

February 2013

The Class Action Fairness Act and Colorable Reasons for Separate Class Actions

Kevin Tamm

University of Cincinnati College of Law, tammkr@mail.uc.edu

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>



Part of the [Law Commons](#)

Recommended Citation

Kevin Tamm, *The Class Action Fairness Act and Colorable Reasons for Separate Class Actions*, 81 U. Cin. L. Rev. (2013)

Available at: <https://scholarship.law.uc.edu/uclr/vol81/iss1/8>

This Student Notes and Comments is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

THE CLASS ACTION FAIRNESS ACT AND COLORABLE REASONS FOR SEPARATE CLASS ACTIONS

*Kevin Tamm**

I. INTRODUCTION

The Class Action Fairness Act (CAFA), codified at section 1332(d) of the U.S. Code, grants the federal courts jurisdiction over civil class action suits with minimal diversity, at least one hundred plaintiffs, and amount in controversy more than \$5 million.¹ However, the statute is silent in situations where there is minimal diversity, at least one hundred plaintiffs, and the amount in controversy is \$4,999,999.² Furthermore, the statute provides no guidance when similar plaintiff classes file multiple irremovable suits against a single defendant.³ Nevertheless, the lack of statutory guidance in § 1332 did not stop the Sixth Circuit Court of Appeals in *Freeman v. Blue Ridge Paper Products, Inc.* from aggregating five similar class action lawsuits in order to satisfy CAFA's removal requirements.⁴

In each of the individual class actions preceding *Freeman*, the plaintiffs claimed close to \$4.9 million, and because the plaintiffs “put forth no *colorable reason* for breaking up the lawsuits,” the Sixth Circuit aggregated the claims.⁵ Other circuit courts have not followed the “colorable reason test” created in *Freeman* and have distinguished the case on factual differences, statutory interpretation, and the relevance of Congressional intent.⁶ The decision in *Freeman* achieves the result of judicial efficiency,⁷ but contradicts the axiom that the plaintiff is the “master of his complaint.”⁸

Part II of this Comment addresses how the Sixth Circuit has used the “colorable basis test” to aggregate class action suits where plaintiffs

* Associate Member, 2011–12 *University of Cincinnati Law Review*.

1. 28 U.S.C. § 1332(d) (2011). Minimal diversity for CAFA is satisfied when “any member of a class of plaintiffs is a citizen of a State different from any defendant.” *Id.* § 1332(d)(2)(A).

2. *See* § 1332(d).

3. *See id.*

4. *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008).

5. *Id.* (emphasis added). The majority and dissent also use the phrase “colorable basis.” *Id.* at 409, 411.

6. *See, e.g., Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1111 (8th Cir. 2011) (separating suits allowed when plaintiffs filed claims to match defendant’s prior law suits); *Barria v. Dole Food Co.*, No. CV 09-213-CAS(VBKx), 2009 U.S. Dist. LEXIS 27926, at *14 (C.D. Cal. Mar. 9, 2009) (separating suits allowed when each suit has different plaintiffs).

7. *Freeman*, 551 F.3d at 408.

8. *Id.* at 411 (Daughtrey, J., dissenting) (quoting *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 407 (6th Cir. 2007)).

have split their claims to avoid federal jurisdiction. Afterward, this Comment analyzes cases from other circuits to explain why other appellate courts have not accepted the colorable basis test. Part III discusses the inherent weaknesses of the colorable basis test, along with possible changes to the language of CAFA that would remedy the problems *Freeman* attempted to address. Part IV concludes that that Congress must amend § 1332(d) to better guide judges in complex class removal situations.

II. BACKGROUND

Since Congress passed the Class Action Fairness Act of 2005, courts have cited a litany of congressional records to explain the application of the law.⁹ The general intent of CAFA was to provide defendants an easier road into federal court to prevent bias in plaintiff-friendly state courts.¹⁰ The relevant Senate Report explains that CAFA “mak[es] it harder for plaintiffs’ counsel to ‘game the system’ by trying to defeat diversity jurisdiction” and “creat[es] efficiencies . . . by allowing overlapping and ‘copycat’ cases to be consolidated . . .”¹¹ Additionally, CAFA allows cases of “national importance” to be removed more easily to the federal courts.¹² The various purposes of CAFA, combined with a lack of explicit statutory guidance, have led to a divergent jurisprudence concerning aggregation in class action suits, which will be discussed herein.¹³

A. *The Colorable Basis Test as a More Searching Inquiry*

The Sixth Circuit was the first, and remains the only, circuit court to support the colorable basis test for aggregating class action claims.¹⁴ In *Freeman v. Blue Ridge Paper Products, Inc.*, Tennessee landowners sued a North Carolina paper mill for polluting a local river.¹⁵ The landowners divided their claims into five separate lawsuits based on

9. See, e.g., *id.* at 408; Proffitt v. Abbott Labs., No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *3-4, *7-11 (E.D. Tenn. Sept. 23, 2008).

10. See *Freeman*, 551 F.3d at 407.

11. *Id.* at 408.

12. See *id.*

13. Compare *id.* at 408-09, with *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1111 (8th Cir. 2011) (*Freeman* majority focusing on congressional intent to remove the class actions and *Marple* majority focusing on the statutory language of CAFA to not aggregate separate suits).

14. This is derived by using the “Shepardize” function on LEXIS. The case has been followed 3 times, once on other grounds, and distinguished 39 times as of Dec. 4, 2011. Available at <http://www.lexis.com>.

15. *Freeman*, 551 F.3d at 406. There were 300 plaintiffs located downriver of the North Carolina plant. *Id.*

sequential time periods related to the total span of pollution.¹⁶ Each suit had the same plaintiffs and claims, and the damages in each case totaled near \$4.9 million.¹⁷ The defendant successfully removed the cases to federal court; however, the plaintiffs later succeeded on their motion to remand to state court.¹⁸ The defendant corporation then appealed to the Sixth Circuit to reverse the district court judgment; the Sixth Circuit reversed and remanded the cases to the federal district court.¹⁹

The Sixth Circuit held that the remand to state court was improper because the “[p]laintiffs put forth no colorable reason for breaking up the lawsuits . . . other than to avoid federal jurisdiction.”²⁰ The court found no “colorable reason” to divide the suits by time periods, partly because the plaintiffs’ counsel admitted he structured the case to avoid federal jurisdiction.²¹ Furthermore, the court noted that the structuring would frustrate the “Congressional intent and purpose of the CAFA.”²² The court limited its holding to situations “where there is no colorable basis for dividing up the [class actions] into separate time periods, other than to frustrate CAFA.”²³

The *Freeman* court derived its reasoning from an earlier district court opinion in the Sixth Circuit. In *Proffitt v. Abbott Laboratories*, the plaintiffs filed eleven class action lawsuits with the same plaintiffs and defendant.²⁴ The plaintiffs argued that being the master of the complaint entitled them to disclaim damages over \$4,999,000 and separate the suits; however, the court stated, “It is apparent . . . that the time divisions are a deliberate attempt to circumvent the CAFA”²⁵ The court noted that the plaintiffs might have arranged the suits in other ways, such as two-year divisions, because the time divisions had no purpose other than avoiding federal jurisdiction.²⁶ Citing the Senate Judiciary Committee and congressional findings, the court concluded, “When Congress amended 28 U.S.C. § 1332, it intended to broaden federal court jurisdiction.”²⁷

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 407.

20. *Id.*

21. *Id.* at 407.

22. *Id.* at 408 (citing *Proffitt v. Abbott Labs.*, No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *7–12 (E.D. Tenn. Sept. 23, 2008)).

23. *Id.* at 409.

24. *Proffitt*, U.S. Dist. LEXIS 72467, at *1–2. The suits concerned the same drug, TriCor, and only one antitrust conspiracy was claimed. *Id.* at *2.

25. *Id.* at *4, *6.

26. *Id.* at *6.

27. *Id.* at *7. The court cited the Senate Judiciary Committee, which stated, “Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its

Shortly after the holdings in *Proffitt* and *Freeman*, the colorable basis test was applied again in the Sixth Circuit.²⁸ In *Hubbard v. Electronic Arts, Inc.*, current and former college student athletes filed three similar class action suits.²⁹ The first suit, *Hubbard I*, contained antitrust-related claims, and the second, *Hubbard II*, had multiple state law claims.³⁰ The plaintiffs' counsel also filed a third class action suit, *Nuckles*, on behalf of former student-athletes.³¹ *Nuckles* was nearly identical to *Hubbard II*, which counsel filed on behalf of current student athletes.³² The plaintiffs accused Electronic Arts (EA) of monopolizing NCAA football video games, raising game prices artificially by eliminating competition, and abusing students by not paying for their likenesses.³³

EA removed the cases using CAFA's removal provision, and the district court denied plaintiff's motion to remand.³⁴ The plaintiffs in each of the three suits capped their damages at \$4,999,999.00,³⁵ and the court found that counsel filed the complaints separately to avoid federal jurisdiction.³⁶ The court agreed that plaintiffs "may defeat removal to federal court by suing for less than the jurisdictional amount[,] and that "[i]t is generally agreed in this circuit, that the amount in controversy should be determined from the perspective of the plaintiff" ³⁷ On the other hand, the court emphasized that damage disclaimers do not preclude a defendant from removing a case if the defendant can show it is "more likely than not" that the minimum amount in controversy will be met.³⁸

Regarding the *Hubbard II* and *Nuckles* suits, the district court attempted to reconcile the *Freeman* colorable basis test with an earlier Sixth Circuit case.³⁹ *Smith v. Nationwide Property & Casualty Insurance Co.* held that where the plaintiff had claimed \$4,999,999.00 in

provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Id.* at *8.

28. See *Hubbard v. Elec. Arts, Inc.*, No. 2:09-CV-233 and 2:09-CV-234, 2011 U.S. Dist. LEXIS 77859 (E.D. Tenn. July 18, 2011).

29. *Id.* at *2-4.

30. *Id.* The plaintiffs included violations of the Tennessee Trade Practices Act, the Tennessee Protection of Personal Rights Act of 1984, the Tennessee common law, and charges of unjust enrichment. *Id.*

31. *Id.* at *5.

32. *Id.*

33. *Id.* at *3-4.

34. *Id.* at *1-2.

35. *Id.* at *2, *6, *11-12.

36. *Id.* at *5.

37. *Id.* at *7 (internal quotes omitted).

38. *Id.* at *8 (internal quotes omitted). The burden of proof of damages is discussed further *infra* at Part III(B).

39. See *id.* at *12-15.

breach of contract damages, the suit could be remanded because the defendant failed to show that the damages would “more likely than not” exceed \$5 million.⁴⁰

The court experienced difficulty reconciling the deferential “plaintiff is master of his complaint” logic from *Smith* with the “colorable reason” logic from *Freeman*.⁴¹ The court noted the *Freeman* test was not “clearly define[d]” and did not “give instructions on its application.”⁴² Plaintiffs’ counsel attempted to distinguish *Freeman* by explaining that the plaintiffs and defendants in the *Hubbard II* and *Nuckles* suits were different; however, the court found this was not a “legitimate purpose.”⁴³ Finally, the court aggregated the claims in *Hubbard II* and *Nuckles*, having not found a colorable reason for the structuring.⁴⁴

B. Distinguishing Freeman’s Colorable Reason Test From the “Plaintiff as the Master of the Complaint”

Other circuit courts have not followed the colorable reason test⁴⁵ and typically distinguish *Freeman* on minor factual differences or completely avoid it.⁴⁶ An example is the Eighth Circuit case *Marple v. T-Mobile Central LLC*, where T-Mobile, prior to the suit, had sued Missouri municipalities for refund of tax payments.⁴⁷ The plaintiff, Marple, then sued T-Mobile because she believed the phone company had passed the cost of the tax unfairly onto consumers.⁴⁸ Marple brought ten separate but similar class action lawsuits to claim any money T-Mobile might recover in its suits.⁴⁹ T-Mobile tried to remove the cases, but Marple won the motion to remand, and the Eighth Circuit affirmed.⁵⁰

The appellate court discussed the statutory language of CAFA and noted the lack of explicit guidance for aggregation between multiple

40. *Id.* Punitive damages were not available in the case making it unlikely the damages would meet the amount in controversy. *Id.* See also *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 403 (6th Cir. 2007).

41. *Hubbard*, 2011 U.S. Dist. LEXIS 77859, at *21–22.

42. *Id.* at *21.

43. *Id.* at *24. In other circuits, this has in fact been found to be a legitimate purpose for separating claims. See, e.g., *Barria v. Dole Food Co.*, No. CV 09-213-CAS(VBKx), 2009 U.S. Dist. LEXIS 27926, at *14 (C.D. Cal. Mar. 9, 2009).

44. See *Hubbard*, 2011 U.S. Dist. LEXIS 77859, at *24.

45. See *supra* Part II(A), n.14.

46. See *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1110–11 (8th Cir. 2011).

47. *Id.* The tax payments had been made under protest, and T-Mobile divided the claims into 10 suits based on 10 specific time periods when taxes were paid. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1110–11.

class action suits.⁵¹ The court found “the absence of provisions [in CAFA] for aggregating between class actions . . . suggests that the use of the *singular* [class action] is significant.”⁵² Here, the court distinguished *Freeman* and found that Marple divided her suits in order to mirror the earlier T-Mobile suits, not to evade federal jurisdiction.⁵³ In distinguishing *Freeman*, the reasoning from *Marple* closely follows that of *Freeman’s* dissent.⁵⁴

The dissent in *Freeman* agreed with the majority opinion that a pivotal reason behind CAFA was to prevent plaintiffs from “keeping [class action] cases of national importance out of federal court.”⁵⁵ However, the dissent believed the pollution cases were not of such importance that a new claim aggregation rule should be created.⁵⁶ Furthermore, the dissent found “no authority” for the creation of a “colorable basis” requirement and argued the plaintiffs could divide their suits based on time because each time the defendant discharged pollutants, a new cause of action may arise.⁵⁷ Additional cases also distinguish the result reached in *Freeman*.

In *Barria v. Dole Food Co.*, one of a group of many similar class action cases, 2,485 banana plantation workers brought nine causes of action against Dole and other companies.⁵⁸ The plaintiffs filed multiple suits with less than one hundred plaintiffs each, and the damages never exceeded \$5 million.⁵⁹ The defendants argued that the California Superior Court, where the plaintiffs filed, had a minimum jurisdiction limit of \$25,000, and therefore the total claims would logically exceed \$62 million.⁶⁰ The defendant also wanted to question the plaintiffs as to whether the damages they sought were truly under \$75,000 per plaintiff.⁶¹

51. *Id.* at 1110.

52. *Id.* (emphasis added). The court is referring to 28 U.S.C. § 1332 using the term “class action” when describing claim aggregation within one suit in 28 U.S.C. § 1332(d)(6) and not “class actions.” 28 U.S.C. § 1332 (2011).

53. *Marple*, 639 F.3d at 1111. The original suits by T-Mobile against the municipalities were filed according to separate time spans, like the suits in *Freeman*. *Id.* at 1110.

54. Compare *id.* at 1110–11, with *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 410–11 (6th Cir. 2008).

55. *Freeman*, 551 F.3d at 410 (Daughtrey, J., dissenting) (internal quotes omitted).

56. *Id.* at 410–11 (Daughtrey, J., dissenting).

57. *Id.* at 411 (Daughtrey, J., dissenting).

58. *Barria v. Dole Food Co.*, No. CV 09-213-CAS(VBKx), 2009 U.S. Dist. LEXIS 27926, at *3–4 (C.D. Cal. Mar. 9, 2009). The planters alleged that Dole caused harm by producing and using a toxic chemical in the growing of bananas. *Id.* at *5.

59. *Id.* at *4, *7.

60. *Id.* at *8–9. Multiplying 2,485 plaintiffs by \$25,000 equals \$62,125,000.

61. *Id.* at *9. In *Abrego v. Dow Chemical Co.*, 443 F.3d 676, 689 (9th Cir. 2006), plaintiffs had lied about the amount they hoped to recover and admitted after remand to state court that they were in fact seeking more than the jurisdictional minimum amount in controversy. See *Barria*, 2009 U.S. Dist.

Ultimately, the court distinguished *Freeman* by explaining that the different banana planters in each case were “distinct plaintiffs,” and it upheld the “strong presumption” against removal jurisdiction in the Ninth Circuit.⁶² The court stated, “defendants have not shown that it is ‘more likely than not’ that any plaintiff’s claim satisfies the \$75,000 jurisdictional requirement [or the \$5 million aggregate in an individual class suit].”⁶³ The justices also refused to speculate as to whether any plaintiffs were lying and would not aggregate their claims.⁶⁴

Freeman and the many cases that refuse to adopt its logic raise a further issue as to what defendants and plaintiffs must show in order to achieve or avoid removal in the federal circuit courts.

C. Judicial Standard for Proof of Damages

In addition to the amount in controversy, issues surrounding the standard of proof of damages also affect CAFA removal. The court in *Freeman v. Blue Ridge Paper Products* avoided the issue by first aggregating the claims of the suits, and then stating, “[b]ecause plaintiffs’ suits in the aggregate seek up to \$24.5 million, we need not decide the proper standard of proof under CAFA when a plaintiff limits his damages to less than the jurisdictional amount”⁶⁵ The claim aggregation allowed the court to presume that the damages exceeded the required amount in controversy unless proven otherwise to a “legal certainty.”⁶⁶

The court in *Hubbard v. Electronic Arts, Inc.* addressed the issue ignored by the *Freeman* court and explained that, typically, deference should be given to the plaintiffs in determining damages in a suit.⁶⁷ However, the court explained that the burden on the defendant to prove damages is only the “more likely than not” standard, which is less rigid than the “legal certainty” standard.⁶⁸ With regard to aggregating *Hubbard II* and *Nuckles*, the court explained three situations: (1) where a plaintiff pleads an amount over the amount in controversy, the amount

LEXIS 27926, at *11–12, n.2.

62. *Barria*, 2009 U.S. Dist. LEXIS 27926, at *9–14. Burden of proof of damages will be discussed further in Part III(B), *infra*.

63. *Id.* at *11–12, n.2.

64. *See id.* at *11–12, n.1–2.

65. *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 409 (6th Cir. 2008). The defendant was not required to show each suit would likely exceed \$5 million because in the court’s view there was only one suit for up to \$24.5 million. *Id.*

66. *Id.* This is a high burden of proof compared to the preponderance or more likely than not standards.

67. *Hubbard v. Elec. Arts, Inc.*, No. 2:09-CV-233 and 2:09-CV-234, 2011 U.S. Dist. LEXIS 77859, at *7–8 (E.D. Tenn. July 18, 2011).

68. *Id.* at *8.

is presumed correct and the defendant must prove to a legal certainty it is not correct; (2) where a plaintiff pleads an unspecified amount, the defendant must show with a preponderance of the evidence that the amount is exceeded for removal; and (3) where plaintiff pleads under the amount in controversy, the defendant must show it is more likely than not the amount in controversy is exceeded.⁶⁹ In aggregating *Hubbard II* and *Nuckles*, the court once again treated the claims as if the plaintiff had filed only one suit, and found that remand was not appropriate under the “legal certainty” test.⁷⁰

The Eighth Circuit in *Marple* did not address the standard of proof, because the defendant argued only that the claims should be aggregated⁷¹ and offered no evidence to prove that each suit would exceed \$5 million.⁷² Thus, when the court did not aggregate the claims, removal was inappropriate.⁷³

The Ninth Circuit in *Barria v. Dole Food Co.* offered a detailed discussion of the legal standard concerning the defendant’s burden for removing the cases concerning the banana pickers.⁷⁴ The court never referred to a legal certainty test; however, it found that the defendants never overcame the “strong presumption” against removal to federal court.⁷⁵ The court did not find sufficient “underlying facts” to support the plaintiff’s argument that the individual claims would exceed \$75,000, nor that the claims in each suit would exceed \$5 million.⁷⁶ The defendants presented evidence from prior class actions to show actual damages awarded far exceeded disclaimed damages, but this was not sufficient for the court.⁷⁷

The inconsistent application of the colorable basis test, and varying alternative legal standards, create uncertainty for plaintiffs and defendants. In addition, this line of cases could result in the same problems that existed before the passage of CAFA, including forum shopping and gaming the class action system to stay in plaintiff-friendly state courts. The following parts address the uncertainty these decisions

69. *Id.* at *18–21.

70. *Id.* at *24–25. In *Freeman* and *Hubbard*, then, a high burden of remand fell on the plaintiffs where the amounts in controversy were assumed to be over \$5 million and the plaintiffs presumably needed to prove damages under \$5 million to a “legal certainty.”

71. *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1110–11 (8th Cir. 2011); *See also Marple v. T-Mobile Cent., LLC*, No. 10-CV-00954-NKL, 2011 U.S. Dist. LEXIS 7773, at *4 (W.D. Mo. Jan 27, 2011).

72. *Marple*, 639 F.3d at 1111.

73. *See id.* The amount in controversy for each suit was less than \$5 million. *See id.*

74. *Barria v. Dole Food Co., Inc.*, No. CV 09-213-CAS(VBKx), 2009 U.S. Dist. LEXIS 27926, at *7–12 (C.D. Cal. Mar. 9, 2009).

75. *Id.*

76. *Id.*

77. *Id.* at *11–12, n.2.

have created, and suggest ways to prevent future problems that deficiencies in CAFA's language might cause.

III. DISCUSSION

Recent class action removal jurisprudence has created a confusing trail for plaintiffs and defendants. Plaintiffs may be hard-pressed to determine when legitimate reasons exist for splitting a suit to avoid removal, especially when splitting damages by time periods is not legitimate, but splitting damages according to defendants' earlier suits *is* legitimate.⁷⁸ Furthermore, judges make removal decisions with little statutory guidance from Congress other than the minimum amount in controversy, minimal diversity, and 100 plaintiffs requirements in § 1332(d). While it is the judiciary's role to say "what the law is," it is not the job of the judiciary to legislate where Congress has failed to implement statutory protections.⁷⁹ Furthermore, class action removal law should not become some *tertium quid* composed of loose judicial interpretations of CAFA and varying state law burdens of proof. By adding greater detail to § 1332(d), Congress could create more certainty and consistency in complex class removal situations.

A. Current Problems and Furthering the Intent of CAFA

The overriding reasons that Congress adopted CAFA were to make removal easier for defendants and to prevent plaintiffs from forum shopping.⁸⁰ The Sixth Circuit in *Freeman* reinforced this point by citing congressional notes concerning CAFA, Senate Reports, and House Reports.⁸¹ These sources supported the idea that in the past, lawyers had "gamed" the class action system and thus CAFA was needed to

78. Compare *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 406 (6th Cir. 2008), with *Marple*, 639 F.3d at 1111.

79. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

80. See *Freeman*, 551 F.3d at 407–08. "CAFA was necessary because the previous law enable[d] lawyers to game the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." *Id.* at 408 (internal quotes omitted).

The Senate Judiciary Committee unambiguously signaled where it believed the burden should lie. The committee report said overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.

Proffitt v. Abbott Labs., No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *8 (E.D. Tenn. Sept. 23, 2008) (internal quotes omitted).

81. *Freeman*, 551 F.3d at 407–08.

prevent further frivolous suits.⁸² By choosing to aggregate suits when there was no colorable basis for separating them, the *Freeman* court furthered the intent of many in Congress at the time of the passage of CAFA.⁸³ However, the court also strayed from the plain reading of the law and added qualifiers to § 1332(d) that are not present in the original text of the statute.⁸⁴

First, because CAFA has no colorable reason requirement for separating claims, the courts in *Freeman*, *Proffitt*, and *Hubbard* overstepped their bounds in imposing a heightened pleading standard on the plaintiffs.⁸⁵ In *Freeman*, the court found persuasive plaintiff counsel's admission that avoiding CAFA was the only reason for dividing the suits, but the court did not explain why it relied on this comment.⁸⁶ CAFA does not delve into the intent of plaintiffs or their counsel.⁸⁷ Further, the court found CAFA's purpose "obvious," but the majority cited only congressional history favorable to its position.⁸⁸ Certainly, different legislators had varying reasons for supporting CAFA, and courts should not read in a legal standard, such as here, by requiring a "colorable reason," where the statutory language is clear.⁸⁹

Justice Daughtrey, the dissenting judge in *Freeman*, skeptically viewed the majority's approach to furthering congressional intent by constructing a rule to stop plaintiffs from keeping "cases of national importance out of the Federal court."⁹⁰ The dissent noted that the pollution cases should be viewed as "matter[s] of local concern" because the class was composed of property owners from Cocke County, Tennessee.⁹¹ Further, Judge Daughtrey argued that during the period of the river pollution, new causes of action may arise each time pollutants enter the water, thus making the divisions not arbitrary.⁹² An

82. *Id.*

83. *Id.* at 408–09.

84. *See* 28 U.S.C. § 1332(d) (2011). There is no "colorable reason" requirement for plaintiffs to divide their suits.

85. *See id.* Requiring a colorable reason to bring separate law suits in state court is comparable to the risk faced by plaintiffs under the heightened plausibility pleading standards enunciated by the Supreme Court in *Iqbal* and *Twombly*. Here, though, there is no similar requirement for any reason to split class claims enunciated by Congress or the Supreme Court. *See* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009).

86. *See Freeman*, 551 F.3d at 407.

87. *See* 28 U.S.C. § 1332(d).

88. *Freeman*, 551 F.3d at 407–08.

89. *See* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotes omitted).

90. *Freeman*, 551 F.3d at 410 (Daughtrey, J., dissenting) (quoting majority opinion at 408).

91. *Id.* The dissent saw a weak interstate connection because the paper mill accused of polluting the river was located in nearby North Carolina and was incorporated in Delaware. *Id.* at 410–11.

92. *Id.* at 411.

unresolved issue, then, is what showing the majority would require without the plaintiffs' counsel having admitted the suits were structured to avoid federal jurisdiction for the suits to proceed to federal court.⁹³

The dissent, in making its decision, continued to argue that the majority ignored the historical axiom that “the plaintiff is the ‘master of his complaint’”.⁹⁴ The majority stated that even though there were 300 plaintiffs in each suit, by limiting individual damages at \$74,000 and overall damages at \$4.9 million, the plaintiffs could have remained in state court because “[p]resumably that overall limit for each time period is binding on the plaintiffs”⁹⁵ In response, Judge Daughtrey aptly noted the majority arbitrarily would allow plaintiffs to cap damages in one suit to avoid federal jurisdiction, but not in multiple suits.⁹⁶ The dissent concluded by stating there is “no authority to support the majority’s adoption of a ‘colorable basis’ requirement”⁹⁷

The *Freeman* dissent had the stronger argument, because without congressional guidance or state law, the majority lacks authority to go beyond the clear language of § 1332(d) and impose a “colorable reason” requirement on plaintiffs. Furthermore, the majority did not lay out factors to guide lower courts in determining what qualifies as a “colorable reason” under this heightened standard. The majority followed the reasoning of *Proffitt v. Abbott Labs.*,⁹⁸ which aggregated claims in eleven lawsuits divided into eleven one-year periods because the structuring was “at odds ‘with the Congressional intent and purpose of CAFA.’”⁹⁹ However, in *Proffitt* the eleven complaints each pointed to one conspiracy that took place throughout the eleven years.¹⁰⁰ In contrast, the defendant in *Freeman* never showed that the pollution occurred in the same manner over all five of the six-month periods.¹⁰¹

Uncertainty arises when courts rely on congressional intent instead of statutory language.¹⁰² The *Proffitt* court cited a litany of documents to show Congress’s intent including the Senate Judiciary Committee Reports and congressional findings prior to enactment of CAFA.¹⁰³ The

93. The decision relying in part on this fact makes it seem quite *ad hoc*.

94. *Freeman*, 551 F.3d at 411 (6th Cir. 2008) (Daughtrey, J., dissenting).

95. *Id.* at 411 (quoting majority opinion at 409).

96. *Id.*

97. *Id.*

98. No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467 (E.D. Tenn. Sept. 23, 2008).

99. *Freeman*, 551 F.3d at 408 (6th Cir. 2008).

100. *Id.*

101. *Id.* at 411 (Daughtrey, J., dissenting).

102. *Zedner v. U.S.*, 547 U.S. 489, 511 (2006) (“[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face”) (Scalia, J., concurring).

103. *Proffitt*, 2008 U.S. Dist. LEXIS 72467, at *3–4, *7–11.

court also relied on other cases citing congressional history in order to avoid copycat and duplicative law suits in different state courts.¹⁰⁴ The court concluded, quite properly, that “[t]he intent of Congress was clear that the new § 1332(d) would substantially broaden federal court jurisdiction over class actions.”¹⁰⁵ However, § 1332(d) carries out that goal when applied as it reads, and the courts should not amplify the intent of Congress *sua sponte*.

Moreover, in *Proffitt* the defendant offered no proof to show the plaintiffs divided their suits to prevent CAFA removal; it was merely “apparent to the court.”¹⁰⁶ Thus, unresolved issues remain such as whether direct or circumstantial evidence is required to show that there is no colorable reason for division of claims, and whether class actions separated by periods of time must be tied to physical events. If the colorable basis test is not to become merely a judicial carte blanche to impose congressional intent, then further statutory guidance is surely needed.

In applying the colorable basis test, the *Hubbard* court stated, “The [*Freeman*] court did not clearly define the test or give instructions on its application.”¹⁰⁷ The confused court tried to reconcile the colorable reason test from *Freeman*¹⁰⁸ with the earlier case of *Smith v. Nationwide Property & Casualty Insurance Co.*¹⁰⁹ In *Smith*, the defendant failed to carry its burden and could not show that it was “more likely than not” that the plaintiffs’ damages would exceed the claimed \$4,999,999.00.¹¹⁰ The *Hubbard* court noted from *Smith* that the plaintiff is the “master of his complaint and can plead to avoid federal jurisdiction.”¹¹¹ After reviewing *Smith*, the court ultimately had difficulty reconciling it with *Freeman*, where the court held that “identical” lawsuits must be aggregated when there is no colorable reason for “splintering” them.¹¹²

The court noted that the plaintiffs were different in the two suits—current student athletes and former student athletes—and that the plaintiffs sued different defendants.¹¹³ Yet, the court still found that the

104. *See id.* at *9–11.

105. *Id.* at *12.

106. *Id.* at *6.

107. *Hubbard v. Elec. Arts, Inc.*, No. 2:09-CV-233 and 2:09-CV-234, 2011 U.S. Dist. LEXIS 77859, at *21 (E.D. Tenn. July 18, 2011).

108. *See id.* at *12–23.

109. 505 F.3d 401 (6th Cir. 2007).

110. *Hubbard*, 2011 U.S. Dist. LEXIS 77859, at *13–14.

111. *Id.* at *13. The court also quotes *Smith*: “A disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are ‘more likely than not’ to ‘meet the amount in controversy requirement[.]’” *Id.* at *13–14.

112. *See id.* at *22–23.

113. *Id.* at *23.

plaintiffs splintered the suits for no colorable reason other than to avoid federal jurisdiction.¹¹⁴ The court ruled, “It seems that the only way to reconcile *Smith* and *Freeman* is that the plaintiff . . . is not the so-called master of his complaint if he specifically drafts it to avoid CAFA by ‘splintering’ identical lawsuits by time.”¹¹⁵ The court continued, “However, [the plaintiff] is the master of his complaint and can specifically plead to avoid federal jurisdiction by using disclaimers to limit the amount in controversy any other time.”¹¹⁶

The result that flows from *Hubbard* is an absurd extension of CAFA through judicial legislation. The court aggregated the \$4,999,999 claims from *Hubbard II* and *Nuckles*, where the plaintiffs had sued on behalf of current and former college athletes respectively.¹¹⁷ CAFA provides in § 1332(d)(6), “In any class action, the claims of the *individual class members* shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000”¹¹⁸ Thus, Congress spoke specifically to aggregating plaintiffs’ claims within individual suits, and not to claim aggregation between suits, even if the suits are “identical” or “splintered for no colorable reason.”

From *Hubbard*, it becomes clear that with a malleable test like the “colorable reason” test, courts will take advantage and expand the test when it suits their goals. *Freeman’s* holding was limited “to the situation where there is no colorable basis for dividing up the sought-for retrospective relief into separate time periods, other than to frustrate CAFA.”¹¹⁹ However, in *Hubbard*, the suits were not merely divided by time periods, but were also differentiated by plaintiffs and defendants with unique characteristics.¹²⁰ Yet, the court still found a way to expand the holding of *Freeman* by finding that current and former student athletes represented “time periods.”¹²¹ This interpretation is a strained reading of *Freeman* and *Proffitt*, and more importantly takes an important step toward limiting the “colorable reasons” that exist for splitting class suits in the Sixth Circuit.

The Eighth Circuit in *Marple v. T-Mobile Central, LLC* specifically noted “the absence of provisions for aggregating between class actions here suggests that the use of the singular is significant.”¹²² Furthermore,

114. *Id.* at *24.

115. *Id.* at *22–23.

116. *Id.* at 23.

117. *Id.* at *6.

118. 28 U.S.C. § 1332(d)(6) (2011) (emphasis added).

119. *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 409 (6th Cir. 2008).

120. *See Hubbard*, 2011 U.S. Dist. LEXIS 77859, at *24.

121. *See id.*

122. *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1110 (8th Cir. 2011) (citing 1 U.S.C. § 1 (2012)).

the court found that Congress included in CAFA detailed instructions on jurisdiction and aggregation; thus, if Congress had intended for the courts to aggregate between supposedly identical suits, it would have so indicated.¹²³ Applying *Marple*'s reasoning to *Hubbard*, which espoused a bright-line rule for when a plaintiff can be the master of his complaint, it is absurd to believe that Congress intended for the courts to create such exceptions to plaintiffs crafting complaints.¹²⁴

Congress wanted to expand federal jurisdiction by passing CAFA, but Congress must be assumed to write legislation within the bounds it intends to create.¹²⁵ The Sixth Circuit need not defend Congress from itself by, at best, filling in potential holes in the legislation, or, at worst, expanding the legislation beyond its purpose. The colorable reason test is the beginning of jurisprudence that could spur exceptions to the plain reading of CAFA, and has led other courts to distinguish *Freeman* and prevent the confusion of a statute easily discernible on its face.

The *Marple* court's distaste for the *Freeman* colorable reason test is apparent throughout its decision in both the statutory construction and in statements like, "[t]he Sixth Circuit ignored the structure chosen by the plaintiffs"¹²⁶ The court distinguished *Freeman* because "there [was] no indication that Marple artificially divided the lawsuit to avoid the CAFA."¹²⁷ However, the court provides scant evidence of this, and provides no guidance on whether the defense could prove such an indication.¹²⁸ This omission leaves open the possibility for more defendants to use this argument in the future.

The court in *Barria v. Dole Food Co.* proceeded similarly to the court in *Marple* and did not adopt *Freeman*, but at the same time refused to discredit the decision.¹²⁹ In *Barria*, the plaintiffs divided their suits so each would have under 100 plaintiffs, and the defendants argued that *Freeman* should prevent the plaintiffs from "gerrymander[ing] their lawsuit to circumvent CAFA[]" and "artificially splinter[ing] their actions to avoid jurisdictional thresholds."¹³⁰ The Ninth Circuit, like the Eighth Circuit in *Marple*, looked to statutory interpretation and found "[n]othing in CAFA suggests that plaintiffs, as masters of their complaint, may not 'file multiple actions, each with fewer than 100 plaintiffs, to work within the confines of CAFA to keep their state-law

123. *Id.*

124. *Compare id.*, with *Hubbard*, 2011 U.S. Dist. LEXIS 77859, at *22–23.

125. *See supra* notes 89 and 102.

126. *Marple*, 639 F.3d at 1111.

127. *Id.*

128. *See id.*

129. *See Barria v. Dole Food Co., Inc.*, No. CV 09-213-CAS(VBKx), 2009 U.S. Dist. LEXIS 27926, at *14 (C.D. Cal. Mar. 9, 2009).

130. *Id.* at *12–13 (internal quotes omitted).

claims in state court.”¹³¹

The preceding reasoning is sound, as CAFA did not speak to anything outside of claim aggregation within one class action.¹³² However, the court failed to reject the *Freeman* decision explicitly and merely distinguished the case on the facts.¹³³ While true that the plaintiffs in *Freeman* had divided their suits by time period, and the plaintiffs in *Barria* divided their suits by “distinct plaintiffs,” neither the former nor the latter are anywhere to be found in CAFA.¹³⁴ Applying the *Barria* court’s logic to the *Freeman* case, it would seem that the colorable reason test should be isolated and refuted. However, no court has done this, which will lead only to the problems that plagued class actions before CAFA.

These types of decisions create uncertainty in the field of class actions. The *Freeman* court created a malleable test that was turned into an erroneous bright line rule by the federal district court in *Hubbard*. Then, the Eighth and Ninth Circuits distinguished *Freeman*’s logic in *Marple* and *Barria*, respectively, rather than rejecting the test. Such rulings allow ill-defined tests to linger and propagate.

When drafting CAFA, Congress could have allowed defendants to remove multiple class actions by aggregation upon a showing by a preponderance of evidence that the statutory amount in controversy, minimal diversity, and one-hundred plaintiffs requirements were met. Congress did not do this, however, and the *Freeman* court essentially added this provision to § 1332(d). On its own motion, the *Freeman* court made multiple lawsuits one, and avoided the language of Congress. Nonstatutory, poorly-defined tests lead laws away from their original purpose or intent. Even worse, the practical effect of *Freeman* was to allow the defendant to litigate what the dissent called a “matter of local concern” in a federal court and deprive the plaintiffs of their rights.¹³⁵

In order to further the broad, fairness-based goals of CAFA, Congress should act early to prevent the “colorable reason” test from creating more uncertainty throughout the circuit courts.¹³⁶ Varying standards of proof and minor factual distinctions surrounding *Freeman* are creating a confusing CAFA jurisprudence, and perhaps the most straightforward

131. *Id.* at *13 (citing *Tanoh v. AMVAC Chem. Corp.*, No. CV 06-7038 PA (JTLx), 2008 U.S. Dist. LEXIS 102958, at *5 (C.D. Cal. Oct. 21, 2008)).

132. *See* 28 U.S.C. § 1332(d)(6) (2011).

133. *See Barria*, 2009 U.S. Dist. LEXIS 27926, at *14.

134. *See* 28 U.S.C. § 1332(d)(6).

135. *See Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 410 (6th Cir. 2008) (Daughtrey, J., dissenting).

136. The “colorable reason” test from *Freeman* has not yet been addressed by the 2nd, 4th, 5th, 10th, or 11th circuits, based on the “Shepardize” function from Lexis. *See* <http://www.lexis.com>.

way Congress could eliminate the circuits' discord over claim aggregation is to prohibit the practice explicitly.

The court in *Marple v. T-Mobile Central LLC* analyzed the language of CAFA closely and found “the absence of provisions for aggregating between class actions here suggests . . . the singular is significant.”¹³⁷ This reasoning is sensible, because CAFA is a detailed statute that was debated at length in Congress.¹³⁸ CAFA specifically offered guidance for the aggregation of claims within a lawsuit,¹³⁹ yet, as the *Marple* court points out, CAFA did not speak to aggregation between class actions.¹⁴⁰ Without guidance on aggregating claims, a procedurally challenging issue,¹⁴¹ courts should not design such malleable and poorly defined tests as the colorable reason test.

An explicit statement following § 1332(d)(6) that outright prevented the aggregation of claims inter-suit rather than intra-suit would carry out not only what is most likely the intent of Congress, but also eliminate a growing disparity in the federal courts.¹⁴² In addition, Congress could clarify that the “plaintiff is the master of the complaint” by specifically excluding the intent of plaintiffs and their counsel during the crafting of their complaints from the eyes of judges and defendants in removal motions.

As more defendants test the water throughout the country, the colorable basis test is likely to stick in courts that are not plaintiff-friendly. The test gives judges fodder to either grant or deny removal without clear explanations,¹⁴³ and it risks recreating and exacerbating the problems of forum shopping and plaintiff-friendly courts if Congress does not clarify the language of the statute. What may seem like a minor problem now can be easily fixed, and if loose jurisprudence is allowed to develop in such a complex field, both plaintiffs and defendants will be at a disadvantage as the law becomes less clear.

The judicial decisions surrounding *Freeman* not only put in conflict the language and intent of CAFA, but also the burdens of the plaintiffs in filing a claim and the defendants in removing it.

137. *Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1110 (8th Cir. 2011).

138. *See* Proffitt v. Abbott Labs., No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *3-4, *7-11 (E.D. Tenn. Sept. 23, 2008).

139. *See* 28 U.S.C. § 1332(d)(6) (2011).

140. *Marple*, 639 F.3d at 1110.

141. *See* Hubbard vs. Elec. Arts, Inc., 2:09-CV-233 and No. 2:09-CV-234, 2011 U.S. Dist. LEXIS 77859, at *12-24 (E.D. Tenn. July 18, 2011).

142. Such an explicit statement in § 1332(d)(6) might read “In any *single* class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, *and the claims of class members in separate suits shall not be aggregated.*” (emphasis added to potential amended language).

143. *See, e.g., Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 409 (6th Cir. 2008).

B. Shifting Burdens of Proof and Forum Shopping

Freeman left unanswered what standard of proof CAFA requires for defendants to remove when a plaintiff limits damages to less than the minimal amount in controversy.¹⁴⁴ The court used a unique trick by first combining five suits into one with damages totaling \$24.5 million. Then, it applied the standard for remanding a case.¹⁴⁵ Essentially, the court placed the burden on the plaintiffs to show to a “legal certainty” the damages would not meet the amount in controversy, which was presumed correct under the court-instituted removal.¹⁴⁶ The court also ignored the defendant’s logical argument that because there were 300 class members and the amount claimed by each member was \$74,000, the amount in controversy would exceed the damage cap of \$4.9 million.¹⁴⁷

By proceeding in the aforementioned manner, the Sixth Circuit ignored the defendant’s reasonable argument which would have allowed for removal of each suit without aggregation.¹⁴⁸ Also, it surely caught both parties off guard and left countless questions unanswered in future litigation. The Senate Judiciary Committee stated that the “new section 1332(d) is intended to expand substantially federal court jurisdiction . . . [i]ts provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if *properly removed by any defendant*.”¹⁴⁹ The court in *Freeman* did not require the defendant to show any proof that the cases should be removed.¹⁵⁰ The defendant was fortunate, because even though the court found its cursory argument about the claims of the individuals overriding the class amount in controversy “not persuasive,”¹⁵¹ the majority did not allow the plaintiffs to structure the suits and removed the cases *sua sponte*.¹⁵²

144. *See id.*

145. *Id.*

146. *See id.*

147. *See id.* The total amount for 300 plaintiffs claiming \$74,000 would be \$22.2 million, but the court found the \$4.9 million dollar cap for each suit superseded the individual caps. *See id.*

148. All 300 plaintiffs were in each suit; the suits were merely divided by time. *See id.* at 406–07. So the court could have said in each suit that if damages were capped at \$74,000 per plaintiff, with 300 plaintiffs the damages could be as much as \$22.2 million, and not the \$4.9 million cap. This would cause problems, however, because in the Sixth Circuit the court states, “Generally, if a plaintiff does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.” *Id.* at 409 (internal quotes omitted).

149. *Proffitt v. Abbott Labs.*, No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *8 (E.D. Tenn. Sept. 23, 2008) (emphasis added) (internal quotes omitted).

150. *Freeman* 551 F.3d at 409.

151. *Id.*

152. *Id.* The aggregation issue was not raised by defendants. *See id.*

In future cases similar to *Freeman*, the question will become what standard or type of proof defendants must show to prove that aggregation of claims is warranted. In *Freeman*, the plaintiffs' lawyer admitted at oral argument that avoiding CAFA was the only reason for structuring the claims in such a way.¹⁵³ This admission might show that clear and convincing evidence is required for aggregating claims between different suits. On the other hand, perhaps less straightforward circumstantial evidence of attempting to avoid federal jurisdiction would be sufficient if the defendants could show that the plaintiffs are substantially similarly situated and there exists no colorable reason for splitting their claims. Regardless, defendants in the Sixth Circuit, and anywhere else the *Freeman* test may be adopted, are unaware as to how to properly remove a case, yet still are not as disadvantaged as the plaintiffs.

The plaintiffs' case in *Freeman* was remanded to the district court, where they would need to show to a "legal certainty" that their aggregated claims would not exceed \$5 million.¹⁵⁴ However, this became nearly impossible after the appellate court found, "plaintiffs' suits in the aggregate seek up to \$24.5 million."¹⁵⁵ Had the plaintiffs been aware of a risk of aggregation, they likely would have sought damages independently in state courts without a class action. And, while the American justice system assumes that citizens know the law,¹⁵⁶ such knowledge becomes difficult when judges make modifications to laws *sua sponte* based on congressional intent. Litigants face difficulty from the colorable reason test because it is a poorly defined strong hammer that judges can use to mold class actions. Future plaintiffs should be sure to have a "colorable reason" when forming their suits, especially in the Sixth Circuit, even though these are not defined by case law or by statute. If plaintiffs want to be sure to litigate their case in state court, they may need to be able to show "to a legal certainty" that the damages do not exceed \$5 million.¹⁵⁷

In *Proffitt v. Abbot Labs.*, the case from which *Freeman* derived its reasoning, the court briefly described the burden of proof typically placed on defendants in removal situations, explaining, "CAFA does not alter the fact that the removing defendant has the burden of demonstrating, by a preponderance of the evidence, that the amount in

153. *Id.* at 407.

154. *Id.* at 409.

155. *Id.*

156. *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.").

157. *See Freeman*, 551 F.3d at 409.

controversy requirement has been met.”¹⁵⁸ This statement was disingenuous, however, because while the court concluded that, “[t]he defendant has made the necessary showing that the amount in controversy has been met,” it never explained how the defendant did so.¹⁵⁹ The court discussed at length the policy behind CAFA and why plaintiffs should not be able to split their suits simply by arbitrary time periods, then ultimately determined the claims must be aggregated and removed.¹⁶⁰ In *Proffitt*, unlike *Freeman*, no direct evidence, or otherwise, had been presented to show that the plaintiffs had in fact split their suits to avoid federal jurisdiction.¹⁶¹ Perhaps, in order to avoid *Proffitt*'s mere facial statement that the defendant “made the necessary showing,” this is why the *Freeman* court ignored the question as to the level of proof needed to remove when there is a factual dispute as to damages.

Regardless, in both *Freeman* and *Proffitt*, the courts find cover for their *sua sponte* decisions. The *Proffitt* court concluded that the defendant had “made the necessary showing” for removal without explanation,¹⁶² and the *Freeman* court required no showing because the five suits were actually only one suit.¹⁶³ Again, these decisions take a great weight off the shoulders of removing defendants, while introducing uncertainty into plaintiffs’ litigation.

In the more recent Sixth Circuit case, *Hubbard v. Electronic Arts, Inc.*, the court discussed standards of proof surrounding removal jurisdiction in the Sixth Circuit and found that the “legal certainty” test applied in cases where an amount was specified over the amount in controversy, and the defendant seeks to prove less.¹⁶⁴ The court also found that a preponderance standard applied in cases of unspecified amounts, where a defendant need only show that it is more likely than not the amount exceed the minimum amount in controversy.¹⁶⁵ The court held that because the *Freeman* court treated the aggregated claims as one “specified amount,” the legal certainty test must apply if the suits

158. *Proffitt v. Abbot Labs.*, No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *3 (E.D. Tenn. Sept., 23, 2008) (citing *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007)). The preponderance standard is also referred to by many courts as the “more likely than not” standard, i.e. if a defendant can show that it is more likely than not that the damages will exceed the minimum amount in controversy, then the case can be removed. *See id.* at *5.

159. *Id.* at *13.

160. *Id.* at *3–13.

161. *See id.* Remember in *Freeman* that the plaintiffs’ counsel was on record saying that avoiding CAFA was the only reason for splintering the suits. *See Freeman* 551 F.3d at 407 (6th Cir. 2008).

162. *Proffitt*, 2008 U.S. Dist. LEXIS 72467, at *13.

163. *Freeman*, 551 F.3d at 406–11.

164. *Hubbard vs. Elec. Arts, Inc.*, No. 2:09-CV-233 and 2:09-CV-234, 2011 U.S. Dist. LEXIS 77859, at *17–21 (E.D. Tenn. July 18, 2011).

165. *Id.*

are aggregated.¹⁶⁶ Thus, once the *Hubbard* court aggregated the suits, it stated, “the amounts in controversy are aggregated to total nearly \$10,000,000. As such, this Court applies the legal certainty test, and further FINDS that the test has been met.”¹⁶⁷

Again, the court’s decision gave no indication as to how the defendants carried any burden in *Hubbard*, and the plaintiffs had no chance to rebut the court’s near-immediate assumption that the amount in controversy met the legal certainty test.¹⁶⁸ Because the *Freeman* test does not include any process, the defendants and plaintiffs in these cases do not make motions or show proof. The courts, in the Sixth circuit at least, bypass these steps and remove cases *sua sponte*.

The problems with *Freeman*, *Proffitt*, and *Hubbard* are legion because courts use incomprehensible standards of proof to grant removal jurisdiction to defendants. In *Freeman*, the court “need[ed] not decide the proper standard of proof under CAFA”;¹⁶⁹ in *Proffitt*, the defendant “demonstrated by a preponderance of the evidence that the amount in controversy requirement has been met”;¹⁷⁰ and in *Hubbard*, “the legal certainty test . . . ha[d] been met.”¹⁷¹ What would cause such variation and confusion in substantially similar cases where all the courts are doing is aggregating claims that have no “colorable reason” to be splintered? The confusion arises because no law exists that allows courts to aggregate claims on their own initiative, and it is being developed as the courts act *sua sponte*. After these three cases, both plaintiffs and defendants are in worse positions because neither party knows what burden it may or may not face in removing or remanding cases. Further, the preceding cases discuss only the Sixth Circuit’s approach; other circuits have even more varying standards of proof required for removal.

The Eight Circuit in *Marple v. T-Mobile Central, LLC* never reached the question of standard of proof, because it disagreed with the principle of inter-suit claim aggregation.¹⁷² However, as “colorable reasons” go, the question in *Marple v. T-Mobile, LLC* becomes: what exactly did the court find “colorable” about the plaintiffs’ reasons? The *Marple* court admitted that the plaintiffs structuring was similar to that in *Freeman*, but distinguished the case and stated, “[i]n contrast, the structure of

166. *Id.* at *19.

167. *Id.* at *24.

168. *See id.* at *24 (emphasis in original).

169. *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 409 (6th Cir. 2008).

170. *Proffitt v. Abbott Labs.*, No. 2:08-CV-148, 2008 U.S. Dist. LEXIS 72467, at *3, *13 (E.D. Tenn. Sept. 23, 2008).

171. *Hubbard*, 2011 U.S. Dist. LEXIS 77859, at *24.

172. *See Marple v. T-Mobile Cent. LLC*, 639 F.3d 1109, 1111 (8th Cir. 2011).

Marple's class actions exactly mirror the underlying ten lawsuits brought by T-Mobile Moreover, there is no indication that Marple artificially divided the lawsuit to avoid the CAFA."¹⁷³ The court did not adopt the test from *Freeman*; however, it subtly gave the colorable reason test credence by looking for reasons why the plaintiffs split their case. As noted throughout this paper, CAFA has no explicit requirement that plaintiffs offer any reason for disclaiming damages over \$5 million and splitting claims. Yet, the court found it necessary to specify that "there is no indication that Marple artificially divided the lawsuit to avoid the CAFA."¹⁷⁴ This statement could signify that if there had been evidence in this case of "artificial" claim splitting, the court would have acknowledged the argument. The court did not explain how evidence of "artificially" splitting conflicts with what the court seems to be calling "colorable basis," here mirroring T-Mobile's prior litigation.¹⁷⁵

Similarly, in *Barria v. Dole Food Co.* the Ninth Circuit addressed its own legal standard for removal to federal court.¹⁷⁶ The court began by explaining that the Ninth Circuit "strictly construes the removal statutes against removal jurisdiction, and jurisdiction must be rejected if there is any doubt as to the right of removal."¹⁷⁷ The court further noted the heavy burden the defendant has to meet in order to achieve removal, including the proper procedural requirements.¹⁷⁸

Regarding the claims in *Barria*, the defendants merely reviewed the plaintiffs' complaints and attempted to show that removal jurisdiction under CAFA was appropriate.¹⁷⁹ The defendants argued in part that because 2,485 plaintiffs filed the action in a state court where the minimum jurisdictional limit was \$25,000, the amount in controversy would exceed \$62 million.¹⁸⁰ However, this reasoning did not persuade the court, and it explained that the defendants did not overcome the "strong presumption against removal jurisdiction."¹⁸¹ The plaintiffs divided their claims "alphabetically and by country,"¹⁸² in contrast with

173. *Id.*

174. *Id.*

175. *See id.*

176. *Barria v. Dole Food Co.*, No. CV 09-213-CAS(VBKx), 2009 U.S. Dist. LEXIS 27926, at *5-12 (C.D. Cal. Mar. 9, 2009).

177. *Id.* at *6 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).

178. *Id.*

179. *Id.* at *7-9.

180. *Id.* at *9.

181. *Id.* at *9, *11 (internal quotes omitted). Further, the court would not agree to allow the defendants to serve requests for admission to the plaintiffs asking if they admit or deny that they were seeking at least \$75,000 in the lawsuit. *Id.* at *9, *11-12.

182. *Id.* at *4.

Hubbard, where dividing suits between distinct plaintiffs, current and former NCAA student athletes, was not a “colorable reason.”¹⁸³ In *Hubbard*, the court found that plaintiffs representing current and former student athletes too closely resembled division by arbitrary time periods.¹⁸⁴ Expanding this logic, then, it is not difficult to see how another court more willing than the *Barria* court to apply the *Freeman* test could say that dividing plaintiffs alphabetically and by country is simply a way of dividing the suits by arbitrary time periods over which damages occurred in the different countries.

The *Barria* defendants made a facially logical argument in support of removal jurisdiction, similar to the argument in *Freeman v. Blue Ridge Paper Products, Inc.*¹⁸⁵ However, it could not overcome the Ninth Circuit’s strong presumption against removal.¹⁸⁶ The court followed the language of CAFA closely, and did not allow removal where defendants could not show the amount in controversy was met literally.¹⁸⁷ At the same time, the Ninth Circuit placed a burden on defendants that defendants in the Sixth Circuit are less likely to face in the wake of *Freeman*. Does this mean that the Sixth Circuit has gone rogue in its interpretation of CAFA? Hardly. The Ninth Circuit, too, is manipulating CAFA. CAFA does not state that matters of removal should have a “strong presumption” against the defendants.¹⁸⁸ While this might be the Ninth Circuit’s law generally, it conflicts with both the intent of CAFA and the Sixth Circuit’s overly expansive reading of removal jurisdiction. The problems flowing from these decisions are the same problems that CAFA was intended to fix.

Federal consistency in removal jurisprudence is essential if CAFA is to achieve its goals of avoiding forum shopping by plaintiffs and preventing plaintiffs from “gaming the system.” However, what better would let plaintiffs game the system than knowing in the Sixth Circuit they might face claim aggregation, but in the Ninth Circuit there is a strong presumption against removal? In addition to denying courts the ability to aggregate claims statutorily in order to provide some certainty to litigants, Congress could craft a compulsory joinder device similar to

183. See *Hubbard v. Elec. Arts Inc.*, No. 2:09-CV-233 and 2:09-CV-234, 2011 U.S. Dist. LEXIS 77859, at *24 (E.D. Tenn. July 18, 2011). The defendants were also different in *Hubbard*. See *id.* at *23–24.

184. *Id.*

185. *Barria* 2009 U.S. Dist. LEXIS 27926, at *8–12. See also *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 409 (6th Cir. 2008) (“We do not rely, however, on Blue Ridge’s argument that the jurisdictional amount is exceeded in each one of the separate cases by virtue of the number of class members (300) and the amount that each class member claimed (\$74,000)”).

186. See *Barria*, 2009 U.S. Dist. LEXIS 27926, at *9.

187. *Id.*

188. 28 U.S.C. § 1332(d) (2011).

Rule 19 of the Federal Rules of Civil Procedure.¹⁸⁹ In order to protect the interests of plaintiffs and defendants, such a practical rule would dispose of issues through a limited number of proceedings, rather than through duplicative litigation. A possible reading of such a clause could incorporate language from Federal Rule 23(b)(3) which governs many large consumer class actions.¹⁹⁰ Below in italics are proposed modified portions of Rule 23(b)(3) which would provide a suitable test for aggregation between suits:

Aggregation of class suits may be appropriate if: the court finds that the questions of law or fact common to class *action claims* predominate over any questions affecting only individual *classes*, and that a *single* class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the *classes'* interests in controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against separate classes;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a *single* class action.¹⁹¹

With light modification, a common rule and widely used class certification test factors can be applied to not only aggregating individual claims into a class action, but multiple class actions into a single class action. Such a clause would further the intent of CAFA in that it would provide judges with the ability to aggregate class suits into entities that are more easily removable to federal court, which is what the *Freeman* court stretched the law beyond recognition to do.

More importantly, with such a rule, the circuits would develop similar jurisprudence, and plaintiffs and defendants would be put on notice as to what their burdens of proof were to either receive or defeat joinder of suits. Such a system would be vastly superior to that begun by *Freeman* where judges, clearly fed up with plaintiffs trying to avoid federal jurisdiction, have begun to remove suits *sua sponte*, without good reasoning or consistency.

Other statutory alternatives surely exist, but the aforementioned statutory additions are two ways to avoid the awkward feeling when a plaintiff class files a \$4,999,999 suit, and the judge has no recourse other than to design a law not present in CAFA in order to send the class to the federal courts.

189. FED. R. CIV. P. 19.

190. FED. R. CIV. P. 23.

191. *Id.* (emphasis added).

IV. CONCLUSION

Since Congress passed CAFA in 2005, plaintiffs' attorneys have found unique ways to avoid litigating in the federal courts, which are typically less friendly to plaintiffs than many of the state courts before CAFA. However, rather than amend CAFA in order to fix some of the legislation's holes, Congress has not acted, leaving the courts on their own and understandably frustrated. This frustration led the Sixth Circuit in *Freeman v Blue Ridge Paper Products, Inc.* to go beyond the letter of the law and aggregate suits in order to satisfy federal jurisdictional requirements. Other circuits have not followed in *Freeman's* wake; however, courts not adopting *Freeman* have looked to its fast and loose reasoning in order to distinguish cases on minor factual differences and a variety of congressional records. Many courts have been forced to make the types of decisions that could be said to be "distinctions without differences," resulting in confusion regarding when class action claims can be separated and when they cannot. The best way to avoid any further expansion of the aggregation principle in the circuit courts surrounding the *Freeman* test is by either explicitly eliminating inter-suit claim aggregation or allowing for a defined joinder mechanism in the federal courts that allows plaintiffs and defendants to be put on notice as to when their suits may be aggregated.