.

35. Rochefort & Cobb, supra note 8, at 15–26. Rochefort and Cobb assert that a social problem may be understood across many dimensions. They discuss the key aspects of problem definition as involving the severity of the problem, its incidence, its novelty, its proximity, the perceived crisis nature of the problem, the characteristics of the crisis population, ends-means orientation of the problem solved, and the nature of the solution.

36. How this issue has been re-characterized recently is a prime example of re-definition. As the problem has been redefined as a serious problem, attributed to man-made action that impacts us all, it has moved onto the public policy agenda.

37. Houston & Richardson, supra note 5, at 486. The use of key statistics is also important in making clear that the issue being described is not an isolated event.

38. Id. See also Stone, supra note 5, at 138. This is what Stone refers to as the story of decline. She tells us that “[i]t run likes this: ‘In the beginning, things were pretty good. But they got worse. In fact, right now, they are nearly intolerable. Something must be done.’ The story usually ends with a prediction of crisis - there will be some kind of breakdown, collapse, or doom—and a proposal for some steps to avoid the crisis.” See also KINGDON, supra note 26, at 91 (“A steady state is viewed as less problematic than changing figures.”).

39. Stone, supra note 5, at 163. See also id. at 172–177 (discussing the importance of numbers in telling the causal story).

40. Rochefort & Cobb, supra note 8, at 60. “Whether a problem exists, how bad it is, who or what is responsible, and what future trends will occur are all perceptions that can depend on the measuring approach used.” Id. at 61. Rochefort and Cobb use examples of the poverty rate and antidrug program evaluations to illustrate that “conclusions differ markedly depending on the numbers employed.”

41. Id.
directly affecting the public. Moreover, the characteristics of the problem population are important in problem definition. Whether the affected group is seen as worthy or unworthy, familiar or strange, culpable or innocent is part of this dimension. Another part of this dimension is whether the affected populations are characterized as sympathetic or threatening.

Fifth, the nature of the solution can help define the problem. The availability or lack thereof of an acceptable solution is an important factor in the extent to which a problem is defined and moved onto the public policy agenda. Moreover, it is important if the solution offered is feasible, both technologically and economically.

Last, a story that uses accepted values as part of the narrative is more effective in defining a problem in a way that will lead to the desired action. An effective causal story alludes to accepted key values as a "normative justification for the articulated causal theory and solutions" offered.

We know the importance of problem definition both in terms of moving an issue onto the public policy agenda and in terms of support for any solution advocated. Moreover, we know how narratives can be useful in constructing a story that creates the perception of a problem and leads to desired solutions. To be effective, the story must point blame; it must characterize the problem as severe, one that affects a large portion of the population, one that is worsening over time. It must be seen as directly affecting the public and must characterize the population protected as deserving; the story must include a ready-made solution and that solution must be feasible. Last, the story must appeal to core American values. An effective narrative in the public policy context, just like any effective narrative, will use symbols and metaphors to define the problem. We have just such a story in the case of tort reform in general and class actions in particular.

42. Id.
43. See infra notes 62-67 (discussing characterization of the plaintiffs in class action cases as greedy and unworthy).
44. Rochefort & Cobb, supra note 8, at 168-172. Related to this is the ends-means orientation of those defining the problem can be relevant. In other words, in some situations the issue is defined by its attachment to a desired end; in other cases, the means and not the ends are important. Rochefort and Cobb use as an example the controversy over distributing sterile needles to IV drug users as a way to prevent the spread of AIDS. Some focus on the end (disease prevention) and some focus on the means (distributing needles to drug users). This distinction defines the problem.
46. Stone, supra note 5, at 137. Professor Stone asserts that “symbolic representation is the essence of problem definition in politics.” Daniels & Martin, supra note 6, at 78 (“Relying on symbols and symbolic devices in political discourse is an appeal to shared values, preferably deeply held values, and involves the manipulation of these values in order to achieve political gain”); Kingdon, supra note 25, at 97 (discussing how a powerful symbol can work as a focusing event moving a problem onto the public policy agenda). See generally MURRAY EDELMAN, CONSTRUCTING THE POLITICAL SPECTACLE (1988); MURRAY EDELMAN, POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL (1977). We will see in the case of class actions that the predominant metaphor is that of a game.
47. Rochefort & Cobb, supra note 8, at 59. This discussion focuses almost exclusively on how a causal story can be used to define the problem. As such, it ignores aspects of problem definition related to what has been termed problem ownership. Consideration of problem ownership looks to
The day after a verdict had been entered against his client, the lawyer rushed to the judge’s chambers, demanding that the case be reopened, saying: “I have new evidence that makes a huge difference in my client’s defense.” The judge asked, “What new evidence could you have?” The lawyer replied, “My client has an extra $10,000, and I just found out about it!”

A. Tort Rhetoric in General

Problem definition has played a crucial role in the movement to reform the tort litigation system. Advocates for reform have used causal stories, metaphors and symbols to define the problem, move it onto the public policy agenda and dictate the solutions chosen. The degree to which tort anecdotes have provided the impetus for reform is generally accepted. Tort tales provide a tale of morally blameworthy individuals (the plaintiffs) who beset blameless, responsible and hardworking individuals (the defendants) aided by the most blameworthy of all—the lawyer. And according to the story, there are lots of these lawsuits. We are in the midst of a litigation explosion.

1. The Story: Lamented Changes

Recall, that a story is most effective if it is a story of decline. The tort reform story is a perfect example. Tort reformers paint a picture of a legal landscape that changed dramatically for the worse as new legal theories changed the tort litigation system in the 1960s and the 1970s. The move to cap punitive

find people with, “special status and educational attainment,” who are highly respected and seen as having the legitimacy to deal with the issue. Connecting such people to a problem can help move the issue onto the public policy agenda. Peter J. May, Reconsidering Policy Design: Policies and Publics, 11 J. OF PUB. POL’Y 187, 190 (1991). Moreover, Professor May argues that whether the problem is what he terms a policy with a public or a policy without a public will affect the policy design and implementation. He defines “publics” as an “identifiable groupings who have more than a passing interest in a given issue debate or are actively involved in an issue debate.” They include professional associations, consumer groups, trade groups and public interest groups. Policies with publics are issues with “well developed coalitions of interest groups” surrounding the issue; policies without publics are issues with limited interest group interest, often limited to technical communities. He suggests that issues that are “immediate, individualized and recurring” are likely to attract publics. These are often characterized as “private” as opposed to “public” risks. According to May, “publics are central to issue emergence, problem definition, and policy design.” Id. at 193.

48. Haltom & McCann, supra note 2, at 5. Term ed “tort deform anecdotes” by Ralph Nader and Wesley Smith, they are arguably “promulgated to mislead the public about the civil litigation system.” Thornburg, supra note 13, at 1122-1131. Thornburg titles one of the sections in her article “Smoke and Mirrors: The Marketing of Anecdotes” and uses examples to show the power of such marketing.

49. Haltom & McCann, supra note 2, at 62. (“Stock characters in tort tales may include greedy plaintiffs, avaricious ambulance chasers, Robin Hoods, mendacious witnesses, scientists for hire, and witless judges and juries, dramatis personae who abound in modern American culture and politics.”).

50. See generally Daniels & Martin, supra note 7, at 82-84 (discussing application of the tort reform rhetoric to the story of decline). See also WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (Plume 1991) (comparing the current problems with the litigation system to better times). A number of commentators have written about
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In this article, we focus on damages as an example. The rhetoric's storyline is that punitive damages are awarded routinely, with increasing frequency, leading to a host of problems illustrated primarily by horror story anecdotes. Another example most relevant to this article is the advent of the class action lawsuit. Victims who before had no avenue for redress are now bringing class action suits in ever increasing numbers.

Moreover, the situation is declining rapidly. According to the rhetoric, we see both the number and size of awards awarded by "runaway juries" "rocketing out of control," and "exploding out of control" in recent years. We hear about an "epidemic" of civil litigation. We are the "world's most litigious nation." Here, the story uses numbers to show that the problem is bad and getting worse. We hear that there are 18 million civil lawsuits filed per year; the sheer number suggests "runaway litigiousness." We hear of a 758% increase in products liability filings. Tort reform horror stories always include the amount of the award. For example, the impact of the McDonald's coffee story isn't just that the plaintiff won, it is that she won $2.3 million. From this we are asked to conclude that the sizes of awards are growing.


51. Daniels & Martin, supra note 7, at 85. One such anecdote asserts that Monsanto cancelled a program to develop a substitute for asbestos because of fear of punitive damage awards. Another anecdote relates that pharmaceutical companies are not pursuing development or distribution of an AIDS vaccine because of the high cost of vaccine-related injuries. Id. at 85-86.

52. HALTOM & MCCANN, supra note 2, at 38. According to Haltom and McCann, the "potential for big awards in class-action cases as well as the rapid growth in punitive damage awards generally together boosted the material as well as moral incentives for attorneys on contingency fees to take cases for group interests previously underrepresented in the political and legal system."

53. Thornburg, supra note 13, at 1100.

54. Daniels & Martin, supra note 7, at 87-89 (discussing the use of terms such as "exploding" and "skyrocketing" to convey a sense of urgency and decline).

55. HALTOM & MCCANN, supra note 2, at 6. The word "epidemic" connotes the metaphor of disease. See Stone, supra note 4, at 152-153 where she discusses the impact of the disease metaphor.

56. Rhode, supra note 13, at 467. As Rhode points out, it doesn't matter that this isn't true ("Scholars have debunked this claim so often that it is startling how much bunk survives.") President Bush complains, "We're a litigious society; everybody is suing, it seems like. There are too many lawsuits in America..." Id. at 451. Rhode also points out that the perception of an increase in propensity to sue isn't accurate. Americans were actually more likely to sue a century ago than they are now. Id at 456.

57. HALTOM & MCCANN, supra note 2, at 53. The 18 million civil suit assertion was made by Vice President Dan Quayle. As Haltom and McCann point out, the United States only had 18 million civil suits if every divorce and child support case was included. But, of course, the accuracy of the number isn't the issue. See supra notes 31-33 and accompanying text.

58. HALTOM & MCCANN, supra note 2, at 53. Again, the accurate figure is closer to 400% and most of that increase was due to asbestos cases. Uncontested divorces actually account for the largest growth in recent lawsuits. Rhode, supra note 13, at 457. Moreover, a study by the Court Statistics Project of the National Center for State Courts found that between 1993 and 2004, tort filings decreased by 5% and contract filings increased by 21%. Nockleby & Curreri, supra note 21, at 1082.

59. Of course, the story doesn't work as well if we mention that the judge reduced the amount of the award to $640,000 or that the plaintiff actually settled for less to avoid an appeal. Rhode, supra note 11, at 455.

60. There is some evidence that the size of tort awards is increasing, but they are rising at about the same rate as the increase in medical costs. Rhode, supra note 13, at 458. See generally Deborah R. Hensler, Jurors in the Material World: Putting Tort Verdicts in their Social Context, 13 ROGER WILLIAMS
2. The Bad Guys – The Lawyers and the Greedy Plaintiffs

Every story needs a villain. This story has two—the greedy and undeserving plaintiff and the greedy lawyer. The plaintiff in the story of tort reform is never painted as an injured plaintiff seeking compensation for life-changing injuries. Instead, the popular metaphor is one of a lottery winner. Our plaintiff has hit the jackpot; he is one who sues out of self-interest—to obtain a windfall. He is a winner in the “litigation lottery.” The plaintiffs in this story are always described as irresponsible—the man who climbs a ladder, falls and blames the ladder manufacturer, the man who uses the lawnmower as a hedge clipper and then blames the lawnmower manufacturers for his injury—unwilling to accept responsibility for their own stupidity. They are irresponsible, or worse—dishonest. These plaintiffs are stigmatized as undeserving of the awards that they are reaping. They are characterized as “opportunistic plaintiffs who evade personal responsibility by carelessly misusing products, performing dangerous practices, showing bad judgment at odds with common sense, and then selfishly resorting to unjustified legal blaming and claiming of remedies against virtuous others . . .”

Even as we blame the greedy plaintiffs, we never forget the true villain—the plaintiff’s lawyer. The lawyer is held forth as the chief “culprit.”

U. L. REV. 8, 9 (2008) (comparing the “magnitude and growth rate of jury verdicts issued from 1992 through 2001 in the nation’s largest state trial courts with the material rewards accorded others—particularly executives at large corporations—as reported by the mass media”).

61. Examples of the lottery winner or jackpot metaphor are everywhere. See, e.g., Daniels & Martin, supra note 7, at 86 (“Who loses with these reform proposals? Only plaintiff lawyers and their already compensated clients who have hit the punitive damages jackpot.”) (quoting Richard J. Mahoney, Punitive Damages: The Courts are Curbing Creativity, N.Y. TIMES, Dec. 11, 1988, § 3, at 3).

62. Martins & Daniels, supra note 7, at 87. Similar to the lottery winner metaphor, the use of the word “windfall” conveys a reward that is undeserving.

63. HALTOM & MCCANN, supra note 2, at 20-21 (discussing how the stories “blame social problems on pathologies of individual irresponsibility, negligence, and greed among plaintiffs or their attorneys obsessed with rights claiming, rather than on incidents of corporate irresponsibility or the deficiencies of our public regulatory or insurance systems”). See Dawn House, Tort Reform – What about the Little Guy?, 39 LOY. L.A. L. REV. 819, 819 (2006) (arguing that the “voices and experiences” of the injured parties “have gone unheard”).

64. Daniels & Martin, supra note 7, at 92 (“The unscrupulousness of the plaintiffs in these stories is palpable ... Such plaintiffs, the stories tell us, are people without integrity or a sense of responsibility. They are simply dishonest”); Thornburg, supra note 13, at 1100 (“Workers and other plaintiffs were portrayed not as persons trying to enforce the law and deter misbehavior, or even as injured victims of the wrongs of others, but as whiners who failed to take personal responsibility for their own problems.”). As Haltom and McCann point out, it is interesting that the story never focuses on the irresponsibility or greed of the corporate defendant. HALTOM & MCCANN, supra note 2, at 20-21 (discussing how the stories “blame social problems on pathologies of individual irresponsibility, negligence, and greed among plaintiffs or their attorneys obsessed with rights claiming, rather than on incidents of corporate irresponsibility or the deficiencies of our public regulatory or insurance systems”). See Dawn House, Tort Reform – What about the Little Guy?, 39 LOY. L.A. L. REV. 819, 819 (2006) (arguing that the “voices and experiences” of the injured parties “have gone unheard”).

65. HALTOM & MCCANN, supra note 2, at 24 (Plaintiffs are “stigmatized as ‘underserving’ in much the same was as are the welfare poor, the unemployed, the homeless... and other ‘deviants’ in American society.”). Haltom and McCann reprint two advertisements by Aetna Life and Casualty to illustrate the importance of individual responsibility—or the lack of it. One tells us that the “entitlement mentality” of the plaintiff has a terrible effect on U.S. society. It is, thus, “time to restore the principles of self-reliance and personal responsibility” to our civil justice system. Id. at 47.

66. Id., at 59.

67. See generally Lisa G. Lerman, Greed Among Lawyers, 30 OKLA. CITY U.L. REV. 661 (2005) (where the greedy lawyer is used as an example of the dangers of greed permeating American
responsible for the pathological tort system. He is both greedy and manipulative. Cursed as a "hungry caterpillar" and compared to a plague of locusts, the lawyer makes the perfect foil. He is portrayed as a "fat cat" trial attorney "living in the 'lap of luxury' at the expense of taxpayers and consumers." He is "making out like a bandit.”

Even though the story paints a picture of ever increasing judgment amounts, the plaintiff himself gets too little of the money. The contingency fee is the focus of much of this criticism. Contingent fees encourage lawyers to bring lawsuits that shouldn't be brought and overcompensate them for the ones that they win. The rhetoric blames contingency fee arrangement for feeding the lawyer's greed and encouraging him to bring frivolous lawsuits—the potential reward provides incentives that the greedy lawyer cannot ignore. The contingency fee encourages self-dealing.

In addition, lawyers are crafty and manipulative. They will do anything to win the case. They use "junk science" to prove causation where there is none. They bring lawsuits that lack merit. There is an inherent distrust of juries that underlies the story. Juries swallow the attorney's arguments hook, line and sinker.
3. The Victims – The Innocent Defendants

The defendants are victimized in two ways. First, they are victimized by the huge and unjustified awards. In this part of the story, even if the defendant is in any way at fault, the amount of the award to the plaintiff is disproportionate to the defendant’s wrongdoing. Arguably, the McDonald’s coffee case illustrates this. Even if we accept the fact that McDonald’s coffee was too hot, the story asks us to believe that the damages were excessive. Alternatively, the defendants are victims of frivolous lawsuits. The defendant has done nothing wrong, but it is being forced to litigate a meritless lawsuit. The story tells us that the mere threat of a lawsuit punishes the defendants and affects us all.

4. The Good Guys

In this story, the innocent victims are not just confined to the hapless defendants. We all suffer. The costs of the current system “are ultimately paid by innocent consumers, taxpayers, policyholders and stockholders.” These lawsuits “terrorize small business owners and drive doctors out of practice.” It is because of lawsuits that medical services are unavailable in some parts of the country. It is because of lawsuits that the costs of our consumer goods are so high. After all, we all pay the “tort tax.” By some estimates, our tort system costs each American on average $809 per year. It is because of

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75. There is debate about the percentage of cases that are frivolous. See, e.g., Sebok, supra note 74, at 1470-1471 (discussing the extent to which medical malpractice cases are justified).

76. Daniels & Martin, supra note 7, at 88. See also Thornburg, supra note 13, at 1102. Thornburg details a public relations campaign conducted by the Insurance Information Institute in 1986 in which they ran print ads touting, “The Lawsuit Crisis is Bad for Babies,” and “The Lawsuit Crisis is Penalizing School Sports.”

77. Rhode, supra note 13, at 451 (quoting President George W. Bush). Bush continued, “[N]o one has ever been healed by a frivolous lawsuit.”

78. See, e.g., HALTOM & MCCANN, supra note 2, at 3. President Reagan blamed the tort litigation system with this tort tale: “Last year a jury awarded one woman a million dollars in damages. She claimed that a CAT scan had destroyed her psychic powers. (Laughter.) Well, recently a new trial was ordered in that case, but the excesses of the courts have taken their toll. As a result, in some parts of the country, women haven’t been able to find doctors to deliver their babies, and other medical services have become scarce and expensive.” But see TOM BAKER, THE MEDICAL MALPRACTICE MYTH 1 (2005) (“[B]uilt on a foundation of urban legend myths mixed with the occasional true story, supported by selective references to academic studies, and repeated so often that even the mythmakers forget the exaggeration, half truth and outright misinformation employed in the service of their greater good, the medical malpractice myth has filled doctors, patients, legislators, and voters with the kind of fear that short circuits critical thinking.”).

79. The so-called “tort tax” is the “aggregate costs to the U.S. economy of tort liability. It was estimated that the tort tax may amount to $300 billion a year at the same time it was acknowledged that this was at best a guess. HALTOM & MCCANN, supra note 2, at 54. Once more, the factual accuracy of these claims are irrelevant. See, e.g., Thornburg, supra note 13, at 1102 (“Empirical research again demonstrated that the message of cost to consumers and disappearance of innovative products was ‘fundamentally false – the product of dubious anecdotes, questionable research, concocted statistics, factual and legal misstatements, and willful disregard of contradictory evidence.’”) (quoting Kenneth Jost, Tampering with Evidence: The Liability and Competitive Myths, 78 A.B.A. J. 44, 45 (1992)).

80. Hantler, Behrens, & Lorber, supra note 74, at 1124-25. By other estimates, the tort tax costs the average U.S. consumer $1000 each year and costs the economy $246 billion a year. See also Andreeva, supra note 2, at 399 (citing statistics showing that the tort system “consumes up to 3
lawsuits that insurance premiums have risen so dramatically. It is because of lawsuits that businesses refrain from developing and distributing valuable products. It is because of lawsuits that pharmaceutical companies refrain from developing new vaccines. The AIDS patient who cannot get an AIDS vaccine suffers. All medical costs rise as doctors engage in "defensive medicine," ordering needless tests to protect themselves from litigation. It is because of litigation that American businesses find it harder to compete with foreign competitors.

Thus, who benefits from reform? The “whole country wins with important gains in jobs, new and improved products, international competitiveness—and a fairer legal system for all.”

### B. Class Action Rhetoric

The class action lawsuit specifically has been the subject of critical commentary. The rhetoric surrounding class actions lawsuits mirrors the rhetoric discussed above with a few refinements. Most importantly, we will see how the way the story is told framed the problem in a way that clamored for public policy response. There is a class action “crisis” driven in large part by the notion that class action lawsuits are brought and managed by the plaintiffs' attorneys “without providing any real benefit to society.” There is an “explosion” of class action “extortion.” Again, the story has good guys, bad guys, victims and a ready solution.

#### 1. The Story: Lamented Changes

Called the "messiest" part of the civil justice system, the class action has been likened to the “equivalent of high-stakes poker.” Class action lawsuits that were once brought seeking injunctive relief, or asserting civil rights or percent of [the U.S.] gross domestic product”.

81. The extent to which increased premiums are due to increases in the size of awards is unclear. See generally Rhode, supra note 13, at 458–459 ("How much effect large damage awards have on policy costs is subject to debate.").

82. The rhetoric asserts that pharmaceutical companies fail to develop new drugs and vaccines because of fears of lawsuits. See supra note 51 and accompanying text.

83. Rhode, supra note 13, at 461. It has, in fact, been estimated that tort liability costs represent 2 percent of the total expense of U.S. goods and services.

84. Daniels & Martin, supra note 7, at 86 (quoting Richard J. Mahoney, Punitive Damages: The Courts are Curbing Creativity, N.Y. TIMES, Dec. 11, 1988, § 3, at 3).


86. Bloom, supra note 86, at 720.

87. Hantler, Behrens & Lorber, supra note 74, at 1136-37 (arguing that the “potential costs of losing often force companies to fold their hands and settle rather than call the plaintiffs’ lawyer’s bluff”).
consumer claims now involve damage claims. The "explosion" of class action suits now "flood" the courts. Class action lawsuits are estimated to have grown by over 1000 percent over last decade. And, the lawsuits are frivolous. President Bush said, as he signed CAFA into law, "We have a responsibility to confront frivolous lawsuits head-on." We learn that plaintiffs' attorneys bring unsupported claims against innocent defendants, forcing them to settle rather than take the risk of a large judgment.

2. The Bad Guys - The Lawyers and the Greedy Plaintiffs

Our first villains are the class action plaintiffs attracted by the potential for large awards. However, in the area of class action, the abuses brought about by the plaintiff spale in comparison to the evildoing of the plaintiffs' attorney. Characterized as "entrepreneurial," or as "opportunistic aggregators," these lawyers seek creative ways to bring class action lawsuits, reap huge fees, and settle lawsuits in ways that benefit themselves rather than their clients. Notice how the story changes in the class action arena. In the typical tort tale, the greedy plaintiff contacts a greedy lawyer and they proceed with their frivolous claim. In the class action tale, the entrepreneurial lawyer himself solicits the client who has little at stake in the actual lawsuit. The class action lawsuit is

88. Bloom, supra note 86, at 726.
89. See, e.g., S. REP. No. 109-14, at 14 (2005) ("[T]he explosion of state court class actions have simply overwhelmed their dockets.").
90. See, e.g., S. REP. No. 109-14, at 13 (pointing out that the "flood of class actions in our state courts is too well documented to warrant significant discussion, much less debate"); Hantler, Behrens, & Lorber, supra note 73, at 1137.
91. Bruce Moyer, Class Actions Move to Federal Court, 52 A.P.R. FED. L. 10 (2005) (citing Rep. Rick Keller saying, "[t]hese out-of-control lawsuits are killing jobs, they're hurting small business people who can't afford to defend themselves, and they're hurting consumers who have to pay more for products"). While class action certification grew by 1000% in state courts, they grew by 338% in federal courts. Hantler, Behrens, & Lorber, supra note 73, at 1137.
92. Moyer, supra note 91, at 10. See also S. REP. No. 109-14, at 14 (asserting that "corporate defendants are forced to settle frivolous claims to avoid expensive litigation").
93. Andreeva, supra note 1, at 385.
94. Hantler, Behrens, & Lorber, supra note 73, at 1138, n.70 ("The drum-beating that accompanies a well-publicized class action ... may well attract excessive numbers of plaintiffs with weak to fanciful cases." (citing In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987))).
95. Howard M. Erichson, CAFA’s Impact on Class Action Lawyers, 156 U. PA. L. REV. 1593, 1596-97 (2008 )("CAFA’s proponents successfully portrayed class action lawyers as opportunistic aggregators who get rich on litigation of their own making, with little control by clients, little remedy for each client, and few clients who even care enough to sue.").
96. Melnick, supra note 85, at 757-58 ("This traditional view of the attorney is largely perverted in the forum of class action litigation, where it is often the attorney himself who solicits the client, turning himself into more of a 'calculating entrepreneur' than the quintessential advocate."). In what is obviously a version of the classic ambulance chasing story, Melnick asserts that "[p]erhaps the most egregious example of client solicitation comes on the heels of a mass disaster, where the attorney attempts to gain access to the suffering families in their time of need and, under the guise of consoling the grief stricken family, encourages them to file suit." Id. at 759. She then concludes that the issue arises "with the behavior of the attorneys, who seem to forget that they are in fact representing injured individuals and appear to be arguing for nothing more than their own monetary gain." Id. at 763. The most frequent symbol invoked here is that of the bounty hunter. See, e.g., Myriam Giles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 MICH. L. REV. 373 (2005).
the “brainchild” of the attorney with little input from his client.\textsuperscript{97} They are, in
many ways, lawyers who do not have to be responsible to their individual
clients.\textsuperscript{98} These lawyers will happily “sell out a class . . . in exchange for
generous attorneys’ fees.”\textsuperscript{99} They are characterized as “setting[ing] themselves up
to receive windfalls from eventual settlements, using clients as mere pawns in
their (the attorneys) eventual recovery.”\textsuperscript{100} Notice, in this scenario, it is the
lawyers who receive the windfalls, not the clients. We are told that the lawyers
receive the “real bonanza.”\textsuperscript{101}

The lawyer in this story is portrayed as greedy and the typical fee
arrangement in class actions is the way he feeds this greed.\textsuperscript{102} We have already
discussed the criticisms of the contingency fee arrangement.\textsuperscript{103} The
contingency fee arrangement, however, works a little differently in the class
action context. In the class action context, each individual plaintiff stands to
recover a small amount; the only person who truly stands to gain is the lawyer.
In the typical class action case, the lawyers receive a disproportionate share of
the settlement or award.\textsuperscript{104} The lawyer in this story is portrayed as more
concerned for his own financial reward than for the rights of his client.\textsuperscript{105} The
lawyer in this story wants to “settle early, receive his paycheck, and avoid

\textsuperscript{97} Melnick, supra note 85, at 759.
\textsuperscript{98} See, e.g., Susan P. Koniak & George M. Cohen, In Hell There will be Lawyers without Clients or Law, 30 HOFSTRA L. REV. 129, 143 (2001)(“[T]he class is entirely a creation of the lawyer: class counsel control its beginning, its end, its shape and its conduct”); Melnick, supra note 85, at 770 (“[T]he client in class action litigation is an amorphous group and the attorney is ultimately responsible to the group as a whole, not to any individual member. Without a specific client to keep him in check, the existence of the entrepreneurial attorney has emerged. Such an attorney exists to further his own self-interests as opposed to furthering the interests of his client.”). They are, of course, subject to ethical obligations to these clients. See Natalie C. Scott, Don’t Forget Me! The Client in a Class Action Lawsuit, 15 GEO. J. LEGAL ETHICS 561, 562 (expressing concerns because attorneys in class action lawsuits represent multiple clients whom they have never met). See also Manesh, supra note 85, at 924 (“Absent any meaningful monitoring by class members, class attorneys are free to operate largely on self-interest, subject only to the restraints of judicial oversight and ethical responsibilities.”).

\textsuperscript{99} Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 282 (7th Cir. 2002). See, e.g., J. Brendan Day, My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act’s Inadequate Provision for Judicial Scrutiny Over Proposed Coupon Settlements, 38 SETON HALL L. REV. 1085, 1094 (discussing how “counsel autonomy significantly increases the risk of collusion between lawyer and defendant”); Koniak & Cohen, supra note 98, at 145-150 (discussing the ways in which lawyers can manipulate the system in their own self interest); Charles W. Wolfram, Mass Torts – Messy Ethics, 80 CORNELL L. REV. 1228, 1231 (1995) (discussing the questionable ethics of “sell-out lawyers who, for millions in fees, are willing to sign away the rights of tens of thousands of faceless and lawyerless class members”). See also Koniak & Cohen, supra note 98, at 145-150 for a discussion of the ways in which lawyers can manipulate the system in their own self interest.

\textsuperscript{100} Melnick, supra note 85, at 758.
\textsuperscript{101} Id. at 759.
\textsuperscript{102} “The class action judicial system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank.” 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).
\textsuperscript{103} See supra notes 71-73 and accompanying text.
\textsuperscript{104} See S. REP. NO. 109-14, at 14-20, for cases in which lawyers receive disproportionate share of settlements.

\textsuperscript{105} See Melnick, supra note 85, at 766 where she describes the inherent conflict of interest (“This can lead to tensions between the attorney and the class members as the attorney has an incentive to settle early and therefore maximize his possible payout . . . . The perversion of the contingency fee within the class action context lies within these dueling interests.”).
litigation" even at the expense of his own client. Moreover, in too many class action settlements plaintiffs receive coupons of little value and their lawyers get millions. In a so-called “coupon settlement,” the plaintiff receives a coupon offering a discount on future products or services provided by the defendant instead of a monetary award. The plaintiff who doesn’t want to purchase any products in the future from the defendant receives nothing. For example, in one Texas class action Blockbuster customers were provided coupons for free movie rentals; at the same time, their attorneys received $9.25 million in fees and expenses. Moreover, the lawyer’s contingency fee is calculated as a percentage of the coupons provided by the defendant, rather than as a percentage of the coupons actually redeemed by the plaintiffs. This results in the disproportionate award that feeds our story of greed.

Moreover, these lawyers are crafty. They work to “game” the system. Because the “modern class action is frequently won or lost at certification,” in our story, lawyers “shop” for the forum most likely to certify the case. First, it is posited that state courts are more likely to certify a case than federal courts. Therefore, our lawyer is described as using “various tricks” to escape

106. Melnick, supra note 85, at 768. See also Martha Pacold, Attorneys’ Fees in Class Actions Governed by Fee-Shifting Statutes, 68 U. CHI. L. REV. 1007, 1008 (2001) (discussing the incentives created in actions governed by fee-shifting provisions and noting that “[t]he result is an enormous incentive for plaintiffs’ attorneys in hybrid class actions to settle, possibly at the expense of their dispersed, and often unknown, clients”). This ignores, however, the fact that, especially in a class action context, the typical plaintiff could not afford to bring the action at all without a contingency fee arrangement. See Melnick, supra note 107, at 769 (“Contingency fees therefore serve the dual purpose of allowing both the individual who cannot afford to litigate and the individual who would not have an economic incentive to litigate, into the courtroom.”).


109. See S. REP. NO. 109-14, at 15–20 (provides examples of coupon settlements). See also, Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 298 (11th Cir. 1999) (Nangle, J., concurring) (critiquing coupon settlements). Other examples include an action against GM Truck where the plaintiffs received a coupon but purchased another GM truck and the attorneys received $9.5 million and a Ford Bronco II case in which the plaintiffs received a warning sticker, a safe driving videotape, a road atlas, an owner’s manual, a flashlight and a free vehicle inspection and the attorneys requested $4 million in fees. Koniak & Cohen, supra note 10. See also Day, supra note 99, at 1100–1105 (discussing the “horror stories” of coupon settlements).

110. The metaphor of the plaintiffs’ attorney “gaming” the system is the most frequent metaphor invoked. See, e.g., S. REP. No. 109-14, at 4 (“[C]urrent law enables lawyers to ‘game’ the procedural rules . . . . In this environment, consumers are the big losers.”).


112. Allan Kanner, Interpreting the Class Action Fairness Act in a Truly Fair Manner, 80 TUL. L. REV.
federal court jurisdiction. Moreover, ever mindful of the crafty defense lawyer, plaintiffs' lawyers engage in "artful pleading" to avoid removal to federal court. In addition, some state courts are better than others. Our lawyer, through his guile, seeks out a jurisdiction populated by judges who are amenable to class certification. Termed, "judicial hellholes," these are court systems alleging to be unfair to defendants. An example of one such jurisdiction is Madison County, Illinois. Citing the large numbers of class actions filed even where there is no evidence that the residents of that county are "somehow cursed or more plagued by injuries than the average citizen," one Congressman suggested that the only reasonable explanation was "aggressive forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab, hearing nationwide cases and setting policy for the entire country." The lawyer who is able to get a class action certified can use the certification as "judicial blackmail" to force the defendant to settle even marginal claims. He can engage in "drive-by class


114. See S. REP. NO. 109-14, at 20-21, for a discussion of the use of class action device as "judicial blackmail" to settle marginal claims.

115. These judicial hellholes are jurisdictions amenable to plaintiffs' claims. The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas. See, e.g., Friedman-Boyce, supra note 108, at 6. Class Action lawsuit filings in Madison County, Illinois increased 5000 percent between 1998 and 2005. Andreeva, supra note 1, at 393. See also Roedder, supra note 14, at 443 ("Not long ago Alabama was a venue favored by plaintiff's counsel for the filing of class actions and the site of very large verdicts."). For a discussion of what qualifies as a judicial hellholes and a list, see generally AM. TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2004 (2007), available at http://www.atra.org/reports/hellholes/report.pdf. The hellhole label persists in spite of the fact that "empirical research tends to debunk the industry complaints". Thornburg, supra note 11, at 1104 ("For example, a study of actual data from top hellholes Madison and St. Clair Counties in Illinois concluded that there was 'no support for the 'hellhole' label.'" (quoting Neil Vidmar et al., "Judicial Hellholes": Medical Malpractice Claims, Verdicts and the "Doctor Exodus" in Illinois, 59 VAND. L. REV. 1309, 1341 (2006)). Thornburg points out that the use of the term is "catchy" and asserts that the "point of the hellhole campaign is not to created an accurate snapshot of reality. The point of the hellhole campaign is to motivate legislators and judges to make law that will favor repeat corporate defendants ..."


117. In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995)("[C]lass certification creates insurmountable pressure on defendants" which forces them to "stake their companies on
certification," or file copy-cat or duplicative class actions in which courts and counsel compete with other courts and counsel for control.

This part of the story adds the fact that state court judges are also greedy. For some reason, they want more cases to litigate. In addition, state court judges have their own reasons for favoring plaintiffs against out-of-state defendants. They certify to curry political favor among local constituents. Therefore, state courts cannot be trusted to see through the crafty lawyer.

3. The Victims – The Innocent Defendants and the Poor Plaintiffs

The class action story has two victims: the innocent defendants who are victims of “drive-by” certifications and judicial “blackmail,” and the plaintiffs. The defendant often settles rather than “rolling the dice” and litigating. Moreover, the plaintiffs are victimized when they receive a disproportionately small recovery while their lawyers receive millions. They end up “feeling as cheated by their long distance lawyers as by the impersonal corporations” that injured them. One example of how the lawyers can injure their clients occurs in net-loss settlements. The most famous net-loss case involved a class action suit alleging that the defendant (Bank of Boston) wrongfully retained surplus

the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”). See S. Rep. No. 109-14, at 20-21 (discussing how power of the class action “can give a class attorney unbounded leverage . . . . Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits”). See generally Richard A. Nagareda, Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration and CAFA, 106 COLUM. L. REV. 1872, 1873, (2006) (discussing the “contention that class certification might exert undue, illegitimate pressure upon the defendant to settle”).

On the other hand, it has been argued that “[b]y describing class actions as legalized blackmail, judges have used inflammatory rhetoric that impugns the character of the plaintiffs and trial lawyers who bring class acts, and of trial judges who certify them.” In re Prempro Products Liability Litig., 230 F.R.D. 555, 573 (E.D. Ark. 2005) (quoting Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U.L. REV. 1357, 1429-30 (2003)). Moreover, the concept of judicial blackmail ignores the fact that the certification stage of the lawsuit is the most “hotly litigated” stage in the process and that “when the qualification necessary to certify a class are combined with the judicial recognition that the certification decision has such a substantial impact on the outcome of the case, the risk of a truly baseless lawsuit making it through the certification process becomes minimal.” Melnick, supra note 85, at 782.

118. These are cases in which the case is certified before the defendant even knows it has been sued. See S. Rep. No. 109-14, at 21-22, for examples.

119. Copy-cat litigation involves a situation where the plaintiffs’ attorney files numerous virtually identical class actions against a large defendant in multiple state courts. Under pre-CAFA law, the defendant was unable to consolidate the actions or to move them to federal court. This resulted in the defendant being forced to hire defense counsel in multiple states and was inefficient. Roedder, supra note 14. See S. REP. No. 109-14, at 23 (discussing abuses with copycat lawsuits because defendants can’t consolidate similar cases at state level). See generally Timothy Kerr, Cleaning Up One Mess to Create Another: Duplicative Actions, Federal Courts’ Injunctive Power, and The Class Action Fairness Act of 2005, 29 HAMLINE L. REV. 218 (2006).

120. See Koniak & Cohen, supra note 99, at 150–155 (discussing the role of the courts in perpetuating class action abuse and their “enthusiasm for settlement”).

121. See S. REP. No. 109-14, at 21 (2005) (discussing how the defendants are “under intense pressure to settle” rather than “roll these dice”). Recall how prevalent the game metaphor is in this narrative. See supra note 62-64 and accompanying text.

122. Scott, supra note 99, at 566. The plaintiffs are often drawn into the lawsuit without their knowledge or consent. In fact, many class action plaintiffs do not even find out about the class action until they receive notification of the certification in the mail.
funds in the class members' escrow accounts. Thus, the sole legal issue was the propriety of the defendant's action in holding the surplus for the extended time period. An Alabama circuit court approved a settlement in which each class member received an interest payment of up to $8.76. At the same time, the court approved attorney's fees in the amount of $8.5 million that were paid directly out of plaintiff's accounts. Because the fee was calculated as a percentage of the entire surplus held by the defendant and not as a percentage of the interest payments actually paid to the plaintiffs, the escrow accounts of many individual plaintiffs were actually debited by more than the interest award. This resulted in a net out-of-pocket loss for those class members.\textsuperscript{123}

4. \textbf{The Good Guys—The Consumers and American Competitiveness Worldwide}

The good guys in our class action story are no different from the good guys in the story of tort reform. Again, we all suffer because of class actions abuse. The fact that so many defendants are forced to settle meritless claims disrupts the U.S. economy\textsuperscript{124} which leads to higher prices for consumers through the so-called tort tax. We all suffer when state court judges "dictate national policy" by deciding what amounts to nationwide state class actions.\textsuperscript{125}

\textbf{C. Relating the Rhetoric to the Literature}

Effective policy stories have a "beginning, a middle, and an end, involving some change or transformation. They have heroes and villains and innocent victims, and they pit the forces of evil against the forces of good."\textsuperscript{126} As we have discussed, some elements of the story are more important than others. First, to be effective in moving a story onto the public policy agenda it must explain the nature of the problem in a way that attributes blame. These are the villains of our story. An effective story constructs a story of purposeful action with intended consequences. As we have seen, in the case of tort reform in general and class action lawsuits in particular, we have a "ready made villain: the lawyer."\textsuperscript{127} In the class action story, the lawyer seeks out plaintiffs to sue our innocent defendant. He does so intentionally because the potential for financial reward is too enticing. Our villain is scheming for the "bonanza," using his clients as "pawns" and ready to "sell out" these clients for the "fast buck." They are the perfect villains. The fact that this characterization fits into the ready-made characterization of lawyers as part of the overall story of tort reform just makes it all the more believable. The fact that this characterization

\textsuperscript{123}. Another favorite case to illustrate the abuses addressed here is a case in which consumers were awarded thirty-three cent checks issued by Chase Manhattan Bank. However, in order to redeem the check, each plaintiff had to use a thirty-four cent stamp to send in his acceptance. Thus, while each plaintiff reaped a one-cent loss, the attorneys were rewarded with $4 million in fees. 149 CONG. REC. H5277 (2003) (statement of Rep. Goodlatte) (cited in Andreeva, supra note 2, at 393).

\textsuperscript{124}. Andreeva, supra note 2, at 398.


\textsuperscript{126}. STONE, supra note 5, at 138.

\textsuperscript{127}. Daniels & Martin, supra note 7, at 76. See supra notes 95-120 and accompanying text.
comports with the negative view of lawyers throughout our history makes it all the easier to sell. They are crafty. They shop for a forum that will best suit their needs.

Second, the story must be constructed in a way that paints a picture of a serious problem affecting a large number of worthy people. It should be increasing in severity over time and is best if characterized as a "crisis." The story should be constructed in a way where the reader sees himself in the eyes of the victim. Here, again, the story of the class action crisis fits nicely. We don't just hear of too many class action lawsuits, we hear that the numbers of class action lawsuits filed, especially in state courts, are increasing exponentially. We are in crisis. We portray the victims as innocent defendants forced to litigate frivolous lawsuits—drive by lawsuits, copy-cat lawsuits. It just doesn't seem fair. These defendants are always portrayed as innocent. We rarely hear mention of profit-seeking corporations (no, only the evil plaintiffs' lawyer seeks profit). More importantly, we all suffer in this story. We care if the innocent defendant is held up by "judicial blackmail" because, when he pays, we all pay. We all suffer. Just like in the rhetoric of tort reform, we all pay a "tort tax" for class action abuse—even, inexplicitly, when the cases are contract cases.

Third, an effective story uses accepted values as part of the narrative. The use of symbols can be an important part of constructing this story. The rhetoric of liability reform has used values such as consumer choice, fairness and equity to support reform. The importance of individual responsibility is evident in our story. We are troubled by the irresponsible plaintiff who seeks to force the defendant, and in fact all of society, to pay for his carelessness. It isn't fair. It also violates our notions of fairness to allow the plaintiffs' lawyer to hit the "jackpot" by his abuse of the system. The gaming metaphor is used to remind us of this inherent unfairness. Of course, it makes sense that advocates for reform in the class action arena would term their statute the Class Action Fairness Act. The use of this term is especially effective because it "presumes, of course, that the existing state of affairs has already been adjudged to be unfair." The current system is posited as counter to common sense.

III. PART III: THE STORY BEGETS THE LAW: CAFA

Called, "legislation by anecdote," CAFA was the likely solution to the problem as defined. Interestingly, CAFA is almost entirely a procedural
statute. As such, it garnered little public attention prior to passage.\textsuperscript{132} Moreover, it has been the subject of surprisingly little commentary.\textsuperscript{133} President Bush signed CAFA into law on February 18, 2005, calling it “a critical step toward ending the lawsuit culture in our country.”\textsuperscript{134} Moreover, he predicted that CAFA “will ease the needless burden of litigation on every American worker, business, and family.”\textsuperscript{135} The Findings and Purposes section of CAFA clearly ties enactment of the Statute to the rhetoric of tort abuse.\textsuperscript{136} Congress begins by declaring that “there have been abuses of the class action
couple the streams. See \textit{Kingdon}, supra note 26.


\textsuperscript{135} Id.

\textsuperscript{136} One commentator discussing CAFA uses headings that illustrate this. Part I is entitled: “Congress Vents Against the Lawyers;” Part II is entitled: “Congress Vents against the State Courts;” and Part III is entitled: “Congress Vents Against both the Lawyers and the State Courts.” See Knight, supra note 129. Knight characterizes the story as one in which “a largely incompetent state judiciary is manipulated like so many faithful puppets by a retinue of unsavory and greedy shysters who control state actions in state courts without regard for the interests of the class members involved.” Id. at 49.
device" over the past decade. Specifically, Congress concludes that abuses in class action lawsuits undermine the judicial system in three ways. First, cases of national importance are often brought in state court. Second, state courts demonstrate bias against out-of-state defendants. Finally, state courts impose their view of the law on other states. In addition, Congress concludes that plaintiffs in class action lawsuits are sometimes harmed where their lawyers receive large awards and they receive only coupons, where certain class plaintiffs benefit at the expense of other plaintiffs and where plaintiffs are unable to understand published notices.

As Congress makes clear, CAFA was intended to respond to perceived abuses in class action practice, specifically to the perceptions that plaintiffs engage in forum shopping and that too many class action settlements are approved in which substantial fees are granted to the plaintiff lawyers at the expense of the plaintiffs. The primary way in which those abuses are addressed is by expanding federal court jurisdiction of class action lawsuits. This is

137. Congress concludes, without enumerating the abuses, that these abuses have (A) harmed class members with legitimate claims and defendants that have acted responsibly. (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system.


138. (a) FINDINGS. - Congress finds the following:

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

Id. at § 2(4).

139. (a) FINDINGS. - Congress finds the following:

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

Id. at § 2 (a)(3).

140. See, e.g., Harris & Busby, supra note 113, at 228 ("The primary goal and main effect of the Act is to expand federal jurisdiction over class actions, even if those actions involve state law claims."); Rollo & Crowson, supra note 109, at 12-13 ("CAFA dramatically expands the original diversity jurisdiction of federal courts over class action cases, and in turn, liberalizes the class action removal rules. . . . [O]ne of CAFA's fundamental tenets is crystal clear—Congress expressed a 'strong preference that class actions be heard in federal court.'"). Congress's desire to put class action lawsuits in federal court is presumably based on the belief that federal courts look less favorably on class action lawsuits and that large numbers of class action lawsuits are a bad thing. In reaching this conclusion, Congress ignores the benefits and original intents of the class action lawsuit. Moreover, it ignores the fact that federal courts are overworked as it is. See, e.g., Andreeva, supra note 2, at 409-410 (CAFA's expansion of federal jurisdiction has "the potential to 'choke Federal court dockets and delay or foreclose the timely and effective determination' of class actions"); Burbank, supra note 2, at 1539 ("This aspect of CAFA raises most clearly the question whether the additional burdens that the statute imposes on the federal courts will adversely affect the quality of justice, not just in the cases that it allows to be brought to federal court, but also in the rest of the federal docket"); Elizabeth J. Cabraser, Fabrice Vincent & Paulina do Amaral, The Class Action Fairness Act of 2005: The Federalization of U.S. Class Action Litigation, 43 CAN. BUS. L.J. 398, 401
accomplished in four ways. First, CAFA expands federal jurisdiction by changing the requirements for diversity jurisdiction for class action lawsuits. Second, CAFA changes the rules with respect to removal to federal court. Third, CAFA creates narrow exceptions with respect to which actions can remain in state court. Fourth, CAFA creates a class action bill of rights to protect plaintiffs from unfair class settlements.

In order to understand how the rhetoric has driven formulation and enactment of the statute, we need to briefly examine CAFA.

A. Expansion of Federal Jurisdiction: A Response to Forum Shopping

Recall our story. The villains in our story are greedy, unscrupulous and crafty lawyers. These lawyers will find any court that will certify the class without thought, ideally in a jurisdiction whose juries are famous for awarding high damages without regard to the merit of the claims. Remember, the story is that state courts are more likely to certify class actions than federal courts and certain magnet state courts are even more likely to certify the class. This allows the unscrupulous lawyer to "game" the system. He shops for the forum most likely to reward the plaintiff class, filing class actions in state courts whenever possible. Any legal rules that make that

(2006) ("Since CAFA provides for no new judgeships, no additional staffing, and no new resources for the federal judiciary, CAFA will further increase the federal courts' already heavy burdens."); Callow, supra note 133, at 30 ("Federal courts, however, are generally overworked and lack the resources necessary to handle their existing dockets."); Harris & Busby, supra note 113, at 229 ("[Q]uestions have been raised about whether federal courts, which are already overcrowded, will have the time to oversee and manage additional large class actions."); Rollo & Crowson, supra note 109, at 13 (discussing the claims that the federal system is already overworked and noting that "CAFA would exacerbate this problem by increasing not only the number of cases on the federal docket, but also the complexity of such cases and the requisite money and attention associated with each case"). Unfortunately, CAFA provides no additional resources to handle the increase in caseload. It was estimated that CAFA would force about forty percent of actions filed in state court into federal court. Linda S. Mullenix & Paul D. Rheingold, Class Actions: Impact of Class Action Fairness Law, N.Y. Law J., March 3, 2005, at 5. A Study conducted by the Federal Judicial Center which examined class action activity during the period from January 1, 2001 to June 30, 2005, found a substantial increase in class action activity in federal courts following CAFA's enactment. Specifically, as expected, they found an increase in class actions predicated on diversity of citizenship and on removal activity. See Thomas E. Willging & Emery G. Lee, The Impact of the Class Action Fairness Act of 2005, Federal Judicial Center (2006). This increase continued during the period from January-June 2006. See Thomas E. Willging & Emery G. Lee, The Impact of the Class Action Fairness Act of 2005 on the Federal Courts, Federal Judicial Center (2007).

141. Interestingly enough, the CAFA jurisdictional provisions do not displace the traditional diversity class action rules, they supplement them. Professor Rubenstein describes a system of peaceful co-existence between the old and the new. Rubenstein, supra note 109, at 5 ("CAFA does not displace conventional diversity class action rules, it augments them.").

142. See generally Rollo & Crowson, supra note 109, at 13 ("CAFA supporters argued that expanding federal jurisdiction over class actions was necessary to address the perception (and in some cases, the reality) that plaintiffs' counsel persistently engage in forum shopping by filing class actions in state courts where huge plaintiff's verdicts are the norm, even though the forum state has little or no connection to the parties or the transaction at issue.").

143. Upon passage, President Bush stated that CAFA "will keep out-of-state businesses, workers, and shareholders from being dragged before unfriendly, local juries, or forced into unfair settlements." Id.

144. For a discussion of magnet state courts that easily certify classes, see S. REP. NO. 109-14, at 22-23 (2005).
difficult are sidestepped.

CAFA's provisions are based on this distrust of plaintiffs' counsel and a lack of confidence in state and local courts. The Congressional findings accuse state and local courts of "keeping cases of national importance out of Federal court,"145 showing bias against out of state defendants146 and of "impos[ing] their view of the law on other States and bind[ing] the rights of the residents of those States.147 Moreover, CAFA's jurisdictional provisions are based on a belief that class action attorneys purposely choose to file in certain state jurisdictions that are likely to certify the class and are famous for awarding large verdicts. Under the law prior to enactment of CAFA, federal diversity jurisdiction was appropriate only if the amount in controversy was $75,000 and if there was complete diversity. CAFA significantly expands federal diversity jurisdiction to force more class actions into federal court.

Under CAFA, federal courts are given jurisdiction over mass actions and any class action148 in which there is more than $5 million in controversy as long as at least one plaintiff class member149 is diverse from at least one defendant and over certain mass actions. This expanded jurisdiction is accomplished in several ways. First, the meaning of diversity is changed under CAFA. Second, the amount in controversy requirement is changed. Third, CAFA provides for more liberal removal provisions.

1. Minimal Diversity

In order to qualify for federal jurisdiction under diversity of citizenship, complete diversity has been a longstanding requirement. In other words, all named plaintiffs have to be citizens of different states from all named defendants.150 Under CAFA, however, the diversity of citizenship requirement is met if any member of the plaintiffs' class is a citizen of a different state from any of the defendants (so-called minimal diversity).151 There are, however, several exceptions to the minimal diversity rule. In an attempt to keep class actions of a local nature in state court, if the action falls within one of these exceptions, state court jurisdiction is appropriate.152

146. Id. at, § 2(a)(4)(B).
147. Id. at, § 2(a)(4)(C).
148. CAFA defines a class action as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1711(2) (Supp. 2008).
149. The term "class member" includes putative class members. 28 U.S.C. § 1711(4) (Supp. 2008). ("[T]he term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.").
150. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that diversity jurisdiction does not exist where some of the plaintiffs and some of the defendants are citizens of the same state).
151. For corporate defendants, the diversity analysis remains unchanged after CAFA. A corporation is deemed to be a citizen both of the state in which it has its principal place of business and the state in which it is incorporated.
152. These exceptions are meant to help strike a balance between cases involving legitimate state court interests and those involving federal interests. See generally Sherman, supra note 134, at 1597 (arguing that the exceptions are too restrictive ("[T]he two exceptions in CAFA are considerably
The first of these exceptions focuses on the citizenship of the parties. The home state exception applies to actions that are filed against defendants in their home state. Under prior law, if any defendant was a resident of the state where the action was filed, the case could not properly be brought in federal court. Under CAFA, whether federal jurisdiction is appropriate for class actions bought in the state where all the primary defendants reside depends upon the citizenship of the plaintiff class.

CAFA creates three categories. Which category applies depends upon the numerical breakdown of the citizenship of the plaintiff class. The first category covers cases in which two-thirds of the class members and all primary defendants are citizens of the forum state. In that case, the federal court must decline jurisdiction. The purpose here is apparently to avoid "gerrymandering" of the class by the plaintiffs' counsel. Under CAFA, even if the plaintiffs' counsel chooses a class of plaintiffs who are all from the forum state, federal jurisdiction is only avoided if all the primary defendants are citizens of the forum state. The second category covers cases in which less than one-third of the plaintiff class members are citizens of the state in which the suit is filed. In that case, federal jurisdiction is appropriate even if the defendant is a citizen of the forum state. The final category covers cases in which more than one-third, but less than two-thirds, of the plaintiff class members and all the primary defendants are citizens of the state in which the suit was filed. In that case, the federal court may accept or decline jurisdiction "in the interests of more restrictive than more states-rights-minded proposals, and it seems unlikely that many class actions can be crafted by class action attorneys to stay in state courts.

153. One question that has been raised concerns the appropriateness of limited discovery to determine composition of the putative class (necessary to apply the mathematical formulas discussed infra), which defendants are the primary defendants, which defendants are real local defendants and where the principal injuries occurred. See generally Roedder, supra note 15.

154. Unfortunately, CAFA fails to define the term "primary defendant." The Senate Report references the "primary defendants" as the real "targets" of the lawsuits, those who would face the greatest potential liability, the "deep pocket". See Vance, supra note 133 at 1623.


156. See generally Sherman, supra note 134, at 1598 (discussing the difficulty of determining the domicile of the each class member as a threshold matter).

157. Roedder, supra note 15. Recall the concern that our crafty lawyer will use artful pleading to avoid federal jurisdiction. Pre-CAFA, this could be accomplished by choosing one plaintiff from the same state as one of the defendants. This category is based on a fear that the plaintiffs' lawyer would choose all plaintiffs from the forum state (say Illinois) and name one Illinois defendant to defeat federal jurisdiction while the "principal defendant" was an out-of-state defendant. Under CAFA, such a case would not qualify for the home state exemption; federal jurisdiction would be appropriate.
justice and looking at the totality of the circumstances.”158 The Statute provides six factors that the court should weigh in making this determination.159

The local controversy exception applies to claims that are unique to the state where the action is filed.160 If more than two-thirds of the class plaintiffs are citizens of the forum state, the court’s focus will shift to the defendant and the conduct alleged. In order for this exception to apply, at least one defendant “from whom significant relief is sought,” and “whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class”161 must be a citizen of the forum state. The Senate Report terms this type of defendant as a “real local defendant.”162 Then, the attention turns to the conduct alleged. If the principal injuries resulting from the alleged wrongdoing occurred within the forum state and no other class actions were filed against any of the defendants asserting the same or similar factual allegations, state court jurisdiction is appropriate.164

It is clear how the rhetoric has driven these changes. The continual focus on lawyers gaming the system is consistent with the story of the opportunistic lawyer, and reiterates the gaming metaphor. CAFA changes the rule from

159. The six factors outlined are:
A) whether the claims asserted involve matters of national or interstate interest;
B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or the laws of other States;
C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed. Id. at § 4(a)(3).
160. Roedder, supra note 15. The Senate Report provides the following example. A class action is brought in Florida against a Florida funeral home alleging wrongdoing related to burial practices. Ninety percent of the plaintiffs live in Florida. In addition to the Florida funeral home, plaintiffs sue an out-of-state parent company. The Senate tells us that this “is precisely the type of case for which the Local Controversy Exception was developed. S. REP. No. 109-14, at 41 (2005).
161. Class Action Fairness Act, Pub. L. No 109-2, § 4(a), 119 Stat. 4 (2005). The difference between the defendant contemplated under the home state exception, the so-called “primary defendant,” and the defendant contemplated under this exception, the so-called “significant” defendant, is unclear. See Vance, supra note 133, at 1624 (discussing definitions of the words primary and significant to conclude that “a primary defendant” ranks higher in the defendant hierarchy than a ‘significant’ defendant). See, e.g., Sherman, supra note 134, at 1600–1601 (discussing the issues presented by the absence of definitions in this section).
163. The term “principal injuries” is not defined. See Puiszis, supra note 133, at 146–147 (discussing potential problems from the ambiguity in the definition).
164. Class Action Fairness Act, Pub. L. No. 109-2 § 4(a)(4)(A)(III), 119 Stat. 4 (2005). This provision is intended to prevent “copy-cat” lawsuits. See supra note 120 where copy-cat lawsuits are explained. The problem of copy-cat litigation does not exist in federal court because of the ability to consolidate proceedings into a multidistrict litigation proceeding in federal court. The CAFA provisions examining whether similar lawsuits have been filed are intended to prevent a plaintiffs’ attorney from circumventing diversity jurisdiction by using one of these exceptions. See Roedder, supra note 15.
complete diversity to minimal diversity. Why? Because under a rule requiring complete diversity, all the plaintiffs' counsel had to do to avoid federal jurisdiction was to add one plaintiff or one defendant to the action from the same state. Voila, federal jurisdiction was lost because complete diversity didn't exist. The exceptions to the minimal jurisdiction requirement provide additional evidence of the effectiveness of the causal story. The home state diversity exception offers a complex mathematical formula designed to prevent "gerrymandering" by the plaintiffs' counsel. The six factors that the court should weigh in making the determination about whether the home state diversity exception exists are consistent with this story.165 For example, the court should consider whether any copy-cat or duplicative lawsuits have been filed. Remember, this is a well-known trick of plaintiff's lawyers under our causal story. The fact that courts are instructed to consider if laws other than those of the state where the claim is filed are relevant is based on the fear that magnet courts act "disrespecting or ignoring the laws of other states."166 Moreover, the court should consider whether the class was defined solely to avoid federal jurisdiction.167

2. Amount in Controversy

Traditionally, each individual plaintiff was required to meet the amount in controversy requirement.168 This has also changed under CAFA. Under CAFA, the amount in controversy requirement is met if the aggregate value of all the class members claims is greater than $5 million.169 We can again see how the rhetoric supports the legislation. Under the traditional rule, plaintiffs' counsel could avoid federal diversity jurisdiction

165. See supra notes 154-160 and accompanying text where home state exception is discussed.
166. Roedder, supra note 15.
167. This factor is based on the fear of "gerrymandering" on the part of the plaintiffs' counsel. See Vance, supra note 132, at 1626 ("If the court concludes that plaintiffs have pleaded an artfully defined class to avoid federal jurisdiction, this factor would favor the exercise of federal jurisdiction.").
168. Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) ("Each plaintiff in a Rule 23(b) class action must satisfy the jurisdictional amount."). Moreover, the Court made clear in Snyder v. Harris, 394 U.S. 332 (1964) that jurisdiction could not be conferred by aggregating claims. Id. at 338 ("We have consistently interpreted the jurisdictional statute passed by Congress as not conferring jurisdiction where the required amount in controversy can be reached only by aggregating separate and distinct claims."). Zahn was, however, overruled by the court in Exxon Mobil Corp. v. Allapattah Services Inc., 545 U.S. 546 (2005). In Exxon Mobil, the Court held that jurisdiction is appropriate in a class action where at last one named plaintiff met the amount in controversy requirement. It did not permit aggregation to meet that amount.
169. It is unclear how the federal courts will aggregate damages to meet this threshold. It seems likely that courts will include costs such as injunctive relief, punitive damages and attorneys' fees to satisfy the amount in controversy requirement. See Roedder, supra note 15. Moreover, valuing injunctive relief can be challenging. Under prior law, courts used one of several approaches to value a claim for injunctive relief. Some looked at the issue from the point of view of the plaintiff; some looked at it from the viewpoint of either the plaintiff or defendant; some looked at it from the viewpoint of the party seeking federal jurisdiction. In the class action context, most courts measured the benefit to each plaintiff separately to avoid aggregation. Under CAFA, it seems likely that the approach will be to value claims for injunctive relief by using the total benefit to the plaintiff class or the total cost to the defendant. See Vance, supra note 133, at 1629 (discussing the various approaches to valuing injunctive relief for amount in controversy purposes.).
merely by making sure that no one class plaintiff asked for $75,000. Because aggregation was not permitted, this would effectively preclude federal jurisdiction.

3. Removal

In order to fully protect defendants from the perceived abuses in state courts, CAFA has also liberalized the removal requirements. Under prior law, defendants were unable to remove an action more than one year after the action was commenced. This prohibition has been removed. This change prevents plaintiffs' attorneys from gaming the system by amending the complaint more than one year after its initial filing and either increasing the amount of damages sought or by dismissing a non-diverse party. In addition, under CAFA, any such changes to the pleadings would subject the case to removal. Second, under CAFA, defendants can remove the action to federal court even if one of the defendants is a resident of the state in which the suit is filed. This section is included to eliminate the possibility that the plaintiffs' attorneys would simply include one in-state defendant to evade federal jurisdiction. Moreover, any one defendant can now remove the action to federal court. This prevents plaintiffs' counsel from naming a friendly defendant who would block removal.

Once more, it is clear that the rhetoric drives the legislation. We change the removal provisions because plaintiffs' attorneys include out of state defendants to “evade” federal jurisdiction. Under prior law, all defendants had to agree to removal. We change the removal provisions because of fears that plaintiffs' counsel would name a friendly defendant, in effect a sham defendant, who would do the bidding of the plaintiffs' counsel and block removal.

4. Mass Actions

A mass action is what might be termed a “class action in disguise.” Mass actions add another layer to the defendants.
actions are civil actions "in which monetary relief claims of 100 or more persons
are proposed to be tried jointly on the grounds that the plaintiffs' claims
involve common questions of law or fact."\textsuperscript{176} Mass actions can be removed to
federal court, but the federal court is only granted jurisdiction over plaintiffs
who have individual claims that meet the $75,000 statutory minimum.\textsuperscript{177}
Plaintiffs who have claims of less than $75,000 will be remanded to state
court.\textsuperscript{178}

There are, however, several significant exceptions. First, where the claim
arises out of an event that occurred in the state where the suit is filed and the
resulting injuries occurred in that state or a contiguous state, that claim cannot
be removed to federal court. This exception is intended to apply to
environmental torts. Second, defendants are not permitted to consolidate cases
for trial and then seek to remove the action to federal court. Last, claims that
have been joined or consolidated for pretrial proceedings cannot be removed.

As we have seen, concerns about forum shopping have led to specific
CAFA provisions. Moreover, CAFA addresses concerns about the plaintiffs' attorney benefitting at the expense of the plaintiff.

B. Bill of Rights: A Response to Unfair Settlements

Section 3 of the CAFA creates what has been termed a "consumer class action bill of rights." As such, it is designed to protect plaintiffs from unfair settlements. Most importantly, CAFA provides for heightened scrutiny of coupon settlements. Recall that coupon settlements are settlements in which the class members receive coupons instead of direct monetary compensation. Under CAFA, before a coupon settlement can be approved, the Court must find that the settlement is "fair, reasonable, and adequate."\textsuperscript{179}

The most troubling perceived abuse here involves the compensation of plaintiffs and their attorneys.\textsuperscript{180} Hence, CAFA includes guidelines for calculating attorneys' fees in class action settlements. Attorneys are no longer allowed to calculate their fee on the basis of the gross amount of the coupons the class is awarded. CAFA provides that a percentage-based attorney fee must be calculated on the basis of the coupons actually redeemed by the class members.\textsuperscript{181}

\begin{footnotesize}
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\item \textsuperscript{176} 28 U.S.C. § 1332(d)(11)(B)(i). See Spencer, supra note 134, at 1073 (discussing the ambiguity in the mass tort definition). "Legislative intent shapes nebulous mass action cloud."
\item \textsuperscript{177} 28 U.S.C. § 1332(d)(11)(B).
\item \textsuperscript{178} Even if the remand results in a class of less than 100, the remaining claims will be adjudicated in federal court.
\item \textsuperscript{179} 28 U.S.C. § 1712(e). This does not represent a change from prior law. Kanner, supra note 113, at 1647 ("This does not appear to change existing law on substantive fairness. As a practical matter, many of the coupon deals that were viewed as most offensive would still be approved under this standard."). See also Klonoff & Herrmann, supra note 134, at 1697 (concluding that "the so-called 'problem' of class action settlements is ill-defined, and Congress has passed a series of unrelated provisions that achieve little and raise more questions than they answer.").
\item \textsuperscript{180} Moreover, there are some concerns about a settlement that appears to benefit the wrongdoer by increasing future sales through the use of the coupon. Rubenstein, supra note 109, at 10.
\item \textsuperscript{181} 28 U.S.C. § 1712(a). Contrasting this method with a method of calculating attorneys' fees as
\end{itemize}
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CAFA also provides for limitations on the settlements that require the plaintiffs to pay the class counsel a fee that results in a net loss to class members. Before the court can approve such a settlement, the court must find that the nonmonetary benefits outweigh the monetary loss. This provision is designed to address the perceived inequities that occurred in the "infamous" case of Kamilewicz v. Bank of Boston Corp. In addition, CAFA prohibits settlements that provide that class members who are geographically closer to the court should receive higher payments. This provision prohibits preferential treatment when there are indistinguishable claims and no legitimate legal basis for the differentiation. This provision does not prohibit "incentive awards." These are special awards given to compensate the named plaintiffs for their effort.

Congress also had concerns about class plaintiffs being unable "to fully understand and effectively exercise their rights." To address this, CAFA requires defendants to send notification of a proposed class settlement to the appropriate officials no later than 10 days after the proposed settlement. Final approval of the proposed settlement may not be granted sooner than 90 days after the appropriate officials receive notice. If the notice requirements are not met, class plaintiffs may "refuse to comply with and may choose not to be a percentage of the total coupon award illustrates Congressional concern. For example, in the recent Microsoft anti-trust case in California, Microsoft agreed to provide $1.1 billion of vouchers to the class plaintiffs. Calculating the attorney fee on the basis of the vouchers available might have yielded a fee of $220 million (at a 20% fee). Rubenstein, supra note 108, at 11. Under CAFA, the calculation is made instead on 20% of the value of the coupons actually redeemed. If, for example, only $100 million is actually redeemed, the fee falls to $22 million. Nothing in CAFA, however, precludes basing attorney fees upon an hourly basis. Id. In addition, CAFA endorses the continued use of the lodestar method of calculating percentage-based compensation, with a multiplier when appropriate. 28 U.S.C. § 1712(b)(2). Lodestar compensation entails compensation based on time spent. Sherman, supra note 134, at 1615.

Ramos v. Bank of Boston Corp., 92 F.3d 506, 508-09 (7th Cir. 1996). See supra note 216-220 and accompanying text (discussion of this case as part of the rhetoric). See Rolo & Crowson, supra note 108, at 18 (credits the provision concerning net-loss settlements with "the media attention associated with several 'poster child' examples of notorious settlements."). For a discussion of this case highlighting the abuse, see Koniak & Cohen, supra note 99, at 1058-1068. Moreover, Koniak & Cohen argue that this case is representative of class action abuses. See id. at 1081.

See generally Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 U.C.L.A. L. REV. 1303, 1310 ("[I]ncentive awards serve multiple goals. They compensate representative plaintiffs for costs . . . . They may also, to some extent, compensate class representatives for what they court perceives to be superior service to the class . . . .")

Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)(C), 119 Stat. 4 (2005). Congress fails, however, to specify why that is a concern and it remains unclear exactly what problem they are trying to solve with the notice requirements. Perhaps Congressional concern has to do with what has been called the "settlement class action." In these cases, the complaint is filed virtually simultaneously with the settlement. Such claims offer plaintiffs prompt relief, plaintiffs' counsel a quick settlement and fee, and defendants a "comprehensive resolution" of the issue. Burbank, supra note 2, at 1498. The fear, of course, is that plaintiffs and future plaintiffs are bargaining away their rights without adequate notice.

The appropriate official is the official with regulatory or licensing authority over the defendant. Notice must be sent to the appropriate state official in every state in which the class plaintiffs reside. The appropriate federal official is typically the U.S. Attorney General. Roedder, supra note 15, at 447.
bound by" the proposed settlement. Congressional intent is that this provision addresses the problem of "clientless litigation." Clientless litigation occurs where there are many plaintiffs but each has such a small financial stake that no one closely monitors the case of the settlement process. The official notice requirement is intended to provide a layer of independent oversight to ensure that the settlement is fair and equitable.188

Here, the story changes. We are not concerned so much with crafty plaintiffs' lawyers working for greedy plaintiffs. Now the plaintiff becomes the victims. We are reminded of the stories and jokes about the lawyer fleecing his client; the lawyer benefits and the client is left with nothing but his empty victory.

IV. PART IV: CONCLUSION

A. The Story as Defined

As we have seen, CAFA was enacted to address the fears of class action abuses. No doubt, class actions are abused. On the other hand, there is no doubt that class actions serve legitimate public policy goals. This section will not consider the extent those fears were justified. What public policy tells us is that "[v]eracity is not the measuring standard – political success is."189 Therefore, the primary goal of the this section is to consider the extent to which formulation of the causal story outlined above lead to CAFA remaining on the public policy agenda and to its eventual enactment.

Let's reiterate our story. It is a story with villains and victims. CAFA is premised on a recitation of Congressional findings that are highly consistent with this causal story. The fact that these findings were, however, based "primarily on untested anecdotes and assumptions,"190 that the "reformers had exaggerated the degree of the abuse,"191 or that the crisis in class actions "may have more to do with perception than reality"192 is largely irrelevant. The story is the story.

188. Id. at 448. It is likely, however, that class action settlements will be more difficult to conclude because of what have been termed the "onerous" notice requirements. Rollo & Crowson, supra note 15, at 17.

189. Daniels & Martin, supra note 7, at 73.

190. Willging & Wheatman, supra note 113, at 594. Others argue that the CAFA unjustifiably attacks "class action lawyers based on the wrong perception that 'lawyers are a ravenous horde seeking to take advantage of others' real or imagined misfortunes.'" Andreeva, supra note 2, at 386 (quoting Thomas A. Donovan, Proposed Class Action Legislation will not do much to Improve a Lawyer's Image, 50 SEP. FED. L. 30, 31 (2003)).


192. Bloom, supra note 86, at 744–45 ("Perception, however, is no small matter because a widely held perception that something is wrong can lead to significant changes in public policy, even when the perception is demonstrably at odds with empirical reality.").
1. A Distrust of State Courts

The traditional view of diversity jurisdiction is that it was created to provide a neutral forum to protect against bias by local courts against out-of-state litigants. The fact that even as far back as pre-1787 no evidence of actual bias was found, doesn't prevent the legislature and commentators from relying on perceptions of such a bias.

CAFA's expansion of federal jurisdiction was based on the belief that federal courts were less amenable to class actions than state courts. This assumption was supported by a Rand Corporation study which found that federal courts were better venues for class actions because, among other reasons, federal judges denied certification under circumstances where state courts might grant it. However, a study conducted by the Federal Judicial Center prior to enactment of CAFA found that there were no differences between the rates that federal courts certified classes as compared to state courts. At both levels, fewer than one in four classes filed as class actions were eventually certified. It appears that post-CAFA, federal courts have disagreed about how leniently to apply certification standards.

Part of the distrust of state courts is based on a belief that state court judges, who are typically elected, will rule in favor of local plaintiffs and against out-of-state defendants in attempt to garner favor with the electorate. There is no evidence to support this assumption, but the myth lives on.

2. The Villain: A Distrust of Plaintiffs' Lawyers

Remember in our story, the primary villains are the lawyers; not just any lawyers, but the plaintiffs' lawyers in particular. They engage in all sorts of nefarious, manipulative conduct.

First, they are crafty. They engage in forum shopping searching for state jurisdictions favorable to class action certification. The extent to which this

193. See Knight, supra note 128, at 51 (characterizing the "strident attacks on the competence and integrity of the state courts that underlie much of CAFA's rationale...[as] unnecessary and unseemly in the extreme").
194. Burbank, supra note 2, at 1460 (discussing diversity jurisdiction in a historical context).
195. Id. at 1460-61.
196. See supra note 113 and accompanying text.
198. See Vance, supra note 133, at 1643 (summarizing findings) ("State and federal courts were 'equally unlikely' to certify class actions... "). See also Callow, supra note 133 (questioning the validity of the conclusion that federal courts are less likely to certify class actions); Harris & Busby, supra note 113, at 229 (citing the same study which found federal courts certify 22% of all class actions, where state courts certify 20%); Willging & Wheatman, supra note 113, at 593 ("[T]here is little empirical evidence supporting the belief that state and federal courts differ generally in their treatment of class action.").
199. See, e.g., Sherman, supra note 133, at 1609.
200. See Deborah Goldberg, Interest Group Participation in Judicial Elections, in RUNNING FOR JUDGE 73 (Matthew J. Streb ed., 2007) ("[E]mpirical research has yet to explore systematically the relationship, if any, between class certification and the involvement in state judicial elections of interest groups for whom such rulings might well be a major topic of concern—whether the local plaintiffs' bar or business-side interests.").
story mirrors reality is challenged by empirical evidence, but the myth lives on. Moreover, forum shopping is always characterized as bad and manipulative in our story. The story ignores that fact that forum shopping is a fundamental fact. Plaintiffs' lawyers choose the jurisdiction in which they file; defendants' lawyers use whatever tools available to them (e.g., change of venue, removal) to affect the site of the litigation. It is inevitable and not necessarily bad.202

Although one of the objectives of CAFA was to eliminate forum shopping in the class action arena, many assume that some degree of forum shopping will continue.203 There is an overwhelming fear of "gamesmanship" on the part of plaintiffs' lawyers204 to avoid federal diversity jurisdiction.205 Commentators fear that plaintiffs will add a state defendant to invoke the state action exception or invoke the limited scope exception by including only ninety-nine plaintiffs.206 There is no corresponding fear of gamesmanship on the part of defendants or their lawyers. For example, although there is mention of defendants' use of a "divide and conquer strategy" by which defendants oppose class actions to force multiple plaintiffs to shoulder the burden of bringing multiple lawsuits, no one characterizes this as "gamesmanship" and finds it objectionable.207 After CAFA, it is difficult for the plaintiff to shop his forum, because we can't trust plaintiffs' attorneys, while "the business community retains the ability to commit the forum shopping abuses that gave rise to CAFA."208


202. See, e.g., Debra Lynn Bassett, The Forum Game, 84 N.C. L. REV. 333, 395 (2006) ("Forum shopping is not a form of 'cheating' by those who refuse to play by the rules. Playing by the rules includes the ability of plaintiff's counsel to select - and defense counsel to seek to counter - the set of rules by which the litigation 'game' will be played. The availability of more than one legally-authorized forum results in legitimate choice, and lawyers ethically are compelled to seek the most favorable forum to further clients' interests. Selecting the most favorable forum is a rational strategy... The widespread criticism of forum shopping simply does not withstand scrutiny."); Alan B. Morrison, Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions, 57 STAN. L. REV. 1521, 1524 (2005) ("[E]very lawyer thinks about the best forum before filing a case or before answering a complaint.").

203. See Vance, supra note 133, at 1642 ("[I]t is safe to predict that the parties will continue to engage in strategic behavior when it comes to choosing a forum."); Willging & Wheatman, supra note 113, at 598 (recognizing that even after CAFA attorneys will have choice of forum decisions to make.).

204. See, e.g., Roedder, supra note 15, at 461 ("This appears to be an attempt to deter the gamesmanship of plaintiffs' attorneys that was commonplace prior to the CAFA.").

205. See e.g., Harris & Busby, supra note 113, at 230 ("The extent of this increase may be limited, however, by plaintiffs' attorneys' attempts to structure classes that can remain in state courts.").

206. Roedder, supra note 15, at 458. In addition, there is fear that ambiguity in CAFA will "lead to creative applications and, perhaps, manipulation." Rollo & Crowson, supra note 108, at 12.

207. See, e.g., Sherman, supra note 133, at 1607; EDWARD A. PURCELL, JR. LITIGATION AND INEQUALITY: FEDERAL DIVERSITY LITIGATION IN INDUSTRIAL AMERICA, 1870-1958 181 (1992) (chronicling the practice of corporate defendants using the federal courts, typically through removal, to gain advantages over their opponents throughout history). For example, corporate defendants have the ability to delay and pressure the plaintiffs into favorable settlements because they have more resources to spend on litigation. Burbank describes corporate defendants as historically using the "burdens of distance and expense as tactical weapons to wear down individual plaintiffs." Burbank, supra note 1, at 1467.

208. Kanner, supra note 113, at 1652 ("Another effect will be to give the defendant the right to
Second, they are greedy. Their compensation is too high. An essential element in the story is the fact that the settlements entered into are "unfair" especially to class members and attorneys benefit disproportionately to any gains by the plaintiffs. The abhorrence of coupon settlements illustrates this concern. This version of the story, however, ignores the fact that class actions were in fact designed to encourage lawsuits where compensatory damages for any one plaintiff would not be large enough to justify a lawsuit. Moreover, there is strong empirical evidence that such an argument is unfounded. A study by the RAND Institute for Civil Justice "contradicts the view that damage class actions invariably produce little for class members and those class action attorneys routinely garner the lion’s share of settlements." Another study concluded that the most important factor in determining the attorney's fee is the amount of the plaintiffs' recovery. In addition, the study found that the percentage of the recovery earmarked for attorneys' fees was inversely proportionate to the award. In other words, as the amount of the plaintiffs' award increased, the percentage of that award that was set aside for attorneys' fees actually fell. Moreover, this same study found that both plaintiff recoveries and attorneys' fees had remained relatively stable over the ten year period examined. In addition, at least one study has found that attorneys' fees are likely to be higher in federal court than in state court.

3. The Victim: The Innocent Defendant

The story also includes an element of unfairness to the hapless defendants. This part of the story argues that frivolous lawsuits are brought as class actions, the innocent defendants settle to avoid risking huge judgments by local juries. Little evidence is offered to support this conclusion. The argument of frivolousness is typically supported by reference to settlements where plaintiffs receive miniscule awards and their lawyers receive large fees. Frivolousness is not, however, measured by the perceived fairness of the award to the plaintiff or by the size of the attorneys' fees; a suit is frivolous if it is without legal merit. No evidence is offered to support a conclusion that class action lawsuits are more likely to be frivolous than any other lawsuit.

209. Melnick, supra note 86, at 789 ("The class action provides the mechanism by which the injured plaintiffs can pool their claims, and in doing so create an action that is worth pursuing.").


211. Eisenberg & Miller, supra note 186, at 78.

212. Id. at 77.

213. Andreeva, supra note 2, at 405.
4. Use of Symbols and Metaphors

There is a class action "crisis." It is all about "fairness." We know that because the title of the statute tell us it is true. It is fair to try to protect the hapless defendants from the evil plaintiffs and their attorneys. It is fair to try to protect the injured plaintiffs from their greedy lawyers. At least once commentator has argued that CAFA is more about protecting defendants than it is about protecting plaintiffs or even attempting to achieve a fair balance.214

The story invokes the metaphor of a game. Plaintiffs' lawyers game the system; plaintiffs and their lawyers "win the lottery," "strike the jackpot." We are asked to conclude that the rules of the game are unfair and, therefore, we need to change them. We need to provide a level playing field.

B. An Alternative Story

The rhetoric of class action by and large ignores the legitimate public policy goals served by class actions.215 One justification of class actions is that they are designed to "correct, punish, and deter big corporations,"216 rather than to merely compensate the plaintiffs. Using the infamous Bank of Boston case as an example, no one plaintiff would initiate a lawsuit with the hopes of receiving an $8.76 award. On the other hand, there are arguably good policy reasons behind encouraging a lawsuit that punishes the Bank of Boston for improperly retaining monies in escrow accounts. Such lawsuits use class action plaintiffs and their attorneys as private attorneys general.217

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214. See Morrison, supra note 203, at 1548 ("The fact that S. 2062 purports to protect absent class members, but does not allow them to remove when defendants and class counsel collude to bring about an unfair settlement, further demonstrates that the bill is not about fairness to class members, but solely about protecting defendants.").

215. See Thomas C. Galligan, Jr., The Risks and Reactions to Underdeterrence in Torts, 70 MO. L. REV. 691 (2005) ("This piece contends that the traditional (one-on-one) model of tort law may both cause and exacerbate the underdeterrence problems and, consequently, alternative models (class actions, augmented awards, and public tort suits) must be considered and analyzed."); Melnick, supra note 85, at 787-797 (discussed the important public policy goals served by class action litigation).

216. Andreeva, supra note 2, at 400. See also Giles, supra note 97, at 430 ("My intuition is . . . that many prudent corporate decisions are made precisely because the palpable threat of class action liability hangs in the boardroom."); Melnick, supra note 86, at 791 ("Therefore, without the class action device, many businesses would arguably be able to escape answering for their wrong-doings until they injured someone so substantially that it became cost effective for the injured victim to pursue the claim individually."); Nockleby & Curreri, supra note 22, at 1087 ("[I]ncreased litigation is not an evil if it protects important rights, increases overall public safety, at reasonable cost, or incentivizes the development of safer practices.").

217. See Deposit Guar. Nat'l Bank, Jackson, Miss. V. Roper, 445 U.S. 326, 338 (1980) ("For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights."); Melnick, supra note 86, at 791 ("Lawyers who have deputized themselves as private attorney generals serve a very important purpose within the legal system. Such lawyers represent classes not only to ensure that the victims are duly compensated, but also to deter certain behavior within society at large."). For criticism of the "private attorney general" model of class actions, see John H. Beisner, Matthew Shores & Jessica Davidson Miller, Class Action "Cops": Servants or Private Entrepreneurs?, 57 STAN. L. REV. 1441, 1451-62 (2005); David Marcus, Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction, 48 WM. & MARY L. REV. 1247, 1286 (2006). See also John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working, 42 MD. L. REV. 215 (1983); Walker, supra note 109, at 863-64.
through litigation\textsuperscript{218} or “adversarial legalism,” the class action relies on “litigation to provide compensation for injury and enforce important social norms.”\textsuperscript{219} How might we construct a story that supports this alternative view of class actions? How would the heroes and villains change? If we view class actions as a legitimate way to further valid public policy objectives, the fact that we have increasing numbers of class actions filed is now viewed as a good thing.\textsuperscript{220} It is no longer a problem worthy of public policy attention. We now praise state courts who certify class actions; we now look for ways to encourage courts to follow their lead and certify class actions where appropriate.

Who are our heroes in this story? The primary hero becomes the plaintiffs’ attorneys. They ferret out wrongdoing on the part of our evil defendants and work tirelessly to redress it. This alternative story praises them for their “entrepreneurial zeal” in finding ways to pursue the class action.\textsuperscript{221} They are adequately compensated for their efforts, but neither the plaintiffs nor society curse them for these rewards. We are happy to pay them for a job well done. Who are the villains in this alternative story – the defendants who have been found guilty of wrongdoing. Now, we blame the corporate defendants who expose their workers to asbestos, or wrongfully retain amounts in escrow accounts believing that they are immune from action because they have not stolen enough from any one individual to make them fear a lawsuit.

Who benefits from the class action in this alternative story? We all do. In this alternative story, class actions support legitimate public policy goals that benefit society.

So, which is the true story? As the old adage tells us, “Listening to both sides of a story will convince you that there is more to a story than both sides.”\textsuperscript{222}

\textsuperscript{218} Hantler, Behrens, & Lorber, supra note 74, at 1153 (“Regulation through litigation takes place when public prosecutors, private plaintiffs’ attorneys, or alliances between these two groups seek to use mass litigation to impose their beliefs about appropriate business behavior on businesses that are operating in a lawful industry.”). Examples include the actions by state attorneys general against the tobacco industry to recover state Medicaid costs.

\textsuperscript{219} Burbank, supra note 2, at 1517. See also Bloom, supra note 85, at 745 (“[I]n earlier days, the class action device was viewed as an important tool for social justice . . . .”); Melnick, supra note 86, at 790 (“These arguments fail to recognize the benefits such litigation provides to the community as a whole and not simply the benefits it provides to individual plaintiffs.”).

\textsuperscript{220} See Elizabeth Chamblee Burch, CAFA’s Impact on Litigation as a Public Good, 29 CARDOZO L. REV. 2517, 2518-19 (discussing “the notion that litigation itself is a public good.”). Burch argues that class “litigation is both a public good provider—by deterring wrongdoing—and a good itself. In fact, pursuing class litigation produces a laundry list of positive externalities.”

\textsuperscript{221} See, e.g., Myriam Giles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U.PA. L. REV. 103, 104-05 (2006) (“Class action plaintiffs’ lawyers are indeed independent entrepreneurs driven by the desire to maximize their gain, even at the expense of class members’ compensation. Where the conventional wisdom has gone wrong, however, is in condemning this as a bad thing and proposing reforms for class action practice designed to correct this conflict . . . . All that matters is whether the practice causes the defendant wrongdoer to internalize the social costs of its actions.”).