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CLASS DISMISSED, NOW WHAT? EXPLORING THE EXERCISE OF CAFA JURISDICTION AFTER THE DENIAL OF CLASS CERTIFICATION

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INTRODUCTION

During the brief period since Congress passed the Class Action Fairness Act (CAFA) in 2005,¹ federal courts have grappled with a number of issues in their attempts to interpret and apply the statute. One of the more interesting of those issues is how to proceed in a CAFA case once class certification has been denied and/or it has become clear that further efforts to achieve class certification are doomed to fail. A handful of courts have been called upon to answer this question thus far, and, not only have those courts arrived at different conclusions, but they have employed wildly varied modes of analyses. Nothing on the face of CAFA expressly requires courts to reassess their subject matter jurisdiction upon denial of class certification. Indeed, it is argued here that the plain language of CAFA dispels any notion that a court's continued subject matter jurisdiction in a CAFA case is tethered to its ultimate class-certification decision.² Nevertheless, several of the courts that have addressed the issue thus far have hesitated to retain non-class actions under the auspices of the Class Action Fairness Act.³ Those courts have taken some inventive, though arguably improper, steps in order to dismiss such cases, including inexplicably reading a condition of eventual class certification into CAFA and directly applying the supplemental jurisdiction statute despite the absence of an anchor claim.⁴ Other courts have found it proper to retain such non-class actions under CAFA, but their analyses also have left something to be desired. Specifically, those courts have not accounted for issues of comity and conservation of federal court resources that are implicated by the federal courts' adjudication of state claims in the absence of a compelling federal interest that might justify the courts' continued exercise of jurisdiction over such claims.⁵

After providing an examination of CAFA and the aforementioned cases, it is argued in this article that CAFA jurisdiction attaches the moment a complaint with adequate class allegations is filed and that a federal court's subsequent denial of class certification or decertification does not obviate that jurisdiction.⁶ However, setting the jurisdictional issue to the side, concerns for comity and the integrity of the federal court system are implicated when federal courts retain non-class actions under CAFA despite the absence of a continuing federal interest in seeing such actions adjudicated by the federal courts.⁷ Accordingly, it is argued that federal courts should abstain from exercising jurisdiction in such cases, a solution that, like

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1. See Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4 (2005).

2. See *infra* Section III.A.3.

3. See *infra* Sections II.A, C, D, E.

4. See *infra* Sections II.A, C, D, E.

5. See *infra* Sections II.B, E.

6. See *infra* Section III.A.

7. See *infra* Section III.B.

other abstention doctrines, doubtlessly would be controversial but that would be justified and certainly preferable to any of the approaches adopted thus far.⁸

I. CAFA: AN OVERVIEW

With CAFA, Congress expanded the federal courts' jurisdiction over class actions, clearing or minimizing certain citizenship and amount-in-controversy requirements previously responsible for keeping many class actions out of the federal court system.⁹ CAFA has been codified at various points in Title 28, including additions to the diversity-jurisdiction section and the insertion of a new removal section.¹⁰ Each of these manifestations of CAFA is described in detail below.¹¹

A. *Original Jurisdiction Under CAFA*

Turning initially to the additions to the diversity-jurisdiction section of Title 28, CAFA first provides definitions for a few terms of interest, including the term "class action," which CAFA defines rather broadly to include "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."¹² Definitions are followed by the general requirements that a "class action" must meet under CAFA, which, in turn, are followed by descriptions of certain situations in which, even if the general requirements have been met, a district court either *may* decline to exercise CAFA jurisdiction or *must* decline to exercise CAFA jurisdiction. Additionally, the statute specifies certain circumstances under which, regardless of the ability of an action to otherwise satisfy its requirements, CAFA does not apply.

On a general level, CAFA requires only a minimal level of diversity of citizenship. A class action satisfies CAFA's diversity requirements if any of the following statements fits: (1) "any member of [the] class of plaintiffs is a citizen of a State different from any defendant"; (2) "any member of [the] class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State"; or (3) "any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state."¹³ Additionally, CAFA requires a cumulative amount in controversy exceeding \$5 million.¹⁴ These general requirements, of course, mark a significant departure from the former treatment of class actions under the general diversity statute, which saw courts requiring that all name plaintiffs be diverse from all defendants and which

8. See *infra* Section III.B.

9. CAFA also vests district courts with jurisdiction over certain "mass actions." See 28 U.S.C. § 1332(d)(11) (2006). However, due to the class action focus of this article, those provisions are not discussed here.

10. See *id.* §§ 1332(d), 1453. Additionally, the so-called "Consumer Class Action Bill of Rights"—sections dealing specifically with the handling of class action settlements—were added to Title 28. See *id.* §§ 1711–15.

11. It should be noted that, due to its relevance to the central thesis of this article, exploration of CAFA's definition of the term "class action" and other related statutory terms has been limited in this section in favor of a more fulsome discussion at a more appropriate juncture.

12. 28 U.S.C. § 1332(d)(1)(B).

13. *Id.* § 1332(d)(2).

14. *Id.* §§ 1332(d)(2), (6).

required each name plaintiff to meet the general \$75,000 amount-in-controversy requirement under the diversity statute.¹⁵

Assuming the general requirements are met, CAFA affords district courts discretion to decline to exercise their CAFA jurisdiction in the event that “greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.”¹⁶ Courts are to consider the “totality of the circumstances” and the “interests of justice” in deciding whether to exercise their CAFA jurisdiction in such cases, and the statute provides a list of six factors courts should take into account, including, among other things, “whether the claims asserted involve matters of national or interstate interest” and “whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants.”¹⁷

CAFA also specifies two situations in which district courts have no discretion and “shall decline to exercise” their CAFA jurisdiction.¹⁸ First, and certainly the simpler of the two, a district court shall decline to exercise CAFA jurisdiction if “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.”¹⁹ Second, courts are required to refuse to exercise CAFA jurisdiction over cases about which it may be said (1) that “greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed”; (2) that “principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed”; (3) that “during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons”; and (4) that at least one defendant meets each of the following descriptions: (a) “significant relief is sought by members of the plaintiff class” from the defendant; (b) that same defendant’s “alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class”; and

15. See, e.g., *Gibson v. Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir. 2001). Additionally, even were it not for the passage of CAFA, the Supreme Court’s decision in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005), in which the Court held that federal courts may exercise supplemental jurisdiction in diversity cases over the claims of plaintiffs not satisfying the \$75,000 amount-in-controversy requirement so long as at least one plaintiff individually meets the threshold, likely would have altered the application of the amount-in-controversy requirement to class actions.

16. 28 U.S.C. § 1332(d)(3).

17. *Id.* Courts are instructed also to consider the following: “whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States”; “whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction”; “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 “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.*

18. *Id.* § 1332(d)(4).

19. *Id.* § 1332(d)(4)(B).

(c) that same defendant “is a citizen of the State in which the action was originally filed.”²⁰

Finally, there are certain situations in which CAFA expressly does not apply, regardless of whether the requirements of CAFA are otherwise met. CAFA does not apply to actions in which “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.”²¹ CAFA also does not apply if “the number of members of all proposed plaintiff classes in the aggregate is less than 100,”²² and CAFA does not apply to certain types of specifically enumerated species of corporate and securities actions.²³

B. Removal Under CAFA

CAFA also heralded changes for the removal of class actions to federal courts. For one, the traditional prohibition against removal in diversity cases by defendants who are citizens of the state in which the action is pending does not apply to cases being removed under CAFA.²⁴ Time limitations on removal also have been relaxed for CAFA cases. CAFA defendants still must seek removal within thirty days of the case becoming removable, but gone is the outer one-year limit on removal that applies to other diversity cases.²⁵ Also alleviated for CAFA defendants is the burdensome requirement that all defendants join in removal—a single defendant has the power to remove an entire action under CAFA.²⁶

In addition to making removal itself easier to achieve, CAFA also relaxes limitations on the appellate review of remand orders. As a general matter, remands to state courts are “not reviewable on appeal or otherwise,” with the exception of remands of certain civil rights actions.²⁷ However, a party may seek review of the remand of a CAFA case by “application...made to the court of appeals not less than 7 days after entry of the order” of remand.²⁸

20. *Id.* § 1332(d)(4)(A).

21. *Id.* § 1332(d)(5)(A).

22. *Id.* § 1332(d)(5)(B).

23. *Id.* § 1332(d)(9).

24. Compare *id.* § 1441(b) (“Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”), with *id.* § 1453(b) (“A class action may be removed to a district court of the United States...without regard to whether any defendant is a citizen of the State in which the action is brought....”).

25. Compare *id.* § 1446(b) (“[A] case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.”), with *id.* § 1453(b) (“A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply)....”).

26. See *id.* § 1453(b) (“A class action may be removed to a district court of the United States in accordance with section 1446...except that such action may be removed by any defendant without the consent of all defendants.”).

27. See *id.* § 1447(d) (excepting civil rights actions removed pursuant to 28 U.S.C. § 1443).

28. See *id.* § 1453(c)(1). The imposition of what literally appears to be a seven-day waiting period on seeking review of a remand under CAFA (“made to the court of appeals *not less than 7 days* after entry of the order” (emphasis added)) already has been the source of much confusion, as courts have debated whether the provision should be read literally or with an eye toward the likely intent of the drafters. See generally Adam N. Steinman, “Less” Is “More”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act’s Appellate Deadline Riddle*, 92 IOWA L. REV. 1183 (2007).

II. THE ISSUE AND THE JURISPRUDENTIAL LANDSCAPE THUS FAR

As set out above, the drafters of CAFA went to great lengths to specify the sorts of putative classes—in terms of class size, class composition, and cumulative damages—that were and were not suitable for treatment under CAFA. However, the drafters offered less in the way of express guidance regarding the rather basic question of whether class certification itself is a prerequisite for the continued exercise of CAFA jurisdiction.

On its face, CAFA neither expressly requires certification or continued maintenance of a class nor mandates dismissal in the event class certification is denied or decertification occurs.²⁹ Still, it is easy to understand how, even in the absence of a provision expressly requiring class certification or maintenance of a class, a court might question its ability to adjudicate and ultimately enter final judgment on *state* law claims under the auspices of a statute called the *Class Action Fairness Act* without ever having certified a class or after having decertified a class. After all, review of CAFA's legislative history reveals that Congress's purported ultimate goals in passing the Act were to prevent abuses to the class action system, including, among other things, forum shopping, and to "provid[e] for Federal court consideration of interstate cases of national importance."³⁰

Even if one questions Congress's true motives in passing CAFA,³¹ it seems beyond debate that, at least at a very broad level, Congress intended to impact the handling of *class* actions and to see that a greater number of *class* actions found their way into federal courts. Adjudication of the state law claims of a single plaintiff (or even a small group of plaintiffs) who has failed to achieve or maintain class certification does little to advance that agenda, and, as will be discussed later, the adjudication of state law claims under such circumstances, especially in the absence of a compelling countervailing federal interest, raises countervailing concerns related to comity and the integrity of the federal court system.³²

Did Congress fail to foresee the issue and to include a proper mechanism for dismissal of those cases in which class certification cannot be achieved? Did Congress understand that such situations would arise but determine that it was an unavoidable cost of bestowing CAFA jurisdiction? Did Congress perceive the danger but assume that, based on past precedent, the courts would find a way to balance CAFA jurisdiction and other concerns and dismiss such cases when appropriate? The handful of courts that have encountered the issue thus far have come to markedly different conclusions. Indeed, as set out below, not only is there a lack of consensus as to whether denial of certification should result in dismissal, but there also is marked disagreement as to how courts should go about analyzing the question.

29. See 28 U.S.C. § 1332(d).

30. See Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4 (2005) ("The purposes of this Act are to...restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.").

31. See, e.g., S. REP. NO. 109-14, at 79 (2005) (Sen. P. Leahy), reprinted in 2005 U.S.C.C.A.N. 4, 73 ("I am disappointed that the Senate has been reduced to taking its marching orders on major legislation from corporate special interests and the White House.").

32. See *infra* Section III.B.2.b.

A. Dismiss—It's That Simple

The question of whether denial of class certification deprives a federal court of further jurisdiction appears to have been directly broached for the first time by a New York district court in *McGaughey v. Treistman*.³³ There, the court denied class certification due to the plaintiff's failure to establish sufficient numerosity per Federal Rule of Civil Procedure 23(a)(1).³⁴ On the issue of continued subject matter jurisdiction, the court simply stated, "Because Plaintiff's motion for class certification must be denied, Plaintiff's action is no longer a class action, and this Court cannot retain subject matter jurisdiction in diversity over Plaintiff's action pursuant to the Class Action Fairness Act."³⁵ Having concluded that the plaintiff's action, standing on its own, could not satisfy the requirements of the general diversity statute, the court dismissed the action for lack of subject matter jurisdiction.³⁶ Though its discussion of the issue was limited, the court appeared to be of the view that, as a general matter, a court's denial of class certification automatically obviates CAFA jurisdiction. Ultimately, the court seemed troubled by the prospect of entertaining a non-class action consisting of state law claims under the auspices of a statute called the *Class Action Fairness Act*.

B. Not So Fast—Once a Federal Case, Always a Federal Case

1. *Genenbacher*

Following closely on the heels of *McGaughey*, an Illinois district court addressed the question of whether a denial of class certification might deprive a federal court of continuing subject matter jurisdiction in *Genenbacher v. CenturyTel Fiber Co. II, LLC*.³⁷ There, the defendant had removed the case to federal court,³⁸ and the court, having denied class certification, raised sua sponte the "issue of its continuing jurisdiction."³⁹ The court acknowledged *McGaughey* but "respectfully

33. No. 05 Civ. 7069(HB), 2007 WL 24935 (S.D.N.Y. Jan. 4, 2007). However, the issue had been touched on in dicta in *Scott v. Grange Ins. Ass'n.*, No. CV-06-104-JLQ, 2006 WL 1663565 (E.D. Wash. June 8, 2006). There, the plaintiff had filed a motion to amend, along with a proposed amended complaint that included class allegations, in state court. *Id.* at *1. The defendant removed, and, when the plaintiff sought remand, the defendant argued that "filing rather than certification is the benchmark permitting removal." *Id.* at *4. The court acknowledged that the defendant's position "may be the case" but ultimately held that remand was appropriate because the plaintiff had filed only a motion to amend accompanied by a proposed amended complaint, which the state court ultimately might or might not grant. *Id.*

34. *McGaughey*, 2007 WL 24935, at *2-3.

35. *Id.* at *3.

36. *Id.* at *3-4.

37. 500 F. Supp. 2d 1014 (C.D. Ill. 2007).

38. Cases originally filed in and cases removed to federal court are treated as interchangeable throughout this article. While it is true that original and removal jurisdiction are not always coextensive, *see, e.g.*, 28 U.S.C. § 1441(b) (2006) (allowing removal jurisdiction in diversity cases "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"), there is no distinction with a difference between the two types of jurisdiction for purposes of this discussion. Regardless of whether a CAFA action has been filed in federal court in the first instance or has been removed to federal court, the exact same question must be answered—whether the action is encompassed by 28 U.S.C. § 1332(d). *See* 28 U.S.C. § 1453(a) (adopting the definition of "class action" and other related terms provided in 28 U.S.C. § 1332(d)).

39. *Genenbacher*, 500 F. Supp. 2d at 1016.

disagreed”⁴⁰ with that court’s reasoning and sought guidance instead in the U.S. Supreme Court’s decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*⁴¹ In *St. Paul*, the Supreme Court had addressed the question of whether the plaintiff’s amendment of its pleadings, subsequent to removal, to lower the amount in controversy might provide grounds for remand.⁴² The Court held that “events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff’s control or the result of his volition, do not oust the district court’s jurisdiction once it has attached.”⁴³ The *Genenbacher* court characterized the *St. Paul* holding more broadly, explaining that “subsequent determinations that the plaintiff will not be able to prove the jurisdictional facts alleged do not affect...continued jurisdiction.”⁴⁴ The court apparently viewed class certification as a “jurisdictional fact” but held that the plaintiff’s failure to ultimately demonstrate that “fact” by achieving class certification had not stripped the court of its subject matter jurisdiction.⁴⁵ The court also cited the fact that the denial of class certification was an interlocutory order subject to revisitation at a later time and reasoned that the court should have continued jurisdiction “until a final judgment can be entered on those claims.”⁴⁶

2. *Levitt*

Within days of the *Genenbacher* decision, a Maryland district court took up a similar issue in *Levitt v. Fax.com*.⁴⁷ The court decertified a class previously certified by the state court from which the case had been removed.⁴⁸ The plaintiff had argued

40. *Id.* at 1016–17.

41. 303 U.S. 283 (1938).

42. *Id.* at 284.

43. *Id.* at 293. In *St. Paul*, the Court seemed particularly troubled by the prospect of allowing an amendment by the plaintiff subsequent to removal, as opposed to an amendment subsequent to filing in federal court in the first instance, to dictate the status of the federal court’s jurisdiction. *See id.* at 290. The Court explained that, for purposes of assessing federal jurisdiction, the amount in controversy set out in a complaint filed originally in state court is inherently more trustworthy than the amount in controversy set out in a complaint filed originally in federal court. This is because there is little reason to suspect artificial inflation or collusion under such circumstances because the plaintiff, if he truly had wished to make his way into federal court, could have done so by simply filing in federal court to begin with. *Id.* (“A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court, or that the parties have colluded to that end.”). According to the Court, it followed then that an attempt to lower the amount in controversy subsequent to removal is more likely an attempt on the part of the plaintiff to “defeat [the defendant’s right to remove] and bring the cause back to the state court at his election,” rendering the right of the defendant to remove “subject to the plaintiff’s caprice.” *Id.* at 294.

Genenbacher, 500 F. Supp. 2d at 1016, involved an action removed from state court, while *McGaughey*, 2007 WL 24935, at *1, had involved an action filed originally in federal court. However, the *Genenbacher* court did not suggest that the cases’ differing routes to federal court marked a distinction with a difference. *See* 500 F. Supp. 2d at 1017 (“This Court respectfully disagrees with this analysis. A case brought or removed under CAFA invokes this Court’s diversity jurisdiction.” (emphasis added)). Moreover, the Supreme Court made clear in *St. Paul* that its holding also would apply in the case of a reduction in the amount in controversy in a case originally filed in federal court. 303 U.S. at 290 (“What already has been said, and circumstances later to be discussed lead to the conclusion that a dismissal would not have been justified *had the suit been brought in federal court.*” (emphasis added)).

44. *Genenbacher*, 500 F. Supp. 2d at 1017.

45. *See id.*

46. *Id.*

47. No. WMN-05-949, 2007 WL 3169078 (D. Md. May 25, 2007).

48. *Id.*

that CAFA “somehow weigh[ed] in favor of certification.”⁴⁹ The plaintiff apparently meant to argue that decertification would strip the court of subject matter jurisdiction and that the court should act to avoid that outcome.⁵⁰ Noting the lack of case law regarding “the effect of post-removal certification or decertification decisions on continued federal jurisdiction,”⁵¹ the court looked to *Davis v. Homecomings Financial*, in which a court had held that the certification of a class so limited that it could not meet CAFA’s \$5 million amount-in-controversy requirement had not “divest[ed] th[e] Court of jurisdiction.”⁵² The *Levitt* court agreed with the *Davis* court’s reasoning and “conclude[d] that decertification of the class [would] not divest th[e] Court of jurisdiction over Plaintiff’s now lone claim.”⁵³

3. *Garcia*

Within a week of *Levitt*, yet another court had entered the fray. A Texas district court was called upon in *Garcia v. Boyar & Miller, P.C.* to decide whether a plaintiff’s inability to achieve class certification under Rule 23 and/or a plaintiff’s motion to amend its complaint to remove class allegations, if granted, might affect the court’s subject matter jurisdiction and require remand to state court.⁵⁴ The court noted that it was free to consider events post-dating removal in determining whether remand was appropriate,⁵⁵ that “[t]here is no bright-line test,” and that each post-removal event should “be analyzed under general jurisdictional principles to determine whether it divests a court of its power to hear the case.”⁵⁶ However, the court ultimately concluded that post-removal events regarding certification (or lack thereof) were irrelevant for purposes of assessing CAFA jurisdiction.⁵⁷ The court

49. *Id.* at *7 (internal quotation marks omitted).

50. *See id.*

51. *Id.*

52. *Id.* (discussing *Davis*, No. C05-1466RSL, 2007 WL 905939 (W.D. Wash. Mar. 22, 2007)). *Davis* fell between *McGaughey* and *Genenbacher*. The court had certified a class but had limited the class to residents of Washington. 2007 WL 905939, at *1. The plaintiff argued that such a limited class could not meet CAFA’s amount-in-controversy requirement and sought remand to state court. *Id.* The court sought guidance from previous cases holding that changes in the amount in controversy subsequent to filing or removal do not divest a federal court of jurisdiction. *Id.* (citing *Hill v. Blind Indus. & Serv. of Md.*, 179 F.3d 754, 757 (9th Cir. 1999)). The court explained that Congress is presumed to be aware of such pre-existing principles when legislating in an area and therefore, in the absence of an express statutory dictate to the contrary, must not have intended for federal courts to relinquish jurisdiction over CAFA cases when faced with a post-filing or post-removal change in the amount in controversy. *Id.* (citing *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683–84 (9th Cir. 2006)). The court also made clear its concern that the plaintiff, having sought remand “because she believe[d] that she c[ould] obtain a better result in state court,” was attempting to engage in forum shopping. *Id.* at *2.

The *Davis* court, unlike most of the courts discussed in this section, did not face the more difficult question of whether the absence of any class might prevent the court from exercising further jurisdiction. Indeed, relatively speaking, the law on subsequent changes in the amount in controversy is much clearer. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293–94 (1938). However, this did not prevent the *Levitt* court and other courts squarely addressing the effect of decertification or a denial of class certification from seeking guidance from *Davis*. *See infra* Section II.B.4.

53. *Levitt*, 2007 WL 3169078, at *7.

54. No. 3:06-CV-1936-D, 2007 WL 1556961, at *3 (N.D. Tex. May 30, 2007).

55. *Id.* at *2 (“If at any time prior to final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”) (citing 28 U.S.C. § 1447(c)).

56. *Id.* (internal quotation marks omitted) (quoting *IMFC Prof. Servs. of Fla. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 157 (5th Cir. 1982)).

57. *See id.* at *5–6.

examined the plain language of 28 U.S.C. § 1332(d), focusing on the statutory definition of 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” and the absence of any provision expressly purporting to impose a certification requirement.⁵⁸ Based on its reading of the statute, the court concluded that the relevant inquiry was simply whether an action had been “filed as a class action.”⁵⁹ Accordingly, the court held that “[f]or initial removal, CAFA does not require that the putative class action meet the requirements of Rule 23(a) or that a class be successfully certified” and similarly that a plaintiff’s failure to “secure class certification under Rule 23(a) does not divest the court of jurisdiction” after removal.⁶⁰ In other words, the court held that certification was neither a prerequisite for removal nor a prerequisite for continuing jurisdiction.

4. *Colomar*

Shortly after *Garcia*, a Florida district court was asked by the plaintiff in *Colomar v. Mercy Hospital, Inc.*, to determine whether denial of class certification was a post-removal event capable of obviating the court’s jurisdiction.⁶¹ Like the *Levitt* court shortly before it, the *Colomar* court looked to *Davis v. Homecomings Financial* and extracted the general principle that “case developments subsequent to removal do not alter the courts’ CAFA jurisdiction.”⁶² The *Colomar* court, like the *Davis* court,⁶³ seemed particularly concerned with what it considered an attempt by the plaintiff to forum shop by “litigat[ing] the case up to the eve of trial, and

58. *Id.* at *5 (quoting 28 U.S.C. § 1332(d)(1)(B) (2006)) (emphasis added).

59. *Id.*

60. *Id.* at *5, 6. The *Garcia* court’s insistence upon separately addressing removal jurisdiction and continued subject matter jurisdiction is a bit perplexing. In a CAFA case, the two issues turn upon interpretation of the same statute and require answering the same question: whether 28 U.S.C. § 1332(d) conditions jurisdiction upon the eventual certification of a class. *See* 28 U.S.C. § 1453 (2006) (adopting the definition of “class action” set forth in § 1332(d) and stating that such “class action[s]” may be removed to federal court “in accordance with section 1446”). The *Garcia* court concluded (and likely correctly so, *see infra* Section III.A.3) that certification is not a prerequisite but rather that CAFA jurisdiction turns on “how the case is filed.” 2007 WL 1556961, at *6. That conclusion rendered separate discussion of removal jurisdiction and continued subject matter jurisdiction unnecessary. The court’s decision to focus on the manner in which the case had been filed effectively collapsed the issues of removal jurisdiction and continuing subject matter jurisdiction into one.

Regardless, another Texas district court recently adopted and applied the *Garcia* standard in *Brinston v. Koppers Indus., Inc.*, 538 F. Supp. 2d 969 (W.D. Tex. 2008). There, as in *Garcia*, the plaintiffs sought to amend to excise class allegations and argued that grant of their motion would necessitate remand for lack of jurisdiction. *Id.* at 974–75. The court granted the motion to amend, but, relying on *Garcia*, held that “CAFA jurisdiction...is based on class allegations in the pleadings at the time of removal.” *Id.* at 975 (applying *Garcia*, 2007 WL 1556961, at *5).

61. No. 05-22409-CIV, 2007 WL 2083562 (S.D. Fla. July 20, 2007). In addition to denial of class certification, the *Colomar* court was also asked to determine whether the post-removal dismissal of a diverse defendant had brought the case within the “home-state controversy exception” set out in 28 U.S.C. § 1332(d)(4)(B), which requires “a court to ‘decline to exercise jurisdiction’ where ‘two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.’” *Id.* at *2 (quoting 28 U.S.C. § 1332(d)(4)(B)). The court treated the dismissal of the defendant and the denial of class certification simultaneously and with identical reasoning. *See id.* at *2–3.

62. *Id.* at *3 (citing *Davis*, No. C05-1466RSL, 2007 WL 905939 (W.D. Wash. Mar. 22, 2007)).

63. *See supra* note 52.

then...seek[ing] [to] remand after adverse rulings have issued and summary judgment is briefed.”⁶⁴

C. Now, for Something Totally Different—A Matter of Supplemental Jurisdiction?

Upon denial of class certification, one California district court, in the case of *Giannini v. Schering-Plough Corp.*, attempted to shift the jurisdictional analysis in an entirely different direction.⁶⁵ At the plaintiff’s request, the *Giannini* court dismissed all class allegations, and the plaintiff sought remand over the objection of one of the defendants.⁶⁶ The court elected to directly apply the supplemental jurisdiction statute to all of the plaintiff’s claims.⁶⁷ That statute, 28 U.S.C. § 1367, allows a district court to exercise “supplemental jurisdiction over all other claims that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III.”⁶⁸ However, a district court “may decline to exercise supplemental jurisdiction over a claim...if...the district court has dismissed all claims over which it has original jurisdiction,”⁶⁹ and, in deciding whether to exercise supplemental jurisdiction, the court should consider “economy, convenience, fairness, and comity.”⁷⁰

Without ever explaining how the entertainment of and subsequent dismissal of the plaintiff’s class allegations were tantamount to having dismissed “claims over which [the court] ha[d] original jurisdiction”⁷¹ (i.e., without ever explaining how class allegations, which do not themselves constitute *claims*, might serve as an anchor claim for the exercise of supplemental jurisdiction), the court treated the question of whether to remand as one of whether the court should exercise jurisdiction pursuant to the supplemental jurisdiction statute.⁷² The court ruled that economy, convenience, fairness, and, especially, comity counseled the court to decline to exercise supplemental jurisdiction over the plaintiff’s state claims and to remand, explaining with regard to comity that “[n]eedless decisions of state law should be avoided.”⁷³

It is difficult to ignore the similarities between a court’s decision whether to cease exercising CAFA jurisdiction over state law claims after denial of class certification and the situation faced by a court deciding whether to cease exercising jurisdiction over remaining state law claims after the dismissal of the only federal anchor claim(s) in an action.⁷⁴ In each situation, the foundation that originally justified federal jurisdiction has eroded away, leaving state law claims in something of a limbo. Moreover, as will be discussed later, the *Giannini* court’s concerns for

64. *Colomar*, 2007 WL 2083562, at *3.

65. No. C-06-06823-SBA, 2007 WL 1839789 (N.D. Cal. June 26, 2007).

66. *Id.* at *1.

67. *Id.* at *2.

68. *Id.*

69. 28 U.S.C. § 1367(c)(3) (2006).

70. *Giannini*, 2007 WL 1839789, at *4.

71. 28 U.S.C. § 1367(c)(3) (emphasis added).

72. *Giannini*, 2007 WL 1839789, at *3–4.

73. *Id.* at *4 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)).

74. See *infra* Section III.B.2.b.

economy and comity are valid and should have a role in the analysis.⁷⁵ Nevertheless, the court's willingness to apply the supplemental jurisdiction statute despite the utter absence of an anchor claim and with no explanation for taking such an unorthodox step seems misguided.⁷⁶

D. A More Nuanced Approach—The “Reasonably Foreseeable Possibility” Standard

1. Falcon

In *Falcon v. Philips Electronics N.A. Corp.*, a New York district court subtly shifted the analysis in a new direction.⁷⁷ The court had denied class certification, holding that the name plaintiff was incapable of adequately representing her proposed class, and the defendant argued that denial of class certification had robbed the court of its jurisdiction.⁷⁸ The court disagreed with the defendant's assertion that denial of certification had rendered the action “something other than a ‘class action’” under CAFA, pointing out that “CAFA does not list class certification as a prerequisite to federal jurisdiction” and emphasizing the “filed under” language in CAFA's definition of “class action.”⁷⁹ Nevertheless, the court opined, “To be sure, if class certification is subsequently denied on a basis that precludes even the *reasonably foreseeable possibility* of subsequent class certification in the future, the Court may lose jurisdiction at that point.”⁸⁰ The court suggested that *McGaughey* had presented such a scenario, characterizing that case as one in which “the court [had] denied class certification because [the] plaintiff could not, and very likely could *never*, satisfy the numerosity requirement of [Rule 23].”⁸¹ The court made no attempt to reconcile its holding with its seemingly conflicting assertion that class certification was not a prerequisite for CAFA jurisdiction.⁸² Rather, the court determined that the continuing failure of the plaintiff's counsel to proffer a suitable class representative rendered the case “a putative class action where a class cannot be certified either now or in the foreseeable future” and ordered the case dismissed for lack of jurisdiction.⁸³

2. Arabian

The *Falcon* “reasonably foreseeable possibility” standard did not go unnoticed. Within a couple of months, the court in *Arabian v. Sony Electronics, Inc.*, echoed

75. See *infra* Section III.B.2.b.

76. Misguided or not, a Florida district court recently referenced the issue as being one of supplemental jurisdiction in *Seyboth v. Gen. Motors Corp.*, No. 8:07-CV-2292-T-27TBM, 2008 WL 1994912, at *2 (M.D. Fla. May 8, 2008). Having granted the defendant's motion to strike the plaintiff's class allegations, the court, with little in the way of analysis, “decline[d] to exercise supplemental[jurisdiction]” and remanded the case to state court. *Id.* Strangely, in its very limited discussion, the *Seyboth* court cited to *Falcon*, see *infra* Section II.D.1, and not to *Giannini. Id.*

77. 489 F. Supp. 2d 367 (S.D.N.Y. 2007).

78. *Id.* at 368.

79. *Id.* (emphasis omitted) (quoting 28 U.S.C. § 1332(d)).

80. *Id.* (emphasis added).

81. *Id.* (discussing *McGaughey v. Treistman*, No. 05 Civ. 7069(HB), 2007 WL 24935, at *2–3 (S.D.N.Y. Jan. 4, 2007)).

82. See *id.* at 368–69.

83. *Id.* at 369.

and applied the test en route to dismissal.⁸⁴ The *Arabian* court had denied class certification, and the defendant sought dismissal for lack of jurisdiction.⁸⁵ The court held that the plaintiffs before it, like those in *Falcon* and *McGaughey*, had been left with no “reasonably foreseeable possibility” of class certification and that dismissal therefore was in order.⁸⁶ The court made a point to distinguish *Genenbacher*, explaining that the *Genenbacher* court must have perceived a “reasonably foreseeable possibility” of class certification at a later date.⁸⁷ The *Arabian* court also attempted to distinguish *St. Paul*, the case upon which the *Genenbacher* court principally had relied,⁸⁸ explaining that *St. Paul* and its progeny were concerned with “events occurring subsequent to the filing or removal of a case” but that the absence of a “reasonably foreseeable possibility” of class certification betrayed a defect existing since before filing: “[b]y denying class certification and subsequently finding that there is no reasonably foreseeable possibility [of class certification], this Court has essentially found that there is not—and never was—diversity jurisdiction...pursuant to CAFA.”⁸⁹

3. *Hoffer*

Almost in tandem with the *Arabian* court, an Ohio district court was attempting to answer the same question, and, like the *Arabian* court, the court in *Hoffer v. Cooper Wiring Devices, Inc.*, looked to *Falcon* for guidance.⁹⁰ Having denied class

84. No. 05cv1741 WGH(NLS), 2007 WL 2701340, at *3–5 (S.D. Cal. Sept. 13, 2007).

85. *Id.* at *1–2.

86. *Id.* at *3–5 (discussing *Falcon*, 489 F. Supp. 2d at 368 and *McGaughey*, 2007 WL 24935, at *2–3).

87. *Id.* at *5 (discussing *Genenbacher v. CenturyTel Fiber Co. II, LLC*, 500 F. Supp. 2d 1014, 1016 (C.D. Ill. 2007)).

88. See *supra* Sections II.B.1, II.D.2.

89. *Arabian*, 2007 WL 2701340, at *5 (internal quotation marks omitted) (discussing, among others, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293–94 (1938)). The *Arabian* court’s holding was even more sweeping than that of the *Falcon* court. In its attempts to avoid *St. Paul*, the *Arabian* court ruled not just that the lack of a “reasonably foreseeable possibility” of class certification had robbed it of its power to *continue* to exercise CAFA jurisdiction, but that CAFA jurisdiction had never existed at all. *Id.* (“[T]his Court has essentially found that there is not—and never was—diversity jurisdiction...pursuant to CAFA.”). That logic could have significant ramifications beyond the dismissal of the action before the court. For example, motions to dismiss are often briefed and ruled upon prior to resolution of a motion to certify a class. Consider the common scenario in which a motion to dismiss results in the dismissal of some but not all of a plaintiff’s claims. The rulings leading to those dismissals may be owed issue-preclusive effect. See, e.g., *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000) (acknowledging that “[i]t is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion”); *Erickson v. Horing*, No. 99-1468 JRT/FLN, 2001 WL 1640142, at *9 (D. Minn. Sept. 21, 2001) (affording issue-preclusive effect to findings leading to the partial grant of summary judgment where other claims had remained in the case at the time partial summary judgment was granted); *Reno v. Atlanta Sundries, Inc.*, No. 99 C 6812, 2001 WL 946190, at *2 (N.D. Ill. March 13, 2001) (affording issue-preclusive effect to a state court’s denial of a motion to dismiss); *In re Jaynes*, 377 B.R. 880, 884–87 (W.D. Wis. Bankr. 2007) (granting issue-preclusive effect to the denial of a motion to dismiss).

However, a subsequent ruling that the court has lacked jurisdiction from the outset of the action could result in a nullification of the court’s earlier partial dismissal, preventing the defendant from relying on that ruling for purposes of issue preclusion in a subsequently filed state court action. See, e.g., *Ramallo Bros. Printing, Inc. v. El Día, Inc.*, 490 F.3d 86, 89–90 (1st Cir. 2007) (holding that only issues “determined by a *valid and binding* final judgment” are entitled to issue-preclusive effect (emphasis added)). Such an outcome would be wasteful of the judicial resources already invested in resolving the motion to dismiss and unfair to the defendant whose efforts and resources earned the partial dismissal.

90. No. 1:06CV763, 2007 WL 2891401, at *1 (N.D. Ohio Sept. 28, 2007) (citing *Falcon*, 489 F. Supp. 2d at 368).

certification, the court applied the “reasonably foreseeable possibility” standard and, with little discussion, concluded that there was no such possibility of future certification in the case before it, that jurisdiction consequently had departed, and that, therefore, dismissal was in order.⁹¹ The court acknowledged the “general principle that once jurisdiction has properly attached, it cannot be ousted by subsequent events,” but, similar to the *Arabian* court, concluded that “the class action claim...was defective from the start.”⁹²

E. A Summary of the Journey Thus Far

Though denial of class certification or decertification can only bring one of two outcomes—dismissal or retention—as the cases summarized above demonstrate, there is more than one analytical route to each of these final destinations. Indeed, thus far, the courts have offered at least five distinct modes of analysis: (1) denial of class certification (and presumably decertification) requires dismissal with no further discussion (the *McGaughey* approach);⁹³ (2) denial of class certification (and presumably decertification) requires dismissal if there is no “reasonably foreseeable possibility” of class certification (the *Falcon*, *Arabian*, and *Hoffer* approach);⁹⁴ (3) denial of class certification (and presumably decertification) requires dismissal if concerns of economy, convenience, and fairness counsel against the application of the supplemental jurisdiction statute to the name plaintiff’s state law claims (the *Giannini* approach);⁹⁵ (4) denial of class certification (or decertification) does *not* require dismissal because denial of certification (or decertification) is a post-filing or post-removal event incapable of nullifying the court’s jurisdiction (the *Genenbacher*, *Levitt*, and *Colomar* approach);⁹⁶ and (5) denial of certification (and presumably decertification) does *not* require dismissal because CAFA jurisdiction attaches the moment a complaint is “filed under” Rule 23 or one of its state analogs (the *Garcia* approach).⁹⁷

No single approach produces a completely satisfying outcome. Application of the *McGaughey* approach or the *Falcon*, *Arabian*, and *Hoffer* approach exalts comity and judicial resource concerns, as dismissal means avoiding unnecessary decisions of state law by the federal courts and unnecessary expenditure of federal court resources. However, that result is achieved by, with little to no explanation, superimposing a class-certification requirement onto CAFA that is not at all heralded by the text of the statute itself. Also, if the central premise underlying those courts’ decisions is incorrect—that is, if the truth of the matter is that class certification is not a requisite for the continued exercise of CAFA jurisdiction—then other weighty concerns are implicated. Indeed, if those courts are mistaken as to the state of the law, then they inadvertently have committed the troubling

91. *Id.* at *1–2.

92. *Id.* at *2 (internal quotation marks omitted).

93. See *supra* Section II.A. Again, the *Falcon* court might contend, though it did not articulate its holding as such, that the *McGaughey* court also ultimately based its ruling on the lack of a “reasonably foreseeable possibility” of class certification. See *Arabian*, 2007 WL 2701340, at *3–5.

94. See *supra* Section II.D.

95. See *supra* Section II.C.

96. See *supra* Sections II.B.1, 2, 4.

97. See *supra* Section II.B.3.

offense of relinquishing a portion of the subject matter jurisdiction granted them by Congress without citing the sort of exceptional circumstances capable of justifying such a significant departure from the usual practice of exercising the full range of jurisdiction allowed by Congress.⁹⁸

The *Giannini* approach also venerates comity and economy, treating them as separate and vital prongs of the analysis to determine whether dismissal is in order. That approach also injects other valid considerations, such as fairness and convenience, into the analysis. Like the *McGaughey* approach and the *Falcon*, *Arabian*, and *Hoffer* approach, though, the *Giannini* approach treats class certification as a requisite for the exercise of CAFA jurisdiction, despite the utter absence of such a requirement on the face of the statute. Moreover, the *Giannini* approach arguably requires commission of yet another offense—contortion of the supplemental jurisdiction statute in order to treat mere class *allegations* as anchor *claims* capable of supporting the exercise of supplemental jurisdiction.

The approaches leading to case retention after denial of certification also leave something to be desired. The *Garcia* approach is owed high marks for not reading a class-certification requirement into CAFA. However, that feat is achieved at the expense of comity and conservation of federal court resources, as the end result is the adjudication of state claims by federal courts without advancing the federal policies supporting the grant of jurisdiction in the first place. The *Genenbacher*, *Levitt*, and *Colomar* approach works the same violence to comity and resources but also, by resorting to *St. Paul* and its progeny to argue around consideration of decertification, implicitly reads a class-certification requirement into CAFA.⁹⁹

III. CHARTING A NEW COURSE

Perhaps there is a way, though, to borrow from each of the approaches set out above, to incorporate the best elements of each into a heretofore unconsidered mode of analyzing the issue. Such an analytical framework is outlined below. At a general level, this approach would have a federal court concede that, by the plain language of CAFA, class certification is not a requisite for the exercise of or continued exercise of CAFA jurisdiction but would still have the court dismiss the vast majority of cases in which class certification is denied or in which decertification occurs. Dismissal of such cases would be premised, not on a finding that the court lacks subject matter jurisdiction, but on the exercise of the court's power to abstain from exercising its subject matter jurisdiction over an action under exceptional circumstances. The exceptional circumstances in such cases would be the needless affront to comity and the integrity of the federal court system posed by the adjudication of a case composed entirely of state law claims without advancing in the slightest the interests that supported Congress's extension of jurisdiction in the first place or any other interest capable of counterbalancing such concerns. To be sure, such an approach would have its critics. Abstention and, more generally, the ability of the federal courts to exercise a more limited range of jurisdiction than that

98. See *infra* Section III.B.

99. See *infra* Section III.A.2.

granted them by Congress, has long been a source of much controversy,¹⁰⁰ and, as will be discussed, the outer limits of a federal court's power to abstain remain unclear. Still, criticized or not, the power of the federal courts to abstain under exceptional circumstances endures. To the extent courts feel compelled to step aside once the option of class treatment is off the table, an abstention approach certainly would be preferable to the contortions of statutory language that, in the majority of cases, has carried the day. Before abstention may even be considered, though, the issue of whether a court's CAFA jurisdiction abides the denial of class certification or decertification must first be put to rest.

A. *The Jurisdictional Issue*

The majority of the courts called upon to decide whether CAFA jurisdiction survives the denial of class certification or decertification, regardless of whether they ultimately have decided to retain the cases before them, appear to have read a class-certification requirement into CAFA's definition of the term "class action."¹⁰¹ However, under general principles of statutory interpretation, CAFA cannot be read to require certification of a class or the continuing presence of a class as a prerequisite to the exercise of CAFA jurisdiction. Under CAFA's plain language, CAFA jurisdiction attaches the moment a pleading featuring class allegations pursuant to Rule 23 or one of its state analogs is filed, and, in the absence of statutory language demanding a contrary result, an order denying class certification or ordering decertification cannot destroy that jurisdiction.¹⁰²

1. CAFA in Black and White

As described in Part I.A, *supra*, CAFA broadly defines the term "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."¹⁰³ The term "class" is defined as "all of the class members in a class action," and the term "class members," in turn, is defined as "the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action."¹⁰⁴ Also relevant to the current discussion is the statute's declaration that it "shall apply to any class action before or after the entry of a class certification order by the court with respect to that action."¹⁰⁵ Missing from CAFA, though, is a provision squarely addressing the implications of the denial of class certification or decertification (e.g., there are no provisions stating, "jurisdiction under this subsection shall terminate upon denial

100. Compare David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing in favor of broader discretion for the federal courts to decide when to exercise the jurisdiction granted by Congress), with Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984) (arguing "that neither total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers").

101. See *infra* Section III.A.2.

102. See *infra* Section III.A.3.

103. 28 U.S.C. § 1332(d)(1)(B) (2006) (emphasis added).

104. *Id.* §§ 1332(d)(1)(A), (D).

105. *Id.* § 1332(d)(8).

of class certification,” or “the term ‘class action’ shall not include an action in which a motion for class certification has been denied”).¹⁰⁶

2. Attempts at Statutory Interpretation Thus Far

Having broadly examined the opinions issued by the courts that have assessed the ramifications of the denial of class certification or of decertification for CAFA jurisdiction, the focus now shifts to the portions of those opinions that speak more narrowly to the question of whether class certification, or at least the potential for class certification, is a requisite for the continued exercise of CAFA jurisdiction and to consideration of whether and how the courts’ answers to that question can be reconciled with the actual language of CAFA. Examination of the courts’ opinions reveals little in the way of explicit examination and interpretation of the text of CAFA. As explained above, most of the courts that have passed on the issue, implicitly or explicitly, have read a class-certification requirement into CAFA, but they have not overtly tethered their readings to particular language from CAFA. Those courts certainly have not pointed to any language from CAFA that might be read to expressly impose eventual class certification as part of the CAFA definition of a “class action” or otherwise as a requisite for the continued exercise of CAFA jurisdiction. No such language appears in the statute. If the courts’ decisions are to be reconciled with the language of the statute at all, as they must be, the only reasonable explanation for the courts’ willingness to view class certification as the sine qua non of CAFA jurisdiction is that the courts have operated on the premise that either the denial of class certification or, in some cases, the absence of a “reasonably foreseeable possibility” of class certification in the future, at least has the potential to remove a case from the ambit of “class action,” as that term is defined in CAFA. The courts’ opinions simply do not offer any other textual explanation for their analyses and decisions.

This reading of the term “class action” is perhaps most apparent in the opinions of those courts that have dismissed after denial of class certification. The *McGaughey* court arguably was the most explicit in its literal reading of “class action,” stating, “Because Plaintiff’s motion for class certification must be denied, Plaintiff’s action *is no longer a class action*, and this court cannot retain subject matter jurisdiction in diversity over Plaintiff’s action pursuant to the Class Action Fairness Act.”¹⁰⁷ The *Falcon* court was less clear in its reasoning, rejecting the defendant’s argument that denial of class certification had rendered the case “something other than a ‘class action,’” acknowledging that CAFA does not list class certification as part of its definition of a “class action,” but still ultimately concluding that, “[t]o be sure,” dismissal was in order due to the absence of a “reasonably foreseeable possibility” of class certification.¹⁰⁸ If the *Falcon* court’s decision is to be reconciled at all with the language of CAFA, it can only be said that the court concluded that denial of class certification itself does not immediately

106. See *id.* § 1332(d).

107. *McGaughey v. Treistman*, No. 05 Civ. 7069(HB), 2007 WL 24935, at *3 (S.D.N.Y. Jan. 4, 2007) (emphasis added).

108. *Falcon v. Phillips Elec. N. Am. Corp.*, 489 F. Supp. 2d 367, 368 (S.D.N.Y. 2007).

render a case “something other than a ‘class action’” but that the absence of even a “reasonably foreseeable possibility” of class certification at some point in the future does strip a case of its “class action” status for purposes of CAFA.¹⁰⁹ The court’s opinion simply offers no other explanation for the court’s interpretation and application of CAFA. The *Arabian* and *Hoffer* courts merely parroted the *Falcon* standard and mimicked that court’s dismissal.¹¹⁰ In doing so, it would seem that those courts also accepted the underlying premise that, in the absence of a “reasonably foreseeable possibility” of class certification, an action is not a “class action” for purposes of CAFA. Again, there is no other way to explain the courts’ rulings because there is no other statutory language upon which their decisions might have turned.

Even several of the courts that have foregone dismissal appear to have read a class-certification requirement into CAFA’s definition of “class action.” The *Genenbacher*, *Levitt*, and *Colomar* courts all felt the need to explain away the denial of class certification or, in the case of *Levitt*, decertification before proceeding with the cases before them.¹¹¹ Each court emphasized that denial of class certification or decertification was an event that post-dated filing or removal and therefore was incapable of impacting the court’s subject matter jurisdiction.¹¹² In doing so, these courts appear to have reasoned that the absence of a class, either due to denial of class certification or decertification, *might have been* capable of stripping an action of its status as a “class action” under CAFA were it not for timing. Had the courts not adopted such an interpretation of “class action,” there would have been no need for the courts to address the issue at all. For example, if the *Genenbacher* court had not viewed class certification as part and parcel of CAFA’s definition of “class action,” there would have been no need for the court to go to great lengths to analogize denial of class certification to the post-removal change in amount in controversy that the Supreme Court held could not defeat subject matter jurisdiction in *St. Paul*.¹¹³ The court simply could have explained that CAFA provides a definition of “class action” broad enough to encompass even an action in which class certification has proven to be an impossibility.

It would appear that only one court—the *Garcia* court—has issued an opinion reflecting at least some meaningful analysis of the actual text of CAFA.¹¹⁴ Though

109. See *id.*

110. See *supra* Sections II.D.2, 3.

111. See *supra* Sections II.B.1, 2, 4.

112. See *supra* Sections II.B.1, 2, 4.

113. Moreover, *St. Paul* dealt, at least in part, with a plaintiff’s attempt at forum manipulation by lowering the amount in controversy after removal. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293–94 (1938). Such forum manipulation concerns arguably are not implicated, though, when the post-removal change stems from an act of the court—denial of class certification or decertification—not an act of any party.

114. After this article was submitted for publication, the Southern District of Illinois took up the issues discussed herein in *Ronat v. Martha Stewart Living Omnimedia, Inc.*, No. 05-520-GPM, 2008 WL 4963214 (S.D. Ill. Nov. 12, 2008). Having denied class certification on several grounds, the *Ronat* court turned to the question of subject matter jurisdiction. See *id.* at *6–7. The court aligned itself with the *McGaughey* court in holding that denial of class certification automatically had vitiated the court’s subject matter jurisdiction. *Id.* After noting its role as a “textualist[],” the *Ronat* court explained that the absence of continuing subject matter jurisdiction was “clear” from “the statute itself.” *Id.* at *7. The court quoted the portion of CAFA stating that the statute “shall apply to any class action before or after the entry of a class certification order” and the portion defining “class certification order” as “an order issued by a court approving the treatment of some or all aspects of a civil action

the *Garcia* court aligned itself with the *Genenbacher*, *Levitt*, and *Colomar* courts by refusing to dismiss for lack of subject matter jurisdiction, the *Garcia* court arrived at its decision through a markedly different channel. Rather than viewing the denial of class certification or decertification as a deficiency but one that should be overlooked because it arises after a case has arrived in federal court, the *Garcia* court looked closely at the language of CAFA, particularly at CAFA's definition of "class action."¹¹⁵ The *Garcia* court seized upon the portion of CAFA defining a "class action" as an action "filed under" Rule 23 or one of its state analogs and thus accepted the premise that CAFA jurisdiction hinges only on the presence of sufficient class allegations at the time of filing or removal.¹¹⁶ This interpretation allowed the *Garcia* court to disregard altogether events such as denial of class certification or decertification when addressing the jurisdictional challenge before it.

3. *Garcia* Moves to the Head of the Class

"In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."¹¹⁷ Resort to legislative history and other potential indicia of congressional intent is permissible only upon a finding that the statutory language in question is ambiguous.¹¹⁸ The plain meaning of statutory language may not be avoided by arguing "that Congress may not have foreseen all of the consequences of a statutory enactment."¹¹⁹ Finally, the title of a statute or of a subsection of a statute is only relevant for purposes of interpretation "where a statute is susceptible of two constructions."¹²⁰

These basic principles of statutory interpretation may not be capable of neatly resolving every situation, but when they are brought to bear on language as plain

as a class action." *Id.* (quoting 28 U.S.C. § 1332(d)(8), (d)(1)(C)). However, the *Ronatt* court's textual analysis left something to be desired, as the court made no attempt to explain why the quoted provisions "clear[ly]" meant that the denial of class certification had undone the court's subject matter jurisdiction, continuing and concluding by simply stating, "[t]his is no longer a class action and so the case ends here." *Id.* For a detailed discussion of the language relied upon by the *Ronatt* court, see *infra* Part III.A.3 and note 123.

115. See *supra* Section II.B.3.

116. See *supra* Section II.B.3.

117. *Household Credit Servs., Inc. v. Pfenig*, 541 U.S. 232, 239 (2004) (internal quotation marks omitted) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

118. See, e.g., *BedRoc Ltd. v. United States*, 541 U.S. 176, 187 n.8 (2004) ("[L]ongstanding precedents... permit resort to legislative history only when necessary to interpret ambiguous statutory text.... 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.'" (quoting *United States v. Fisher*, 2 Cranch 358, 399, 2 L.Ed. 304 (1805))).

119. See *Lockhart v. United States*, 546 U.S. 142, 146 (2005) (internal quotation marks omitted) (quoting *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991)).

120. See *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks omitted) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)) (refusing to consider the subchapter title "Public Services" in 104 Stat. 337 when deciding whether inmates in state prisons were covered by a portion of the ADA prohibiting discrimination by "public entities"); see also *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947) ("[T]he title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." (citations omitted)).

and unambiguous as that of the relevant portions of CAFA, the proper outcome is rather clear. Again, CAFA defines the term “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.”¹²¹ In providing this definition of “class action,” particularly with its use of the phrase “filed under,” Congress unambiguously set the time of filing as the proper point to assess CAFA jurisdiction and the presence of class allegations at that time as the key requirement of CAFA jurisdiction. This reading of the term “class action” is bolstered by Congress’s express declaration that the provisions of CAFA “shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.”¹²² A necessary implication of the provision is that an action can be a “class action” for purposes of CAFA even if a class has not been certified.¹²³ Thus, the provision strongly undercuts any notion that class certification is a hidden element of CAFA’s definition of “class action” or that Congress intended to install class certification as an essential ingredient of CAFA jurisdiction through any other means.

To sum up the plain meaning of the relevant portions of CAFA and their implications, CAFA grants federal courts jurisdiction over “class action[s].” Any action “filed under” Rule 23 or one of its state analogs is a “class action.” Nothing in CAFA’s definition of “class action” suggests that the eventual denial of class certification or decertification of a class already certified might remove an action from the ambit of the term “class action.” Also absent is any other provision or language purporting to speak to the ramifications of the eventual denial of class certification or of decertification, much less language dictating dismissal for lack of jurisdiction under such circumstances. Accordingly, as the *Garcia* court—and

121. 28 U.S.C. § 1332(d)(1)(B) (2006). One might question the wisdom of utilizing the phrase “filed under,” as opposed to something along the lines of “invoking Rule 23...” or “the filing of a complaint featuring allegations consistent with Rule 23...” “Filed under” suggests that Rule 23 and its state analogs provide an independent cause of action or some distinct procedural mechanism for filing complaints, which is not the case. Nevertheless, it is the wording that Congress settled upon, and, for current purposes, the phrase certainly does not suggest the imposition of a class certification requirement as a requisite for the exercise or continuing exercise of class certification. Indeed, as set out herein, the phrase suggests an intent quite to the contrary.

122. 28 U.S.C. § 1332(d)(8).

123. It is not difficult to imagine an argument that the “before and after” language divides a “class action” into two phases, one before and one after a court’s certification of a class, and thereby reflects Congress’s intent to emplace eventual class certification as a condition of the continued exercise of CAFA jurisdiction. Such a reading goes too far, though. First, on a very literal level, a case in which class certification has been finally and ultimately denied would still fall within the ambit of the provision. In such a case, any point in time from the filing of the complaint to the entry of a final order disposing of the action technically could be characterized as a point “before...the entry of a class certification order by the court.” More to the point, the provision only purports to elaborate on circumstances under which the provisions of CAFA “shall apply,” not on circumstances under which the provisions of CAFA “shall only apply” and certainly not on any circumstances under which the provisions of CAFA “shall not apply.” Indeed, as to the latter, there are provisions of CAFA that purport to do just that, but those provisions do not designate cases in which class certification has been denied or in which decertification has occurred as circumstances preventing the exercise or further exercise of CAFA jurisdiction. In light of the rest of the statutory language, particularly the broadly drafted definition of the term “class action,” it likely would take more than a provision that sets forth an arguably non-exclusive list of circumstances under which CAFA *does* apply to limit the reach of the statute. Indeed, in context, the provision seems more like a simple acknowledgment on the part of Congress that class certification will never be resolved at the time a case is filed in federal court and rarely if ever resolved before the time for removal from state court has expired but that courts should not let those facts stop them from, at least initially, exercising CAFA jurisdiction over actions.

only the *Garcia* court—has held, CAFA jurisdiction irrevocably attaches at the moment a pleading invoking Rule 23 or one of its state analogs is filed, and a federal court retains CAFA jurisdiction even after it has denied class certification or decertified a class, regardless of whether there is a “reasonably foreseeable possibility” of or any other potentiality for future certification of a class.

Because the operative language from CAFA is clear, there is no need or even latitude to resort to legislative history.¹²⁴ Even were that not so, review of CAFA’s legislative history provides precious little guidance on the ramifications of the denial of class certification or of decertification on CAFA jurisdiction. Only the Senate released a report on CAFA, and the closest that report comes to addressing the question discussed here is with its response to “[c]ritics’ [c]ontention” that CAFA would “cause delay and mass confusion because of (a) the difficulty of assessing compliance with jurisdictional requirements at the outset and (b) the potential that class membership and definitions will change over time.”¹²⁵ However, that portion of the report addresses only the inability of subsequent changes in the amount in controversy or in the citizenship of class members to impact a federal court’s jurisdiction.¹²⁶ The Senate Report explains that there are certain “rules of the road” that prevent “plaintiffs who believe[] the tide [i]s turning against them” from “amend[ing] their complaint months (or even years) into the litigation to require remand to state court.”¹²⁷ The Senate Report does not specifically broach the question of whether denial of class certification or decertification—acts of the court and, therefore, highly unlikely to be acts of attempted forum manipulation—might impact the court’s subject matter jurisdiction.¹²⁸

Nevertheless, there is one aspect of the legislative history of CAFA worthy of note: the 2003 Senate version of CAFA featured a provision requiring dismissal upon the denial of class certification, but that provision was dropped as part of the compromise that ultimately led to CAFA’s passage.¹²⁹ Were there room for consideration of legislative history here, the omission of that provision in the iteration of the bill that ultimately passed would suggest against the notion that class certification or a reasonable prospect of class certification is required for the exercise of CAFA jurisdiction.

Receiving little aid from legislative history, one could argue that Congress must not have foreseen that granting CAFA jurisdiction under the terms that it did might

124. See, e.g., *BedRoc v. United States*, 541 U.S. 176, 187 n.8 (2004).

125. S. REP. NO. 109-14, at 68 (2005), reprinted in 2005 U.S.C.C.A.N. 4, 63.

126. See *id.* at 68–72, 2005 U.S.C.C.A.N. 4, 63–68.

127. See *id.* at 70, 71, 2005 U.S.C.C.A.N. 4, 65, 66.

128. See *id.* Moreover, as one commentator has pointed out, for other reasons, “[a] number of federal courts have declined to rely on the 2005 Senate Report.” See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U.P.A. L. REV. 1439, 1444 n.12 (U. Penn. Law School, Public Law Research Paper No. 08-03), available at <http://ssrn.com/abstract=1083785> (citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006)) (discussing the debate as to whether the Senate Report was issued prior to the vote on CAFA and thus as to whether courts should consider the report).

129. See Burbank, *supra* note 128, at 1456 n.62 (“Senator Dodd asserted that the ‘compromise eliminates the dismissal requirement, giving federal courts discretion to handle Rule 23 ineligible cases appropriately. Potentially meritorious suits will thus not be automatically dismissed because they fail to comply with the class certification requirements of Rule 23.’”) (quoting 149 CONG. REC. S16,102–03 (daily ed. Dec. 9, 2003)).

result in federal courts being asked to adjudicate the de minimis claims of name plaintiffs remaining after the denial of class certification, especially in cases where name plaintiffs are not even diverse from the defendant(s). However, any such lack of foresight by Congress, even if demonstrable, simply cannot justify a departure from the plain language of the statute in order to superimpose a class-certification requirement onto CAFA.¹³⁰ Similarly, one could point to the oddness of adjudicating a *non-class* action under the auspices of a statute called the *Class Action Fairness Act*, as the *McGaughey* court appeared to do.¹³¹ However, the title of the statute cannot undermine its plain language, especially when a portion of that plain language provides a definition, albeit an unintuitive one, of the very term from the statutory title that otherwise might give one pause.¹³² In short, as the *Garcia* court concluded, there is just no way of getting around CAFA's broad definition of "class action."¹³³ Thus, if courts feel it is incumbent upon them to dismiss CAFA cases once class certification is off the table, they are going to have to look beyond the question of whether jurisdiction exists to the question of whether jurisdiction ought to be exercised.

B. The Abstention Solution

The Supreme Court has framed the issue of abstention as a balancing act, pitting federal interests favoring retention of a case against countervailing concerns, such as comity and federalism.¹³⁴ Viewed in this manner, abstention may be an option for a federal court struggling to determine whether it should dismiss a CAFA action after having decided that class treatment of the action would be inappropriate or unworkable. Federal interests in having federal courts retain such cases are minimal and are thus outweighed by the concerns and risks that inevitably would flow from the courts' needless resolution of state law issues in such cases.

1. Abstention—A Brief Overview

In its 1996 opinion *Quackenbush v. Allstate Insurance Co.*, the Supreme Court provided a thorough overview of the abstention doctrines it had recognized and the backdrop against which those doctrines had developed.¹³⁵ The Court began by discussing the decisions and opinion excerpts typically invoked by those who argue that the federal courts have little to no discretion when deciding whether to exercise some portion of the subject matter jurisdiction vested in them by Congress.¹³⁶ As the Court pointed out, it has been said that the federal courts "have a virtually unflagging obligation...to exercise the jurisdiction given them"¹³⁷ and that federal courts "have no more right to decline the exercise of jurisdiction which is given,

130. See *Lockhart v. United States*, 546 U.S. 142, 146 (2005).

131. See *supra* Section II.A.

132. See *Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998).

133. See *supra* Section II.B.3

134. See *infra* Section III.B.1.

135. 517 U.S. 706 (1996).

136. *Id.* at 716.

137. *Id.* (internal quotation marks omitted) (parenthetically quoting *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 821 (1976)).

than to usurp that which is not."¹³⁸ Nevertheless, the Court pointed out that the duty of the federal courts to exercise their jurisdiction "is not...absolute" and that there is still room for federal courts to abstain from exercising their jurisdiction under "exceptional circumstances where denying a federal forum would clearly serve an important countervailing interest," such as where "abstention is warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration."¹³⁹

The Court went on to briefly summarize the species of abstention recognized thus far: (1) *Younger* abstention, allowing federal courts "to refrain from hearing cases that would interfere with a pending state criminal proceeding...or with certain types of state civil proceedings";¹⁴⁰ (2) *Pullman* abstention, allowing federal courts to abstain when "the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law";¹⁴¹ (3) *Thibodaux* abstention, allowing federal courts to avoid "cases raising issues 'intimately involved with [the States'] sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law";¹⁴² (4) *Huffman* abstention, allowing federal courts to abstain from adjudicating "cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes";¹⁴³ (5) *Colorado River* abstention, allowing federal courts to refrain from exercising jurisdiction over "cases which are duplicative of a pending state proceeding";¹⁴⁴ and, finally, the brand of abstention at issue in *Quackenbush*, (6) *Burford* abstention, allowing federal courts to withhold jurisdiction in those cases where "the availability of an alternative, federal forum threaten[s] to frustrate the purpose of [a] complex administrative system" established by a state.¹⁴⁵

As the Court went on to explain, the exercise of abstention in order to dismiss an action outright, as opposed to entering a stay, largely has been reserved for cases involving requests for equitable or discretionary relief, such as injunctive and/or declarative relief.¹⁴⁶ Claims at law for monetary damages traditionally have been subject, at most, to the entry of a stay pursuant to abstention principles, which "postpones adjudication of the dispute" but does not result in immediate relinquishment of jurisdiction by the court.¹⁴⁷ In the case at bar, the Ninth Circuit

138. *Id.* (internal quotation marks omitted) (parenthetically quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

139. *Id.* (internal quotation marks omitted) (quoting *Colorado River*, 424 U.S. at 813, 817).

140. *Id.* (citing, among others, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971)).

141. *Id.* at 716-17 (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)).

142. *Id.* at 17 (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)).

143. *Id.* (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943)).

144. *Id.* (citing *Colorado River*, 424 U.S. 800).

145. *Id.* at 725 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943)).

146. *Id.* at 718 (citing *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1980)).

147. *Id.* at 719 (emphasis omitted) (citing *Thibodaux*, 360 U.S. at 28-30). As several commentators have noted, the Court's distinction between employing abstention principles to stay an action for monetary damages, instead of dismissing the action outright, is somewhat illusory. See, e.g., Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1899-1900 (2004). Due to principles of issue preclusion, a federal court's stay of a federal action in favor of a parallel state action is likely to result in the same outcome as

had applied a per se bar to application of *Burford* abstention to any case not seeking equitable relief.¹⁴⁸ The Court rejected such a rigid rule, explaining that it previously had allowed for abstention in cases involving other sorts of discretionary relief, such as in cases seeking declaratory relief, and that the Court had yet to hold “that abstention principles are completely inapplicable in damages actions,” even allowing for stays under the rubric of abstention in certain actions for damages.¹⁴⁹ Nevertheless, the Court made clear that “[u]nder [its] precedents, federal courts have the power to dismiss or remand cases based on abstention principles *only where the relief being sought is equitable or otherwise discretionary*.”¹⁵⁰ Still, the Court appeared to leave itself a bit of room to breathe, explaining that the case at bar did not render it “necessary to inquire more fully as to whether [the] case present[ed] the sort of exceptional circumstances in which...yielding federal jurisdiction might be appropriate.”¹⁵¹

Looking beyond the discretionary–non-discretionary line the Court may or may not have drawn, the *Quackenbush* Court highlighted the balancing act that animates and guides the various abstention doctrines. “Federal courts abstain out of deference to the *paramount interests* of another sovereign, and the concern is with principles of comity and federalism.”¹⁵² A court deciding whether to abstain must render a decision “based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the ‘independence of state action.’”¹⁵³ Justice Kennedy, in his *Quackenbush* concurrence, was the most willing to look beyond the discretionary–non-discretionary distinction relied upon by the majority and to highlight what appear to be the true drivers of the various abstention doctrines, stating:

The traditional role of discretion in the exercise of equity jurisdiction makes abstention easiest to justify in cases where equitable relief is sought, but abstention, including dismissal, is a possibility that may yet be addressed in a suit for damages, if fundamental concerns of federalism require us to face the issue.¹⁵⁴

2. Sufficiently Exceptional Circumstances?

If there indeed is no place for abstention in suits for non-discretionary relief, then abstention is a dead end for most federal courts seeking to avoid the exercise of CAFA jurisdiction after denial of class certification or decertification. However, the *Quackenbush* court left the door cracked, arguably leaving room for later discussions as to whether specific circumstances are sufficiently exceptional to warrant abstention and dismissal even when non-discretionary relief is sought.

dismissal would have. *See id.* Regardless of whether the federal court forces the plaintiff to seek relief solely in state court or chooses to retain the case but delay decision until the state court has ruled, the ruling of the state court is likely to carry the day. *See id.*

148. *Quackenbush*, 517 U.S. at 710 (citing 47 F.3d 350, 354–56 (9th Cir. 1995)).

149. *Id.* at 730, 730–31.

150. *Id.* at 731 (emphasis added).

151. *Id.* (internal quotation marks omitted).

152. *Id.* at 723 (emphasis added).

153. *Id.* at 728 (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943)).

154. *Id.* at 734 (Kennedy, J., concurring).

Perhaps, as Justice Kennedy suggested, there could be situations where “fundamental concerns of federalism require” abstention and, consequently, dismissal, even in a suit for monetary damages.¹⁵⁵ Perhaps, there are situations in which the balance between “the federal interests in retaining jurisdiction over the dispute”¹⁵⁶ are simply outweighed by other concerns, even if the relief sought from the federal court is not discretionary.

As set out below, the balance, or lack thereof, of interests left when the prospect of class certification vanishes from a CAFA case just might fit the bill. The interests weighing in favor of federal courts’ retention of such cases is minimal to the point of nonexistence. That paucity of federal interest, in turn, unleashes and exacerbates certain countervailing concerns—risks and costs that are inevitable when federal courts address issues of state law, as they often must do, but that nevertheless are *needless* when there is no compelling federal interest in having the federal courts undertake them.

a. Weighing in Favor of Federal Court Retention...

Turning first to the side of the scale hosting the “federal interests in retaining jurisdiction,”¹⁵⁷ typically, at the point in time at which a court must consider the propriety of abstention, the federal interest supporting a case’s presence in federal court in the first place is as viable as ever. For example, in *Younger*, nothing had occurred between the time the plaintiff had filed his action and the time at which the district court had elected to abstain to lessen or alter the federal court’s interest in answering the federal questions raised by the plaintiff.¹⁵⁸ Similarly, in *Quackenbush*, nothing had occurred prior to the district court’s decidedly erroneous decision to abstain to lessen the federal interest in hearing a case in which the requisites for diversity jurisdiction had been met.¹⁵⁹

CAFA presents a different scenario. Generally speaking, the primary federal interest at the root of CAFA jurisdiction is seeing to the consideration of “cases of national importance” by the federal courts rather than the courts of a single jurisdiction.¹⁶⁰ In the absence of a class, the ability of a class action to have a national impact is drastically reduced, if not eliminated, and, consequently, such a case loses its air of “national importance.”¹⁶¹ This transience of federal interest sets CAFA cases apart from typical abstention-candidate cases. At the point class treatment is removed from the equation in a CAFA case, “federal interests in

155. *See id.*

156. *See id.* at 728.

157. *See id.* at 728 (quoting *Burford*, 319 U.S. at 334).

158. *See Younger v. Harris*, 401 U.S. 37 (1971).

159. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). Though, as scholars have pointed out, the exact nature of the federal interest(s) in having federal courts hear diversity cases remains to this day somewhat unclear. *See Burbank*, *supra* note 128, at 21, 25 (discussing various potential rationales for the framers’ grant of diversity jurisdiction, including “inten[t] to make available a neutral forum for litigants worried about local bias in the courts of states other than their own” and “mak[ing] available a forum where the creditor class would receive ‘justice.’”).

160. *See Pub. L. No. 109-2*, §§ 2(a)(4)(A), 2(b)(2) (2005).

161. *See id.* § 2.

retaining jurisdiction” over the case are rendered negligible.¹⁶² The language of CAFA itself bolsters this slight assessment of the remaining federal interests in retention of a CAFA case in the absence of a class. The provision of CAFA rendering the statute inapplicable to “proposed plaintiff classes” of fewer than 100 members¹⁶³ suggests that the sort of case left when class certification has been ruled out—which in all likelihood would include only a handful of name plaintiffs—would not qualify as the sort of “case[] of national importance” targeted by Congress.¹⁶⁴

b. And Against Retention...

Weighing against these slight federal interests are significant comity concerns. Cases in federal court *solely* under the auspices of CAFA typically are composed of state law claims.¹⁶⁵ As the Supreme Court stated in the context of its pendent jurisdiction analysis in *United Mine Workers of America v. Gibbs*, “Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.”¹⁶⁶ Such comity concerns have led courts to refuse to exercise pendent jurisdiction after dismissal of all the federal claims in federal-question cases and consequently to dismiss or remand remaining state law claims.¹⁶⁷ As the *Giannini* court clearly perceived,¹⁶⁸ the situation faced by such courts is quite analogous to the situation faced by a court trying to decide whether to dismiss a “classless” CAFA case. Of course, the analogy is not perfect, as the exercise of supplemental jurisdiction, unlike the exercise of CAFA jurisdiction, always has

162. Of course, there may occasionally be cases in which, even after the denial of class certification, an action meets the general diversity requirements (i.e., in which all plaintiffs are diverse from all defendants and at least one plaintiff independently claims an amount in controversy exceeding \$75,000). See 28 U.S.C. § 1332 (2006). In such cases, a federal interest would remain; however, because the general diversity statute would cover such cases, the issue of continued exercise of CAFA jurisdiction would be moot.

163. Pub. L. No. 109-2 § 4(a)(5)(B).

164. See *id.* § 2.

165. This may not always be the case, though. For example, *McGaughey* and *Levitt* involved federal claims under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 (2000). See *McGaughey v. Treistman*, No. 05 Civ. 7069(HB), 2007 WL 24935, at *1 (S.D.N.Y. Jan. 4, 2007); *Levitt v. Fax.com*, No. WMN-05-949, 2007 WL 3169078, at *1 (D. Md. 2007). However, because the TCPA “is the rare federal statute that does not provide federal question jurisdiction,” *McGaughey*, 2007 WL 24935, at *3, the plaintiffs in those cases looked to CAFA.

166. 383 U.S. 715, 726 (1966) (emphasis added). The Court further pointed out that “[s]ome have seen [such comity] consideration as the principal argument against exercise of pendent jurisdiction.... ‘Federal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation.’” *Id.* at 727 n.15 (citing *Strachman v. Palmer*, 177 F.2d 427, 433 (1st Cir. 1949) (Magruder, J., concurring)).

Regardless of the Supreme Court’s view, some argue that the Constitution “does not betray a preference for the resolution of disputes in either federal or state court” and that a “baseline forum neutrality” reflected in the Constitution and in Congress’s jurisdictional enactments argues against hesitance by the federal courts to resolve issues of state law. See James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1055, 1056 (1994). “In short, absent direction from Congress, federal and state courts are properly seen as functional equivalents comprising a single national system. In those substantial areas where their jurisdictional powers overlap, they are interchangeable.” *Id.* at 1056–57.

167. See *id.*; see also 28 U.S.C. § 1367(c) (“The district courts may decline to exercise supplemental jurisdiction over a claim...if...the district court has dismissed all claims over which it has original jurisdiction.”).

168. See *supra* Section II.C.

been viewed as a matter of discretion.¹⁶⁹ Still, such supplemental jurisdiction cases support the notion that “needless” decisions of state law by the federal courts implicate legitimate comity concerns and that a decision of state law is “needless” when the federal interests that led the case into federal court in the first place have evaporated before the court has had the opportunity to adjudicate the state law claims.¹⁷⁰ Because the federal interests supporting the presence of CAFA cases in federal court dissipate at the moment class certification stops being an option,¹⁷¹ any subsequent decisions of state law would be “needless.”¹⁷² Avoidance of such “needless” determinations of state law weighs heavily against retention of a “classless” CAFA case by a federal court.

In addition to invoking comity concerns, the unnecessary resolution of questions of state law by the federal courts results in their *needless* assumption of the risk that their interpretations of ambiguous points of state law will “be displaced tomorrow by a state adjudication.”¹⁷³ When state law is ambiguous, as may often be the case in complex class actions asserting novel theories, a federal court’s interpretation “cannot escape being a forecast rather than a determination.”¹⁷⁴ If that forecast is incorrect, it may become necessary for a state court to set the record straight. As the Supreme Court put it in *Pullman*, “[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is...supplanted by a controlling decision of a state court.”¹⁷⁵ Such situations lead to confusion and constitutional friction between the federal and state systems that, if possible, should be avoided.¹⁷⁶ Again, because the federal interest in having federal courts entertain CAFA cases withers in the absence of a class,¹⁷⁷ assumption of such a risk by virtue of ruling on state law claims after the denial of class certification or after decertification is simply unnecessary, which tips the scale further against retention of CAFA cases by the federal courts once class treatment has been ruled out.

Finally, there is the issue of *needless* expenditure of limited federal court resources. By injecting a greater number of class actions into the federal court system, CAFA has increased the burdens shouldered by the federal courts, not only by increasing the raw number of cases handled by the federal courts but by ushering in a larger number of cases likely to involve complex issues.¹⁷⁸ The federal courts’ expenditure of the additional resources necessary to adjudicate the cases of

169. See, e.g., *Gibbs*, 383 U.S. at 726–28.

170. See *id.* at 726.

171. See *supra* Section III.B.2.a.

172. See, e.g., *Gibbs*, 383 U.S. at 726–28.

173. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

174. *Id.* at 499.

175. *Id.* at 500.

176. See *id.*

177. See *supra* Section III.B.2.a.

178. See Burbank, *supra* note 128, at 94 n.383 (“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.” (citing Elizabeth J. Cabraser et al., *The Class Action Fairness Act of 2005: The Federalization of U.S. Class Action Litigation*, 43 CAN. BUS. L.J. 398, 401 (2006)) (internal quotation marks omitted)); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1726 (2008) (“[F]rom a purely administrative perspective, the resulting increase in complex cases...threaten[s] to consume scarce judicial resources...[of] an already overburdened federal judiciary.”).

“national importance” targeted by Congress with CAFA, of course, is unavoidable.¹⁷⁹ However, the expenditure of such additional federal resources is not as justifiable in “classless” CAFA cases, in which no federal interests are being redeemed as part of the bargain.¹⁸⁰ Thus, conservation of federal court resources also weighs against the already minimal federal interests in having federal courts retain CAFA cases in the absence of a class and weighs in favor of abstention.

c. On Balance...

Accordingly, if the abstention analysis indeed is a balancing act, the side of the scale hosting “federal interests in retaining jurisdiction” is uniquely unburdened in a CAFA case once class certification is off the table.¹⁸¹ Thus, the aforementioned countervailing concerns exacerbated by this paltriness of federal interest—concerns regarding decisions of state law and expenditure of federal court resources rendered *needless* by the exodus of the only federal interests supporting federal court jurisdiction—easily prevail. This state of affairs argues in favor of recognizing the power of the federal courts to abstain in such cases.

CONCLUSION

Judging from the varied reactions courts have had thus far, it may be a while before the dust settles and the federal courts settle upon a consistent approach to dealing with CAFA cases in the wake of the denial of class certification or of decertification. However, a proper first step on that journey would be for the courts to recognize and accept that they retain jurisdiction over CAFA cases even in the absence of a class. This would allow the federal courts to shift their focus to other possible means of quelling the concerns and doubts that keep them from embracing such cases, such as the abstention solution offered here, which, barring intervention by Congress, may be the only way to balance the unavoidable realities of CAFA’s jurisdictional grant and concerns for comity and the integrity of the federal court system.

179. See Pub. L. No. 109-2, § 2(b)(2) (2005); S. REP. NO. 109-14, at 53 (2005), *reprinted in* 2005 U.S.C.A.N. 4, 49 (“Ultimately, regardless of the impact on the federal court caseload, large interstate class actions belong in federal court.”).

180. See *supra* Section III.B.2.a.

181. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996).