

# Unsettling The Settled: Is There A Re-emerging Debate Regarding The Role Of Choice-Of-Law In Class Certification Proceedings?

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FOR YEARS, defendants opposing multi-jurisdiction product liability or alleged toxic exposure class actions in federal courts have benefited from a plethora of decisions denying certification of such classes based in whole or in part upon choice-of-law concerns. Most federal courts have found that where individual choice-of-law determinations are necessary, and different states' laws apply to different putative class members' claims, certification is improper under various subsections of Federal Rule of Civil Procedure 23(a) and 23(b). Because class actions potentially turn small value individual actions into "bet the company" litigation, the success and reliability of the choice-of-law defense has been a welcome development.

However, class actions continue to be litigated in federal court, and plaintiffs are searching for new ways to reverse the trend against certification of multi-jurisdiction product liability or toxic tort classes based on choice-of-law considerations. Several writers (some of whom also represent plaintiffs in class action lawsuits) have recently argued in the academic literature that the Class Action Fairness Act of 2005 ("CAFA")<sup>1</sup> alters the need for choice-of-law analysis. By increasing the likelihood that multi-jurisdiction class actions will be litigated in federal rather than state court, they



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<sup>1</sup> Pub. L. 109-2, § 9, 119 Stat. 4 (2005).

argue that CAFA in essence requires that federal courts analyze the laws of multiple jurisdictions when necessary. Under this rationale, “[n]o longer is it appropriate to summarily deny certification on the grounds that multiple state laws are involved.”<sup>2</sup> Other articles suggest that, in light of CAFA, prior interpretations of the Supreme Court’s decision twenty-five years ago in *Phillips Petroleum Co. v. Shutts*<sup>3</sup> are now incorrect. *Shutts* rejected the application by a state court of that state’s law to claims from other jurisdictions absent fulfillment of very strict conditions rarely (if ever) met in products liability or toxic tort cases. Many federal courts have incorporated *Shutts* in their choice-of-law determinations. Under this “new” interpretation, the authors seek to transform *Shutts* into support for application of a single state’s law to a multi-jurisdiction class.

This article summarizes recent attacks on the choice-of-law doctrine and offers defense arguments detailing why CAFA does not alter the need for or manner of its application. Although plaintiffs have not pursued these challenges yet in active litigation on a widespread basis, defendants should be vigilant in monitoring for and defending against these arguments. If plaintiffs

successfully argue that choice-of-law analyses are unnecessary or, at least, do not prevent certification where material differences in applicable law exist, defendants will lose a powerful component of their class certification defense.

## I. The Central Nature of Choice-of-Law Analyses

Although most class action defendants are familiar with the choice-of-law issues inherent in multi-jurisdiction products liability and toxic tort class actions, a brief review of *Shutts* and its impact on the current choice-of-law landscape provides helpful context for understanding the potential new challenges to this defense. In *Shutts*, a class of gas company investors located throughout the country filed suit in Kansas state court seeking application of Kansas law to their claims to recover interest on certain royalties from oil leases, most of which were not in Kansas.<sup>4</sup> The Kansas state court certified the class and applied Kansas law to all of the leasing agreements.<sup>5</sup> The defendants’ appeal focused in large part on the impropriety of certification given the differences between Kansas law and the laws of the states in which the leases were located.

Because state laws differed, for example, on key points such as the amount of interest (if any) that could be recovered, the Supreme Court found that the conflicts among the potentially applicable laws could have a major

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<sup>2</sup> Allan Kanner and M. Ryan Casey, *Consumer Class Actions after CAFA*, 56 DRAKE L. REV. 303, 326 (2008) (hereinafter “Kanner & Casey”); *id.* at 329-30 (because CAFA described class actions as “an important and valuable part of the legal system,” Congressional intent “in moving multi-state class actions was not to kill them, but instead bring them under federal management”).

<sup>3</sup> 472 U.S. 797 (1985).

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<sup>4</sup> *Id.* at 815.

<sup>5</sup> *Id.*

impact on the amount of the defendants' liability.<sup>6</sup> The Court also held that class action defendants are entitled to certain due process protections, including having the correct law applied to each claim against them.<sup>7</sup> That absent class members nationwide can be bound by the forum state's law in certain circumstances does not mean in every situation that a defendant's due process rights can be met by having liability assessed based on one state's law as well. In conducting the required choice-of-law analysis, the Supreme Court rejected the idea that presiding over a nationwide class action gave the state court "much greater latitude in applying its own law to the transactions in question than might otherwise be the case."<sup>8</sup> Courts:

... may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.<sup>9</sup>

Instead, for a single state's law to apply to a nationwide class, that state's law "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [that state's] law is not arbitrary or unfair."<sup>10</sup> The Court held that Kansas' lack of interest in or contacts with claims regarding out-of-state leases made application of Kansas law inappropriate.<sup>11</sup>

Although *Shutts* addressed the choice-of-law analysis in state court, federal courts have incorporated its rationale into their choice-of-law decisions.<sup>12</sup> In *Amchem Prods., Inc. v. Windsor*,<sup>13</sup> the Court rejected certification of a Rule 23(b)(3) settlement class of individuals who had been exposed to asbestos based in part on the need to conduct a plaintiff-by-plaintiff choice-of-law analysis that would result in the required application of different state laws to individual class members.<sup>14</sup> Two years later, the Supreme Court reiterated in another asbestos case that nothing in Rule 23 – which is a procedural tool – changes the substantive due process right of the parties to have the correct law applied to each plaintiff's claim.<sup>15</sup>

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<sup>10</sup> *Id.* at 821-22.

<sup>11</sup> *Id.* at 822.

<sup>12</sup> The citations below are to representative leading opinions, although by no means the only opinions, that have denied certification of multi-jurisdiction product liability class actions based on choice-of-law grounds.

<sup>13</sup> 521 U.S. 591 (1997).

<sup>14</sup> *Id.* at 624-25.

<sup>15</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

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<sup>6</sup> *Id.* at 818.

<sup>7</sup> *Id.* at 811.

<sup>8</sup> *Id.* at 820.

<sup>9</sup> *Id.* at 821.

Based on these and dozens of other cases, all but a handful of federal courts have recognized that the determination of what state's law applies to each putative class member's claims "pervades every element" of the class certification analysis under Rule 23 and must be "tackled at the front end" of every class certification inquiry.<sup>16</sup> As the Seventh Circuit noted:

Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court. Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected.<sup>17</sup>

Once addressed, it is "not surprising that all relevant Court of Appeals and the bulk of relevant district court decisions have rejected class certification in products liability cases" involving multiple jurisdictions.<sup>18</sup> Rule 23 cannot be used to change the law otherwise applicable to a plaintiff's claim.<sup>19</sup>

<sup>16</sup> *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 561 (E.D. Ark. 2005).

<sup>17</sup> *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020-21 (7th Cir. 2002) (citations omitted).

<sup>18</sup> *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 65-66 (S.D.N.Y. 2002).

<sup>19</sup> *See Spence v. Glock*, 227 F.3d 308, 313 (5th Cir. 2000); *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (class certification is inappropriate because instructing the jury on different negligence and other laws applicable to nationwide class would be "impossible"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743 n.15 (5th Cir. 1996) (where the laws of

## II. Impact of CAFA on Choice-of-Law Analyses

Some authors have recently contended that by increasing the jurisdiction of federal courts over more multi-jurisdiction product liability and toxic tort class actions, CAFA prohibits federal courts from refusing to certify a class based on differences among the applicable state's laws.<sup>20</sup> This theory is based on the premise that a "national market" has been created by "mass produced goods entering the stream of commerce with no preset purchaser or destination."<sup>21</sup> Consumers across the country suffer the same injuries and have an identical interest in obtaining redress. Nationwide classes under state consumer protection statutes or other state law theories of liability therefore serve the important societal need to "right these wrongs" once, rather than with subclasses for 50 different jurisdictions or in

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different jurisdictions would apply to class members' claims, it is "difficult to fathom how common issues could predominate.").

<sup>20</sup> *Kanner & Casey* at 329-30.

<sup>21</sup> *See Elizabeth J. Cabraser, Just Choose: The Jurisprudential Necessity To Select a Single Governing Law for Mass Claims Arising from Nationally Marketed Consumer Goods and Services*, 14 *ROGER WILLIAMS U. L. REV.* 29, 30 (2009) (hereinafter "Cabraser (2009)"); *Kanner & Casey* at 323; Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act*, 106 *COLUM. L. REV.* 1839, 1842 (2006); *see also id.* at 1857 (discussing "national market class actions" arising from "complex cases involving multiple parties, multiple jurisdictions, and the need to iron out the interests of multiple jurisdictions in controlling the underlying conduct").

millions of individual actions.<sup>22</sup> CAFA serves that interest by allowing federal jurisdiction over the claims. To the extent differences exist between state laws governing fraud, negligence, and other claims, those differences are merely “variations” of the same law rather than true conflicts between different laws.<sup>23</sup> This is, according to the authors, particularly true in consumer class actions because of CAFA’s stated intent to “benefit society by encouraging innovation and lowering consumer prices.”<sup>24</sup>

This argument fails because of several key deficiencies. First, the availability of similar products nationwide does not equate to a weakening of the defendant’s right to have the correct law applied. Regardless of the types of claims pursued, where different states’ laws apply, plaintiffs “must creditably demonstrate, through an extensive analysis of state law variances that class certification does not present insuperable obstacles.”<sup>25</sup> Second, most courts assessing certification in multi-jurisdiction products liability or toxic tort cases have found that plaintiffs are unable to meet this burden because differences in

state law are meaningful (as described in *Shutts*), not just cosmetic variations. For example, a putative consumer protection act class cannot be certified simply because all such laws have the same goal—protecting consumers. The “differences in the required proofs” in each state’s statute “demonstrate that a nationwide certification would not be manageable because of the multiple and different variables that would have to be proved as to each class member.”<sup>26</sup>

Reliance on CAFA as an “out” for plaintiffs seeking to avoid a detailed choice-of-law analysis also ignores the difference between a jurisdictional statute (which CAFA’s removal provisions are) and a statute creating substantive law (which they are not).<sup>27</sup> The provisions of CAFA at issue in the choice-of-law context allow removal to federal court of a class action that (1) consists of at least 100 putative members, (2) involves an aggregate amount in controversy

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<sup>22</sup> Cabraser (2009) at 32; Kanner & Casey at 323.

<sup>23</sup> Cabraser (2009) at 32-33.

<sup>24</sup> Kanner & Casey at 330 (citing Pub. L. No. 109-2, sec. 2(b)(3)); *see also* Cabraser (2009) at 46 (discussing “Catch-22” facing plaintiffs in nationwide consumer fraud cases “where class actions are needed the most” who find that their suits are removed and then certification routinely denied because of differences in state law).

<sup>25</sup> Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) (internal quotations omitted).

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<sup>26</sup> *Lilly v. Ford Motor Co.*, No. 00 C 7372, 2002 WL 507126, at \*2 (N.D. Ill. Apr. 3, 2002) (quotation omitted); *see also Castano*, 84 F.3d at 742 n.15 (declining to certify CPA and other claims because “[w]e find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered.”); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 220-21 (E.D. Pa. 2000) (refusing to certify a nationwide Consumer Protection Act class because Consumer Protection Acts are not uniform and the required application of the laws of 41 states defeated the predominance requirement).

<sup>27</sup> CAFA also contains provisions governing class action settlements and class notice requirements. A discussion of those portions of the statute is outside of the scope of this article.

exceeding \$5 million, and (3) involves at least one putative class member who is a citizen of a state different from any defendant. Although there are limited situations in which a federal court may decline jurisdiction, multi-jurisdiction product liability and toxic tort cases are increasingly arriving and staying in federal court under CAFA's jurisdictional provisions.

Finally, although CAFA's preamble discusses the potential efficiency of class actions generally, it stops far short of saying that efficiency can be achieved by certification of every proposed class, and it certainly does not provide courts with a pass to skip the required choice-of-law analysis. To the contrary, Congress rejected such a change to the traditional choice-of-law analysis requirement. Prior to its passage, several senators proposed to amend CAFA to include a prohibition against denying class certification because of choice-of-law concerns.<sup>28</sup> The amendment failed by a 61 to 38 vote.<sup>29</sup> There is no question that Congress considered the choice-of-law implications of CAFA and decided that there should be none. Judicially interpreting the essence of CAFA to include a change to the choice-of-law analysis in class actions directly contradicts the statute and its history. Defendants who encounter this argument in litigation should quickly point out that Article III prevents the courts from doing what Congress did not.<sup>30</sup>

In case courts correctly find that CAFA does not directly render the choice-of-law analysis unnecessary, plaintiffs' advocates have a second theory. They argue that when re-read in light of CAFA, the meaning of *Shutts* has switched from one limiting the circumstances in which one state's law may be constitutionally applied to a multi-jurisdiction class to expanding them.<sup>31</sup> Under *Shutts*, state courts may apply one state's law to a multi-jurisdiction class action so long as the choice is "not 'arbitrary,' but based upon a real connection between the state whose law was applied and the conduct giving rise to the dispute at issue."<sup>32</sup> Because the traditional choice-of-law analysis focuses on differences in state law, federal courts rarely find application of a single state's law to multi-jurisdiction classes appropriate. However, under this theory, the "initiative to federalize most class actions that was ultimately enacted as CAFA" requires a relaxed interpretation of *Shutts*.<sup>33</sup> In the increasingly national marketplace, citizens of various states are likely to have similar claims suited for the efficiencies of class action treatment.<sup>34</sup> Therefore, given the CAFA preference that these cases be litigated in federal court and the establishment in *Shutts* that application of a single state's law to a

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<sup>28</sup> 151 Cong. Rec. S1166 (Feb. 9, 2005) (Statement of Sen. Feinstein).

<sup>29</sup> 151 Cong. Rec. S1184 (Feb. 9, 2005).

<sup>30</sup> *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995).

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<sup>31</sup> See, e.g., Cabraser (2009) at 32-36.

<sup>32</sup> Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts*, 74 U. MO. KAN. CITY L. REV. 543, 545 (2006) (hereinafter "Cabraser (2006)").

<sup>33</sup> Cabraser (2009) at 45; Issacharoff, 106 COLUM. L. REV. at 1843.

<sup>34</sup> *Id.* at 1844.

multi-jurisdiction class can be constitutional, proponents of this theory argue that federal courts cannot:

“opt out” of the judicial duty to determine how best to manage the legitimate claims of the interstate classes that Congress has now entrusted to the federal courts as exclusive guardian. The forum of *Shutts* choice-of-law analysis may have shifted from state to federal courthouses, but its abiding utility and power have been enhanced by the post-CAFA necessity of the federal courts to resolve choice-of-law in the very context-multistate class actions-that they often formerly were able to avoid.<sup>35</sup>

In answering the question of which single state’s law can be applied in a non-arbitrary fashion, proponents of this theory suggest that courts should apply the law of the defendant’s home state.<sup>36</sup> However, nothing in the text of CAFA implicitly or explicitly alters the requirement in *Shutts* that before applying a single state’s law to a nationwide class, the court must conduct a choice-of-law analysis that demonstrates the selected jurisdiction’s law has “a ‘significant contact or significant aggregation of contacts’ to the claims asserted *by each member of the plaintiff class*, contacts ‘creating state interests,’ in order to ensure that the choice of [that state’s] law is not arbitrary or unfair.”<sup>37</sup> Nor does applying the law of defendants’ home

state to every multi-jurisdiction class satisfy *Shutts*. As many post-*Shutts* courts have held, “[n]o injury, no tort, is an ingredient of every state’s law.”<sup>38</sup> For example, in one recent putative toxic exposure class action, plaintiffs alleged that classes including residents in FEMA-provided trailers in four states after Hurricanes Katrina and Rita were entitled to medical monitoring and to recover for alleged economic injuries.<sup>39</sup> The court rejected both requests in part based on differences in the applicable states’ laws.<sup>40</sup> If the court adopted the putative “new” interpretation of *Shutts* described above, the choice-of-law analysis would have been unnecessary, and the certification decision would rest solely on an analysis of the other individual issues involved, such as exposure to the toxin and risk of injury. Although the inherently individual nature of those issues alone still prevent certification, abandoning the traditional choice-of-law doctrine would deprive defendants of a powerful argument against class certification. It would also frustrate the purposes of CAFA by placing defendants in the exact precarious position created by state court class actions abuses that CAFA sought to avoid.<sup>41</sup>

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<sup>38</sup> *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d at 1016-18 (reversing class certification due to insurmountable variations in states’ laws).

<sup>39</sup> *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., No. MDL 071873, 2008 WL 5423488, at \*17, 20 (E.D. La. Dec. 29, 2008).

<sup>40</sup> *See id.* at \*17, 21.

<sup>41</sup> *See, e.g.*, General Motors Corp. v. Bryant, 285 S.W.3d 634, 641 (Ark. 2008) (certifying nationwide class despite variations in state law because Arkansas state courts are not required

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<sup>35</sup> Cabraser (2006) at 568.

<sup>36</sup> *See* Cabraser (2009) at 45; Issacharoff, 106 COLUM. L. REV. at 1868.

<sup>37</sup> 472 U.S. at 821-22 (emphasis added).

Others suggest that even if a single state cannot be selected because of the “variations” in state law, states with similar laws can be grouped together. This idea has found some relatively limited traction in post-2005 federal class certification decisions. In *In re Pharmaceutical Industry Average Wholesale Price Litigation*,<sup>42</sup> the court certified one nationwide class that alleged defendants made certain intentional misrepresentations in order to fix prices on a limited number of pharmaceutical products. The court held that although state consumer protection laws varied, no state allowed intentional misrepresentations, and that based on the very specific and factually limited allegations at issue, differences in state consumer protection laws regarding reliance and causation could be managed.<sup>43</sup> This case does not support certification in a broader array of products or toxic exposure cases because it is limited only to intentional misrepresentation allegations (as opposed to fraudulent omissions) and because the findings on commonality, predominance, and superiority are very fact-specific. Further, far more post-CAFA decisions addressing requests for nationwide class actions under a single state’s law have cited to *Shutts* and denied certification based a traditional choice-of-law analysis, including other claims alleging various improper market practices.<sup>44</sup>

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to conduct a choice-of-law analysis before certification so long as common factual issues exist), *cert. denied* 129 S. Ct. 901 (2009).

<sup>42</sup> 230 F.R.D. 61 (D. Mass. 2005).

<sup>43</sup> *Id.* at 85.

<sup>44</sup> *See, e.g., Siegel v. Shell Oil Co.*, 256 F.R.D. 580 (N.D. Ill. 2008) (denying certification of

### III. Conclusion

Although the choice-of-law issue is enjoying a renewed debate in the academic literature based on the passage of CAFA, nothing in the statute changes the fact that multi-jurisdiction classes in product liability and toxic tort class actions face insurmountable choice-of-law hurdles. Meaningful differences between states’ laws cannot be ignored simply because CAFA provides for federal jurisdiction over more of these claims. As discussed above, class certification is a procedural mechanism governed by Rule 23 that allows for the aggregate resolution of claims when certain stringent requirements are met. Nothing in Rule 23 changes the substantive right of the parties, including a defendant’s right to have the correct law applied to each claim against it.<sup>45</sup> If that cannot be accomplished in a manageable aggregate proceeding that meets the requirements of Rule 23, certification is improper. Therefore, the nearly unanimous opinions of district and appellate courts across the country issued

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nationwide class under Illinois consumer protection statutes for allegedly improper pricing practices); *Utility Consumers’ Action Network v. Sprint Solutions, Inc.*, 259 F.R.D. 484 (S.D. Cal. 2009) (denying certification of nationwide class against telecommunications company under California’s consumer protection laws for alleged wrongful billing of certain fees); *see also Thompson v. Bayer Corp.*, no. 4:07CV00017, 2009 WL 362982 (E.D. Ark. Feb. 12, 2009) (denying certification of nationwide class alleging fraudulent marketing of over-the-counter vitamin products because of differences in laws of unjust enrichment).

<sup>45</sup> *See Ortiz*, 527 U.S. at 845.

before CAFA's enactment discussing the unmanageable features of a multi-jurisdiction class where numerous different states' laws must be applied to various class members' claims are as applicable now as they were before CAFA went into effect in February 2005.