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CAFA Settlement Notice Provision: Optimal Regulatory Policy?

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INTRODUCTION

Sometimes the periphery proves to be of central importance. In its infant years, the Class Action Fairness Act of 2005 (CAFA)[1] has undergone much critical scrutiny.[2] This Article moves us to the pe-

[†] Professor of Law, New York University School of Law. I am grateful to Herschel Elkins, Special Assistant Attorney General for Consumer Policy, Coordination, and Development in the California Attorney General's office; James Tierney, Director of the State Attorney General Program at Columbia Law School and former Attorney General of Maine; and three anonymous representatives from three different state offices of attorney general (referenced in footnotes as State A, State B, and State C) for sharing with me their knowledge of and experience with the CAFA settlement notice provision. Howard Erichson, Trevor Morrison, and William Rubenstein provided helpful comments, and Jacob Karabell provided excellent research assistance and participation in fieldwork.

[1] Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[2] *See, e.g.*, Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. ???? (2008); Symposium, *Emerging Issues in Class Action Law*, 53 UCLA L. REV. 1303 (2006).

riphery to evaluate the largely ignored settlement notice provision.[3] The provision mandates that notice of every class action settlement within CAFA's purview must be provided to "appropriate" federal and state officials.[4] The relevant federal official is the Attorney General of the United States.[5] As for the states, the relevant official is the 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," or, by default, the attorney general (AG) of any state in which any class member lives.[6]

Defense counsel shoulders the burden of providing the requisite notice.[7] Appropriate notice must be provided to a state official in every state in which class members reside.[8] The relevant officials must receive copies of the complaint, class notice, proposed settlement, and other pertinent materials.[9] The officials need not respond (or even acknowledge receipt), but a judge's order giving final approval of a proposed settlement may not be issued until ninety days after appropriate notification to state and federal officials—thus giving the offi-

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[3] 28 U.S.C. § 1715 (Supp. V 2005).

[4] *Id.*

[5] *Id.* § 1715(a)(1)(A).

[6] *Id.* § 1715(a)(2). Only if there is no primary regulator of the activity does the state AG qualify:

> Thus, for example, in a case against an insurance company involving insurance practices, such as how premiums are calculated, notice would be required to the state insurance commissioner in each state where the company is licensed and where class members reside. If some class members reside in states where the company does not do business and therefore is not subject to regulation, then notice would be given to those states' attorneys general. Similarly, if the company at issue were a toy manufacturer, which is not licensed by a particular regulatory body, then notice would have to be given to the state attorney general of each state where plaintiffs reside.

S. REP. NO. 109-14, at 34 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 33.

However, as Robert Klonoff and Mark Herrmann have noted, § 1715(e) binds class members to the settlement only when the required notice under § 1715(b) is directed either to the state AG or to the person that has primary regulatory authority. *See* Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1709 (2006). It remains unclear whether a defendant must serve both the primary regulator and the AG, or whether one of the two suffices. *See id.* at 1708 ("Given the severity of the punishment, defendants should err on the side of over-notifying state officials.").

[7] 28 U.S.C. § 1715(b).

[8] *Id.*

[9] *Id.*

cials time to act if they so wish.[10] The consequences of noncompliance are quite drastic: should a defendant fail to comply with the notice provision, a class member can choose not to be bound by the settlement agreement.[11]

Little is known about why this provision was added to CAFA, and the legislative history is scant. Nonetheless, it has been an enduring feature since the legislation was first proposed in 1997.[12] At the most basic level, the provision ensures that "a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies."[13] Specialized state regulatory authorities (or the state AG in the absence of a state regulator) are likely to be familiar with the business practices at issue in the litigation, and they are well situated to "voice concerns if they believe that the class action settlement is not in the best interest of their citizens."[14] The overriding purpose seems to have been to prevent lawyers from crafting abusive settlements favoring themselves over consumers or other injured parties.[15] In this vein,

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[10] *Id.* § 1715(d). The ninety-day period was chosen as "consistent with the period normally needed to provide notice to class members and allow parties to opt-out, intervene, or otherwise respond." John Beisner & Jessica Davidson Miller, *Litigating in the New Class Action World: A Guide to CAFA's Legislative History*, 6 CLASS ACTION LITIG. REP. 403, 414 (2005).

[11] 28 U.S.C. § 1715(e)(1). Given the draconian penalty, mere "technical" violations may be forgiven:

> The Committee wishes to make clear that [§ 1715(e)(1)] is intended to address situations in which defendants have simply defaulted on their notification obligations under this provision; it is not intended to allow settlement class members to walk away from an approved settlement based on a technical noncompliance (e.g., notification of the wrong person, failure of the official to receive notice that was sent), particularly where good faith efforts to comply occurred.

S. REP. NO. 109-14, at 35, *reprinted in* 2005 U.S.C.C.A.N. at 34.

[12] S. 254, 105th Cong. sec. 2, § 1711(g)(1) (1997).

[13] S. REP. NO. 109-14, at 32, *reprinted in* 2005 U.S.C.C.A.N. at 32.

[14] *Id.* at 5, 2005 U.S.C.C.A.N. at 6.

[15] The legislative history does not disclose which parties or interest groups favored such a provision. On one view, it was urged by the defense bar as a shield against further challenges to proposed settlements. Telephone Interview with Representative from State A's AG's office (Feb. 8, 2008). The provision, however, gives little to defendants as a legal matter, as it neither grants immunity nor alters rules of preclusion. Members of the defense bar, moreover, have complained about the potentially onerous burden it places on them, in addition to the drastic consequences it creates should they fail to provide the requisite notice. *See* Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and*

the provision provides "a check against inequitable settlements in these cases," which could arise from "collusion between class counsel and defendants to craft settlements that do not benefit the injured parties."[16]

Some legal scholars have begun to ask whether CAFA's settlement notice provision will awaken a "sleeping giant."[17] The scant existing commentary is of two minds.[18] This perhaps reflects the juxtaposition of the lofty goal of aggressive AG monitoring against the fact that the AGs lack a precise mandate for official review, let alone any additional resources for the endeavor. Thus, while the relevant state officials must be given notice, there is no requirement that they take any ac-

Amended Federal Rule 23, CONSUMER FIN. L. Q. REP., Spring–Summer 2005, at 11, 17 ("Perhaps the most far-reaching aspect of CAFA's 'Consumers' Class Action Bill of Rights' from the defense perspective is its new onerous notification duty in class action settlements.").

On another view, the provision reflects Congress's view that having AG input on prospective class action settlements is valuable and in the public interest. Then again, the provision was resisted by nearly one-third of the state AGs. *See infra* notes 20-22 and accompanying text.

[16] S. REP. NO. 109-14, at 35, *reprinted in* 2005 U.S.C.C.A.N. 3, 34; *see also* 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."); 147 CONG. REC. 22740 (2001) (statement of Sen. Grassley) ("To address the problem where class members get nothing and attorneys get millions, the Class Action Fairness Act of 2001 provides that notification of any proposed settlements must be given to the State attorneys general or the primary regulatory or licensing agency of any State whose citizens are involved."); 143 CONG. REC. 1292 (1997) (statement of Sen. Kohl) (exhorting officials to "intervene in cases where they think the settlements are unfair").

[17] William B. Rubenstein, The Public Role in Private Governance: Some Reflections on CAFA's Early Experience 3-4 (Nov. 19, 2007) (unpublished manuscript, on file with author) ("CAFA's AG-notice provision may occasion the awakening of a sleeping giant—state enforcement authorities—much as the Private Securities Litigation Reform Act of 1995 . . . spurred many large investors to engage in the governance of securities class actions in new and surprising ways."). This Article began as a critical response to Rubenstein's draft, which highlighted "the public role in private governance" as embodied in the CAFA settlement notice provision. As I will explore below, Rubenstein's public versus private dichotomy is a significant—albeit partial—lens through which to evaluate CAFA as regulatory policy.

[18] *Compare* Klonoff & Herrmann, *supra* note 6, at 1707 ("As a regulatory mechanism . . . the notice provisions are unlikely to yield much benefit."), *with* Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 854 (2007) ("[A]ctive participation by State Attorneys General in response to Bill of Rights notices is likely.").

tion whatsoever.[19] Nor are any resources dedicated to the review of class action settlements.

Equally deflating are the views expressed by the state AGs, several of whom do not appear satisfied with their new CAFA-inspired role. A group of fifteen state AGs wrote Congress to contend that the mandated notices "would be unlikely to reveal evidence of collusion, and thus would provide little or no basis for objecting to the settlement."[20] The AGs further asserted that "[w]ithout clear authority in the legislation to more closely examine defendants on issues bearing on the fairness of the proposed settlement (particularly out-of-state defendants over whom subpoena authority may in some circumstances be limited), the notification provision lacks meaning."[21] Finally, they also feared that "[c]lass members could be misled into believing that their interests are being protected by their government representatives, simply because the notice was sent to the Attorney General of the United States, State Attorneys General and other federal and state regulators."[22]

Whether or not the CAFA settlement notice provision will radically—or even perceptibly—alter the class action landscape, it nonetheless provides a useful lens through which to examine the much broader topic of CAFA as regulatory policy. By inviting intervention by a state governmental actor in ex post private litigation under the jurisdiction of the federal courts, this one small provision presents a microcosm of the trenchant federalism, regulatory, and institutional debates spawned by CAFA.

I. MYRIAD DIMENSIONS OF CAFA AS REGULATORY POLICY

The subject of CAFA as regulatory policy is immense. As if through a refracting lens, CAFA's image is transformed by the angle from which it is viewed. A series of progressively unfolding dyads provides a useful heuristic for isolating particular aspects of CAFA's regulatory nature.

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[19] *See* 151 CONG. REC. S451 (daily ed. Jan. 25, 2005) (statement of Sen. Kohl) ("We do not require that State attorneys general do anything with the notice they receive.").

[20] 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).

[21] *Id.*

[22] *Id.*

In a previous article, Samuel Issacharoff and I proposed a framework to situate CAFA within the broader trend of federalization of substantive law and procedural fora, which we argued was a notable feature of the two-decades-long Rehnquist Court.[23] We set forth a stylized two-by-two matrix, designed to highlight our focus on the federalization trend across two separate dimensions: substantive law (federal or state) and procedural forum (federal or state).[24] Amidst what we perceived as an overall momentum in case law and legislative developments away from state law and state fora toward federal standards and federal fora (depicted by the arrow in Table 1), we located CAFA in a potentially unstable, partially federalized quadrant, characterized by a regulatory mismatch between the source of law governing primary conduct and the forum. CAFA centralizes in federal court cases affecting the national market, but it fails to provide a source of federal law to govern these actions.[25] By probing "an underexplored link between the emergence of predominant federal substantive law overcoming the problems of horizontal coordination among the states, and the correspondingly expanding role of the federal forum in creating a nurturing incubator for that law,"[26] our matrix sheds light on the regulatory mismatch that CAFA represents.

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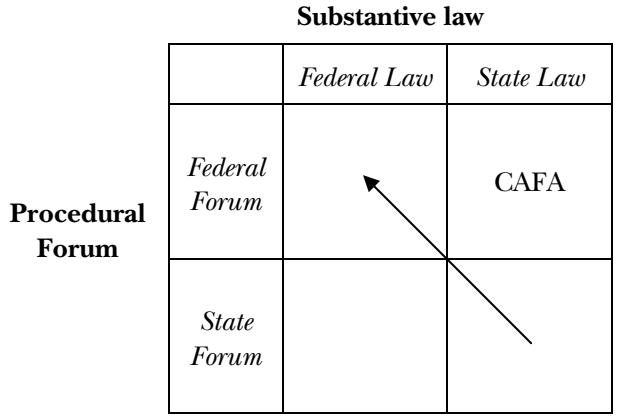
[23] *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415-20 (2006).

[24] *See id.* at 1359; *infra* Table 1.

[25] CAFA expands the scope of federal diversity jurisdiction over class actions bearing on national market conduct. *See* CAFA § 2(b)(2), (a)(4), 28 U.S.C. § 1711 note (Supp. V 2005) (stating that in enacting CAFA, Congress sought to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction" and to stem "[a]buses" that were "keeping cases of national importance out of Federal court"). Some have argued, however, that the overinclusiveness of the bill's jurisdictional provisions allows cases where one state's interests dominate to be situated in federal court nonetheless. *See, e.g.*, Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. ????, ???? ("CAFA's exceptions should be amended now to restore the balance of power between plaintiffs and defendants in class actions where a state's interest in regulation through litigation is intense and where the argument for federal jurisdiction relies on the fictions of corporate citizenship and the gathering powers of federal courts.").

[26] Issacharoff & Sharkey, *supra* note 23, at 1418.

Table 1: Federal/State Dimensions



As with all stylized heuristics, however, separate dimensions of the link between CAFA and regulatory policy remain out of focus. One perhaps glaring omission was inattention to the institutional dimension of regulatory policy—namely whether the attempt to control primary conduct of actors is achieved by ex ante regulation by agencies or ex post common-law liability by private actors. This institutional dimension is front and center in a recent article of mine, which sets forth another two-by-two matrix to organize an analysis of federal preemption of state tort law claims.[27] For example, in the context of the regulation of pharmaceutical drug labeling, the central issue in preemption controversies is whether the fairly stringent ex ante scrutiny of prescription drug labels' content prior to the approval of a new drug application should foreclose ex post litigation of failure-to-warn claims brought by private litigants in state or federal court.

In the particular context of federal preemption of state products liability claims, the ex ante/ex post regulatory mechanism maps by and large onto discrete institutional actors operating at the federal versus state level—regulation by federal agencies in the ex ante context and private litigation of state tort claims in the ex post context. Federal agencies—such as the Food and Drug Administration (FDA), National Highway Transit and Safety Administration (NHTSA), and Consumer Product Safety Commission (CPSC)—generally conduct ex

[27] *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 480 (2008); *infra* Table 2.

ante product regulation pursuant to federal statutes and regulations. In contrast, most ex post private litigation involves state statutory or common law standards (with the exception of state negligence per se actions resting on the violation of a federal statutory standard). This need not be the case, however. In certain areas—for example, insurance and gaming—states have specialized executive departments or commissions.[28] Once again, we can turn the refracting lens, this time to sharpen the distinction between regulatory mechanism and institutional actor.

Table 2: Ex Ante/Ex Post Regulation

	Federal Law	*State Law*
Ex Ante Regulation (Agencies)	Federal Regulations: FDA, NHTSA, CPSC	State Regulations: Insurance Commissioner,[29] Gaming Commissioner[30]
Ex Post Common Law Liability (Courts)	Negligence per se Actions	Private Tort Litigation

[28] Other representative examples include the Texas Department of Licensing and Regulation, which oversees more than twenty types of businesses and agencies, including electricians and talent agencies, *see* http://www.license.state.tx.us/ (last visited Apr. 15, 2008); the Oklahoma Corporation Commission, which regulates public utilities, oil and gas, and transportation, *see* http://www.occ.state.ok.us/ (last visited Apr. 15, 2008); and the Hawaii Office of Consumer Protection, which undertakes various consumer protection functions, *see* http://hawaii.gov/dcca/quicklinks/consumer_resource_center (last visited Apr. 15, 2008).

[29] *See, e.g.*, Arizona Department of Insurance, http://www.id.state.az.us/ (last visited Apr. 15, 2008); Florida Office of Insurance Regulation, http://www.floir.com/ (last visited Apr. 15, 2008); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. REV. 13, 14 (1993) ("Among major financial institutions in the United States, only insurance firms are subject to plenary state regulation.").

[30] *See, e.g.*, California Gambling Control Commission, http://www.cgcc.ca.gov/ (last visited Apr. 15, 2008); Pennsylvania Gaming Control Board, http://www.pgcb.state.pa.us/ (last visited Apr. 15, 2008).

It is instructive to superimpose another dimension, the public/private dichotomy, on the ex ante versus ex post dimension of the previous matrix. Considered along this new matrix, government (here, represented by the state AGs; in my prior analysis, by federal agencies—thus implicating the federalism dimension from Table 1 as well) occupies the space of public ex ante regulator, as well as ex post regulator.

Table 3: Public/Private Regulation[31]

	Public	*Private*
Ex Ante	Regulation	Market
Ex Post	(i) Punishment (Criminal and Civil Proceedings) (ii) Government Litigation for Money Damages (iii) Government Participation in Private Litigation	(i) Private Litigation[32] (ii) Private Participation in Government Proceedings (as Grievant, Witness, Intervenor, or Counsel)

In the latter guise, government assumes myriad roles: it (1) initiates parallel litigation;[33] (2) participates in private litigation, as intervenor,

[31] Howard Erichson deserves credit for helping me sharpen the focus of Table 3.

[32] It bears emphasizing that, while private litigation occupies the sphere of ex post regulation, it nonetheless imposes ex ante incentives on actors in the system. *See infra* notes 102, 107, and accompanying text.

[33] Attorneys general are charged with investigating claims and bringing actions in the public interest. Such cases typically are brought pursuant to the AGs' parens patriae authority under consumer protection or antitrust statutes. *See, e.g.*, Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1860-61 (2000) (suggesting that states' parens patriae actions against tobacco companies aided plaintiffs in private cases).

Parens patriae suits were the subject of much of the congressional debate over CAFA. CAFA permits defendants to remove "mass actions" (or class-action-like lawsuits) from state to federal court, but it contains an exception for parens patriae actions. 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (Supp. V 2005); 151 CONG. REC. S1164 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) ("Th[e] statutory definition makes it perfectly clear that the bill applies only to class actions, and not parens patriae ac-

objector, or amicus;[34] and, (3) per CAFA's settlement notice provision, reviews the outcome of private litigation (i.e., settlements).[35] Hence, we see that the AG occupies a hybrid public-private governance role.[36] The settlement notice provision creates a mechanism for public oversight of private litigation and thus an opportunity for cooperative regulation spurred by public and private parties.[37] The AG's role in this new regu-

tions."). But the absence of a parallel exception for traditional class actions brought by AGs irked several congressmen opposing the bill; it also spurred the National Association of Attorneys General (NAAG) to write a worried letter to Congress. *See* Letter from NAAG to Senators Bill Frist and Harry Reid (Feb. 7, 2005), *reprinted in* 151 CONG. REC. H740 (daily ed. Feb. 17, 2005); *see also* 151 CONG. REC. S1158, 1159 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor) ("It is my concern, as well as those of 46 attorneys general, that certain provisions in S. 5 might be interpreted to hamper their ability to bring such actions, thereby impeding one means of protecting their citizens from unlawful activity and resulting harm.").

[34] *See, e.g.*, Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 631 (2d Cir. 2004) (noting intervention by the New York AG's office in support of the defendant's claim that the dances, songs, and costumes in dispute belonged to the defendant and not the plaintiff estate); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 162 (5th Cir. 2004) (noting intervention by the Louisiana AG as plaintiff in a class action brought by consumers against wireless service providers, alleging deceptive trade practices and breach of contract); Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1251 (N.Y. 2006) (explaining the intervention of New York's AG on behalf of an undocumented alien plaintiff seeking to recover lost earnings under the state's labor law). *See generally* Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853 (1989) (discussing myriad ways in which government can participate in private litigation, including Rule 19 compulsory joinder, intervention via Rule 24 or specific statutes, consolidation of a government action with a private action, and participation as an amicus curiae). Of particular relevance to this Article, Greenbaum tentatively recommended a precursor to CAFA's notice provision, namely a statute that required notifying the *federal* government of a private lawsuit "whenever a case raises issues of general importance involving federal interests or has the potential to impair or impede the Government's interests as a practical matter." *Id.* at 872.

[35] It is beyond peradventure that "[t]he powers and duties of the state attorney general have 'dramatically expanded' over time." Trevor W. Morrison, *The State Attorney General and Preemption*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William Buzbee ed.) (forthcoming 2008) (manuscript at 4), *available at* http://ssrn.com/abstract=1088136.

[36] *See* Rubenstein, *supra* note 17 (manuscript at 31-32) (discussing the "four sets of ways in which public enforcement may intertwine with private class action lawsuits"); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 672 (2000) ("We cannot think creatively about the role of the state without first breaking free of the hierarchical image of government power to which most of administrative law theory now adheres."). As illustrated in Table 3, the role of private actors in government proceedings (as grievant, witness, intervenor, or counsel) offers a counterpoint to the sort of government involvement in private litigation envisioned by the CAFA settlement notice provision.

[37] In this respect, a comparison might be drawn to another public-private action: qui tam actions, such as those pursued under the False Claims Act, 31 U.S.C. §§ 3729–

latory mechanism should be placed in the wider context of ex post AG involvement in civil litigation. Before assessing the likely effect of CAFA, however, it is instructive to consider the pre-CAFA landscape.

II. PRE-CAFA LANDSCAPE: LITTLE-STUDIED PAST

The first thing to keep in mind is that the CAFA settlement notice provision does not confer new powers upon the state AGs. Indeed, although the issue was apparently the subject of little scholarly attention, states had not been altogether quiescent on the private-settlement review front.[38] Certain AG's offices—namely those in California, Florida, New York, and Texas—had been particularly proactive in activities I will roughly categorize as (1) filing individual objections to a class action settlement; (2) coordinating a broader resistance effort among a group of state AGs' offices; and (3) protecting and/or initiating independent litigation in the wake of the class action settlement.[39]

3733 (2000), and analogous state statutes. Qui tam relators can sue on behalf of the government only after providing notice to the government. The relator's suit is also subject to being taken over by the government and then to being settled or even dismissed over the relator's objection. The qui tam regulatory scheme—comprising front-end governmental notice regime, accompanied by formal governmental takeover power—can be distinguished from the CAFA settlement notice regime, which calls for notice at the back end of the process and which does not formally grant state AGs any takeover power.

[38] For a review of pre-CAFA state-AG involvement in the class action settlement process, see Frank A. Hirsch, Jr., Pre-CAFA AG Interventions Provide Guidance on the Impact of the Act's Regulatory Notification Requirement (Jan. 17, 2007), http://www.nelsonmullins.com/news/nelson-mullins-articles-speeches-detail.cfm?id=98, describing *Milkman v. American Travelers Life Insurance Co.*, No. 3775 (Pa. Ct. Com. Pl.); *Cummins v. H&R Block, Inc.*, No. 03-134 (W. Va. Cir. Ct.); and *Roller-Edelstein v. Wyndham International, Inc.*, No. 02-04946 (Tex. Dist. Ct.), cases also discussed below. I am grateful to Frank Hirsch and Joseph Dowdy, attorneys at Nelson Mullins Riley & Scarborough, LLP, for providing me with primary materials for the latter two cases.

Nor have state AGs been passive on the more general battleground of private litigation. *See, e.g.*, Howard M. Erichson, *Coattail Class Actions: Reflecting on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 34 (2000) ("The fundamental danger in allowing government lawyers to use private claims as a bargaining chip is that negotiating parties will often prefer to resolve their dispute by shifting costs to absent third parties if possible."); Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2003-07 (2001) (describing reasons underlying the rise in coordinated litigation by state AGs that began in the early 1980s).

[39] It bears mention that these roughly hewn categories bleed into one another and are by no means mutually exclusive. *See infra* text accompanying note 89.

A. *AG Objections*

Some state AG's offices have a history of objecting to class action settlements. This is not to say, however, that their involvement consistently has a perceived impact. Here, I provide some illustrative examples from the generally proactive AG's offices of New York, California, and Florida.

The New York AG objected to the settlement of a Fair Labor Standards Act claim brought by stockbrokers against their employer.[40] The AG made three forceful objections: the New York claimants would receive less than California claimants had secured in a parallel settlement, the plaintiffs' counsel deserved a smaller fee award, and any difference between the requested attorneys' fees and the court's awarded fees should not revert to the defendant.[41] None of these arguments dissuaded the court from approving the settlement.[42] Another federal district court likewise rebuffed the California AG when he tried to upend a $4.5 million settlement of a class action filed by consumers against a product manufacturer that allegedly made false representations in its advertising. The AG insisted that the defendant's insurance policies might provide for a recovery of $2 million for each of the more than fifty thousand putative class members, but the court rejected these arguments on the ground that the AG was essentially asking for a full trial on the merits of each claim prior to settlement.[43]

Sometimes an AG's office simply wants to express disapproval without necessarily aiming to derail the settlement. Such was the case when the Florida AG filed an amicus brief in a class action brought by patients against Aetna to express concern about the settlement's definition of "medical necessity."[44] An AG objection can also lead the parties to modify the settlement, as was the result in *Access Now, Inc. v.*

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[40] *See* Glass v. UBS Fin. Servs., Inc., No. 06-4068, 2007 WL 221862, at *1-2 (N.D. Cal. Jan. 26, 2007) (noting the appearance of the New York AG as amicus curiae).

[41] *See* Proposed Amicus Curiae Memorandum of Law of New York Attorney General at 1-2, *Glass*, No. 06-1068 (N.D. Cal. Nov. 28, 2006), 2006 WL 3851912.

[42] *See Glass*, 2007 WL 221862, at *17.

[43] *See In re* Rio Hair Naturalizer Prods. Liab. Litig., MDL No. 1055, 1996 WL 780512, at *15 (E.D. Mich. Dec. 20, 1996) ("Overlooked by the Attorney General is the obvious fact that a full trial, with the attendant costs of pre-trial discovery, would further deplete the assets available for settlement and could just as likely result in a finding of no coverage whatsoever leaving absolutely nothing for the injured claimants."); *id.* at *2 n.3 ("The Court has been advised that as of the date of this Order, 52,436 claims have been submitted.").

[44] *See In re* Managed Care Litig., No. 00-1334, 2003 WL 22850070, at *3 (S.D. Fla. Oct. 24, 2003). Despite the AG's objections, the court approved the settlement. *Id.* at *7.

Cunard Line Co.[45] In that case, the Florida AG joined the United States AG to object to the settlement of a class action alleging that two of the defendant's cruise ships did not comply with Americans with Disabilities Act regulations.[46] The Florida AG was particularly concerned that the settlement released the defendants from any claims under applicable state law and would thereby undermine the Florida AG's efforts to enforce state accessibility laws.[47] The settlement was subsequently modified, and although the final terms were not disclosed, both AGs withdrew their respective objections.[48]

B. *Coordinated AG Efforts to Object*

State AG's offices do not always act alone. Coordinated efforts on behalf of several state AG's offices likewise seem to have been prompted by the more active offices. Here, too, I provide some representative examples.

In September 2001, the Texas AG opposed the proposed settlement of a class action alleging unfair and deceptive trade practices in the insurance industry in Pennsylvania state court.[49] In its amicus brief, the AG explained that the filed class action overlapped with an investigation by Texas public authorities into insurance industry practices.[50] The AG asserted, moreover, that it was in a better position to represent the interests of Texas class members.[51] Thirty-four state and commonwealth AGs filed a letter in support of the Texas AG.[52] The trial court nonetheless rebuffed the Texas AG's attempt to remove the Texas plaintiffs from the binding settlement.[53]

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[45] No. 00-7233, 2001 WL 1622015 (S.D. Fla. Oct. 31, 2001).

[46] *See* Complaint at 2-7, *Access Now*, No. 00-7233 (S.D. Fla. Aug. 5, 2000), 2000 WL 34461959.

[47] *See* Objections of Attorney General Amicus Curiae of the State of Florida to Proposed Class Action Settlement Agreement at 2, *Access Now*, No. 00-7233 (S.D. Fla. Oct. 11, 2001), 2001 WL 34700858.

[48] *See Access Now*, 2001 WL 1622015, at *1.

[49] Milkman v. Am. Travellers Life Ins. Co. (*Milkman I*), No. 3775, 2001 WL 1807376, at *4 (Pa. Ct. Com. Pl. Nov. 26, 2001).

[50] Amicus Curiae Brief of the Attorney General at 3-7, *Milkman I*, No. 3775 (Pa. Ct. Com. Pl. Sept. 5, 2001), 2001 WL 34136843.

[51] *Id.* at 2.

[52] *See* Milkman v. Am. Travellers Life Ins. Co. (*Milkman II*), No. 3775, 2002 WL 778272, at *1 n.2 (Pa. Ct. Com. Pl. Apr. 1, 2002).

[53] *Milkman I*, 2001 WL 1807376, at *10 (refusing to impose an "opt-in" requirement on Texas plaintiffs because "[t]here is no evidence that [special] circumstances exist here").

Another coordinated effort met a similar fate. Several state AGs (from Connecticut, Arizona, Iowa, Kansas, New York, Nevada, Oklahoma, Pennsylvania, Rhode Island, and Vermont) banded together to object to a provision of the class action settlement agreement against the owners of Chrysler minivans seeking a replacement for a defective latch.[54] The offending provision gave Chrysler the option to suspend relief to class plaintiffs in any jurisdiction where a state attempted to bring an enforcement action asserting claims within the scope of the settlement agreement.[55] The state AGs feared a "chilling effect" on state enforcement, but the court paid little heed to the AGs' concerns.[56]

Not all such efforts have been in vain. Other coordinated efforts have led to changes in the approved settlement. In approving the notorious class action settlement in *In re Prudential Insurance Co. of America Sales Practices Litigation*,[57] Judge Anthony Scirica drew attention to the fact that several "enhancements" were made to the proposed settlement on account of several states' (California, Florida, Texas, and Massachusetts) objections to the initial settlement.[58]

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[54] *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1018, 1028 & n.3 (9th Cir. 1998). Incidentally, this class action lawsuit followed closely on the heels of a NHTSA investigation, providing support for the "piggyback" theory, where private litigation follows in the wake of regulatory action. *See infra* notes 109-111 and accompanying text.

[55] *Hanlon*, 150 F.3d at 1028.

[56] *Id.* For yet another example of a futile coordinated AG effort, see *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, MDL No. 633, 1986 WL 6531 (E.D. Pa. June 10, 1986). There, the AGs from Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin filed a joint memorandum opposing the settlement of an antitrust class action alleging that the defendant fixed the price of title search, title examination, and settlement services. *Id.* at *6. Notwithstanding the states' objections, the court approved the settlement, noting the "almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation." *Id.* at *22.

[57] 148 F.3d 283 (3d Cir. 1998).

[58] *Id.* at 298. Judge Scirica also drew support for the settlement from the participation of the thirty states that comprised the "Multi-State Task Force":

> [W]e are cognizant that the original framework of this settlement resulted from the efforts of the Multi-State Task Force. The involvement of the various state insurance regulators, with their vast experience and expertise, provides great support in favor of the fairness of the settlement. In addition, we are impressed by the seal of approval this settlement has received from the insurance regulators of each of the 50 states and the District of Columbia.

Id. at 329.

C. *AG Pursuit of Litigation in the Wake of Objection*

The success of AG objection and intervention cannot be measured fully by settlements either derailed or modified prior to judicial approval. This is because another mode of AG participation is to object in order to stave off adverse effects on its own pending investigation or lawsuit. Relatedly, AGs have initiated litigation in the wake of a proposed class action settlement.

Several examples illustrate the AGs' efforts to block proposed settlements in order to protect their own litigation turf.[59] Take, for instance, objections raised by several state AGs to a proposed settlement of a class action suit brought in federal district court in East St. Louis, Illinois, against the national sweepstakes firm, Publishers Clearing House, for having allegedly engaged in notorious fraudulent practices.[60] Fearing that "an imminent settlement of a private class-action suit might preclude other suits," sixteen AGs filed their own lawsuits.[61] While their objections to the East St. Louis, Illinois, settlement fell on deaf ears, the AGs were nonetheless successful in pursuing their own

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[59] Objecting before final approval of a settlement seems well advised. Alternatively, an AG also could institute a parens patriae action collaterally challenging a settlement approved in another forum, though any challenge would be subject to applicable preclusion principles. *See* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. ????, ???? (contending that, post-CAFA, collateral challenges to the terms of a federal-court-approved settlement should only succeed if plaintiffs did not have "[a] full and fair opportunity to raise performance defects" in the rendering forum).

[60] *See, e.g.*, Press Release, Connecticut Attorney General's Office, Court Urged to Reject Publishers Clearing House's Proposed Settlement (Nov. 15, 1999) (quoting Attorney General Richard Blumenthal's assertion that "[t]his settlement proposal is artfully crafted to discourage thousands of consumers victimized by PCH from pursuing the refunds they deserve . . . ."), *available at* http://www.ct.gov/ag/cwp/view.asp?A=1774&Q=282822; Telephone Interview with Representative from State B's AG's office (Feb. 15, 2008) ("The settlement attempted to bar our claims as law enforcement, so we went into East St. Louis and registered our objection. . . . Ultimately, the court dismissed our objections . . . , and we proceeded in our litigation with Publishers Clearing House, and I don't believe the release language barred any of our claims."). In this instance, the AGs were attuned to the private settlement because "each of the 50 states had investigations, and a majority of states had filed lawsuits against Publishers Clearing House." *Id.*

[61] *See Sweepstakes Firm Faces Lawsuit from 16 States*, Associated Press, ST. LOUIS POST-DISPATCH, Jan. 25, 2000, at A11 ("[Sixteen] states filed the suits because the attorneys general feared an imminent settlement of a private class-action suit might preclude other suits. A hearing on that settlement will be held today in U.S. District Court in East St. Louis, Ill.").

litigation.[62] Publishers Clearing House ultimately settled with officials from all fifty states in two additional separate settlements.[63]

A second example follows this same pattern of AGs' successful continued pursuit of their own litigation in the wake of an initial defeat in objecting to a proposed class action settlement. In June 2002, the Florida AG's office filed a lawsuit against the Wyndham Hotel chain for deceptive trade practices involving undisclosed automatic surcharges improperly added to guests' hotel bills.[64] While this case was pending in Florida state court, the Wyndham chain entered into a proposed class action settlement, filed in a Texas state court.[65] Again, fearing preclusion of its own litigation, the Florida AG intervened in the Texas litigation.[66] On substance, Florida's AG objected to the fact that the settlement was a coupon settlement and on the ground that the parties had failed to disclose enough information for the court properly to determine if the agreement was fair.[67] The AG's involvement led to a voluntary dismissal of the claims that overlapped with

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[62] *Settlement Approved in Sweepstakes Suit*, Associated Press, SAN DIEGO UNION-TRIB., Feb. 21, 2000, at A10.

[63] *See LI's 100*, NEWSDAY (New York), Sept. 17, 2001, at C16.

[64] *See* Motion by State of Florida, Office of the Attorney General, Department of Legal Affairs' to Continue Hearing on Preliminary Approval of Settlement at 3-4, Roller-Edelstein v. Wyndham Int'l, Inc., No. 02-04946 (Tex. Dist. Ct. Dec. 29, 2004) ("The Attorney General is currently in litigation with Wyndham International, Inc. and has been since June, 2002 . . . . The lawsuit . . . is based upon facts substantially the same as those alleged in the instant proceeding, i.e., Wyndham's charging undisclosed resort fees and other add-on fees, and the deceptive representation of some of these fees . . . .").

[65] *See* Application for Preliminary Approval of Proposed Settlement Class and Settlement, *Roller-Edelstein*, No. 02-04946 (Tex. Dist. Ct. Oct. 15, 2004).

[66] *See* Emergency Motion by State of Florida, Office of the Attorney General, Department of Legal Affairs' to Continue Hearing on Preliminary Approval of Settlement, *Roller-Edelstein*, No. 02-04946 (Tex. Dist. Ct. Dec. 17, 2004). The Emergency Motion stated,

> The Attorney General is currently in litigation with Wyndham International, Inc. and has been since June, 2002, alleging that Wyndham and its hotels in Florida engaged in deceptive and unfair trade practices by charging undisclosed add-on fees to hotel guests in Florida. The suit seeks actual damages for consumers who were damaged by these practices. The suit has been intensely litigated and a great deal of discovery has been conducted. This Court's acceptance of a settlement may impact or even preclude the Attorney General from obtaining damages for consumers in the Florida suit.

Id. at 2.

[67] *See* Amended Memorandum of Law of State of Florida, Office of the Attorney General, Department of Legal Affairs' in Opposition to Preliminary Approval of Settlement at 6-11, *Roller-Edelstein*, No. 02-04946 (Tex. Dist. Ct. Jan. 19, 2005).

the Florida action.[68] The Florida AG then announced a $2.3 million settlement of the Florida state case in July 2006.[69]

The final example stems from a controversy involving H&R Block's sale of high-interest loans to nationwide customers awaiting tax refunds.[70] In December 2005, H&R Block entered into a proposed nationwide class action settlement in a 2003 West Virginia state court case.[71] In February 2006, on the heels of the announcement of the proposed nationwide class settlement, as well as its own extensive investigation into H&R Block's allegedly deceptive marketing of loans to Californians (who were on the hook for hundreds of dollars in fees and interest),[72] the California AG brought a civil enforcement action

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[68] *See* Plaintiffs' Notice of Nonsuit, *Roller-Edelstein*, No. 02-04946 (Tex. Dist. Ct. May 10, 2005).

[69] *See* Settlement Agreement, State v. Wyndham Int'l, Inc., No. 02-1296 (Fla. Cir. Ct. July 28, 2006), *available at* http://myfloridalegal.com/webfiles.nsf/WF/KGRG-6S8QXF/$file/Wyndham_Settlement.pdf; *see also* Peter Geier, *State AGs Eschew Class Action Fairness Act Review*, NAT'L L.J., Oct. 18, 2006, at 5 ("The settlement provided cash restitution for consumers and required the hotels change their business practice.").

[70] *See* Frank Norton, *States Criticize H&R Block*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 16, 2006, at 1D. According to the article,

> H&R Block reported revenue of $182 million on refund loans in 2005, about 4 percent of total sales. It paid more than $100 million to settle related lawsuits. The company faces suits this year filed by California . . . and New York . . . . The California suit was filed on behalf of 1.5 million residents who took out refund loans.

Id.

[71] *See* Cummins v. H&R Block, Inc., No. 03-134 (W. Va. Cir. Ct. Dec. 23, 2005) (order preliminarily approving class action settlement); *see also* Press Release, H&R Block, H&R Block and Attorneys Propose Refund Loan Settlement to Court (Dec. 21, 2005), *available at* http://hrbmortgage.net/press/Article.jsp?articleid=1238 ("The proposed settlement was filed today in Cummins v. H&R Block, an action that has been pending in the Circuit Court of Kanawha County, West Virginia since 2003. It would also settle [the Ohio, Alabama, and Maryland] cases. Overall, the proposed settlement class would include more than 8 million consumers.").

H&R Block had made several previous unsuccessful attempts to forge a nationwide settlement. *See* Memorandum of the California Attorney General as Amicus Curiae at 4, *Cummins*, No. 03-134 (W. Va. Cir. Ct. May 31, 2006) [hereinafter Memorandum of California AG] (noting such attempts by H&R Block in Reynolds v. Beneficial National Bank, 288 F.3d 277, 279 (7th Cir. 2002); Carnegie v. Household International., Inc., 371 F. Supp. 2d 954 (N.D. Ill. 2005); and Reynolds v. Beneficial National Bank, 260 F. Supp. 2d 680 (N.D. Ill. 2003)); *id.* at 12 ("H&R Block has now come to West Virginia, presumably seeking a friendlier reception for its proposed nationwide settlements than it has received in other jurisdictions."). Herschel Elkins kindly provided me with a copy of this memorandum.

[72] Herschel Elkins confirmed that that the California AG's office was investigating H&R Block on these charges prior to the *Cummins* settlement. E-mail from Herschel

for restitution against H&R Block in California.[73] Then, in May 2006, the California AG's office objected to the proposed nationwide settlement in West Virginia state court. The AG argued that "the terms of the Proposed Settlement are unfair, inadequate and unreasonable with respect to California residents, and . . . Californians have little to gain and much to lose from being included in the present action."[74] The AG worried, moreover, that H&R Block "may well attempt . . . to use settlement of the present action, if it is approved, to defeat or confute the Attorney General's claims for restitution in the California case."[75] Despite the AG's objection, the West Virginia state court approved the class action settlement.[76] In the wake of this setback, however, the California AG did not simply let the matter lie; instead, he took matters into his own hands and vigorously pursued his own suit against H&R Block.[77]

With this background of pre-CAFA activity in mind, we can proceed to examine the post-CAFA landscape.

III. POST-CAFA LANDSCAPE: UNCERTAIN FUTURE

A recently decided case, *Figueroa v. Sharper Image Corp.*,[78] provides a striking example of concerted AG activity on the post-CAFA landscape just over the horizon. It is difficult to extrapolate from a sample of one, but the key question is whether *Sharper Image* represents an anomaly or a harbinger of much more AG activity to come.

Elkins, Special Assistant Att'y Gen. for Consumer Policy, Coordination, and Dev., Cal. Att'y Gen.'s Office, to author (Feb. 20, 2008) (on file with author).

[73] *See* Memorandum of California AG, *supra* note 71, at 1-2 ("The Attorney General has currently pending in San Francisco Superior Court a civil law enforcement action . . . against H&R Block, Inc. and several related H&R Block entities, alleging among other things that Block violated California law in marketing its refund anticipation loans."); *see also California Sues H&R Block*, CONSUMERAFFAIRS.COM, Feb. 15, 2006, http://www.consumeraffairs.com/news04/2006/02/ca_hr_block.html ("California Attorney General Bill Lockyer today sued H&R Block alleging the tax preparation giant has violated 15 state and federal laws in marketing and providing high-cost refund anticipation loans (RALs), mainly to low-income families.").

[74] Memorandum of California AG, *supra* note 71, at 16.

[75] *Id.* at 14.

[76] *Cummins*, No. 03-134 (order preliminarily approving class action settlement); H&R Block, Inc., 2007 Annual Report (Form 10K), at 25 (June 29, 2007) (describing the company's obligations resulting from settlement).

[77] *See* David Twiddy, *Taxing Times for H&R Block*, HOUSTON CHRON., Mar. 27, 2006, at D6.

[78] 517 F. Supp. 2d 1292 (S.D. Fla. 2007).

A. *Formal Actions*

In the *Sharper Image* case, a national class of Ionic Breeze purchasers brought suit against Sharper Image, which marketed and distributed the air purifier. The class alleged that the Ionic Breeze was ineffective and exposed consumers to hazardous ozone levels.[79] Ultimately, the parties presented a proposed settlement agreement to the court; for class members, the deal included a coupon for nineteen dollars and a significant discount on an Ionic Breeze accessory designed to reduce ozone emission.[80]

Fulfilling CAFA's notice requirement, the defendant submitted the required documentation to state AGs throughout the country. Shortly thereafter, the AGs in thirty-five states and the District of Columbia filed an amicus brief urging the court to reject the proposal.[81] The AGs condemned the "coupon settlement," noting that the agreement did not prevent Sharper Image from increasing the cost of its products to compensate for the coupons and arguing that the fee award to class counsel was unjustly high.[82] The AGs urged the court to discount the fact that only a few class members personally objected to the settlement, in light of the fact that the AGs represented "hundreds of thousands if not millions of eligible class members in this action."[83] The parties subsequently amended the settlement agreement multiple

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[79] *See* Plaintiff's Class Action Complaint at 6-7, *Sharper Image Corp.*, 517 F. Supp. 2d 1292 (No. 05-21251), 2005 WL 1457853 (alleging claims for breach of contract).

[80] *See* Renewed Joint Motion for Preliminary Approval of Settlement, Conditional Certification of the Settlement Class, Conditional Appointment of Settlement Class Counsel and Settlement Class Representatives, Providing for Notice, Enjoining the Prosecution of Released Claims, and Incorporated Memorandum of Law at 5-7, *Sharper Image*, 517 F. Supp. 2d 1292 (No. 05-21251), 2007 WL 617117.

[81] *See* Brief Amicus Curiae of the Attorneys General of Alaska et al. in Opposition to the Proposed Settlement Agreement, *Sharper Image*, 517 F. Supp. 2d 1292 (No. 05-21251).

[82] *Id.* at 6-11. One state AG representative put it more forcefully:

> When we saw the CAFA notice, it was not ideal. It had the coupon aspects; the attorneys' fees were substantial. I don't know if the fees alone would have led us to object, but people would have paid hundreds of dollars for this unit and if [the complaint was accurate that] the units were worthless, if not outright harmful, you would receive less than a twenty-dollar coupon to go back to Sharper Image. Those are the kinds of cases that are going to get the attention of state AGs, especially when CAFA was supposed to, in some sense, restrict coupon settlements.

Telephone Interview with Representative from State C's AG's office (Feb. 22, 2008).

[83] Brief Amicus Curiae of the Attorneys General of Alaska et al. in Opposition to the Proposed Settlement Agreement, *supra* note 81, at 19.

times, but the AGs continued to object.[84] Ultimately, the court rejected the settlement, citing the "vigor and substance" of the AGs' participation.[85]

B. *Informal Activity*

Even at this early juncture, an exclusive focus on formal actions taken by state AGs misses the potentially significant strata of informal activity. According to Herschel Elkins, Special Assistant Attorney General for Consumer Policy, Coordination, and Development in the California Attorney General's Office, most post-CAFA objections by AGs have been handled informally: "Our [California] office has received about 140 CAFA notices . . . . I have contacted defense counsel in 12-15 proposals. . . . In [some], we seek clarifications or changes in the notice or in the agreement. Counsel are quite cooperative, in large part because they do not want formal objections by AGs."[86]

This informal approach, of course, lacks the oft-touted transparency of the more formal approach. Again, in Elkins's words,

> We only have materials and investigation supplied by the attorneys of the parties, each anxious to finalize the settlement and to put the best light on the settlement. At least superficially, the attorneys are learning to present their settlements, and the settlements are being presented, in a manner which would not draw adverse criticism.[87]

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[84] *See Sharper Image*, 517 F. Supp. 2d at 1308.

[85] *Id.* at 1328 ("What distinguishes this case . . . is the singular appearance of the Attorneys General of thirty-five states and the District of Columbia . . . ."). Of course, it is possible that the court would have reached the same conclusion absent the AGs' intervention.

[86] E-mail from Herschel Elkins, Special Assistant Att'y Gen. for Consumer Policy, Coordination, and Dev., Cal. Att'y Gen.'s Office, to author (Nov. 27, 2007) (on file with author). It is worth noting that the quantity of informal intervention by the California AG's office could be atypical in comparison with other states. This type of active involvement, however, was echoed by another state AG representative:

> Another part of CAFA [apart from formal objections] is that we get notices and are able to get involved and improve the settlements without having to file an objection. . . . The fact that state attorneys general are noticed and have an opportunity to come into court and challenge provisions of a class action settlement they don't like can sort of give you additional leverage.

Telephone Interview with Representative from State C's AG's office, *supra* note 82.

[87] E-mail from Herschel Elkins to author, *supra* note 86. Recall that this is the concern raised by a group of AGs at the outset in response to the proposed settlement notification provision. *See supra* note 20 and accompanying text.

Notice how the informal approach may, in essence, bring AGs to the settlement negotiation table.[88] This unintended consequence of CAFA's settlement notice provision has escaped scrutiny in the literature thus far.

IV. CAFA SETTLEMENT NOTICE PROVISION: TAKING STOCK

This brief foray into pre-CAFA and early post-CAFA AG activity brings us to the final juncture: taking stock of the import of CAFA's settlement notice provision. Two critical questions should be addressed. First, what change is wrought by placing this new (or, as we have seen, enhanced as opposed to truly novel) regulatory mechanism in the hands of AGs? Second, and much more daunting, are any such changes in furtherance of "optimal" regulatory policy?

A. *What Has Changed?*

The survey of the pre-CAFA landscape suggests that the delineation of the government's ex post roles (initiating parallel litigation, participating in private litigation, and reviewing class action settlements) may be too sharp. Recall the several illustrative examples of aggressive AG actions in the pre-CAFA period. In particular, recall that AGs sometimes pursued their own lawsuits in the wake of voiced objections to class action settlements. Most of the pre-CAFA examples fit a pattern whereby the AGs objected to private settlements when they threatened an internal investigation or ongoing lawsuits.[89] Per-

[88] As one state AG representative explained, "If we can suggest certain improvements and the parties adopt them, I think that's ideal. . . . We try to get involved early on and steer things in [a positive] direction." Telephone Interview with Representative from State C's AG's office, *supra* note 82.

This form of public participation in private litigation is reminiscent of state intervention in punitive damages cases, where part of the punitive damages recovery redounds to the state coffers. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 435 & n.343 (2003) (noting that staff in the Iowa Attorney General's office files appearances to protect the state's interest in punitive damages cases and also advises litigants in posttrial negotiations).

[89] Herschel Elkins confirmed that one of the ways in which the California AG's office learned of proposed settlements in the pre-CAFA period was by "being informed by one of the parties when we had a pending investigation or case." E-mail from Herschel Elkins to author, *supra* note 72. Other means mentioned by Elkins included "happening to see public notices" and "being informed by media inquiry." *Id.* In a telephone interview, a representative from State C's AG's office explained:

> A lot of times there's a class action, we may already have our own investigation going. Our goals in terms of how we want our investigation to finish—we have

haps the settlement notice provision will spur more systematic AG involvement at the review stage, providing AGs with access to corporate practices and behaviors that are not yet the subject of ongoing investigation or litigation.[90] We might ask, then, whether CAFA could become a powerful tool in the hands of active AGs. Without necessarily suggesting the awakening of a "sleeping giant" (whom you recall was not altogether asleep at the get-go), increased AG activity might be expected in the wake of two incidental effects of the new regulatory provision: the consolidation and sharing of information and opportunities for collaboration among the state AGs.[91]

> to take a look at the class action proceedings to make sure our options aren't limited by an inappropriate resolution of the class action. . . . A lot of times, if it's a big enough case that there's a CAFA class action case pending, there's probably an investigation by one state or several states. . . . Part of it [is] trying to make sure that interests of the attorneys general are recognized and that people don't think you can settle a class action and you're somehow done, especially if the class action is inappropriate.

Telephone Interview with Representative from State C's AG's office, *supra* note 82.

[90] A representative in one state AG's office confirmed that reviewing the materials submitted to comply with the CAFA settlement notice provision has "tipped us off" to bad business practices, which were then investigated by the AG's office. Telephone Interview with Representative from State A's AG's office, *supra* note 15. A representative from State C's office expressed similar thoughts:

> [Pre-CAFA] sometimes the defense counsel would slip up and talk about the class action. Certainly pre-CAFA we've gone into court and opposed class action settlements and had them stopped. But it was more a matter of chance and trying to pick up on clues and whether it was a parallel class action.

Telephone Interview with Representative from State C's AG's office, *supra* note 82.

It is worth remembering, however, that CAFA settlement notices are by no means the only—let alone the most significant—conduit of information to the AGs. As James Tierney reminds us,

> The truth is that AGs have always monitored class actions because disgruntled litigants are regularly appearing at an AG's doorstep! . . . All lawyers—including plaintiff lawyers—are in touch with their AGs these days and disgruntled litigants can easily attract the attention of an AG. Interest groups also weigh in pretty regularly.

E-mail from James Tierney, Director of the State Att'y Gen. Program at Columbia Law School and former Att'y Gen. of Me., to author (Feb. 19, 2008) (on file with author).

[91] Recall that some AGs were not in favor of their enhanced regulatory role. *See supra* notes 20-22 and accompanying text (describing some AGs' opposition to the proposed settlement notice provision). One state AG representative echoed this view on the basis of his post-CAFA experience:

> I've sat here and collected that stuff; it is not useful to get this. I still object that we have to get this information. I think Congress was envisioning that the AGs would be so outraged that we would go into action on these things. Who are we to say that this is a grossly bad settlement?

1. Information

CAFA's settlement notice provision has at least the incidental effect of providing a means for compiling a fairly comprehensive database regarding class action settlements, given the directive that notice be provided in every class action governed by CAFA.[92]

It is far more difficult to assess whether (apart from the intrinsic value to academics, policymakers, and the like) greater access to such information would have an effect on regulation—of either the ex ante or ex post varieties. One recent case study of insurance regulators, nonetheless, provides limited support for the proposition that such information could make a difference. It turns out that intervention by insurance regulators in private class action litigation is fairly infrequent. In a recent study by Nicholas Pace et al., regulatory agencies played an active role in only eight percent of all attempted class actions.[93] Regulatory involvement was more likely when cases moved to the certification stage: regulators were involved in ten percent of cases with a motion for certification and in sixteen percent of certified cases. This raises the question: why do we not see more regulatory intervention? Pace et al. refute explanations based on lack of resources or interest, suggesting that the explanation might have more to do with a lack of transparency about ongoing class action litigation.[94]

It may well be that regulators more generally have lacked a method for determining the existence of class actions in which they might wish to get involved. The AG notice provision calls class actions to the attention of local regulators. As an information-providing mechanism, however, its effectiveness certainly would be enhanced if

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Telephone Interview with Representative from State B's AG's office, *supra* note 60.

[92] With movement of more actions from state to federal court, CAFA itself already tips in this direction. For instance, whereas settlements in state court rarely see the light of day, information regarding federal class action settlements is available online via the Public Access to Court Electronic Records (PACER) system. It remains to be seen to what extent plaintiffs and public interest groups, in addition to state AGs, will take advantage of this new database.

[93] NICHOLAS M. PACE ET AL., RAND INST. FOR CIVIL JUSTICE, INSURANCE CLASS ACTIONS IN THE UNITED STATES 99 (2007). RAND collected data from a survey of insurance companies in the United States that provided detailed information regarding their experiences with class actions over a ten-year period. *Id.* at iii.

[94] *See id.* at 99-101 ("With no centralized clearinghouse for recording the fact that such cases have begun or for tracking their progress, regulatory administrators must rely on other, mostly indirect avenues to bring class actions to their attention.").

it provided for notification *before* certification.[95] This simply suggests, however, that the enhancement of information is an incidental (and most likely unintended) effect of the CAFA notice provision.

2. Collaboration

A second likely incidental effect of the AG notice provision is further collaborative efforts among the AGs.[96] There is, at present, a building movement in the National Association of Attorneys General (NAAG) to address CAFA regulatory notifications in a uniform manner. NAAG posts summaries of all class action notices on an internal website, enabling various state AG's offices to keep abreast of recent filings and to enable coordinated efforts where there is sufficient interest.[97]

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[95] As one state AG representative complained: "Under CAFA, you only hear about the case once there's a preliminary settlement. It can be sort of late in the process as well. The case can be pretty far along." Telephone Interview with Representative from State C's AG's office, *supra* note 82. Precertification notification, however, would provide little solace to those who worry about so-called "collusive" lawsuits that are filed solely for settlement and in order to preclude other suits. *Cf.* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. ????, ????. Moreover, to the extent that AGs met the existing notification requirement with dismay, *see supra* notes 20-22 and accompanying text, such an expansion to include notice of any filed case would likely meet even greater resistance.

[96] Here, too, it is important to keep in mind that myriad other forces are simultaneously at work and may be contributing substantially to increased coordination among the AGs. *See* E-mail from James Tierney to author, *supra* note 90 ("Technology and personal relations—not to mention our work here at our [State Attorney General Program at Columbia Law School]—have made it much easier for AGs to coordinate on everything—letters to Congress, public policy initiatives, litigation, etc.").

[97] Two state AG representatives confirmed that their respective offices relied upon those summaries to keep track of the voluminous individual filings. Telephone Interview with Representative from State B's AG's office, *supra* note 60; Telephone Interview with Representative from State C's AG's office, *supra* note 82. In this latter interview, the representative explained:

> [E]very CAFA notice that we get comes to me. I take a look at it with an attorney, and we distribute it to the different parts of the office based on subject matter. If it's a consumer protection case, we send it to our economic crimes division. If it was an overtime case, we might send it to our employment division. We have a form where people have to say whether this is a case where it makes sense for the attorney general to become involved in and to actively try to improve the settlement.

Id. The representative also stated, "I think it does help in a sense that all fifty states see the same notice." *Id.* Moreover, in at least a few instances, another state AG's office had flagged a particular settlement as inadequate and suggested that other state AG's offices review it. Telephone Interview with Representative from State B's AG's office, *supra* note 60.

The pre-CAFA landscape reminds us that judicial deference to the AGs' position is by no means guaranteed. However, it seems likely that the AG effort in *Sharper Image* was successful in large part because of the concerted effort among almost all the state AGs.[98] It is also conceivable that CAFA's notice requirement will encourage judges to take these AG objections more seriously, in light of the perceived congressional imprimatur on AG involvement.

Finally, given the proliferation of information and the opportunities for AG intervention—on an individual or collaborative basis—made overt by CAFA's settlement notice provision, the "dog that didn't bark" might lend credence to a settlement. In other words, the absence of objection by any "appropriate State official"[99] might be used affirmatively in support of the proposed settlement.[100] One federal district court has indeed embraced such a rationale.[101]

In one sense, each of these changes—though perhaps significant for assessing the tools in the hands of AGs who might attempt greater involvement in private litigation—is mere tinkering in the shadow of the truly momentous question: whether CAFA leads us toward or away from some ideal optimal regulatory policy. Included in the title of this Article, regulatory policy is the elephant in the room. What we really

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Herschel Elkins is more equivocal on this point: "Since the states have begun to share analyses, there could be greater activity by the states, but that is far from certain." E-mail from Herschel Elkins to author, *supra* note 86.

[98] *See supra* note 85 and accompanying text; *see also* Telephone Interview with Representative from State C's AG's office, *supra* note 82 ("Obviously, when you can get together a substantial number of state AGs, you have a weight that can be very persuasive to a court.").

[99] 28 U.S.C. § 1715(a)(2) (Supp. V 2005).

[100] *Cf.* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 90-96 (2007) (rejecting the view that silence of absent class members should weigh in favor of approving settlement).

[101] *See* Browning v. Yahoo! Inc., No. 04-01463, 2007 WL 4105971, at *12 (N.D. Cal. Nov. 16, 2007) ("Because numerous governmental agencies (including the FTC) were given notice of the settlement and have not objected, this factor weighs in favor of the settlement."). The irony here is that widespread adoption of this rationale could lead to lesser scrutiny by courts of class action settlements, at least in the absence of an objection by a state or federal AG.

Moreover, given limitations on state AG budgets and resources, it is misguided to assume that the AGs' silence equals assent. As one representative in a state AG's office bluntly put it: "Every minute I spend reading these notices is taking away from busting on some scam artist making his way through the state." Telephone Interview with Representative from State B's AG's office, *supra* note 60; *accord* Telephone Interview with Representative from State C's AG's office, *supra* note 82 ("It's a tremendous amount of work. Just generally we probably see one hundred or so CAFA notices a year.").

need to assess is the optimal balance of public and private enforcement of legal standards, formulated at the state or federal level.[102]

B. *Optimal Regulatory Policy?*

Here, in order to suggest a framework for beginning to answer this key normative question, we come full circle back to the myriad dimensions of CAFA as regulatory policy and the cascading matrices set forth in Part I.

First, as depicted in Table 1, the determination of whether to regulate at the state (more localized) or federal (more centralized) level features prominently in regulatory policy. The existence of interstate externalities and economies of scope or scale tends to favor regulation at the national level—in a federal forum, applying federal law. Other factors argue in favor of regulation at a more decentralized level, such as democratic accountability to regional differences in policy preferences, the benefits of experimentation, and the comparative advantage of interstate competition yielding optimal policy outcomes. While a consensus might emerge at this abstract, theoretical level, in practice it is difficult to avoid the fact that "[o]ne person's healthy regional diversity is another's interstate externality."[103]

At this point, the institutional dimension of the problem is brought into focus by Table 2. In the products liability realm, for example, the choice between ex ante regulation and ex post liability not only entails a federal versus state (or centralized versus local) dimension, but it also maps onto a particular institutional choice. This choice implicates the correspondence between regulation and agencies on the one hand and liability and private litigation on the other. For this reason, a comparative institutional approach focusing upon the relative capabilities of courts and agencies is needed.[104] Given that answers to the optimal regulation question are contingent upon ex-

[102] Private enforcement of legal standards includes compensation of injured victims via private tort suits. It is worth reiterating here that tort law wears (at least) two hats: that of compensation and that of regulation (primarily deterrence). *See* Sharkey, *supra* note 27, at 459-71 (describing the "two faces of tort law" in the Supreme Court's products liability jurisprudence). Here, I acknowledge that I am privileging the regulatory role of torts; defense of this predilection goes beyond the scope of this Article.

[103] Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 166, 168 (Richard A. Epstein & Michael S. Greve eds., 2007).

[104] *See* Sharkey, *supra* note 27, at 502-20 (assessing the comparative institutional advantage of agencies in the realm of courts deciding whether to preempt state tort law).

tensive findings of legislative facts, I have argued that agencies can serve as references to courts with respect to the feasibility and desirability of a uniform national regulatory policy.[105] The repository of agency information—ideally reflecting a broad range of views, having been vetted by expert and public opinion—focuses on the precise nature of the agency's regulatory cost-benefit (or risk-risk) determinations as well as the economic consequences of various determinations and the effects of state regulation (including tort liability) on federal regulatory schemes. As institutional actors, federal agencies are susceptible to attacks of unaccountability; in particular, critics charge that states' regulatory interests will fall on deaf ears. Here, perhaps the state AG might be seen as an effective representative of relevant states' regulatory interests.[106]

Even this perspective is too limited. For, as Table 3 is designed to accentuate, governmental bodies (whether agencies or AGs) can regulate in the ex post, as well as ex ante, realm. Given the ability of public regulators to occupy the same ex post regulatory space as private litigants, a threshold issue is whether AGs or other public regulators view their regulatory mandate as trying to prevent many of the same alleged harms that drive private class action litigation.[107] If so, we might expect at a minimum that such regulators would advise the court of their opinion. As we saw above, the CAFA settlement notice provision might facilitate this process, at least if there have been limitations to date on regulators' ability to gain access to information about private litigation.

As a theoretical matter, economists have posited an inverse relationship, at least on the margin, between ex ante and ex post regulation.[108] It is extremely difficult to test this prediction as an empirical

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[105] *Id.* at 479.

[106] Given the AGs' track record before the federal district courts (at least in the small sample surveyed in this Article), it is worth asking whether AG participation and input might be more effective before the relevant state or federal agency.

[107] Here, again, I privilege the deterrence goal of regulation. *See supra* note 102. It may well be that an AG would be motivated to intervene on alternative grounds—for example, where the AG has no objection to the total amount the defendant is required to pay, but nonetheless objects to the design or distribution of remedies. A common objection heard by AGs (not to mention a driving force behind CAFA's scrutiny of coupon settlements) is that lawyers' fees are too high relative to the benefit to class members. Telephone Interview with Representative from State C's AG's office, *supra* note 82.

[108] *See, e.g.*, Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 365-66 (1984); Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271, 275-78 (1984); *see also* Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 387 (2007) ("The question is not whether we

matter in the real world. Again, I allude to the insurance class action case study. Eric Helland and Jonathan Klick have used the RAND data provided by Pace et al. to investigate whether regulation and class actions are substitutes on the margin.[109] They find no evidence to support the proposition that ex ante public regulation and ex post private litigation "function as substitute[]" channels to deter harmful behavior.[110] To the contrary, they "uncover some evidence of a piggybacking effect in which either litigation follows regulatory enforcement or vice versa," at least in the insurance industry.[111] This only captures one dimension of the regulatory policy conundrum, however.[112] The larger question is how to strike the optimal balance along myriad dimensions: between state and federal regulation, between ex ante and ex post approaches, and between public and private regulators.

CONCLUSION

At this early juncture, it is too soon to tell whether the CAFA settlement notice provision will have a significant impact on private settlements of class actions, let alone any wider impact in motivating state AGs to police more aggressively certain types of misconduct. To the extent that the provision does have a marked effect, it will most likely be due to the increased availability of information and to the facilitation of coordinated efforts on behalf of groups of state AGs. In order to assess the overall effect, it is necessary to delve beneath

abandon our ex post legal system, but whether we would tolerate the push for ex ante regulation that would likely be its substitute.").

[109] Eric Helland & Jonathan Klick, *The Tradeoffs Between Regulation and Litigation: Evidence from Insurance Class Actions*, 1 J. TORT L., Oct. 2007, at 5, http://www.bepress.com/jtl/vol1/iss3/art2.

[110] *Id.* at 9.

[111] *Id.* Helland and Klick were unable to determine whether private litigation follows public or vice versa. At least one AG representative, however, posits that the piggybacking is unidirectional, with private litigation feeding off of public investigation and prosecution. E-mail from Hershel Elkins to author, *supra* note 72 ("I know of no investigations post-CAFA which have thus far resulted from private class action settlements and I doubt there will be many, if any, in the future. However, there have been some private actions which have followed our actions.").

[112] Moreover, as Howard Erichson has argued, given the symbiotic relationship between government and private proceedings, we should in fact expect a positive correlation between the two. *See* Erichson, *supra* note 38, at 5-16. According to Erichson, although we might expect an inverse relationship at the macro-level—for example, a country such as the United States combines scant ex ante regulation with a strong ex post litigation infrastructure—at the micro-level of specific instances of harmful conduct, we should instead expect to see mutually reinforcing ex ante and ex post actions. *Id.*

the layer of formal activity to probe the informal bargaining and negotiation taking place at the behest of state AGs. The time is ripe for positing a framework within which to evaluate the effectiveness of the notice provision.

The settlement notice provision also provides a window on an even grander topic: CAFA as regulatory policy. As if through a refracting lens, the view of CAFA is transformed by the angle from which it is viewed. In this Article, I have proposed a series of progressively unfolding dyads in order to highlight the state/federal, ex ante/ex post, and public/private dimensions of regulatory policy implicated by CAFA. My hope is that this triad of matrices proves a useful framework for evaluating the design of optimal regulatory policy—a large domain of which the CAFA settlement notice provision is but one small part.