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JUDICIAL REVIEW OF SETTLEMENTS UNDER THE CLASS ACTION FAIRNESS ACT AND DEFERENCE DUE TO THE DEPARTMENT OF JUSTICE AND STATE ATTORNEYS GENERAL

Michael E. Solimine[*]

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Abstract: The Class Action Fairness Act of 2005 (CAFA) made it easier to remove consumer class actions from state to federal court, and among other things regulates the procedure of federal court approval of settlements of those cases. CAFA requires that before any court approval or disapproval, the parties must notify the Attorney General of the United States, and the attorneys general of states where members of the class live, of the pending settlement in order to receive any objections or other input. While such notice is frequently sent, since most class action cases settle out of court, it appears that the U.S. AG and state AGs rarely formally object to proposed settlements. Perhaps not surprisingly, the provision has been the subject of little commentary and analysis.

This Article fills that gap by focusing on how state AGs process and evaluate such notices under CAFA, using as a case study over ten years' worth of unpublished data obtained from the Ohio Attorney General, regarding the Ohio AG's review of thousands of CAFA settlement notices. The Article also addresses whether states should also be permitted to intervene as parties in CAFA suits, and the legal and policy issues regarding how much weight or deference a federal court should give to objections or input (or lack thereof) from the DOJ and state AGs, usually through amicus curiae briefs, to proposed settlements.

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## I. INTRODUCTION

The enactment of the Class Action Fairness Act (CAFA) of 2005[1] resulted in the federalization of many class action lawsuits—both those originally filed in federal court and those removed from state courts into federal court—especially in the mass tort litigation area.[2] Prior to CAFA's enactment, defense attorneys viewed federal courts as more favorable venues for class actions because of more restrictive federal class rules.[3] On the other hand, plaintiff attorneys suffered a defeat as the result of CAFA's enactment since they were no longer able to strategically forum shop for advantageous state court forums.[4] CAFA's purpose seemed apparent: bring multistate class actions into national courts and subject such actions to the more exacting supervision of the federal courts.[5] Nonetheless, states have retained a significant role in addressing complex cases specifically in "pursu[ing] aggregate relief on behalf of state citizenry."[6]

In aiming to uphold the states' role in complex litigation, federal courts have (1) recognized and upheld state courts adjudicating state class litigation, (2) rejected the primacy of federal courts in applying Rule 23 class certification standards in derogation of countervailing state statutes, (3) recognized the role of state Attorneys General (AG) in their *parens patriae* capacity to pursue

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[1] Pub. L. No. 109-2, 119 Stat. 4 (codified 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2018)).
[2] Linda S. Mullenix, *The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, 2019 BYU L. REV.1551, 1554. See also Bacher v. Boehringer Ingelheim Pharm. Inc., __ F.4th __, __, 2024 WL 3503528 *1 (2d Cir. July 23, 2024)(Calabresi, J.)(CAFA "is best-known as a landmark expansion of federal subject-matter jurisdiction over class actions.").
[3] *Id*.
[4] *Id*.
[5] Edward A. Purcell Jr., *The Class Actions Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1854 (2008).
[6] Mullenix*, supra* note 2, at 1555.

complex litigation, and (4) acknowledged the right of state AGs to receive notice of federal class action settlements.[7]

But it appears that the last factor has remained largely dormant. As a leading class action scholar, Linda Mullenix, has recently observed, "[t]he overwhelming majority of cases indicate that federal and state officials rarely comment or object to pending federal class settlements. This raises the question of whether the CAFA notice provision is little more than a "paper tiger."[8] She adds that "the reasons for this apparent state lassitude in commenting on or objecting to federal class action settlements remain unexplored."[9]

This Article begins to fill this gap in the commentary on CAFA. Part II of this Article explores the procedural and legal landscape of consumer class actions before CAFA as well as why Congress enacted CAFA. As will be seen, CAFA leveled the playing field between plaintiffs and defendants, limited alleged abuse and inconsistencies by state-court judges, and encouraged ample protection of consumers' representation in class action lawsuits.

Part II also confirms Mullenix's conclusion regarding the relatively insignificant role both the U.S. Department of Justice and state AGs have played in private class action settlements since CAFA's enactment, despite their permitted role as class action settlement objectors. While it comes as no surprise that state AGs' involvement in objecting to class action settlements immensely varies state to state, at both the state and federal level involvement in the settlement of class actions is near non-existent, even following the enactment of CAFA.

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[7] *Id*. at 1555-56.
[8] *Id*. at 1597.
[9] *Id*. 1597.

Part III addresses states' abilities to intervene—as opposed to simply objecting—in a class action settlement suit governed by CAFA. Given current standing jurisprudence, it is questionable whether states have the power to intervene in such suits, as exemplified especially by the United States Court of Appeals for the Sixth Circuit's decision in *Chapman v. Tristar Products, Inc*.[10] Yet, formally attempting to intervene assumes a desire by state AGs to do so. Given their general lack of participation in even objecting to settlements, intervention in a lawsuit would require AGs to go even a step further. In this light, the *Chapman* holding may not seem to be particularly significant, but it accentuates the importance of the jurisprudential weight courts do or should give to DOJ or AG objections to settlements when they are made.

Part IV addresses the current deference courts give to DOJ and state AG settlement objections as well as examines the inconsistency by courts in their amount of deference and reason—or lack thereof—for deference. This Part also explores the benefits and consequences of allowing the DOJ and state AGs to in effect serve as permanent objectors to class action lawsuits. This discussion reaffirms the conclusion that the DOJ, and more specifically, state AGs are appropriate officials to in effect serve as permanent objectors and such a role can adequately fulfills CAFA's purpose and mission—protect the consumer class in complex litigation. To accomplish that, we argue that courts should not give weight to the DOJ or State AGs *not* objecting to a settlement, and in contrast should give significant (though not complete) deference to objections when they are made. This dichotomy acknowledges the realities attending DOJ and state AG review of class action settlements while respecting the purpose of the CAFA notice requirement.

## II. CAFA SETTLEMENT APPROVAL PROVISIONS AND OBJECTIONS BY THE U.S. DEPARTMENT OF JUSTICE AND STATE ATTORNEYS GENERAL

[10] 940 F.3d 299 (6th Cir. 2019).

### *A. CAFA in General*

Before CAFA was enacted, plaintiffs in class action lawsuits (typically based on state law claims) often chose to file their cases in state court jurisdictions perceived as "pro-plaintiff."[11] State court judges were frequently viewed as more sympathetic to class action plaintiffs and less sympathetic to out-of-state defendants,[12] creating opportunities for significant "forum shopping" (i.e., strategically filing a lawsuit in an alleged favorable forum).[13] Due to strict diversity jurisdiction limitations,[14] defendants faced challenges in removing cases from pro-plaintiff state courts to presumably more neutral federal courts, who are typically more experienced in litigating complex cases such as class actions. Further, this regime allowed for state courts to adjudicate cases involving parties from multiple states, disputes involving interstate commerce, and matters with national significance, impacting all Americans rather than just residents of a particular state.[15] However, in cases of such national impact and importance, some argued that state courts were not the proper forums for resolution.[16]

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[11] *See* Robert H. Klonoff, *The Decline of Class Actio*ns, 90 WASH. U. L. REV. 729, 732 (2013).
[12] *Id*.
[13] *See* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Action: A Critique of Epstein v. MCA, Inc*., 73 N.Y.U. L. REV. 765, 776 (1998). We acknowledge that "forum shopping" is a broad term that means different things in different contexts, and is usually used pejoratively. See generally Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011); Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LIT. 107 (2012); Patrick Mullinger, *The Mall of Litigation: The Dangers and Benefits of Forum Shopping in American Jurisprudence*, U. CIN. L. REV. BLOGPOST (Nov. 17, 2021), https://uclawreview.org; Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990). We use the term mainly in the descriptive sense regarding the litigation strategies of many plaintiffs' attorneys in class action cases.
[14] *See* 28 U.S.C. § 1441(b)(2) (stating that removal may be unavailable when at least one "properly joined and served" defendant is a citizen of the forum); 28 U.S.C. § 1446(b)(2)(A) (preventing removal when at least one defendant "properly joined and served" unambiguously refuses to consent to a removal notice within 30 days of service). *See infra* notes 29-32.
[15] Purcell, *supra* note 5, at 1854.
[16] *Id*. citing S. Rep. 109-14, at 62; S. Rep. 108-123, at 61-62 (2003); H.R. Rep. 108-144, at 15 (2003). "This practice is an affront to federalism," the House Judiciary Committee declared, "because it results in one State court judge effectively making the law of that State applicable nationwide." H.R. Rep. 108-144, at 13.

Contemporaneous with Congress's consideration and passage of CAFA, extensive case studies and research demonstrated that many state court judges—who are often elected officials—appeared to tend to favor class action members over large, out-of-state defendant corporations.[17] Aside from case outcomes apparently reflecting this bias, much of the congressional floor debate and discussions during the CAFA hearings focused on abuses perpetuated by state-court judges and plaintiffs' counsel under the pre-CAFA system. Typically, this abuse manifested itself in small, monetary recoveries for class members, who either received minimal compensation, undesirable coupons or vouchers,[18] or even lost money without any recovery at all.[19]

Congress faced additional challenges beyond those addressed in the floor debate over CAFA. With some class actions reaching immense proportions, class members often struggled to oversee the actions of class attorneys, who represented only the class representatives (not the class at large), without any prior notice.[20] This lack of communication between representatives' attorneys and class members,[21] coupled with potential conflicts of interest among representatives, members, and their respective legal counsel, left the system "susceptible to abuse because class members had little knowledge of or control over the litigation."[22]

Additionally, according to some perspectives, class actions had detrimental effects on the broader American community. Class attorneys, it was argued, often filed frivolous lawsuits to

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[17] Klonoff, *supra* note 11, at 732. See also Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 423 (2008); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1664–65 (2008).

[18] *See, e.g.,* Kamilewicz v. Bank of Boston, 92 F.3d 506 (7th Cir. 1996) (declining, despite concerns, to review the Alabama settlement which gave class members less than $10 while they had to pay nearly $100 in legal fees since a lower federal court cannot review decisions of state courts).

[19] Klonoff, *supra* note 11, at 743.

[20] Purcell, *supra* note 5, at 1852.

[21] *See* Amanda M. Rose, *Classaction.gov*, 88 U. CHI. L. REV. 487, 494-495 (2021) (discussing the class action transparency problem).

[22] Purcell, *supra* note 5, at 1853.

coerce deep-pocketed corporations into large fee awards going solely to attorneys, which led to unnecessary litigation that primarily benefited attorneys rather than the class members.[23] This resulted in unnecessary litigation to the detriment of class members and posed a threat to businesses nationwide by draining their resources and revenue.

CAFA's legislative record also reveals a more fundamental principle driving legislation: restore the Framer's intent for federal court consideration of interstate cases under diversity jurisdiction.[24] Diversity jurisdiction was originally established to ensure impartial adjudication of multi-jurisdiction litigants. Some modern class actions, however, epitomized the very concerns diversity jurisdiction aimed to address: bias against out-of-state defendants and state courts' failure to recognize the interests of other affected states in the litigation process.[25] CAFA's journey through Congress was far from swift. It underwent over eight years of effort, saw multiple name changes and versions, endured numerous committee hearings, and survived several attempts to halt debate through cloture.[26] As Mullenix succinctly observes, "there can be little doubt" that CAFA's passage "was imbued with politics. In the same vein that corporate [defense] interests lobbied Congress for years to enact this legislation, plaintiff's interests advocated equally

[23] *Id*. at 1855. *See also* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000).
[24] Purcell, *supra* note 5, at 1859, citing S. Rep. No. 109-14, at 6 (2005) reprinted in 2005 U.S.C.C.A.N. 3, 7.
[25] S. Rep. No. 109-14, at 6, reprinted in 2005 U.S.C.C.A.N. at 7.
[26] *See* Purcell, *supra* note 5, at 1856-60.

forcefully against the legislation, but lost the battle."[27] Despite these travails, Congress eventually passed it and it was signed into law by President George W. Bush in 2005.[28]

Expanding removal from state to federal court occupies much of CAFA. Prior to CAFA, it was extremely difficult for defendants to remove a state-law class action to federal court due to the stringent requirements of complete diversity jurisdiction.[29] Given the inherent nature of class actions involving numerous plaintiffs from across the nation, satisfying these requirements was improbable. Aside from these requirements, in the pre-CAFA world, defendants only had one year from the date of filing to remove a class action to federal court,[30] removal required the consent of all defendants,[31] and removal was not allowed when one defendant was a citizen of the state where the suit was brought.[32]

CAFA revolutionized this landscape by permitting class actions to be initiated in federal court or promptly removed from state courts with more relaxed criteria. Of these, CAFA now permits removal with minimal diversity, meaning any class member must be diverse from any defendant and the entire proposed class's amount in controversy exceeds $5,000,000.[33] CAFA also completely eliminates the above-mentioned one-year removal deadline, the need for consent from all defendants, and the prohibition on removal when a defendant resides in the state where the

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[27] Linda S. Mullenix, *The Politics of Class Action Reform: Reflections on the American Experience* in THE AUSTRALIAN CLASS ACTION: A 30 YEAR PERSPECTIVE 245, 256 (Michael Legg & James Metzger, eds., 2023)(footnote omitted). See also David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1288-91 (2007)(tracing the legislative maneuvering of CAFA through Congress between 1997 and 2005, and referring to it as "the brainchild of a group of Fortune 500 corporate counsel"); Diego A. Zambrano, *The State's Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1864 (2018)(CAFA was "heavily partisan and passed the Senate and House with overwhelming Republican support despite substantial opposition from Democrats.")(footnote omitted).
[28] Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).
[29] 28 U.S.C. §§ 1332, 1441 (2006). *See* note 14 *supra*.
[30] 28 U.S.C. § 1446(b) (2006).
[31] *See, e.g.*, Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988).
[32] 28 U.S.C. § 1441(b).
[33] 28 U.S.C. § 1332(d)(2), (d)(5)(B).

lawsuit was filed.[34] While some call CAFA an "extended and well-organized political campaign," or a "bow[] down to federalism,"[35] others downplay its impact due to the lack of any substantive changes in the law.[36] Nevertheless, CAFA has substantially transformed the procedural framework for class action lawsuits.

### *B. CAFA's Settlement Notice Provision: Purpose and Effect*

In addition to empowering defendants, CAFA explicitly recognizes a role for the DOJ and state AGs to participate in reviewing federal class action settlements through its notice requirement.[37] State AGs are the chief legal officers for their respective state and thus are responsible for enforcing state law while defending the state against legal challenges.[38]

In furtherance of its purpose, CAFA also addressed the trend of class actions being settled out of court, and often only as mere settlement devices.[39] CAFA requires settling defendants to notify "appropriate" federal and state officials of the pending federal class action settlement. The U.S. Attorney General is the relevant federal official, while the AGs of states where each class member resides are the pertinent state officials.[40]

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[34] 28 U.S.C. § 1453 (b)(CAFA statute); 28 U.S.C. § 1332(d)(2), (d)(5)(diversity statute)..
[35] Purcell, *supra* note 5, at 1823.
[36] *Id*.
[37] 28 U.S.C. § 1715 (2018).
[38] Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 65 (2018)
[39] Purcell, *supra* note 5, at 1853 (citing Thomas E. Willging, Laural L. Hooper & Robert F. Niemic, *Empirical Study of Class Actions in Four Federal District Courts* 7, 10 (FED. JUDICIAL CTR. 1996) (finding that out of 152 suits certified as class action in the mid-1990s, fifty-nine were certified for settlement purposes only).
[40] 28 U.S.C. § 1715(a)(2)(stating that the state level relevant official is one who has "primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State…If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.").

The CAFA notice requirement is triggered when parties to a federal class action submit a proposed settlement for approval in a fairness hearing before a federal judge.[41] By its terms the provision applies to *all* class actions litigated in federal court, whether filed originally there or by removal.[42] Defense counsel must confirm they have complied with the CAFA notice requirements by demonstrating that notice has been provided to the appropriate officials of all states where class members reside, not just the officials in the state where the case is heard.[43]

The notice must include certain documents, such as the complaint and hearing schedules. But some requirements are more burdensome on the defendant—like including the appropriate state official of each state with the name of each class member who reside in that state as well as the estimated proportionate share of the claims of those members to the entire settlement—all within ten days of filing the proposed settlement.[44] Although the notified officials need not take any action, a judge cannot issue final approval of a settlement until ninety days after notice.[45] Failure to comply with the CAFA notice requirement renders any subsequent settlement agreement void in its entirety.[46]

By some accounts, "the legislative history [of the notice provision] is scant," but the "overriding purpose seems to have been to prevent lawyers from crafting abusive settlements favoring themselves over consumers or other injured parties."[47] In other words, Congress intended the CAFA notice requirement to empower States, through their AGs, to safeguard their citizens'

[41] *Id*. at § 1715(b).
[42] See 28 U.S.C. § 1711(2)(defining "class action" to include those originally filed in or removed to federal court). See generally Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1709 (2006).
[43] 28 U.S.C. §1715(b).
[44] 28 U.S.C. § 1715(b)(7).
[45] 28 U.S.C. § 1715(d).
[46] 28 U.S.C. § 1715(e)(1).
[47] Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?,* 156 U. PA. L. REV. 1971, 1973 (2008)(footnote omitted).

interests, rather than their own sovereign interests.[48] Committee hearings emphasized that the primary purpose of the notice requirement is to "safeguard plaintiff class members' rights," enabling State AGs to "voice concerns if they believe that the class action settlement is not in the best interest of its citizens."[49] On that account, the provision does not seem to have a strong political valence; it is meant to protect the class, not plaintiffs or defendants (or their attorneys) as such.[50]

To be sure, some critics of CAFA view it primarily as aiding business interests by enabling them to avoid supposed "runaway awards" and "corporate 'blackmail'."[51] In our judgment, however, a fair-minded review of the congressional hearings that led to CAFA's passage provide ample evidence of abuse in state courts concerning class action settlements.[52] For example, there was testimony revealing numerous instances of alleged misconduct by state court judges and plaintiffs' attorneys, resulting in class members receiving meager compensation, undesirable coupons or vouchers, or even experiencing financial loss as an agreed upon settlement.[53] More pertinent for our purposes, it is telling that CAFA's critics appear to have relatively little to say about the notice provision.[54]

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[48] 151 Cong. Rec. S450 (daily ed. Jan. 25, 2005) (statement of Sen. Kohl) ("The Attorney General review is an extra layer of security for the plaintiffs and is designed to ensure that abusive settlements are not approved without a critical review by one or more experts.").

[49] S. Rep. No. 109-14, at 5 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 6.

[50] According to Sharkey, the "legislative history does not disclose which parties or interest groups favored such a provision." Sharkey, *supra* note 47, at 1975 n.15. Moreover, the provision "gives little to defendants as a legal matter," and indeed some members of the defense bar complained about the "potentially onerous burdens it places on them." *Id.*

[51] Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1, 42 (2023).

[52] See Klonoff, *supra* note 11, at 743 ("The concerns about abuses in state court were not without foundation.").

[53] Id. at 743-44 (citing S. REP. NO. 109-14, at 13-23; 151 CONG. REC. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 CONG. REC. H723, S726 (daily ed Feb. 17 2005) (Statement of Rep. F. James Sensenbrenner); 151 CONG. REC. S999-02, S999 (daily ed. Feb. 7, 2005) (Statement of Sen. Arlen Specter)).

[54] Which isn't to say that the notice provision is not without its critics. See, e.g., Klonoff & Herrmann, *supra* note 42, at 1706-09. But as we read them, Klonoff and Herrmann's criticisms are cast in nonideological terms. See id. at 1707 ("As a regulatory mechanism, however, the notice provisions are unlikely to yield much benefit. CAFA

Regarding the application of the notice provision, final approval of a proposed settlement by a judge is contingent upon appropriate notification to the respective state AG, allowing them time to respond, comment, or object to the proposed settlement within ninety days.[55] Some critics have argued that CAFA has facilitated a process that increasingly shifts state law class actions to federal courts, thereby elevating federal judges, who may lack significant expertise in state common law, as the primary interpreter of state law.[56] To the extent that is true, the notice requirement may be conceptualized as an appropriate counterbalance to the expansion of federal court jurisdiction. As Mullenix argues, while much of CAFA federalizes heretofore state litigation, the notice provision grants state AGs "a relatively robust role in addressing complex litigation and afforded significant protection to state auspices in state enforcement efforts."[57]

Notably, CAFA's notice requirement does not grant state AGs any new authority. Certian state AG offices have historically been proactive in the class action context, primarily through objections to proposed class actions settlements, inter-state coordination, and initiating independent litigation regarding the dispute underlying the class actions settlement. However, some scholars had doubts from the outset about whether CAFA's notice requirements would prompt increased AG involvement in scrutinizing class action settlement proposals.[58]

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compels defendants to send massive class action settlement papers to overworked state regulators, but does not compel the regulators to do anything.")(footnote omitted). See also note 50 *supra* (pointing out that the notice provision is not particularly helpful for defendants).

[55] 28 U.S.C. § 1715(d). Professor Mullenix, no apologist for corporate defendants, observes, persuasively to us, that prior to CAFA, "plaintiffs' attorneys were able to strategically forum shop for advantageous state court forums, and defense attorneys had little recourse to avoid state court adjudication because state courts were more than happy to retain their jurisdiction to the derogation of federal courts." Mullenix, *supra* note 2, at 1554.

[56] Hershkoff & Norris, *supra* note 51, at 27.

[57] Mullenix, *supra* note 2, at 1556. See also PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 39-40 (2015)(tbl. 2.4)(listing selected federal statutes enacted from 1976 to 2010, which empower state litigation, including CAFA which "provides state AGs greater oversight of and information concerning private class action litigation").

[58] Klonoff & Herrmann, *supra* note 42, at 1706-09; Sharkey, *supra* note 47, at 1974-75.

Additionally—and central to this Article—is the fact that governmental entities are not required to respond to CAFA notices, nor are courts obligated to adhere to their objections if they do respond. In fact, the notice requirement garnered some criticism from state AGs across the nation.[59] While CAFA was being considered by Congress, approximately one-third of state AGs objected to the notice provision, with many expressing skepticism that the notice requirement would not bring about any significant change.[60] They believed that without clearer statutory guidance, they would be unable (and arguably unwilling) to discern abuse solely through notices and, consequently, unable to take meaningful action.[61]

### *C. The U.S. Department of Justice and the Notice Provision*

At the federal level, the consumer protection office of the U.S. Department of Justice (DOJ) is responsible for monitoring notices of settlements and intervening in those action when necessary.[62] Despite this delegated duty, the DOJ has seldom objected to settlements since the enactment of

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[59] *Id.* at 1975 (citing Letter from Eliot Spitzer, N.Y. Attorney Gen., et al., to Senators Bill Frist & Harry Reid (Feb. 7, 2005), reprinted in 151 Cong. Rec. H644-45 (daily ed. Feb. 16, 2005)).

[60] *Id*.

[61] *Id*.

[62] *Consumer Protection Branch Practice Areas*, CIVIL DIVISION U.S. DEP'T OF JUST. (Mar. 22, 2023) https://www.justice.gov/civil/consumer-protection-branch-practice-areas. The DOJ's website devotes a mere two sentences to its duty to monitor class action settlement notices: "Fulfilling the Department's duty to ensure that class action settlements are fair and appropriate under the terms of the Class Action Fairness Act, the Branch monitors notices of significant settlements and takes action to discourage settlements that reward attorneys while offering allegedly harmed consumers little or nothing of value." Aside from the fact that DOJ rarely responds to CAFA notices, one might wonder why CAFA empowered the DOJ to be sent notice at all, when a potentially large number of state AGs will be sent notice, and members of the class may also register objections. What is the value added by the DOJ? The answer is that there can be value in multiple enforcers. Rather than wasteful redundancy, multiple objectors might bring different perspectives and expertise to the propriety of any given class action settlement. The sheer number of such settlements can also benefit from multiple (at least in theory) reviews. See generally Christine P. Bartholomew, *Playing Nicely With Others: How and Why Antitrust Enforcers Should Work Together*, 85 ANTITRUST L.J. 241 (2023); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016). See also Colin Provost, Elysa Dishman & Paul Nolette, *Monitoring Corporate Compliance through Cooperative Federalism: Trends in Multistate Settlements by State Attorneys General*, 52 PUBLIUS: J. FEDERALISM 497 (2022)(discussing state AGs and the DOJ cooperating in filing multistate lawsuits of regulated industries and resulting settlements).

CAFA.[63] Currently, the DOJ does not utilize any kind of uniform, standardized system for tracking the notices it receives pursuant to CAFA.[64] This deficiency may stem from the absence of a centralized repository for class action filings generally. Despite receiving hundreds of notices each year, the DOJ as of 2021 had only responded six times since the passage of CAFA to class action settlement notices.[65] There is no indication that the DOJ has changed its frequency of objections since then.

In response to this trend, Professor Amanda Rose has proposed the creation of a website coined "Classaction.gov"—a government-operated website to facilitate class action lawsuits by providing up-to-date and publicly accessible information on potential class action lawsuits, as well as a streamlined system for class action settlement notice pursuant to CAFA.[66] Relating to CAFA notices, the proposed website would not only alert designated federal and state authorities of proposed class actions, but would also enable a broader spectrum of stakeholders, including nonprofit consumer advocacy groups and academics, to receive alerts regarding relevant class actions.[67] This enhanced accessibility to information would allow interested parties, including the DOJ, to provide input at any stage of litigation, potentially even prior to reaching the settlement stage. This proactive approach would enable the DOJ to have a centralized system which would allow it to provide more substantive input before a settlement is reached and decided upon. While deficiencies may still linger even with the Classaction.gov's implementation, it would arguably prompt the DOJ to more actively participate in the class action settlement context.

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[63] *See* Rachel L. Brand, Assoc. Att'y Gen., Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society (Feb. 15, 2018)(discussing the DOJ's lack of participation in response to CAFA notices submitted), quoted in Rose, *supra* note 21, at 515 & n. 84 (discussing limited responses to CAFA notices by the DOJ).
[64] *Consumer Protection Branch Practice Areas*, CIVIL DIVISION U.S. DEP'T OF JUST. (Mar. 22, 2023) https://www.justice.gov/civil/consumer-protection-branch-practice-areas. *See* Rose, *supra* note 21, at 502.
[65] Rose, *supra* note 21, at 502.
[66] *See generally* Id.
[67] *Id*. at 515-516.

The DOJ blamed its lack of settlement objections on the delay in processing such notices internally. In 2018, Associate Attorney General Rachel Brand explained the current process of notice compilations at the DOJ office. First, any mail sent to the attorney general goes through "strict scrutiny" involving multiple mailrooms, each in a different government building, and each requiring weeks of processing including scanning and x-rays.[68] Only after this burdensome scan—typically taking around seventy days—would the lawyer receive the notice to review. Consequently, the DOJ is left to evaluate the settlement, consider objecting, and draft an argument in support of its objection all within around twenty days. Moreover, notices are often reviewed after settlements have been finalized, further limiting the window for objection.[69] As of February of 2018, the DOJ was receiving over 700 CAFA notices annually but had participated in only two cases—which were more than a decade prior.[70] However, Brand asserted that "[they have] begun to fix that process" and where a settlement was not "fair or reasonable" the DOJ would consider filing a statement of interest saying so.[71]

Since the DOJ's vow in 2018 to take on a more active role in class action settlements,[72] three years later it had filed statements in four consumer class action cases—all in 2019.[73] Some question the motivation behind the DOJ's extra attentiveness—was it to inadvertently support conservative organizations in the fight against class actions or to protect the consumer public? Another

[68] *Id*. at 515 n.84.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] Perry Cooper, *DOJ Opposes Another Class Deal, Another Court Ignores It*, BLOOMBERG LAW (Aug. 9, 2018), https://news.bloomberglaw.com/class-action/doj-opposes-another-class-deal-another-court-ignores-it.
[73] Cannon v. Ashburn Corp., No. CV 16-1452 (D.N.J. Apr. 16, 2018), 2018 WL 1406882; Cowen et al v. Lenny & Larry's Inc., No. 1:17-cv-01530, Dkt. No. 103 (N.D. Ill. Feb. 15, 2019); Chapman et al v. Tristar Products, Inc. No. 1:16-cv-01114, Dkt. No. 134 (N.D. Ohio June 6, 2018); Off. of Pub. Affs., *Department of Justice Opposes Unfair Attorney Fee Arrangement in Class Action Settlement Involving Dial Soap*, DEP'T OF JUST. (May 10, 2019), https://www.justice.gov/opa/pr/department-justice-opposes-unfair-attorney-fee-arrangement-class-action-settlement-involving.

perspective comes from leading consumer advocate Brian Wolfman, who questioned the effectiveness of the DOJ's strategy asserting that no matter their underlying motive, objecting to a mere two cases in one year is unlikely to achieve any motive or purpose.[74]

More interestingly, two of the cases objected to in 2018 were small suits—not involving big money or household company names. Some argue that to fulfill its mission of consumer protection, the DOJ should focus on lawsuits involving payday lenders, banks, and credit card companies.[75] Instead of the 2018 pledge acting as a steppingstone to consistent advocacy by the DOJ,[76] activity on the federal level has ceased to be become more prevalent. Despite the DOJ's pledge to adopt a more active role, particularly compared to state AGs, it has yet to fully meet this standard.

### *D. State Attorneys General and the Notice Provision*

Although there exist instances where state AGs have raised objections to settlements, typically involving multiple state AGs per case, anecdotal evidence supports Professor Mullenix's assertion noted earlier in this Article that in most cases, state officials rarely oppose (or even respond to) class action settlements.[77] Of the contested settlements drawing significant state AG objections, many are joined by other state AGs. For instance, in *Figueroa v. Sharper Image Corp.*, the U.S. District Court for the Southern District of Florida held that a proposed settlement, offering class members coupons, was procedurally and substantively unfair, inadequate, and unreasonable.[78] The

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[74] Perry Cooper, *DOJ Opposes Another Class Deal, Another Court Ignores It*, BLOOMBERG LAW (Aug. 9, 2018), https://news.bloomberglaw.com/class-action/doj-opposes-another-class-deal-another-court-ignores-it.
[75] *Id.*
[76] But the DOJ has voiced objections to settlements in some areas besides consumer actions. *See* Mike Scarcella, *Justice Department Says Settlement Too Lax in Real Estate Commission Case*, REUTERS (Feb. 16, 2024) https://www.reuters.com/legal/government/justice-department-says-settlement-too-lax-real-estate-commission-case-2024-02-16/. (real estate). *See also* Dylan Lovan, Justice Department, *Louisville Negotiating Federal Settlement on City's Policing Practices*, THE ASSOCIATED PRESS (Feb. 21, 2024) https://www.msn.com/en-us/news/us/justice-department-louisville-negotiating-federal-settlement-on-citys-policing-practices/ar-BB1iBZhr. (policing practices).
[77] Mullenix, *supra* note 2, at 1597.
[78] 517 F. Supp.2d 1292, 1329 (S.D. Fla. 2007).

court's decision was influenced by the objection of thirty-five state AGs to all three iterations of the proposed coupon settlement, demonstrating an active stance in safeguarding the interests of hundreds of thousands of consumer class members.[79]

Similarly, in a case from the District of Connecticut, the court denied a proposed settlement offering consumer class members continued membership with the company.[80] Aside from the fact that the proposed settlement awarded "in-kind"[81] benefits, where the cost of the benefit masterfully does not represent the dollar amount ascribed to it,[82] the court refused to approve a proposed settlement, expressly relying on the "especially helpful" amicus curiae brief of thirty-nine state AGs "forcefully" (in the Court's characterizations) opposing the settlement for being overstated and undervalued.[83]

Aside from the above-mentioned cases in Florida and Connecticut, the state of Arizona stands out for its transparency regarding objections to settlements.[84] The Arizona AG focuses on "cases where there is a case fund, often with millions of dollars available, yet consumers receive nothing but highly restrictive coupons and the money ends up lining the pockets of attorneys."[85] For example, in a pressure cooker class action, parties reached a settlement on the first of trial, offering

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[79] *Id*. at 1328.
[80] Wilson v. DirectBuy, Inc., 2011 U.S. Dist. WL 2050537 *7 (D. Conn. May 16, 2011).
[81] *See, e.g.,* Clement v. Am. Honda Finance Corp., 176 F.R.D. 15, 26-27 (D.Conn. 1997) (disapproving settlement and noting that coupons operated as "a sophisticated…marketing program").
[82] *See* In re Mex. Money Transfer Litig., 267 F.3d 743, 748 (7th Cir. 2001) ("[C]ompensation in kind is worth less than cash of the same nominal value…").
[83] *DirectBuy, Inc*., 2011 U.S. Dist. WL 2050537 at *9. The Court stated that the state AGs "forcefully argue that that the settlement is both overstated and undervalued. The Court finds their Memorandum to be especially helpful and views it as a placeholder for many absent class members' objections." *Id*. (cleaned up and footnote omitted). The Court also cited *Figueroa* as an example where the opposition of 35 state AGs "counseled against a finding of fairness." *Id*. See also notes 164 &197 *infra* (further discussing *DirectBuy*).
[84] Christopher Carlson, Ashley L. Taylor Jr., et. al, *Objections by DOJ and State AGs Seek to Sanitize Class Settlement with Dial Hand Soap*, TROUTMAN PEPPER (May 16, 2019) https://www.consumerfinancialserviceslawmonitor.com/2019/05/objections-by-doj-and-state-ags-seek-to-sanitize-class-settlement-with-dial-hand-soap/.
[85] Rachel L. Brand, Assoc. Att'y Gen., Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society (Feb. 15, 2018). See *supra* note 62.

consumer coupons worth $72.50 (expiring after 90 days) to use toward one of three $159 TriStar products, alongside an extended warranty.[86] To further diminish plaintiffs' recovery, the settlement required class members to agree to release all personal injury claims, even though each named plaintiff got $25,000 for their own injuries.[87] The Arizona Attorney General at the time, Mark Brnovich, led nineteen state AGs in objecting to the proposed settlement. In 2020, General Brnovich again led a 13-state coalition of state AGs successfully urging the Ninth Circuit to reverse a Wesson Oil proposed settlement.[88]

While this anecdotal evidence of state AG activity is informative, given the lack of more systematic evidence in the literature on state AG responses to the notice requirement, we sought to examine more closely the experience from at least one not atypical state AG. To that end, we requested and received unpublished data from the Consumer Protection Section of the Ohio Attorney General's office, encompassing the notices to class action settlements from 2007 to 2024 involving Ohio plaintiff class members to use as a case study.[89] Upon receipt of a settlement, a paralegal in the Ohio AG's office documents the notices received and distributes them to the relevant section of the office for review.[90] Each section of the Ohio AG has an individual

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[86] Perry Cooper, *DOJ Opposes Another Class Deal, Another Court Ignores It*, BLOOMBERG LAW (Aug. 9, 2018), https://news.bloomberglaw.com/class-action/doj-opposes-another-class-deal-another-court-ignores-it.
[87] *Id*.
[88] Richie Taylor, *Attorney General Mark Brnovich Fights to Protect Consumers in Class Action Lawsuit,* ARIZONA ATTORNEY GENERAL (June 3, 2021) https://www.azag.gov/press-release/attorney-general-mark-brnovich-fights-protect-consumers-class-action-lawsuit. For another example of the Arizona AG objecting to a class action settlement, see Brief of the Attorneys General of Arizona et al., as Amici Curiae in Support of Petitioner, Threat v. Farrell, 142 S. Ct. 71 (2021)(No. 20-1349), 2021 WL 1720714. The brief also cites several other joint briefs of State AGs objecting to class action settlements. Id. at 4-5, 2021 WL 1720714 at **3-5.
[89] Email from Teresa A. Heffernan, Counsel, Consumer Protection Section, Ohio Attorney General, to Michael E. Solimine, March 8, 2022, 3:27 p.m. [hereinafter 2022 Heffernan email](copy on file with authors); Email from Teresa A. Heffernan, Counsel,Consumer Protection Section, Ohio Attorney General, March 18, 2024, 9:57 a.m., to Michael E. Solimine [hereinafter 2024 Heffernan email](copy on file with authors).
[90] 2022 Heffernan Email, *supra* note 89.

designated to review the settlement, noting any concerns or determining if further discussion is necessary.

The staff focuses on several key factors during their review: the alleged harm outlined in the complaint, the potential impact on Ohio consumers, the class member notification, release language, injunctive and monetary relief terms, any cy pres distribution, and attorney's fees.[91] When concerns arise, the Ohio office may decide to raise them with other state AGs, engage in discussions with plaintiff and defense counsel, and if necessary, file an amicus brief with the court outlining their objections.[92] Moreover, the activity of the Ohio office may not necessarily be reflected in a formal objection to a settlement, or even formally memorialized by the AG's office itself. The office may reach out to counsel "more frequently with questions or concerns about specific aspects of the settlement. Typically, a call with the parties is enough to remedy any concerns."[93]

The data provided by the Ohio AG includes a robust summary of each case from 2007 to early 2024 in which the AG office has received a settlement notice.[94] Each case includes a description of the nature of the suit, the date of notification, the parties' representation, the number of Ohio class members, the final hearing date, as well as any pertinent notes.[95] While the notes offer insights into the evaluation process, such as concerns about cy pres distributions, class member compensation, and injunctive relief, they do not explicitly state whether objections were filed for

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[91] *Id*.
[92] *Id*.
[93] 2024 Heffernan email, *supra* note 89. This informal contact does not seem to be unusual. See Sharkey, *supra* note 47, at 1990 (in contacting counsel the California AG's office may "seek clarifications or changes in the notice or in the [settlement] agreement. Counsel are quite cooperative, in large part because they do not want formal objections by AGs.")(footnote omitted).
[94] 2022 Heffernan email, *supra* note 89.
[95] *Id*.

any of the nearly 6,000 cases reviewed.[96] But the notes are few and far between—nearly 6,000 cases and none explicitly mention whether an objection to the settlement was filed or not.[97]

Until the Ohio AG implemented their spreadsheet tracking the cases with settlement notices, they lacked any specific way to organize these records.[98] While the current record-keeping system might be improved, it nonetheless suggests more centralized recording and awareness of class action settlements by state AGs. Additionally, we acknowledge that this is only one state's system. While providing an in-depth discussion of each state's procedure for class action settlement notices is beyond the scope of the present Article, it would be fair to say that CAFA resulted in an increased awareness amongst state AGs regarding notices. However, from the provided material, it is evident that state AGs are leaps and bounds away from their intended and idealistic role under CAFA.

## III. STATE INTERVENTION IN CAFA SETTLEMENT LITIGATION

CAFA does not explicitly authorize a state to formally intervene pursuant to Federal Civil Procedure Rule 24. Given the ambiguity in the Act, courts have grappled with whether state intervention in the class action settlement context is consistent with standing jurisprudence and Rule 24. Not allowing state intervention as a party may be the proper conclusion under current jurisprudence. However, this result is in tension with the purpose of CAFA in allowing the government to have an involved role in the consumer class action context. This Part explores the

[96] *Id*. Some notes include "settlement calls for a 'cy pres' distribution of the net settlement to the National Women's Health Resource Center," "17,500 class members," "percentage of settlement is zero because no class members to be paid directly by GM," "settlement is $10 ticket to one of two Pitt football games. . .tickets to the games are usually around $30," "mailing to Illinois did not include the proposed settlement, if other state were missing it could be a violation of the CAFA statute; attorney fee may be excessive," "concerns regarding the lack of injunctive relief in the settlement."
[97] *Id*.
[98] *Id*.

implications of adhering to general state standing principles and disallowing states to intervene in this context.

### *A. Intervention and State Standing in General*

As previously mentioned, under CAFA state AGs possess the inherent authority to object to settlement proposals, by filing an amicus curiae brief with the court or in another way, allowing the state AGs—who arguably have a substantial stake in the outcome—to submit a legal memorandum to support consumer class members and express their distaste toward the proposed settlement.[99] Since those submitting briefs are not parties to the litigation, typical justiciability doctrines do not apply. Specifically, the state AGs (considered nonparties) in those filings are not bound by standing requirements that would apply to actual parties to a suit.

However, what if an AG wishes to intervene in the litigation and become a party to the case? A party would have greater rights than an amicus filer, such as being able to appeal an action by a district judge regarding approval of a settlement.[100] Standing doctrine permits states to sue in federal court in various capacities, such as states protecting their own sovereignty interests, and states vindicating the interests of their citizens (i.e., *parens patriae*).[101] Over the last three decades, states, usually through their AGs, have increased their regulatory and litigation activities,[102] due

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[99] CAFA doesn't specifically mention objections, but the notice requirement was "presumably [created] so that the state may comment upon or object to the settlement's approval, if the State believes the terms in adequately protect state citizens." California v. Intelligender, LLC, 771 F.3d 1169, 1172 (9th Cir. 2014).

[100] See, e.g., Chapman v. Tristar Products, Inc., 940 F.3d 299, 303 (6th Cir. 2019)("Arizona sought to intervene for purposes of appeal" regarding a class action settlement approved by the district judge).

[101] See generally Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1957-63 (2019); Ann Woolhandler & Julia D. Mahoney, *State Standing after* Biden v. Nebraska, 2023 SUP. CT. REV. 303, 307-09.

[102] Mank & Solimine, *supra* note 101, at 1968.

to factors such as increased staffing and resources, coordination among various state AGs, and heightened political polarization.[103]

The institutional benefits of states bringing lawsuits are numerous: most state AGs are elected officials, they represent a broader array of interests, they can collaborate with other state AGs to exert leverage, and some view state suits as the "litigation safeguard of federalism."[104] But as Will Baude and Sam Bray recently noted, "it is not typical for so many of our major public law cases to have names like *United States v. Texas* and *Biden v. Nebraska*."[105]

States have long successfully sued in federal court in various capacities.[106] Yet, States must first satisfy the justiciable doctrine of standing to bring a lawsuit or be a party to the litigation. As the Supreme Court has repeatedly and recently emphasized, standing requirements ensure that a matter is properly before the court as a "case or controversy" under Article III and that consistent with the separation of powers, the judiciary is the proper forum for resolution instead of the political branches.[107]

However, the Supreme Court's holding in *Massachusetts v. EPA* further allowed states to sue by relaxing the standing requirements for states.[108] There, the Court held that states are entitled to "special solicitude" standing and in some circumstances, states enjoy greater standing rights than

[103] *Id*.
[104] *Id*. (*quoting* Lemos & Young, *supra* note 38, at 117).
[105] William Baude & Samuel Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 154 (2023).
[106] *See* Mank & Solimine, *supra* note 101, at 1957.
[107] See, e.g., FDA v. Alliance for Hippocratic Medicine, 602 U.S. 367, 379, 144 S. Ct. 1540, 1554-55 (2024); Murthy v. Missouri, 603 U.S. __, 144 S. Ct. 1972, 1985 (2024). See also Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1710 (2008). *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (holding that a plaintiff must show they have suffered an injury in fact that is concrete and particularized, actual or imminent, not conjectural or hypothetical, the injury is fairly traceable to the challenged action of the defendant, and it is likely that the injury will be redressed by a favorable decision).
[108] 549 U.S. 497 (2007).

private individuals.[109] However, the opinion was not a model for clarity. Without claifying how states were entitled to greater standing rights as opposed to individuals, the majority opinion hinted that states are empowered under their quasi-sovereign interests in protecting the health, safety, and welfare of its citizens.[110]

Subsequent Supreme Court decisions, in contrast, seem to impose constraints on state standing doctrine.[111] Most recently, in *Biden v. Nebraska* and *United States v. Texas*, the plaintiff states relied on a broad interpretation of standing, specifically the "special solicitude" toward state interests as presented in *Massachusetts v. EPA*.[112] However, the court was hesitant to—and in fact did not—rely on *Massachusetts v. EPA*. In *Biden v. Nebraska*, six states challenged the Secretary of State's program to forgive student loan debt under the Higher Education Relief Opportunities for Students Act of 2003 and the Administrative Procedure Act.[113] The Court held that the State of Missouri had standing to sue but on very narrow grounds—solely because MOHELA, the loan company, was undisputedly harmed by the loan relief program, and since Missouri created and controlled MOHELA, that State suffered an injury in fact sufficient to establish standing to challenge the Secretary's plan.[114]

Conversely, in *United States v. Texas*, the Court explicitly held that the state of Texas did not have standing to sue and rejected the state's proposal for "expansive judicial direction of the Department's arrest policies" and allow for the anticipated "complaints in future years about

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[109] *Id*. at 520.
[110] *Id*. at 518-20. See Mank & Solimine, *supra* note 101, at 1957-58.
[111] Baude & Bray, *supra* note 105, at 154.
[112] *Id*. at 175.
[113] 143 S. Ct. 2355, 2362-2365 (2023).
[114] *Id*. at 2368. But see id. at 2391 (Kagan, J., dissenting) ("Courts must still 'function as courts'. . .. And in our system, that means refusing to decide cases that are not really cases because the plaintiffs have not suffered concrete injuries. The Court ignores that principle in allowing Missouri to piggy-back on the 'legal rights and interests' of an independent entity. If MOHELA wanted to, it could have brought this suit. It declined to do so.").

alleged Executive Branch under-enforcement of…drug laws, gun laws, obstruction of justice laws, or the like."[115] While those cases did not specifically implicate CAFA, they signal the Court's initiative of restricting state standing principles. The following section discusses state standing specifically regarding actions implicating CAFA.

### *B. Critiquing* Chapman v. Tristar Products, Inc.

The recent trend in case law has been stricter requirements for states to obtain standing and courts have followed this pattern when it comes to state AGs attempting to protect consumers from unfair class action settlements. As will be seen, CAFA does not grant any new authority upon government officials to be able to sue, and therefore, the stringent requirements for states to obtain standing has proven to be a difficult procedural hurdle for state AGs to overcome.

While the Supreme Court has addressed the standing of states with some frequency, it has said very little in regard to permissible state lawsuits under CAFA. In one case from 2014, in *Hood v. AU Optronics*, the Court held that CAFA does not apply in *parens patriae* actions brought by the attorney general where the state is the only named plaintiff.[116] The Court held that the statutory text of CAFA was clear, and by defining a "mass action" as "100 persons or more," a single state AG suing was against the clear statutory construction of CAFA.[117] Lower courts have been

[115] 143 S. Ct. 1964, 1973 (2023). The Court at the 2023 Term passed up an opportunity to clarify the open issues on state standing. In Murthy v. Missouri, 603 U.S. __, 144 S. Ct. 1972 (2024) the Court in a 6-3 decision held that two states and several individual plaintiffs lacked standing to sue various Executive Branch officials and agencies, bases on alleged government pressure on social media platforms to censor their speech. The Court applied traditional standing requirements that apply to all plaintiffs, and said virtually nothing about state standing as such, including such issues as whether States may enjoy "special solicitude" on these issues. Id. at 1985-97. Similarly, the dissent focused on the standing of an individual plaintiff, and held she had standing, and found it unnecessary to address state standing. Id. at 2005 (Alito, J., dissenting).
[116] Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161 (2014).
[117] *Id*. at 169.

gradually providing further clarity on the applicability of CAFA to attorney general actions, including the prominent Sixth Circuit case of *Chapman v. TriStar Products, Inc*.[118]

In *Chapman (*a consumer class action lawsuit), the parties reached a settlement agreement allowing class members to receive a coupon for the purchase of a Tristar product as well as a warranty extension.[119] More concerning, the settlement provided around $1.2 million in relief to the purchaser class but around $1.9 million in attorneys' fees.[120] During the fairness hearing, the state of Arizona alongside the DOJ, as amici, argued that the settlement was unfair to the plaintiff class members, mainly because it awarded more to the parties' attorneys than class members themselves.[121] However, despite the objections, the District Court indicated its intention to approve the settlement, which prompted Arizona to seek official intervention under Rule 24 of the Federal Rules of Civil Procedure.[122] It was denied, and that denial was affirmed on appeal. To do so as intervenors, the Sixth Circuit held that the Arizona AG needed to establish Article III standing.[123]

Arizona put forth three theories to support its standing: the doctrine of *parens patriae*, CAFA itself, and its participatory interest as a "repeat player."[124] However, the Sixth Circuit ultimately rejected all of these proposed theories, finding that Arizona lacked standing to intervene.

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[118] Emily Myers, *Update on CAFA and Attorney General Actions*, NAT. ASSOC. OF ATTORNEY GENERALS (Feb. 2, 2021) https://www.naag.org/attorney-general-journal/update-on-cafa-and-attorney-general-actions/.
[119] 940 F.3d 299, 303 (6th Cir. 2019).
[120] *Id*.
[121] *Id*.
[122] *Id*. at 304.
[123] *Id*. The Supreme Court "has declined to address an entrenched circuit split over this question." Monica Haymond, *Intervention and Universal Remedies*, 91 U. CHI. L. REV. __, __ (forthcoming 2024)(manuscript at 15 n.65)(on file with authors).
[124] *Chapman*, 940 F.3d at 304. Eighteen state AGs (including Ohio's) joining together, and the United States, submitted amicus curiae briefs arguing that the settlement should not have been approved, but neither brief appears to have directly addressed the issue of whether Arizona should be permitted to intervene in the case. See Brief of *Amici Curiae* Eighteen State Attorneys General Opposing Final Approval of Proposed Settlement, Chapman v. Tristar Products, Inc., (S.D. Ohio June 12, 2018 (Case No. 1:16-cv-1114); Brief for the United States as Amicus Curiae in Support of Appellant and Urging Reversal, Chapman v. Tristar, Inc., 940 F.3d 299 (6th Cir. 2019), 2019 WL 495842.

Regarding CAFA, Arizona relied on the legislative history of the Act,[125] arguing that the notice requirement provided state AGs with the opportunity and authority to intervene in litigation. However, the Sixth Circuit declined to rely on the legislative history of the act where the statutory text was clear: "Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials."[126]

The court also rejected the *parens patriae* argument, noting that Arizona failed to demonstrate any indirect effects of the alleged injury on Arizona as a whole, apart from the injury to identifiable class members.[127] Additionally, Arizona failed to show an injury to a quasi-sovereign interest—an interest in more than that of an individual.[128] To make this determination, courts look to whether the state would address the issue through its sovereign law-making powers. The court found that the existence of CAFA did not show that Arizona had exercised its sovereign-law making processes to address this situation because, at the fairness hearing Arizona disclaimed objections to the settlement on fraud or collusion grounds, limiting them to the same individual interests for the individual class members.[129]

The outcome in *Chapman* is not radically discordant with generally accepted standing principles for states, somewhat unclear though those principles are. Arizona's *parens patriae* argument was severely weakened by the absence of objections from Arizona consumers to the proposed settlement, and the State's objective did not necessarily involve representing consumers

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[125] *Chapman*, 940 F.3d at 306 (stating the notice provision of CAFA "is designed to ensure that a responsible state and/or federal official []is in a position to react if the settlement appears unfair to some or all class members.").
[126] *Id*. at 306-307 (citing 28 U.S.C. 1715(f)).
[127] *Id*. at 306.
[128] *Id*. at 305.
[129] *Id*.

in the litigation beyond objecting to the settlement.[130] Furthermore, other courts have similarly ruled that CAFA does not confer standing on state officials. For example, in *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, the Eastern District Court of Louisiana held that the "governmental entities" objecting to the settlement lacked standing "because of their status."[131] Once again, the court rejected the *parens patriae* argument, emphasizing that to be successful, states needed to articulate an interest distinct from that of specific, private parties.[132] Additionally, the court underscored that CAFA's notice provision "simply require[d] notification" and it "d[id] not create standing that a state official otherwise lacks."[133]

Similarly, the Eastern District of Pennsylvania reached a comparable conclusion in the case of *In re Budeprion XL Marketing & Sales Litigation*.[134] There, Texas sought intervention as a matter of right, a request that the court unequivocally denied.[135] The court emphasized CAFA does not address the issue of granting states the right to participate in every class action settlement.[136]

While the above holdings may be consistent with current standing jurisprudence, they nonetheless, we argue, conflict with and do not sufficiently take into account one of the key provisions of CAFA. Recall CAFA's purpose requiring the sending of notice of proposed settlements was not a pro forma sharing of information. Rather, it was intended to "give states a role in ensuring that [their] citizens are equitably compensated in class action settlements;"[137] to

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[130] John Goodman & J. Thomas Richie, *It's None of Your Business: Sixth Circuit Says Arizona Lacks Article III Standing to Intervene to Challenge a Class Settlement*, JDSUPRA (Oct. 22, 2019). https://www.jdsupra.com/legalnews/it-s-none-of-your-business-sixth-72894/.
[131] 910 F.Supp.2d 891, 936 (E.D. La. 2012).
[132] *Id*. at 943.
[133] *Id*. See Paterson v. Texas, 308 F.3d 448, 451 (5th Cir. 2002)(overruling objections of Texas AG to a class action settlement due to lack of standing).
[134] 2012 WL 4322012 (E.D. Pa. 2012).
[135] *Id.*
[136] *Id*. at *4.
[137] California v. Intelligender, L.L.C., 771 F.3d 1169, 1173 (9th Cir. 2014).

fight against "myriad instances of alleged abuse [in class action settlements];"[138] and to "notify[] appropriate state and federal officials of proposed class action settlement swill provide a check against inequitable settlements in these cases."[139] Overall, one of the main goals behind CAFA's enactment was to tackle a well-known structural problem that exists in nearly all class action lawsuits—the tendency of class counsel to compromise absent class members' claims without adequately compensating victims for their losses.[140] It was even contemplated on the Congressional floor during the passage of CAFA that the provisions were intended to allow officials to "*intervene* in cases where they the settlements are unfair."[141] Thus, even without specific textual reference to intervention, taken as a whole (and augmented by explicit legislative history), CAFA strongly suggests that state AGs (and the DOJ) have the right to formally intervene, in addition to or in lieu of submitting less formal objections, such as amicus briefs.

Thus, CAFA arguably suggests that states meet the criteria for intervention as of right under Rule 24(a)(2) since the purpose of CAFA implicitly is to allow state AGs to "claim an interest relating to the. . .transaction. . .and is so situated that disposing of the action may as a practical matter impair or impeded the movant's ability to protect its interest, unless existing parties adequately represent that interest."[142] CAFA was intended to alleviate the problem where class members are not adequately represented and to allow states to advocate on their behalf—which is wholly in line with the purpose of intervention as of right. Even where a court does not grant a

[138] Klonoff, *supra* note 11, at 743 (*citing* S. REP. NO. 109–14, at 13–23; 151 CONG. REC. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 CONG. REC. H723, S726 (daily ed. Feb. 17, 2005) (statement of Rep. F. James Sensenbrenner); 151 CONG. REC. S999-02, S999 (daily ed. Feb. 7, 2005) (statement of Sen. Arlen Specter)).
[139] Mullenix, supra note 2, at 1551 (citing S. REP. NO. 109-14, at 5 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 6).
[140] *See* Brief of Amici Curiae States of New York et al., Day v. Gunn (11th Cir., filed June 27, 2012), at 18-22, 2012 WL 2872201 (arguing for deference to SAG objections, based on overall purpose of CAFA and citing legislative history on the notice provision).
[141] 143 Cong. Rec. 1292 (1997) (statement of Sen. Kohl) (emphasis added). Granted, Kohl may not have been using the word in its strict legal, Rule 24-sense.
[142] Fed. R. Civ. P. 24(a)(2).

state AG intervention as of right, permissive intervention under Rule 24(b) could be granted. On a permissive intervention motion, the court may allow a government officer or agency to intervene if a party's claim is based on a statute.[143] Here, a court could rely on CAFA to allow State AGs to intervene permissively, where it would be denied as of right.

### *C. Representative Suits by State AGs*

The apparent lack of action by state AGs in objecting to many settlements via CAFA may stem in part from their authority to sue in their own representative capacity.[144] State AGs may choose to initiate lawsuits to enforce laws more generally, or they may pursue more representational actions on behalf of state residents.[145] As mentioned above, the latter represents a form of *parens patriae* to vindicate the private rights of citizens. Numerous state and federal statutes authorize states to sue in their *parens patriae* authority, often seen in "common class action areas like securities, antitrust, employment, and consumer law."[146]

These representational suits are procedurally simpler for state AGs since they are not subject to the certification rules of Federal Rule 23,[147] nor is CAFA applicable.[148] However, the broad authority state AGs seem to possess in their *parens patriae* capacity when initiating their own lawsuit seems to be at odds with situations where courts scrutinize state AGs attempts to intervene in ongoing lawsuits. This discrepancy is particularly prevalent regardless of the procedural avenue

[143] Fed. R. Civ. P. 24(b).
[144] *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 449 (2018)(contemplating that while SAGs may respond to CAFA notices by formally objecting they may also decide to initiate public suits of their own.)
[145] *Id*. at 446.
[146] *Id*. See also Mank & Solimine, *supra* note 101, at 1982 (discussing federal statutes which expressly authorize enforcement of federal law in federal court via suits by state attorneys general); Bennett Cho-Smith, Note, *State Attorneys General, You're My Only Hope: How to Fill the Enforcement Gap in Federal Consumer Protection Law with* Parens Patriae *Litigation*, 22 GEO. J. L & PUB. POL'Y 303 (2024)(same).
[147] Washington v. Chimei Innolux Corp., 659 F.3d 842, 848 (9th Cir. 2011).
[148] Mississippi ex rel Hood v. AU Optronics Corp., 571 U.S. 161 (2014) (holding that representative suit by SAG was not a class action and therefore not subject to removal pursuant to CAFA).

they take, which is states' initiative to protect their citizens by representing them in legal proceedings.

The apparent procedural obstacles that state AGs encounter when seeking to intervene—and consequently responding to a CAFA notice—may help explain why, at least in part, state AGs rarely raise objections. It could be that state AGs prefer to pursue their own collateral, *parens patriae* lawsuit to sidestep the procedural challenges with intervention.[149] For example, in a class action settlement against IntelliGender for false advertising, where IntelliGender agreed to pay each class member $10 and make a cy pres donation of $40,000 worth of products,[150] the California AG, dissatisfied with the proposed settlement, filed a separate suit on the same claims, instead of objecting to the settlement.[151] The Ninth Circuit upheld the California AG's right to initiate their own lawsuit to pursue civil penalties and injunctive relief on behalf of the State's residents, regardless of the class settlement.[152] Even when class members receive a substantial and equitable settlement, state AGs may still initiate separate actions for penalties against the defendants.[153] Indeed, some courts have even denied class certification when they found that the interests of class members were adequately represented by a state AG in another lawsuit.[154]

However, the holding in the Sixth Circuit case, *Nessel ex rel. Mich. v. Amerigas Partners, L.P.*, that an action initiated by an state AG is not removable to federal court under CAFA, limits—and

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[149] See also Sharkey, *supra* note 47, at 1985 (pointing out that AGs can also initiate litigation even after a class action settlement has been approved).
[150] Gram v. IntelliGender, No. 2:10-cv-04210 (C.D. Cal. Filed June 7, 2010).
[151] California v. IntelliGender, LLC, 771 F.3d 1169 (9th Cir. 2014).
[152] *Id*. at 1175-1178.
[153] Jack Ewing & Hiroko Tabuchi, *Volkswagen Scandal Reaches All the Way to the Top, Lawsuits Say*, NY TIMES (July 19, 2016), https://www.nytimes.com/2016/07/20/business/international/volkswagen-ny-attorney-general-emissions-scandal.html. New York and Massachusetts AGs filed suit in New York state court seeking penalties against Volkswagen for deceptive emissions. *Id*.
[154] *See* Kamm v. Cal. City Dev. Co., 509 F.2d 205, 213 (9th Cir. 1975); Pennsylvania v. Budget Fuel Oil Co., 122 F.R.D. 184, 185-86 (E.D. Pa. 1988).

in fact forbids—the application of CAFA to solely representative suits.[155] In this case, the state of Michigan filed suit against Amerigas, alleging that it engaged in unfair trade practices in violation of Michigan's Consumer Protection Act (MCPA). The MCPA allowed the state AG to bring a class action on behalf of injured residents in the state of Michigan. Amerigas attempted to remove the class action to federal court, arguing that the suit was as a class action under CAFA.[156] The district court remanded the case since the action, being brought by the attorney general, did not require the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequate representation. Because there is no clear statement in CAFA that Congress intended removal of such actions brought directly by the attorney general, and although the suit was brought under direct statutory authority, the court "decline[d] to effectively invalidate the Michigan Legislature's determination that an Attorney General should be able to sue for injuries to consumers pursuant to Section 10 [of the MCPA]."[157]

Although CAFA seems to vest significant power with state AGs to protect its citizenry in consumer class action lawsuits and resulting settlements, other jurisprudential trends restrict the paths for state AGs to become involved. Aside from the stringent state requirements for states to be a party to the lawsuit, numerous courts restrict the ability for state AGs to intervene or bring their own representative suits. Despite the apparent restrictions on a state AG's ability to act under CAFA, the next Part discusses why courts should give deference to state AG objections to settlements, as well as the benefits of having state AGs fulfill the role as permanent objectors under CAFA.

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[155] 954 F.3d 831 (6th Cir. 2020).
[156] CAFA defines a class action as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action." 28 U.S.C. § 1711(2).
[157] *Amerigas Partners, L.P.*, 954 F.3d 831 at 838.

## IV. Judicial Deference to Department of Justice and State Attorneys General Objections as Amici in CAFA Settlement Review

The government's involvement in the class action settlement litigation post-CAFA, on both the federal and state level, is sparce. On the rare occasions when the government does register an objection to a settlement after a CAFA notice, some courts continue to grapple with whether or not to give deference to a government actor's objection to settlement, and if so, how much weight to give *that* objection (or lack of one). Although the presence of an objection may present a good reason for a court to not approve a settlement, the lack of an objection can make for a more difficult interpretative presumption. The lack of objection does not necessarily indicate an AG's approval of a settlement but could indicate a variety of other things—the AG overlooked the proposed settlement, the AG did not have adequate time to prepare an objection, or the AG decided to devote their limited resources to a more pressing issue at the time. Therefore, a court's reliance on a state AG's lack of objection is misplaced. This Part argues for a heightened deference due to state AG objections to proposed settlements, and that any deference the court gives to such objections is to be considered in conjunction with the court's own evaluation of the other factors to be considered under Federal Rule of Civil Procedure 23(e). Additionally, this Part concludes that nearly no weight should be afforded to the lack of objection as a reason to approve a settlement.

### *A. Current Judicial Practice*

Given the limited instances where either the DOJ or state AGs object, there is relatively little case law directly addressing this issue. Most judges merely acknowledge the absence of objections, often interpreting it as tacit support for the settlements, and proceed to evaluate the settlement

under existing case law applicable to Rule 23(e), which mandates judicial approval of any proposed class action settlement, regardless of CAFA's involvement.[158]

The few cases that do address this issue are, at best, ambiguous regarding the deference, if any, that should be given to such objections (or lack thereof) when evaluating a proposed settlement governed by CAFA. Even where AGs object, not all courts entertain the substance of the AG's objections. In *Day v. Persels & Assoc., LLC*, twenty-five state AGs objected to a proposed settlement on behalf of nearly 17,000 members of the proposed class.[159] Despite the AGs' argument that disregarding their objections ran counter to CAFA's purpose, the Court of Appeals for the Eleventh Circuit dismissed their argument, as it was raised by a nonparty for the first time on appeal.[160] The court did not explicitly respond to the state AG's argument that special deference should be afforded where multiple AGs object,[161] though it ultimately held that the U.S. Magistrate Judge in the case should not have approved the settlement.[162]

Some courts consider the number of state AGs objecting to any given proposed settlement as a factor against approval, but there is no consistent pattern. In *Day*, where twenty-five state AGs signed on to an amici brief, the court did not give much weight to their argument. However, in the aforementioned *Figueroa* decision, where thirty-five state AGs objected, the court acknowledged this as a significant factor, "distinguishing it from other class actions."[163] Similarly, in *Wilson v.*

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[158] See, e.g., Plagens v. Deckard, 2024 WL 2080662 (N.D. Ohio May 9, 2024)(holding that the relevant Rule 23 requirements have been satisfied; that the settlement should be approved by the court as required by Rule 23(e); and that "Defendants complied with the notice requirements of [CAFA]," id. at *8).
[159] *See* Brief of Amici Curiae States of New York et al., Day v. Gunn (11th Cir., filed June 27, 2012), at 18-22, 2012 WL 2872201 (arguing for greater deference to State AG objections, based on overall purpose of CAFA and citing legislative history on the notice provision).
[160] Day v. Persels & Associates, LLC, 729 F.3d 1309, 1325 (11th Cir. 2013).
[161] Andrew J. Kennedy, *Where's the Relief? Do Large Attorney Fee Awards Undermine Class Action Settlements?,* 39 LITIGATION NEWS 10, 12 (Winter 2014).
[162] *Day*, 729 F.3d at 1326-27.
[163] Figueroa v. Sharper Image Corp., 517 F. Supp.2d 1292, 1328 (S.D. Florida).

*DirectBuy, Inc*., the court held that the fact that thirty-nine state AGs objected to the settlement was "especially helpful" and was a "placeholder for many absent class members' objections."[164] Although thirty-five and thirty-nine are more than twenty-five, all three encompass at least half of the state AGs. And to put an *exact* number on the qualifying number of state AG objections to bear any weight is unreasonable and arbitrary. That said, the fact that twenty-five AGs objected to the same settlement, where in most cases it appears that state AGs do not make any formal response to a proposed settlement, should have been telling to the *Day* court.

Interestingly (and contrary to our position), some courts interpret the *absence* of a state AG objection as implicit approval of the settlement.[165] The officials in the Ohio AGs' office who deal with CAFA notices clarified that their inaction regarding a proposed settlement should not be construed as approval or support for a settlement. In other words, they make clear to all parties that their inaction does *not* equate to approval.[166] Yet, some courts have come to the opposite conclusion, holding that since no official who was notified under CAFA responded to the proposed settlement, the inaction "favor[ed]" settlement,[167] or even held that "this factor *weigh[ed] heavily* in favor of approval."[168] These opinions cite no authority for this proposition and do not

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[164] Wilson v. DirectBuy, Inc., 2011 U.S. Dist. WL 2050537 *9 (D. Conn. May 16, 2011).
[165] This was true prior to the passage of CAFA as well. *See, e.g.*, Thompson v. Midwest Foundation Independent Physicians Ass'n, 124 F.R.D. 154, 161 (S.D. Ohio 1988) ("The officer of the Ohio Attorney General has also reviewed the proposed Settlement Agreements and has no objection. This is an important factor for the court's consideration in determining the fairness of the proposed settlement").
[166] *See* 2024 Heffernan email, *supra* note 89 ("Any communication we have with parties to a CAFA settlement comes with the following disclaimer: 'a lack of further action by any state may not be presumed to be, or construed or interpreted as an affirmative approval of or support for the te3rms of the settlement, and to represent that a lack of further action following an inquiry is implicit or explicit approval of the settlement would be deceptive.'"
[167] In re: Google Location History Litigation, 2024 WL 1975462 *8 (N.D. Cal., May 3, 2024). See also Noll v. eBay, 309 F.R.D. 593, 608 (N.D. Cal. 2015)(no state AG objections "favors the settlement."). For further discussion of this position, see Sharkey, *supra* note 47, at 1995 ("given the proliferation of information and the opportunities for AG intervention—on an individual or collaborative basis--made overt by CAFA's settlement note provision…the absence of an objection [by a state official] might be used affirmatively in support of a proposed settlement.")(footnote omitted).
[168] Pansiera v. Home City Ice Co., 2024 WL 813759 *5 (S.D. Ohio, Feb. 27, 2024)(emphasis added).

specifically mention which or how many officials were notified. There is obvious tension between courts explicitly advising in their opinions that the AG's inaction equates to approval, yet the Ohio AG (and other state AGs, we suspect) specifically noting the opposite.

Courts have grappled with the amount of deference due to state AGs when they object or do not object, whether the number of AGs objecting matters, and how involved of a role state AGs should play in the private class action settlement litigation. The inconsistency between the courts' deference may be the result of a lack of direction explicitly stated in CAFA, combined with the fact that case law lacks a clear, consistent directive.

### *B. State AGs as Permanent Objectors*

Developing a more coherent way to consider what weight courts should give state AG objections is to revisit why court approval of class settlements is thought to be needed at all. The starting point is to highlight the inherent challenges in class action suits, particularly the principal-agent problem, the rationale behind CAFA's notice requirement becomes more apparent. In typical class actions, absent members lack control over litigation, their interests may diverge from those of the named plaintiff class members, and trials are rare.[169] Moreover, the financial dynamics of class actions sets them apart from other types of litigation. Class action attorneys often work on a contingency fee basis or earn fees based on the settlement amount, incentivizing them to pursue lucrative cases and settle for significant sums, even if individual class members receive only a fraction of the settlement.[170] Additionally, defense counsel is incentivized to settle a case once the

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[169] BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 35 (2019); Nicholas Bergara, Note, *Nipping It In the Bud: Fixing the Principal-Agent Problem in Class Actions by Looking to Qiu Tam Litigation*, 97 NYU L. REV. 275, 280 (2022)
[170] Bergara, *supra* note 169,. at 282-283.

class has been certified in the hopes of avoiding litigation costs and it gives them an opportunity to just pay the class's attorney a sufficient amount to make it all go away.[171]

Much literature points to these conflicting interests and notes that the class action is "controversial and embattled"[172] because through the above reasons, it is frequently abused.[173] One of the most telling statistics enhancing this point is the fact that nearly all class actions are settled. A study of certified class actions in federal court from 2005 to 2007 indicated that most certified class actions had been settled.[174] Judge Richard Posner, a particularly influential commentator on class actions,[175] attributes this trend as two-fold: defendants are unwilling to risk an adverse settlement and plaintiffs' counsel has an opportunity to maximize their attorneys' fees.[176] He further states

> The defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class. From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees…Enter the objectors. Members of the class who can smell a rat can object to approval of the settlement…If their objections persuade the judge to disapprove it, and as a consequence a settlement more favorable to the class is negotiated and approved, the objectors will receive a cash award that can be substantial.[177]

[171] *Id*. at 283. *See* Medeline M. Xu, Note, *Form, Substance, and Rule 23: The Applicability of the Federal Rules of Evidence to Class Certification*, 95 NYU L. REV. 1561, 1585-86 (2020) (finding that the prominence of contingency-fee arrangements in class actions incentivize class counsel to accept a settlement that may produce few benefits for plaintiff classes then they would have obtained at trial because it may result in better attorneys' fees payouts.)
[172] Klonoff, *supra* note 11, at 731-33.
[173] Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014) (Posner, J.), citing Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* 1–2 (2009); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3–4 (1991); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 627 (1987).
[174] *Eubank*, 753 F.3d at 720, citing Emery G. Lee III et al., *Impact of the Class Action Fairness Act on the Federal Courts* (FEDERAL JUDICIAL CENTER 2008).
[175] Daniel Klerman, *Posner and Class Actions*, 86 U. CHI. L. REV. 1097 (2019).
[176] *Eubank*, 753 F.3d at 720.
[177] *Id*.

To address these concerns, some have proposed empowering government actors to act as permanent objectors to class action settlements. Elizabeth Chamblee Burch suggests a "level up" approach, allowing non-profit entities to fulfill this role in mitigating the profit-driven incentives of traditional objectors.[178]

Burch notes that the existing concern with Rule 23 objectors is the inability for a judge to distinguish between a "good objector" (like a non-profit public interest group) with a "bad objector" (like a for-profit attorney), and even then for an objector to be incentivized by anything other than a payout.[179] Given this pay-driven incentive for almost all objectors, encouraging organizations or entities who do not have a profit motive to object to settlements will cure the deficiencies with the set up to begin with. In a similar vein, CAFA inadvertently serves a similar function. While state AG offices may not be non-profits in the sense that Burch alludes to, they are not necessarily motivated by profits when objecting to a proposed settlement. Thus, CAFA's notice requirement aligns with the goal of introducing non-profit-driven oversight into the class action settlement process, albeit perhaps unintentionally.

CAFA enables state AGs and the DOJ to serve as permanent, standing objectors to class action settlements. State AGs have been actively involved in litigation, both individually and collectively, especially as plaintiffs.[180] As mentioned earlier, state AGs serve as the chief legal officers of their respective state.[181] Initially passive and reactive entities, state AGs became significantly more active during the "New Federalism" era of the Reagan Administration.[182] With regulatory

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[178] Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47 (2018).
[179] *Id*. at 53-55 (noting that "bad" objectors seem to care less about improving the deal and instead care more about monetary payment from class attorneys but that the role is critical to bring to light new information about conflicts of interest within the class or between class members and counsel).
[180] NOLETTE, *supra* note 57, at 19-38; Lemos & Young, *supra* note 38, at 65.
[181] Lemos & Young, *supra* note 38, at 65.
[182] *Id*. at 67.

responsibilities increasingly delegated to state agencies, state AGs began to play a more prominent role in litigation on behalf of their citizens.[183] Guided under the doctrine of *parens patriae*—which authorize state suits to vindicate sovereign interests—state AGs began to become more prominent in litigation on behalf of its citizens.[184]

Operating under the *parens patriae* doctrine enables state AGs to overcome many procedural hurdles that typical private litigants face. For example, the success of the 1990s Big Tobacco litigation was largely attributed to the involvement of state AGs, who shifted the focus to restitution-based actions and avoided class action certification.[185] Not only has litigation increased when state are parties, but there has also been a significant rise in states filing briefs as amici. Since 1989, states have accounted for 20% of all certiorari petitions accompanied by amicus briefs and 18% of amicus briefs on the merits.[186] Furthermore, states are increasingly collaborating in litigation efforts, with the number of multistate cases rising from around 1 per year before 1980 to about 40 cases in 2008.[187]

The extensive experience of state AGs in litigating various issues, combined with the sheer volume of class action settlements and notices they handle, equips them with the expertise to discern fair settlements from unfair ones. State AGs are also more likely to provide fair and objective evaluations of class action settlements compared to the attorneys involved in the case, who may be primarily motivated by financial considerations[188] and focused solely on their client's

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[183] *Id*.
[184] *See* Massachusetts v. Bull HN Info Sys. Inc., 143 F.Supp.2d 134 (D. Mass. 2001); *see also* Minn v. Standard Oil Co., 568 F. Supp. 556 (D. Minn. 1983).
[185] Lemos & Young, *supra* note 38, at 67-74.
[186] *Id*. at 67-73.
[187] NOLLETE, *supra* note 57, at 200, 221.
[188] Purcell, *supra* note 5, at 1853; *See* Thomas E. Willging, Laural L. Hooper & Robert F. Nemic, *Empirical Study of Class Actions in Four Federal District Courts* 7, 10 (FED. JUDICIAL CTR. 1996)(finding that of 152 suits certified as class actions in the mid-1990s, fifty-nine were certified for settlement purposes only); Roger C. Cramton,

interest, rather than the broader class at large. Given the inevitable conflicts of interest inherent in the class action structure, particularly between class members, their representatives, and their attorneys, state AGs are well positioned to represent the interests of all class members and ensure that settlements are fair and equitable.[189]

However, there are no doubt instances, perhaps many, where state AGs fail to allocate sufficient attention to class action settlements particularly as there exists no obligation to respond to mandated notices.[190] Additionally, state AGs may adopt polarized, politically driven positions that may not fully or fairly represent the interests of a state. Of the fifty state AGs, forty-three are independently elected, distinct from the other executive officers. Additionally, it is common for state AGs to pursue higher office following their tenure as state AG.[191] Consequently, a state AG's regulatory decisions concerning class actions may be influenced by their individual political ambitions and objectives.

For instance, during the tobacco industry litigation, state AGs from more liberal states were more likely to participate in multistate litigation compared to their counterparts from conservative states.[192] Although the motivation behind an AG's involvement in such litigation may vary and

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*Individualized Justice, Mass Torts, and Settlement Class Actions; An Introduction*, 80 CORNELL L. REV. 811, 817 (1995).

[189] *See* Purcell, *supra* note 5, at 1852-53.

[190] Klonoff and Hermann observed, not long after the passage of CAFA, that given the lack of an obligation to respond, that "CAFA's effectiveness thus rests on the hope that state regulators will read and decipher the class notices, and then care enough to block unfair settlements. Only time will tell whether regulators have the resources, skills and concern to give teeth to the notice requirement." Klonoff & Herrmann, *supra* note 42, at 1707.

[191] *See generally* Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS J. FEDERALISM 597 (2010); Marissa A. Smith, Note, *Politicization of State Attorneys General: How Partisanship Is Changing the Role for the Worse*, 108 CORNELL L. REV.

[192] Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 383-85 (2012).

may not necessarily stem from political agendas alone, it does raise concerns regarding the potential for a politically influenced AG system.

Granting the various political and policymaking agendas of different state AGs, and AGs as a whole, we nonetheless argue that state AGs should be viewed as "permanent objectors" to class action lawsuits under CAFA. Since they are the most experienced with litigating a variety of issues and are less likely to be motivated by profits and politics, state AGs should take a more active role as objectors.[193] This starts with creating a transparent plan which allows an AG office to dedicate more time and resources in regard to the CAFA procedures. In order for state AGs to adequately fulfill their role in protecting its citizenry, they need to expend the resources and time to discern fair consumer settlements from unfair ones. Though, if state AGs were to become more involved in the settlement process (as we argue they should), this still leaves the question of how much deference courts should give to state AGs objections, amici briefs, and intervention motions—which is discussed in the following Section.[194]

### *C. Proper Judicial Deference*

Given the fact that at least some state AGs take a proactive role in objecting, and seriously look at, settlement notices as they come in, courts should give weight to the (few) objections that are

[193] A complimentary model would conceptualize state AG objections as "fire-alarms," a signal to a federal court that closer scrutiny is due a settlement because of potential harm to the interests of the citizens of a State. See Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 245-53 (1999).

[194] In this Article we focus on the CAFA notice provision as it stands, but we acknowledge that different oversight-of-class-settlement schemes are possible and worthy of comparison. For example, there can be hybrid enforcement schemes, where government agencies or officials must give consent to a proposed lawsuit by a private plaintiff. See FITZPATRICK, *supra* note 169, at 53; Stephanie Bronstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811, 836 (2019). This alternative is no panacea. It would seemingly require that there be an explicit principal-agent relationship between the government and the plaintiff's attorney, entailing robust supervision and control by the AG during the entirety of the suit. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT & T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 630 (2012). And while the "hybrid model might well offer some advantages over pure private enforcement,…the price for those advantages is to introduce all the government's politically motivated bias into the private world." FITZPATRICK, *supra* note 169, at 53.

made. However, any deference that is given, must be considered in conjunction with the court's own evaluation of the other factors to be considered under Rule 23(e) and the case law interpreting that provision.

To be sure, even prior to the passage of CAFA, a state AG's opinion was an important factor for the court's consideration in determining the fairness of the proposed settlement.[195] The fact that state AGs receive an immense volume of CAFA notices and file formal objections in only a small number of cases, should be further evidence that a state AG's objection should be afforded significant weight, as argued by the state AG before the Eleventh Circuit in *Day*.[196] Even more deference should be granted when numerous state AGs object together against the same proposed settlement. Where an amicus brief is joined on by several AGs opposing proposed class settlements likely indicates an unfair settlement and should in fact be viewed as "a placeholder for many absent class members' objections."[197]

By deference, we do not mean that the federal court should blindly follow the opinion of the DOJ or state AGs regarding the propriety of enforcing a proposed settlement. CAFA itself has neither specific statutory language nor, as far as we can discern, specific legislative history addressing this issue. But the very existence of the notice provision suggests *some* form of deference; if that were not the case, then the DOJ and state AGs could presumably file amicus briefs in CAFA settlement cases anyway, and judges could give such briefs (or their absence) as much or as little weight as they see fit.

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[195] *See* Thompson v. Midwest Found. Indep. Physicians Ass'n, 124 F.R.D. 154, 161 (S.D Ohio 1988).
[196] *See* Brief of Amici Curiae States of New York et al., Day v. Gunn (11th Cir., filed June 27, 2012), at 18-22, 2012 WL 2872201.
[197] *Wilson v. DirectBuy, Inc*., 3:09-CV-590, 2011 WL 2050537, at *9 (D. Conn. 2011).

Instead, we suggest that federal courts give careful consideration, approaching though not reaching a rebuttable presumption in favor of the objection. The "appropriate weight in each case [should] depend upon the circumstances," which can include the brief's "clarity, thoroughness and support,"[198] considering the purposes of CAFA to monitor the fairness of settlements. To put the same points another way, courts should welcome "the benefit of [the] perspectives" in this context of the DOJ and State AGs, which can be "especially informative to the extent it rests on factual premises within [their] expertise."[199] Courts can also consider other factors, such as the number of amicus briefs filed (separately or jointly) by the DOJ or State AGs of those States that were notified.[200]

Though deference is due to the *presence* of objections, courts ought to be more cautious when it comes to giving deference to the *lack* of an objection. As we have mentioned throughout the Article, state AGs rarely object to proposed settlements. And the reasons for this have yet to be fully explored. But given the immense amount of notices state AGs receive each year, combined with all the other duties state AGs are tasked with, the lack of objection may not be solely because the AG views the settlement as fair. State AGs are likely to become overwhelmed with other work or miss the deadline to submit an objection because of the quick turnaround in response to parties'

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[198] Animal Science Products, Inc. v. Hebei Welcome Pharm. Co. Ltd., 585 U.S. 33, 43 (2018)(discussing factors federal courts should consider in giving weight to amicus briefs filed by foreign governments on foreign law).
[199] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2267 (2024)(cleaned up).
[200] See Solimine, *supra* note 192, at 391-93 (exploring whether the Supreme Court should, in federalism cases, give special deference to amicus briefs filed in favor of one position, when a majority or super-majority of State AGs file amicus briefs, jointly or separately). Courts might also consider weighing the ideological diversity, i.e., the political affiliation, of multiple state AGs filing an objection. The "larger and more bipartisan the coalition" filing objections, "the more confident a court can be that" the objections have "not been submitted for purely political" reasons. Mank & Solimine, *supra* note 101, at 1976. We concede that some awkwardness can attend a neutral federal judge explicitly referring, and giving positive or negative weight, to the partisan affiliations of other public officials. Id at 1976 & n. 128.

CAFA notices. Either way, courts should be much more cautious to give deference to the lack of an objection.

Ultimately, we argue that no deference should be given to the lack of an objection. It is highly problematic when courts presume that the lack of objection equates to a consent of the settlement. Especially where the Ohio AG explicitly stated that their lack of objection is not approval of a settlement, the fact that many courts rely upon this in their decision approving a settlement shows the disconnect that CAFA itself does not account for. For example, in *Pansiera v. Home City Ice Co*. a federal district court in Ohio relied on the lack of objection as a factor favoring settlement.[201] In this lies a discrepancy and lack of communication between—at the very minimum—the state of Ohio AG office and courts in its jurisdiction.

However, some courts acknowledge that "CAFA does not create an affirmative duty for either state or federal officials" to act in response to a proposed settlement, but instead CAFA "presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures."[202] Therefore, where no state AG has responded to the CAFA notice, this indicated that such official do not object to the settlement, and thus this favors the settlement.[203] Considering at least one State AG office—Ohio—has admitted that the lack of action does not equate to approval, an Ohio federal court, at the very least, should evaluate and focus on the Rule 23(e) factors when determining whether to approve a settlement.[204]

[201] 2024 WL 813759 (S.D. Ohio, Feb. 27, 2024). See also Thompson v. Midwest Found. Independent Phys. Ass'n. 124 F.R.D. 154, 161 (S.D. Ohio 1988)(pre-CAFA decision with same holding).
[202] Noll v. eBay, Inc., 309 F.R.D. 593, 608 (N.D. Cal. 2015).
[203] *Id*.
[204] F.R.C.P. 23(e)(2)(stating the court may approve a settlement only after a hearing and it finds that the settlement is fair, reasonable, and adequate after considering whether (a) the class representative and class counsel have adequately represented the class; (b) the proposal was negotiated at arm's length; (c) the relief is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class; (iii) the terms of any proposed award of attorney's fees; and (iv) any identifying agreement under 23(e)(3); and (d) the equitable concerns relative to each class member). For a discussion of the

In order for the lack of an objection to be given any weight by a court approving a settlement, the state AG and the court need to communicate their expectations with each other adequately. Especially where an AG has expressly announced its position that the absence of an objection should have no weight on approving a settlement, a court should give it no weight. And where a state AG has not expressly pronounced its position, a court should not assume a lack of objection equates to approval.

## V. CONCLUSION

Although CAFA was enacted nearly twenty years ago, its intended purpose has yet to be fully fulfilled. The notice provision was intended to encourage state AGs and the federal government to take on a more active and supervisory role over the contested, sometimes abused class action litigation arena. Specifically, the notice provision allows state AGs to police certain types of misconduct that consistently occur in class action lawsuits—unfair bargaining power between consumers and large companies, inadequately represented consumers in the litigation, and unfair settlements leaving plaintiff class members with near nothing and most recovery in the hands of the attorneys.

Despite this, government official activity has remained stagnant, despite some pledges by officials to become more involved. To answer Starkey's contemplated question in 2008, CAFA has yet to awaken a "sleeping giant" or "radically. . .alter the class action landscape."[205] Regardless of government involvement in objecting to class action settlements, state AG departments and courts across the country have inconsistently applied the procedures, logic, and framework

impact of the 2003 and 2018 amendments to Rule 23(e), see Linda S. Mullenix, *Reflections on the Flying Buttresses of Class Action Settlement Approval*, 84 U. PITT. L. REV. 395, 405-09 (2022); Matt Veldman, Note, *A Rule Change Is, After All, a Rule Change: Rule 23 Settlement Approval and the Problems of Consensus Rulemaking*, 122 CAL. L. REV. 159 (2024).

[205] Sharkey, *supra* note 47, at 1974-75.

originally developed in CAFA. Given the procedural hurdles state AGs face when attempting to intervene in class action lawsuits, courts have been reluctant to allow AGs to participate, even when they try to. The counterintuitive nature of this imbalance and inconsistency may be affecting the lack of participation by AGs. For whatever reason participation is low, we conclude that courts should give a heightened deference to state AG and U.S. DOJ objections to class action settlements. Given the plethora of reasons that a state AG may choose to not object to a settlement, whether resulting from a lack of time, notice, or simply declining to object to a fair settlement, courts should not view a lack of objection as a state AG's approval of the settlement.