CLASS ACTIONS UNDER CAFA AND *PARENS PATRIAE* ACTIONS: *WEST VIRGINIA EX REL. MCGRAW V. CVS PHARMACY, INC.*

The Class Action Fairness Act of 2005 (CAFA)[1] gives federal district courts jurisdiction over certain civil actions that are "class actions" and meet CAFA's amount in controversy and minimal diversity requirements. The relevant portion of CAFA states:

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, and *is a class action* in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .[2]

CAFA defines "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or *similar* State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."[3] Rule 23(a), which lays out specific class action requirements, specifically states:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.[4]

In *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*,[5] the United States Court of Appeals for the Fourth Circuit addressed the question of whether an action by the West Virginia Attorney General brought pursuant to state statutes, which in part sought to recompense individual consumers, was a class action that was removable under CAFA.[6] The Fourth Circuit, in a split opinion, affirmed

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1. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).
2. 28 U.S.C. § 1332(d)(2)(A) (2006) (emphasis added). CAFA's diversity rules are more extensive, but these other sections apply solely when either the plaintiff or defendant is a foreign state, *see* § 1332(d)(2)(B)–(C), and therefore, are beyond the scope of this Comment.
3. § 1332(d)(1)(B) (emphasis added).
4. FED. R. CIV. P. 23(a).
5. 646 F.3d 169 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011).
6. *See id.* at 171–72 (citing W. VA. CODE ANN. §§ 30-5-12b(g), 46A-6-104, 46A-7-111 (LexisNexis 2007)).

the West Virginia District Court and held that the action was not a class action that was removable under CAFA.[7]

I. DISTRICT COURT OPINION

On August 24, 2009, the State of West Virginia, purporting to act in its "sovereign and quasi-sovereign capacity" and through the West Virginia Attorney General, commenced an action in state court against six pharmacy companies (Pharmacies), alleging that the companies "sold generic drugs to West Virginia consumers without passing along to the consumers the cost savings of generic drugs over brand name equivalents."[8] According to the attorney general, this violated the West Virginia Pharmacy Act, which mandates that any savings in the price of generic prescriptions must be passed on to the purchaser,[9] and the West Virginia Consumer Credit Protection Act (WVCCPA), "which prohibits 'unfair or deceptive' trade practices and the collection of 'excess charges.'"[10] The attorney general sought injunctive relief, restitution and disgorgement of money received from the excess charges, repayment to individual West Virginia consumers, civil penalties, interest, and costs.[11]

On September 10, 2009, the Pharmacies removed the action, asserting, among other grounds, that the action was removable under CAFA because it was a "disguised class action" brought on behalf of individual consumers.[12] In their notice of removal, the Pharmacies pointed to count III of the complaint, which dealt with the reimbursement of excess charges for consumers.[13] Under West Virginia Code § 46A-7-111(1), if "an excess charge has been made, the court shall order the [defendant] to refund to the consumer the amount of the excess charge."[14] The Pharmacies also argued that CAFA's numerosity, amount in controversy, and diversity requirements were met with regard to count III.[15] Further, the Pharmacies argued that the suit by the attorney general was brought in a representative capacity because the attorney general "was seeking refunds on *behalf of* each affected West Virginia purchaser of generic drugs," and thus, the action "was a representational proceeding, qualifying as a 'class action' under CAFA."[16] On October 13, 2009, the attorney general filed

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7. *Id.* at 172.
8. *Id.* at 171–72 (internal quotation marks omitted).
9. *Id.* at 172 (citing W. VA. CODE ANN. § 30-5-12b(g)).
10. *Id.* at 172–73 (quoting W. VA. CODE ANN. §§ 46A-6-104, 46A-7-111).
11. *Id.* at 173.
12. *Id.* (internal quotation marks omitted).
13. *Id.*
14. W. VA. CODE ANN. § 46A-7-111(1).
15. *McGraw*, 646 F.3d at 173. The Pharmacies argued that the minimal diversity requirement of 28 U.S.C. § 1332(d)(2)(A) was satisfied because the Pharmacies were not West Virginia citizens. *Id.*
16. *Id.*

a motion to remand.[17] The district court granted the motion to remand, holding that the attorney general's action was a *parens patriae* action[18] that is neither a "class action" nor a "mass action" under CAFA.[19] Of particular importance to the district court in making this determination was the fact that under the WVCCPA, the attorney general could act on his own rather than having to act based on consumer complaints.[20] Further, the district court found that the attorney general's "paramount goal[s]" in initiating the action against the Pharmacies were to disgorge the Pharmacies of any and all gains obtained through the collection of excess charges, seek civil penalties for the state, and warn future violators—goals "separate and apart from the interests of particular consumers in obtaining recompense."[21]

II. FOURTH CIRCUIT OPINION

A. Majority

The Fourth Circuit Court of Appeals affirmed the district court's decision to remand the case.[22] In the majority opinion, authored by Judge Niemeyer and joined by Judge Davis, the court held that the attorney general's action was not a class action under CAFA because the action "was not brought under Federal Rule of Civil Procedure 23 or a 'similar statute or rule of judicial procedure authorizing an action to be brought by 1 or more persons as a class action.'"[23]

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17. West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 748 F. Supp. 2d 580, 582 (S.D. W. Va. 2010), *aff'd*, 646 F.3d 169 (4th Cir. 2011).

18. *Parens patriae* refers to "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen." BLACK'S LAW DICTIONARY 1221 (9th ed. 2009). In order for a state to maintain a *parens patriae* action, "'the State must articulate an interest apart from the interests of particular private parties,' also known as a 'quasi-sovereign interest.'" *McGraw*, 646 F.3d at 180 (Gilman, J., dissenting) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)). There are two recognized categories of quasi-sovereign interests: "(1) a state's interest in the physical and economic well-being of its citizens in general, and (2) a state's interest in 'not being discriminatorily denied its rightful status within the federal system.'" *Id.* (quoting *Barez*, 458 U.S. at 607).

19. *McGraw*, 748 F. Supp. 2d at 597. Mass actions are also removable under CAFA and have slightly different requirements than class actions:

> "[M]ass action" means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [§ 1332](a).

28 U.S.C. § 1332(d)(11)(B)(i) (2006). Mass actions do not include actions in which "all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." § 1332(d)(11)(B)(ii)(III).

20. *McGraw*, 646 F.3d at 173 (quoting *McGraw*, 748 F. Supp. 2d at 593).

21. *Id.* (citing *McGraw*, 748 F. Supp. 2d at 593, 594) (internal quotation marks omitted).

22. *Id.* at 179.

23. *Id.* at 171, 177–78 (quoting 28 U.S.C. § 1332(d)(1)(B)).

The Pharmacies first argued that, although the attorney general did not label the State's action as a class action, the court must look to the substance of the action rather than merely how the action is labeled to determine whether the action is a class action under the CAFA.[24] The Pharmacies contended that the statutes under which the attorney general brought the action were similar state statutes to Federal Rule of Civil Procedure 23.[25] The court noted that "[a] state statute or rule is 'similar' to Federal Rule of Civil Procedure 23 if it closely resembles Rule 23 or is like Rule 23 in substance or in essentials."[26] Specifically, as required under CAFA, "the state statute or rule must resemble or be like Rule 23 by 'authorizing an action to be brought by one or more representative persons *as a class action*.'"[27] The court found that Congress intended that class action be defined "in terms of its similarity and close resemblance to Rule 23."[28] Thus, according to the court, an action that is brought pursuant to a state statute will only be a CAFA class action if the action is representative in nature and the four criteria stated in Rule 23(a) are satisfied: "numerosity, commonality, typicality, and adequacy of representation."[29] In further articulating the similarity standard the court stated:

> [W]hile a "similar" state statute or rule need not contain all of the other conditions and administrative aspects of Rule 23, it must, at a minimum, provide a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class, such that it would not be unfair to bind all class members to the judgment entered for or against the representative party.[30]

In other words, the state statute authorizing the action must contain the four requirements in Rule 23(a) to be a "similar" state statute under CAFA.

The court noted that the state consumer protection statutes under the authority of which the attorney general acted in commencing the action "contain virtually none of the essential requirements for a Rule 23 class action."[31] Importantly, the attorney general was not "designated as a member of the class whose claim would be typical of the claims of class members."[32] Instead, under

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24. *See id.* at 174 (quoting Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 424 (5th Cir. 2008)).

25. *Id.*

26. *Id.* (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1161 (11th ed. 2007)).

27. *Id.* (citing 28 U.S.C. § 1332(d)(1)(B)).

28. *Id.*

29. *Id.* at 174–75 (citing FED. R. CIV. P. 23(a)). For the specific language of Rule 23(a), see *supra* text accompanying note 4.

30. *Id.* at 175 (footnote omitted). The court noted that West Virginia Rule of Civil Procedure 23 would, had it been invoked, have satisfied this "similarity" standard. *Id.*

31. *Id.* at 175–76.

32. *Id.* at 176.

the authority of the West Virginia statutes, the attorney general could act on his own, "independently of any consumer complaints, as a *parens patriae*."[33] The court stated that the fact that the attorney general was seeking state interests such as "disgorgement of ill-gotten gains, 'separate and apart from the interests of particular consumers in obtaining recompense,' validate[d the attorney general's] action as a *parens patriae* action."[34] In addition, the West Virginia statutes did not contain any numerosity, commonality, or typicality requirements whatsoever, "all of which are essential to a class action."[35]

The Pharmacies argued that the action was still a "disguised class action" because under count III "the attorney general acts on behalf of the citizens, each of whom allegedly suffered a common injury."[36] However, the court maintained that this type of representative action is still not a class action, as a class action requires that the individual filing the action actually be a member of that class "whose claim is typical of the class members' claims."[37] The court noted that the West Virginia Attorney General's role in bringing the suit was like that of an "EEOC or other regulator when it brings an action on behalf of a large group of employees or a segment of the public," representative actions which the Supreme Court of the United States has held not to be class actions under Rule 23.[38] In *General Telephone Co. v. EEOC*,[39] the Supreme Court held that a sex-discrimination suit brought by the EEOC under Title VII which sought injunctive relief and back pay for a number of affected employees was not a class action subject to the requirements of Rule 23.[40] Furthermore, in *In re Edmond*,[41] the Fourth Circuit held that "a bankruptcy claim brought by the Maryland Attorney General's office 'on behalf of itself and all [affected Maryland] consumers' did not need to comply with Rule 23, even though one of the claim's primary purposes was to provide individual citizens with refunds pursuant Maryland's Consumer Protection Act."[42] Thus, although the WVCCPA, not dissimilar from the statutes at issue in *General Telephone* and *Edmond*, gave the attorney general authority to seek relief for individual citizens, the court reiterated that the action was not a class action because neither West Virginia nor the attorney general was a member of the supposed class and did

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33. *Id.*

34. *Id.* (quoting West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 748 F. Supp. 2d 580, 593 (S.D. W. Va. 2010), *aff'd*, 646 F.3d 169 (4th Cir. 2011)). The court made clear that it was not required to find that the action was a *parens patriae* action in order to determine that the action was not brought under a statute "similar" to Rule 23. *Id.* at 176 n.2.

35. *McGraw*, 646 F.3d at 176. Those statutes also "authorized the [a]ttorney [g]eneral to proceed without providing notice to overcharged consumers, which would be essential in a Rule 23 class action . . . ." *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 177 (citing General Tel. Co. v. EEOC, 446 U.S. 318, 334 & n.16 (1980)).

39. 446 U.S. 318 (1980).

40. *Id.* at 320, 321, 324, 334 n.16.

41. 934 F.2d 1304 (4th Cir. 1991).

42. *McGraw*, 646 F.3d at 177 (citing *Edmond*, 934 F.2d at 1306) (alteration in original).

not suffer injuries of the same kind as the members—the West Virginia citizens—of that supposed class.[43] Accordingly, the court held that the district court did not err in remanding the case because the attorney general's action was not a class action brought under a state statute that was similar to Rule 23.[44]

The court ended its opinion with a discussion of the state sovereignty reasons for its decision. The court noted that if it were to hold that the attorney general's action had to be pursued in federal court rather than state court, the court "would risk trampling on the sovereign dignity of the State and inappropriately transforming what is essentially a West Virginia matter into a federal case."[45] The central federal interest of CAFA's removal provisions is that federal courts should decide "interstate case[s] of national importance."[46] However, "CAFA is also sensitive to deeply-rooted principles of federalism, reserving to the States primarily local matters."[47] The court made clear that in a case such as this, "where West Virginia has raised no federal question and where all persons on whose behalf West Virginia has filed this action are West Virginia citizens, the 'claim of sovereign protection from removal [arises] in its most powerful form.'"[48] Thus, "a federal court should be most reluctant to compel . . . removal" and should only do so "when removal serves an overriding federal interest."[49] Moreover, "[c]omity demands that [courts] step most carefully before 'snatch[ing] cases which a State has brought from the courts of that State unless some clear rule demands it.'"[50] The court indicated that there is no precedent enunciating a clear rule that "'a state as a plaintiff suing defendants over whom it has regulatory authority in state court under its own *state laws* may be removed to federal court,' except when the state raises a federal question."[51] Consequently, the court held that CAFA did not "clearly demand" that the action by the West Virginia Attorney General be removed, despite the fact that the Pharmacies were not citizens of West Virginia.[52]

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43. *Id.* The court also looked to the legislative history of CAFA but concluded that it "[was] hardly probative." *Id.*

44. *Id.* at 177–78.

45. *Id.* at 178.

46. *Id.* (quoting CAFA, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005)) (internal quotation marks omitted).

47. *Id.*

48. *Id.* (quoting *In re* Katrina Canal Litig. Breaches, 524 F.3d 700, 706 (5th Cir. 2008)) (alteration in original).

49. *Id.*

50. *Id.* at 179 (quoting Franchise Tax Bd. of Cal. v. Contr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 21 n.22 (1983)).

51. *Id.* at 178–79 (quoting *Katrina Breaches*, 524 F.3d at 711).

52. *Id.* at 179.

B. Dissent

Judge Gilman from the Sixth Circuit, sitting by designation, dissented.[53] Taking a markedly different approach from the majority, Judge Gilman found that the attorney general's action was a class action brought under a similar statute to Rule 23.[54] Judge Gilman stated that class action should be defined as "[a] lawsuit in which the court authorizes a single a person or a small group of people to represent the interests of a larger group,"[55] and that the attorney general's action "squarely fits" within that definition.[56] He dismissed the requirements of numerosity, commonality, typicality, and adequacy of representation as "'bells and whistles' whose absence in the pleadings do not prevent the [a]ttorney [g]eneral's suit from being considered a class action under CAFA."[57] Judge Gilman averred that a court must evaluate the "essence" of the action, and whether the West Virginia Attorney General's action was a class action under CAFA turned on "who the real party in interest" was in the case.[58] Judge Gilman elaborated:

> If West Virginia is the real party in interest, then this is a proper *parens patriae* action over which the federal courts lack jurisdiction. On the other hand, if the real parties in interest are the . . . consumers, and the state is only a nominal party, then . . . [there is] jurisdiction under CAFA.[59]

Judge Gilman further noted that he would adopt a "claim-by-claim approach" in deciding whether a state has in fact acted in a *parens patriae* capacity and brought the action in furtherance of a "quasi-sovereign interest."[60]

Judge Gilman heavily relied on the Fifth Circuit's decision in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.* in evaluating the action in the present case.[61] In *Caldwell*, the Louisiana Attorney General filed a lawsuit in state court against several insurance companies, seeking, among other things, treble

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53. *Id.* at 179 (Gilman, J., dissenting).

54. *Id.* at 185.

55. *Id.* at 179 (quoting BLACK'S LAW DICTIONARY 284 (9th ed. 2009)) (internal quotation marks omitted).

56. *Id.*

57. *Id.*

58. *Id.* at 179–80.

59. *Id.* at 180 (citation omitted).

60. *Id.* at 180, 181 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)) (internal quotation marks omitted). The majority describes the "claim-by-claim approach" by the dissent as if "Count III does not state a valid *parens patriae* claim [then] the action as a whole must be classified as a class action." *Id.* at 176 n.2 (majority opinion). *See supra* note 18 for a discussion of *parens patriae* actions and quasi-sovereign interests.

61. *Mcgraw*, 646 F.3d at 181 (Gilman, J., dissenting) (citing Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 422–23, 430 (5th Cir. 2008)).

damages on behalf of individual citizens of the state.[62] While the attorney general labeled the action as *parens patriae*,[63] the Fifth Circuit concluded that the real parties in interest with regard to the treble damages claim were the individual citizens.[64] The Fifth Circuit held that the requirements for a CAFA mass action were easily met and as such, the action was properly removed.[65]

Judge Gilman, in the present case, stated that he believed that the "primary thrust" of the attorney general's suit was count III, under which the attorney general sought recompense for individual citizens.[66] In reaching this conclusion, Judge Gilman noted that if a court found that the Pharmacies had actually overcharged the consumers then the WVCCPA *mandates* that the consumers be compensated, whereas the "injunctive relief and any civil penalties are *discretionary* with the court and require more stringent proof on the part of the [a]ttorney [g]eneral."[67] Thus, because the injunctive relief and civil penalties could succeed only if the reimbursement claims were successful, then those claims should be considered as subsidiary to the primary claim for reimbursement.[68] While admitting that the subsidiary claims for injunctive relief and civil penalties would fall under *parens patriae* authority, Judge Gilman stated that "the West Virginia Attorney General . . . does not have a quasi-sovereign interest in the refunds that the Pharmacies will be required to pay directly to the affected consumers if they are found to have violated the WVCCPA."[69] Thus, according to Judge Gilman, the individual West Virginia consumers were the real parties in interest regarding count III.[70]

Judge Gilman also noted that the attorney general's action was "essentially identical" to claims filed in other states by private attorneys against the

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62. *Caldwell*, 536 F.3d at 422–23.

63. *Id.* at 423.

64. *Id.* at 429. The court in *Caldwell* stated:

> [A] party is a real party in interest when it is "directly and personally concerned in the outcome of the litigation to the extent that his participation therein will insure 'a genuine adversary issue between the parties.'" . . . "Such an interest is lacking when a state undertakes to sue for the particular benefit of a limited number of citizens."

Id. at 428 (quoting Land O'Lakes Creameries v. La. State Bd. of Health, 160 F. Supp. 387, 388 (E.D. La. 1958)) (citation omitted).

65. *Id.* at 430. The court in *Caldwell* left it to the discretion of the district court to decide whether to remand all of the claims or sever the claims and remand only the treble damages claim. *Id.* (citing *In re* Katrina Canal Litigation Breaches, 524 F.3d 700, 711–12 (5th Cir. 2008)). Although the court in *Caldwell* did not address the provision in CAFA regarding mass actions and actions brought on behalf of the public, presumably the court did not believe it applied since in the court's view the real parties in interest were the policyholders with regard to the claim for treble damages, and the action was brought on behalf of those individuals. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(III) (2006); *Caldwell*, 536 F.3d at 429, 430. See *supra* note 19 for a discussion of the requirements of a mass action under CAFA.

66. *McGraw*, 646 F.3d at 181 (Gilman, J., dissenting).

67. *Id.* at 181–82.

68. *Id.* at 182.

69. *Id.*

70. *Id.* at 182–83.

Pharmacies.[71] In looking to the legislative history, Judge Gilman found support in certain floor statements regarding a proposed amendment to CAFA that would exempt "all class actions filed by state attorneys general from removal under CAFA."[72] The amendment, which was ultimately defeated, was opposed because there was concern that the amendment would create a risk "where State attorneys general can be used as pawns so that crafty class action lawyers can avoid [removal under CAFA]."[73] In Judge Gilman's opinion, that concern had "come to fruition" with the present case.[74]

Discussing the Rule 23 requirements that the majority found lacking in the WVCCPA, Judge Gilman stated that "CAFA does not require such exactitude" and pointed to the Senate Judiciary Committee Report on CAFA and its statements indicating that "the definition of a class action should be interpreted liberally."[75] According to Judge Gilman, "the majority's conclusion that the [a]ttorney [g]eneral cannot be a class representative because he has not literally been injured is too narrow of a reading of class representation."[76] Judge Gilman noted that the Fifth Circuit did not even address this issue in *Caldwell*, but instead found that the suit was "brought in a representative capacity on behalf of those who allegedly suffered harm."[77]

Judge Gilman then distinguished *General Telephone* and *Edmond* cited by the majority. He found that unlike Title VII at issue in *General Telephone*, under which suits are brought "to vindicate public interest,"[78] the relief under WVCCPA § 46A-7-111(1) is "solely for the benefit of the aggrieved consumer."[79] In his opinion, *Edmond* was also distinguishable because unlike the Maryland Consumer Protection Act at issue in that case where a "private action is 'in addition' to any action by the [attorney general],"[80] the West Virginia Attorney General's authority "under WVCCPA § 46A-7-111(1) is dependent on whether the consumer files his or her own suit."[81] Thus, Judge

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71. *Id.* at 182.

72. *Id.*

73. *Id.* (quoting 151 CONG. REC. S1157, S1163 (daily ed. Feb. 9, 2005) (statement of Sen. Chuck Grassley)) (internal quotation marks omitted).

74. *Id.*

75. *Id.* at 183 (quoting West Virginia *ex rel.* McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010) (internal quotation marks omitted); S. Rep. No. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34).

76. *McGraw*, 646 F.3d at 183–84 (Gillman, J., dissenting).

77. *Id.* at 184 (quoting Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 430 (5th Cir. 2008)) (internal quotation marks omitted).

78. *Id.* (quoting General Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 326 (1980)) (internal quotation marks omitted).

79. *Id.*

80. *Id.* (quoting *In re* Edmond, 934 F.2d 1304, 1312 (4th Cir. 1991)) (internal quotation marks omitted).

81. *Id.* at 184–85. The WVCCPA provides that if an individual citizen commences his or her own suit to recover the excess charges then "an action by the attorney general to recover for the same excess charge shall be stayed while the consumer's action is pending and shall be dismissed if

Gilman concluded that "[t]he [a]ttorney [g]eneral's power over a particular generic-drug purchaser's claim is . . . ultimately controlled by the consumer."[82] Judge Gilman, therefore, believed that WVCCPA § 46A-7-111 was sufficiently similar to Rule 23, and that the jurisdictional requirements of CAFA were met, which would allow the case to be removed to federal court.[83]

Judge Gilman also addressed the sovereign immunity issues cited by the majority. "[B]ecause West Virginia voluntarily brought [the] lawsuit, [Judge Gilman saw] no Eleventh Amendment or sovereign immunity concerns in asserting federal jurisdiction over [the] case."[84] In conclusion, Judge Gilman stated: "[I]f something looks like a duck, walks like a duck, and quacks like a duck, it is probably a duck . . . . [T]his case 'quacks' much more like a CAFA class action than a *parens patriae* case."[85]

III. PETITION FOR WRIT OF CERTIORARI

On August 18, 2011, the Pharmacies filed a petition for writ of certiorari with the Supreme Court.[86] The Supreme Court denied the Pharmacies' petition on November 28, 2011.[87]

IV. CONCLUSION

The Fourth Circuit opinion in *McGraw* is an important addition to class action jurisprudence. In spite of the lack of guidance found in CAFA, the Fourth Circuit has fashioned a reasonable approach to analyzing the issue with the formulation of its standard. By requiring that an action brought under a state statute be representative in nature and satisfy the four criteria of Rule 23(a) in order to be a class action, the court has provided a reliable framework for the district courts in the Fourth Circuit to ensure consistent results regarding this issue.

The majority opinion in *McGraw* is consistent with, and has been endorsed in, decisions by both the Seventh and Ninth Circuits.[88] In *LG Display Co. v. Madigan*,[89] the Seventh Circuit held that an action brought by the Illinois

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the consumer's action is dismissed with prejudice or results in a final judgment." W. VA. CODE ANN. § 46A-7-111(1) (LexisNexis 2007).

82. *McGraw*, 646 F.3d at 185 (Gilman, J., dissenting).

83. *Id.*

84. *Id.*

85. *Id.*

86. Petition for a Writ of Certiorari, CVS Pharmacy, Inc. v. State of West Virginia *ex rel.* McGraw (No. 11–224), 2011 WL 3706738.

87. CVS Pharmacy, Inc. v. State of West Virginia *ex rel.* McGraw, 132 S. Ct. 761, 761 (2011).

88. The Fifth Circuit is the only other circuit beside the Fourth, Seventh, and Ninth Circuits to address the issue at the time of this writing, *see supra* notes 61–65, 77 and accompanying text.

89. 665 F.3d 768 (7th Cir. 2011).

Attorney General against LCD panel manufacturers for antitrust violations under an Illinois statute, in which the attorney general sought injunctive relief, civil penalties, and treble damages for both the state and individual consumers, was neither a mass action nor a class action under CAFA.[90] The court held that the action by the Illinois Attorney General was not a class action under CAFA because the attorney general was not a member of the class and the Illinois statute did not contain any of the pivotal requirements for a class action under Rule 23.[91] The court found that the suit was not a mass action under CAFA because only the Illinois Attorney General made a claim for damages under the Illinois statute; thus, the "claims of 100 or more persons" requirement could not be met.[92] Moreover, the "suit is not a mass action under 28 U.S.C. § 1332(d)(11)(B)(ii(III) if 'all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of the purported class) pursuant to a State statute specifically authorizing such action.'"[93]

In *Washington v. Chimei Innolux Corp.*,[94] the Ninth Circuit adopted the Fourth Circuit's analysis and held that actions filed by the Attorneys General of Washington and California alleging antitrust violations against LCD panel manufacturers under state statutes in which the state attorneys general sought damages for state residents, were not class actions under CAFA.[95] The court found that the state statutes at issue did not authorize an action as a class action and neither statute was similar to Rule 23 because the statutes lacked the central requirements of Rule 23.[96]

The holdings of the Fourth, Seventh, and Ninth Circuits stand for the proposition that *parens patriae* styled actions are not likely to be considered class actions under CAFA, and that a state statute which does not contain the central requirements for a class action under Rule 23(a) will not be a "similar" statute under CAFA. Moreover, if an action authorized by statute is properly brought as a *parens patriae* action, pursuant to a state's quasi-sovereign interest, the language in CAFA would seem to expressly exclude such actions from the mass action prong of CAFA.[97] Notwithstanding the Fifth Circuit's holding in *Caldwell*, there is no split among the appellate courts regarding whether *parens patriae* styled actions are class actions under CAFA, as the Fifth Circuit in

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90. *Id.* at 770, 774. The Seventh Circuit expressly disagreed with the claim-by-claim approach utilized by the Fifth Circuit in *Caldwell*. *Id.* at 773.

91. *Id.* at 772. The court made this holding despite the fact that the Illinois statute explicitly references the type of action as a class action. *See id.* at 771–72 (quoting 740 ILL. COMP. STAT. ANN. 10/7(2) (West 1993)).

92. *See id.* at 772 (quoting 28 U.S.C. § 1332(d)(11)(B)(i) (2006)) (internal quotation marks omitted).

93. *Id.* (quoting § 1332(d)(11)(B)(ii)(III)).

94. 659 F.3d 842 (9th Cir. 2011).

95. *Id.* at 846, 849–50.

96. *Id.* at 849–50 (quoting § 1332(d)(1)).

97. *See Madigan*, 665 F.3d at 772 (quoting § 1332(d)(11)(B)(ii)(III)).

Caldwell only held that the action in that case constituted a mass action under CAFA and declined to decide whether such an action was a class action.[98] However, regarding mass actions, the Fifth Circuit's decision in *Caldwell* and the Seventh Circuit's decision in *Madigan* do appear to be in conflict. Thus, while the Supreme Court recently declined to hear the *McGraw* case, perhaps the Court will address CAFA and *parens patriae* styled actions in the context of mass actions at some point in the immediate future.

Marshall P. Walker

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98. Louisiana *ex rel.* Caldwell v. Allstate Ins. Co., 536 F.3d 418, 430 (5th Cir. 2008) ("Since we have concluded that this case was properly removed under CAFA's 'mass action' provision, we need not address whether this lawsuit could . . . properly proceed as a class action under CAFA."); *see also In re* Vioxx Prod. Liab. Litig., No. 1657, 2012 WL 10552, at *8 (E.D. La. Jan. 3, 2012) (stating that the *Caldwell* opinion is not at odds with the other federal circuits' opinions regarding class actions). Further, there seems to be a recent growing consensus among federal district courts that these types of *parens patriae* styled actions by state attorneys general are not class actions or mass actions subject to removal under CAFA. *See, e.g.*, Nevada v. Bank of Am. Corp., No. 12-15005, 2012 WL 688552, at *3 (9th Cir. Mar. 2, 2012) (citing *Chimei*, 659 F.3d at 847) (finding *parens patriae* enforcement suits filed by the attorney general were not class action suits under CAFA); *Vioxx*, 2012 WL 10552, at *1, *8 (holding that an action by the Kentucky Attorney General was not a class action); South Carolina v. LG Display Co., No. 3:11–cv–00729–JFA, 2011 WL 4344074, at *1, *7 (D.S.C. Sept. 14, 2011) (quoting West Virginia *ex rel.* McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 172 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011)) (holding that an action by the South Carolina Attorney General was neither a class action nor a mass action); South Carolina v. AU Optronics Corp., No. 3:11–cv–007131–JFA, 2011 WL 4344079, at *1, *7 (D.S.C. Sept. 14, 2011) (quoting *McGraw*, 646 F.3d at 172) (holding that an action by the South Carolina Attorney General was neither a class action nor a mass action); Arizona v. Countrywide Fin. Corp., No. CV-11-131-PHX-FJM, 2011 WL 995963, at *1, *3 (D. Ariz. March 21, 2011) (holding that an action by the Arizona Attorney General was neither a class action nor a mass action); Connecticut v. Moody's Corp., No. 3:10cv546(JBA), 2011 WL 63905, at *1, *4 (D. Conn. Jan. 5, 2011) (holding that CAFA did not apply to an action by the Connecticut State Attorney General).