As Congress recognizes, class actions afford a valuable mechanism to plaintiffs with small claims by providing them access to the courts when their injuries are not sizable enough to make pursuing individual claims economically feasible. In addition to enabling individuals who suffer the same harm to seek redress for their injuries, class actions provide defendants with an end to litigation through the finality of res judicata. Since Amchem Products, Inc. v. Windsor, however, federal courts routinely deny certification of multi-state class actions grounded on state law claims, claiming the application of multiple states' laws defeats the predominance and/or the manageability requirement of Federal Rule of Civil Procedure 23(b)(3).
response to federal courts’ hostility towards multi-state diversity class actions, plaintiffs have typically sought class certification in state courts where class actions have a higher likelihood of being certified.\(^6\)

The Class Action Fairness Act of 2005\(^7\) ("CAFA") arose in part to address a number of abuses occurring at the state level in the class action system. Specifically, some state court judges were failing to consistently apply the rules governing class actions and were not providing adequate supervision of litigation procedures and settlements.\(^8\) To solve these problems, CAFA provided for original jurisdiction and removal of class actions to federal court at the request of either party in cases involving minimal diversity.\(^9\) The effect of CAFA will most likely be that multi-state class actions that had previously been heard in state court will be removed to and quickly dismissed in federal court leaving many claimants with no place to seek justice; that is, unless federal courts change their methods for handling multi-state diversity class actions.

Multi-state class actions can be made manageable if federal courts are willing to undertake the proper, albeit complex, analysis of the laws of multiple states; and, in this post-CAFA era, it is imperative that they do so. Since federal courts are the primary forum in which multi-state class actions may now be brought, it is vital that they stop summarily denying certification of class actions involving the laws of multiple states and assert themselves in their proper role as overseers of interstate cases of undeniable national importance. Undoubtedly, the "quagmire" of choice-of-law issues involved in a multi-state diversity action may be "extremely unsettling" when viewed at the outset of the litigation.\(^10\) Nevertheless, if federal courts are willing to conduct the proper analysis they will discover that "the problem is not nearly so

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9. Id. at 28–29.

complex." Furthermore, there are tools available to federal courts to help manage even the most complex litigation. Part I of this Comment enumerates the changes embodied in CAFA and explains the effect that these provisions will have on class actions. Part II discusses the trend among federal courts to deny certification of multi-state diversity class actions on the ground that application of the law of multiple states is unmanageable and therefore fails to satisfy Rule 23(b)(3)’s predominance requirement. Part III predicts consequences likely to result if federal courts continue to deny certification of manageable multi-state diversity class actions after CAFA. Part IV examines In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation in order to demonstrate the manageability of multi-state diversity class actions by outlining the requisite analyses and briefly describing some of the tools available to assist with management before and during trial.

I. Under CAFA, Most Multi-State Diversity Class Actions Will Be Removed to Federal Court Where a Federal Judge Will Be Charged with the Certification Decision

CAFA creates new federal jurisdiction based on minimal diversity and eliminates most restrictions on removal. Whether originally filed in or removed to federal court, these actions will be consolidated through the Multidistrict Litigation procedure ("MDL"), under 28 U.S.C. § 1407(a) and placed before a single federal judge at least for the purposes of pretrial proceedings. Due to most states’ choice-of-law rules, the judge may have no option but to apply the substantive law of each class members’ state of residence.

A. Prior to CAFA, Most Multi-State Class Actions Grounded in State Law Were Heard in State Courts

The stringent diversity and amount-in-controversy requirements for federal jurisdiction were responsible for keeping these class

13. 288 F.3d 1012 (7th Cir. 2002).
15. Before CAFA, complete diversity was required for a class action to be filed in or removed to federal court. Complete diversity exists when no named class representative is a citizen of the same state as any defendant. After CAFA only minimal diversity is required,
actions in state courts. Yet the class action device experienced serious abuse in state court,\textsuperscript{17} such as "irrational federalism,"\textsuperscript{18} reverse auctions,\textsuperscript{19} judicial "terror" on defendants,\textsuperscript{20} and the lack of judicial review of settlements.\textsuperscript{21} These abuses led Congress to reform the requirements for federal jurisdiction through CAFA.\textsuperscript{22}

B. CAFA Substantially Expands Federal Jurisdiction to Encompass Most Multi-State Class Actions

CAFA removes the complete diversity requirement and the rule against aggregating claims to satisfy the amount-in-controversy requirement.\textsuperscript{23} Specifically, CAFA expands federal jurisdiction to encompass class actions that meet the following four requirements: (1) the aggregate amount in controversy exceeds $5 million; (2) the plaintiff class includes 100 or more members; (3) the primary defend-

which exists when at least one member of a plaintiff class is a citizen of a different state from any one defendant. See James M. Underwood, \textit{Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action}, 46 S. Tex. L. Rev. 391, 407 (2004); S. Rep. No. 109-14, at 10 (2005) (describing how the complete diversity requirement allowed plaintiffs' lawyers who prefer to litigate in state courts to easily "game the system" and avoid removal of large interstate class actions to federal court).

16. Prior to CAFA, the amount-in-controversy requirement mandated that the claims of each class member exceed $75,000 without aggregation. 28 U.S.C. § 1332(a); \textit{see also} S. Rep. No. 109-14, at 10–11; Underwood, \textit{supra} note 15, at 407. Note that \textit{Exxon v. Allapattah}, 125 S. Ct. 2611 (2005), held that under the supplemental jurisdiction statute, 28 U.S.C. § 1367, if one plaintiff or representative plaintiff satisfied the amount in controversy, other plaintiffs or class members with lesser claims could join in the action. \textit{Id.} at 2614.


18. \textit{See} Underwood, \textit{supra} note 15, at 405–06. "Irrational federalism" refers to the practice of locally elected state court judges applying local law to claims against nonresident businesses, thus affecting business practices beyond their state jurisdictions. \textit{Id.}

19. \textit{See id.} at 409 ("In the reverse auction, a defendant faced with multiple filings will often separately negotiate with the different class counsel at the same time to encourage counsel to underbid one another with the defendant's promise of an agreed certification as part of a settlement that is good for the defendant, profitable for the lowest bidding class counsel and less lucrative for the class members."); \textit{see also} the litigation surrounding \textit{Matsushita Electric Industrial Co. v. Epstein}, 516 U.S. 367, 378 (1996) (holding that a Delaware state court decision approving a settlement had a preclusive effect in federal courts).


21. When a court does not properly oversee a settlement, plaintiff and defense counsel may collude and leave the plaintiff with a poor settlement. \textit{See} Underwood, \textit{supra} note 15, at 427–29. Even in the absence of collusion, too often state courts approve class action settlements that are extremely lucrative to the class counsel by way of attorneys' fees, but provide little to no benefit to the class members. S. Rep. No. 109-14, at 14–20.


ants are not states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief; and (4) any class member is either (a) a citizen of a different state from any defendant, (b) a foreign citizen and a defendant is a citizen of a state, or (c) a citizen of a state and any defendant is a foreign citizen.\textsuperscript{24} If the class action meets these requirements, the defendant may remove the case from state to federal court under CAFA.\textsuperscript{25}

C. \textbf{CAFA Enables Defendants to Remove Nearly All Multi-State Diversity Class Actions Filed in State Courts to Federal Court}

Prior to CAFA, defendants were unable to remove multi-state diversity class actions to federal court if the plaintiff chose a non-diverse class representative to defeat diversity.\textsuperscript{26} Additionally, in actions in which each class member's damages were less than $75,000, the claims could not be aggregated to satisfy the amount in controversy requirement.\textsuperscript{27} Another obstacle to removal was that all defendants had to join in the notice of removal.\textsuperscript{28} Plaintiffs merely had to join a local defendant or a defendant unlikely to join in the notice for removal to avoid federal jurisdiction.

CAFA modifies the law regarding removal in three important ways.\textsuperscript{29} First, any defendant can remove a class action and no longer needs the consent of all defendants.\textsuperscript{30} Second, a class action may be removed even if a defendant is a citizen of the forum state.\textsuperscript{31} Finally, the former rule that an action may not be removed on the basis of diversity more than one year after commencement of the action,\textsuperscript{32} no longer applies to removal of class actions.\textsuperscript{33}

\begin{footnotesize}
\begin{enumerate}
\item See id.\textsuperscript{24}
\item See Scott L. Nelson, \textit{The Class Action Fairness Act of 2005: An Analysis}, 2005 A.B.A. Sec. Litig. 5.\textsuperscript{25}
\item See S. Rep. No. 109-14, at 10 (2005); Underwood, \textit{supra} note 15, at 407 (2004).\textsuperscript{26}
\item 28 U.S.C. § 1441(b) (2000).\textsuperscript{28}
\item Id.\textsuperscript{30}
\item Id.\textsuperscript{31}
\item 28 U.S.C. § 1446(b).\textsuperscript{32}
\item Class Action Fairness Act § 5.\textsuperscript{33}
\end{enumerate}
\end{footnotesize}
D. Although CAFA Provides Some Mandatory and Discretionary Restrictions on Federal Jurisdiction over Class Actions, It Will Nonetheless Force Most Multi-State Diversity Class Actions into Federal Court

CAFA imposes two mandatory restrictions and suggests federal judges exercise discretion in allowing the transfer of the class action from state to federal court. The first mandatory restriction requires the district court to decline jurisdiction if more than two-thirds of the class members are citizens of the state in which the action was originally filed and the following conditions are met: (1) the principal injuries resulting from the alleged conduct of each defendant were incurred in the state where the action was originally filed; (2) no other similar class actions have been filed during the preceding three years; and (3) there is at least one in-state defendant from whom significant relief is sought and whose conduct forms a significant basis of the plaintiffs' claims.  

The second mandatory restriction requires a federal court to decline jurisdiction if two-thirds or more of the class members and all "the primary defendants" are citizens of the state in which the action was originally filed. The two mandatory restrictions effectively limit class actions heard in state court to those "where the great majority of the class and one or more significant defendants are citizens of the forum state."  

A third limit imposed by CAFA is discretionary. The district court may choose to decline jurisdiction when between one-third and two-thirds of the class members and "the primary defendants" share state citizenship. CAFA enumerates several factors to assist the judge in determining whether to, in the interest of justice, deny jurisdiction. Thus, a federal court not only has discretion to decline jurisdiction where a large number of plaintiffs share state citizenship with the primary defendants, but it also has statutory guidelines for exercising

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34. Id. § 4.
35. Id.
38. Id. These factors include whether the claims involve matters of national or interstate interest, involve the application of the law of states other than the forum state, derive from class actions pleaded in a manner that seek to avoid federal jurisdiction, represent a distinct nexus between the case and the forum state, present an imbalance with class members residing in the forum state being a substantial majority as compared with residents of other states, and whether the action simulates other class actions brought before the courts within the past three years. See id.
that discretion, based on the relationship of the action to the forum state. 39

Although the mandatory and discretionary provisions place some class actions back in state court, they have little impact on CAFA's overall effect—rerouting almost all multi-state class actions from state to federal court. 40 Apart from cases "where a class is defined to include only citizens of a particular state, there may be [only a] few cases where class members will be so concentrated in individual states that the two-thirds requirement could be met." 41 Furthermore, in cases where the restrictive provision potentially applies, it may be difficult to determine at the outset if the provision applies, spawning satellite litigation over the number of class members who are forum state residents. 42

CAFA's expansion of federal jurisdiction and the elimination of restriction on removal make it likely that, as a practical matter, the only classes remaining in state court are those that are limited to state domiciliaries and at least one principal defendant who is also a domiciliary. Consequently, the majority of multi-state class actions will be initially filed in, or immediately removed to, federal court. Once in federal court, there may be other class actions, consolidated cases, or individual lawsuits arising out of the same legal and factual basis as the action proposed for certification. 43 These cases may cause conflicts if they purport to bind overlapping or duplicative actions. 44 In federal courts, multiple cases based on the same product or occurrence may be transferred to a single federal district under the MDL procedure of 28 U.S.C. § 1407.

39. See id.
40. See S. Rep. No. 109-14, at 84–85 (2005); id. at 92 ("[T]he effect of the class action provisions of [CAFA] would be to move virtually all class action litigation into the Federal courts . . . ."); Nelson, supra note 25, at 13 ("[W]e can expect to see defendants vigorously exercise the removal provisions . . . .").
41. See Nelson, supra note 25, at 7.
42. Id.
43. The district judge "should direct counsel to identify the names of all similar cases in other courts, their stage of pretrial preparation, and the assigned judges." Manual for Complex Litigation (Fourth) § 20.312 (2004).
44. Id. § 21.15.
E. Related Cases Pending in Federal Courts May Be Consolidated in a Single District Where a Federal Judge May Have to Decide Whether a Class Action Governed by Multiple State Laws Can Be Properly Certified for Class Treatment

To avoid inconsistent rulings and minimize duplicative discovery, the Judicial Panel on Multidistrict Litigation ("MDL Panel") has authority to transfer related federal cases to one district court for consolidated pretrial proceedings. It is advisable that district courts delay certification of class actions if transfer is likely. If certification is granted prior to transfer, however, the transferee court may decertify the class and start afresh with the certification analysis. Therefore, after the cases are multidistricted, a single federal judge will determine whether an action is suitable for class treatment.

Before ruling on certification, the MDL court hearing the transferred case arising under state law must determine what law applies to the cases. The *Erie* doctrine requires a federal court exercising diversity jurisdiction to apply the law of the state in which the federal court sits, as opposed to some artificial construct such as "federal general common law." Further, the *Erie* doctrine binds a federal district court sitting in diversity to the choice-of-law methodology of the state in which it sits. Cases that have been multidistricted bring with them the law of the state from which they were transferred. They are not adjudicated under the law of the transferee court. To determine what law applies to a class action that has been transferred pursuant to

45. Id.
47. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.15 (2004) ("If transfer to a MDL proceeding is likely, it is usually best to defer certification until the MDL Panel acts. . . . A delay in deciding certification might also be appropriate if other cases in state or federal court are at a more advanced stage in the litigation.") Id.
48. See In re Plumbing Fixture Cases, 298 F. Supp. 484, 496 (J.P.M.L. 1968). With regard to the class action determinations made by a transferor court prior to transfer, the transferee court "may determine class action questions and review and revise any class action order as in its sound judicial discretion is desirable or necessary in interests of justice." Id. at 496.
50. Id. at 78.
52. See id.
53. See id.
MDL, a transferee court must look to the state from which the action was transferred and apply that state's choice-of-law rules.\(^{54}\)

Where plaintiffs are residents of the forum in which the action was originally filed, and where the claims arise from transactions that occurred in that forum, the choice-of-law rules of most states will apply the law of the forum—the plaintiffs' domicile.\(^{55}\) Accordingly, the MDL judge to whom such cases are transferred will, in most instances, be required to apply the law of each individual class member's domicile to each individual class member's claims.\(^{56}\)

II. Federal Courts Routinely Deny Certification of Multi-State Diversity Class Actions Because They Require Application of Multiple States' Laws

Since Amchem, the obstacle to satisfying Rule 23(b)(3)'s twin requirements of predominance and superiority has been the need to apply the law of multiple jurisdictions.\(^{57}\) Most discussions on choice-of-law in multi-state diversity class actions begin with Phillips Petroleum Co. v. Shutts,\(^{58}\) in which the Supreme Court held that application of a single state's law to a nationwide plaintiff class, when 97% of the plaintiffs had no apparent connection to that state, was a violation of due process.\(^{59}\) It was, however, the Court's approval of the Third Circuit's

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\(^{54}\) Generally, a federal court sitting in diversity must apply the choice-of-law rule of the state in which it sits. Under Van Dusen, when cases are transferred from one district to another pursuant to 28 U.S.C. § 1404, and jurisdiction is based on diversity of citizenship, the transferee court must apply the law of the transferor court. Van Dusen v. Barrack, 376 U.S. 612, 637-40 (1964). As the court in DuPont Plaza Hotel Fire Litigation, 745 F. Supp. 79, 81 (D.P.R. 1990), noted, "[t]his same principle has been traditionally followed without much explanation in [diversity] cases consolidated by the Multidistrict Panel pursuant to the provisions of 28 U.S.C. § 1407." (citing In re Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594 (7th Cir. 1981); In re Air Crash Disaster at Wash. D.C. on Jan. 13, 1982, 559 F. Supp. 333 (D.D.C. 1983)).


\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1015 (7th Cir. 2002) (holding that class action is never proper when the laws of multiple states must be applied); Spence v. Glock, Ges.m.b.H., 227 F.3d 308, 314 (5th Cir. 2000) (denying certification of nationwide class because the laws of multiple states would have to be applied.); In re Am. Med. Sys., Inc., 75 F.3d 1069, 1085-86 (6th Cir. 1996) (denying certification of a nationwide class action because the district judge failed to consider how the law of negligence differs through the jurisdictions); Castano v. Am. Tobacco Co., 84 F.3d 754, 741 (5th Cir. 1996) (denying certification of a nationwide diversity class action because the need to apply each state's tort and fraud laws defeated predominance and manageability).

\(^{59}\) 472 U.S. 797 (1985).
opinion twelve years later in *Amchem* that contained the language, albeit dicta, that provided federal courts with the ammunition necessary to deny certification on the grounds that the application of the laws of multiple states renders a class action unmanageable. The Third Circuit stated:

> [B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims . . . the proliferation of disparate factual and legal issues is compounded exponentially. The states have different rules governing the whole range of issues raised by the plaintiffs' claims: viability of futures claims; availability of causes of action . . . ; causation; the type of proof necessary to prove asbestos exposure; statutes of limitations; joint and several liability; and comparative/contributory negligence.\(^6^0\)

During its discussion on predominance, the Supreme Court approvingly noted the Third Circuit's conclusion on this point stating, "Differences in state law . . . compound these disparities."\(^6^1\)

The *Amchem* decision arose out of the asbestos litigation that began to flood the courts in the 1970s.\(^6^2\) In 1991, the MDL Panel transferred all asbestos cases pending in federal district courts throughout the country—some 30,000 cases at that time—to a single district, the United States District Court for the Eastern District of Pennsylvania.\(^6^3\) After consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations.\(^6^4\) Although the MDL Panel's order collected, transferred, and consolidated only pending federal court cases, settlement negotiations included efforts to find a means of resolving future cases.\(^6^5\) The first round of settlement negotiations fell apart; the second round resulted in the filing of the case that ultimately became *Amchem*.\(^6^6\) Plaintiffs initially filed in the Eastern District of Pennsylvania, the asbestos MDL court, on behalf of a nationwide class of persons who had not yet filed suit based on any asbestos injury, but who might file such a claim in the future against any of the asbestos defendants named in the suit.\(^6^7\) The parties never intended to litigate this new class action.\(^6^8\) Instead,

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61. *Amchem*, 521 U.S. at 624.
64. *Id.* at 422, 424.
65. *Amchem*, 521 U.S. at 600.
66. *Id.*
67. *Id.* at 601.
68. *Id.*
the parties filed for the sole purpose of obtaining certification of a class of future claimants on whose behalf a settlement already negotiated could then be entered into. It was a "future only" "settlement only" class action.

Within a single day the parties presented the district court with a complaint, an answer, a proposed settlement, and a joint motion for conditional class certification. The proposed class consisted of potentially hundreds of thousands, perhaps millions, of individuals who had been exposed to asbestos. The complaint delineated no subclasses. The district court certified the class and approved the proposed settlement. The Third Circuit reversed on several grounds. One reason in particular was that the predominance and manageability requirements were not satisfied due to the need to apply the law of fifty states. The Supreme Court, agreeing with the Third Circuit, vacated the judgment and remanded.

The Supreme Court held that in order to be certified a settlement class must meet the requirements of Rule 23(a) and (b), even though the parties do not intend to try the case. The Court refused to certify the class because, inter alia, the laws of multiple states would have to be applied. Although the Court limited its holding to "settlement only" class actions, it warned that variations in state law could

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69. Id. at 601-02.
70. Id.
71. Id.
72. The class comprised all persons who had not previously sued any of the asbestos manufacturing companies that are petitioners to the suit, "but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member— to asbestos or products containing asbestos attributable to a . . . [petitioner], or (2) whose spouse or family member had been so exposed." Id. at 602.
73. Id. at 603.
77. Rule 23(a) states:
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are question 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 interest of the class.
78. Amchem, 521 U.S. at 619–22. The Court noted, however, that a settlement-only class action need not be manageable under the superiority requirement in Rule 23(b)(3) because the proposal is that the case will not go to trial. Id. at 620.
79. Id. at 622–24.
defeat predominance and render the class unmanageable.80 When the laws of fifty states are implicated in a class action, "differences in state law will 'compound the disparities' among class members from the different states."81

Although Amchem does not categorically preclude certification of multi-state class actions, since Amchem, federal courts have rarely certified class actions involving the laws of multiple states.82 If the laws of each plaintiff's state must be applied to each plaintiff, federal judges will typically dismiss the case, reasoning that the case is simply unmanageable because common questions do not predominate.83 As the Senate Report accompanying CAFA indicates, "six circuit courts and twenty-six district courts have consistently denied certification of multi-state consumer cases."84 The United States Chamber of Commerce has also recognized this, stating: "Federal courts have consistently refused to certify nationwide class actions in product defect cases because the need to apply the laws of many different states would make such a sprawling class action unmanageable."85 It is such an accepted practice in federal courts to deny certification of multi-state class actions that the Senate Report contains a plea from the dissenting Senators to amend CAFA to "ensure that cases which are removed from state courts are at least not immediately dismissed by the Federal judge on choice of law grounds."86 Opponents of CAFA argue that it, in conjunction with Amchem, may spell the end of nationwide class actions based on state law because it will effectively prevent both state and federal courts from hearing any nationwide or multi-state class action.87

80. See id.; see also 7AA CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1780.1 (3d ed. 2005) (explaining that predominance and superiority inquiries are inexorably intertwined with respect to choice-of-law issues such that application of multiple state laws to a single consolidated proceeding is capable of both defeating predominance and rendering the class unmanageable).


83. Id. at 87.

84. Id. at 86.

85. Id. at 87.

86. Id.

87. Id. at 85-87.
III. The Combination of CAFA and Amchem Results in Negative Consequences for Plaintiffs and Defendants

After Amchem, plaintiffs sought certification of multi-state and nationwide class actions in state court in an effort to avoid the roadblock to certification they faced in federal courts. Prior to CAFA, the proponent of certification could name a class representative that shared a common citizenship with any defendant, or limit individual class member claims to an amount less than $75,000. CAFA has eliminated these loopholes by removing the complete diversity requirement and the rule against aggregating claims to satisfy the amount-in-controversy requirement, and by lessening the removal requirements for defendants. Since CAFA, it is practically impossible for plaintiffs in a class action to avoid federal jurisdiction.

While it is too soon to gauge the effects of CAFA, it seems likely that class action plaintiffs' lawyers may begin to file multiple statewide class actions—i.e., file multiple suits with each one limited to the residents of a single state, in order to avoid the problems of multi-state classes. An unsettling result may be that plaintiffs' counsel will only file multiple statewide class actions on behalf of residents of the most populous states, so that the damages will be sufficient to support the litigation. Since one-half of the population can be gathered in about nine states, the concern is that the less populous states will be left out. For defendants, an unforeseen consequence may be that they are faced with multiple class actions, in various locations, possibly resulting in conflicting judgments.

88. Feldman, supra note 6, at 231 ("Given federal court hostility to certification of non-federal question class actions, plaintiffs have proceeded to file a larger percentage of these putative class claims in state court.").
IV. District Courts Can Certify Certain Multi-State Diversity Class Actions if They Are Willing to Conduct the Necessary Analyses and Use the Tools Available to Them

In Bridgestone/Firestone, the Seventh Circuit decertified two nationwide class actions because the claims required adjudication under the law of many jurisdictions and was therefore unmanageable under Rule 23(b)(3). The Seventh Circuit reached this conclusion without undertaking any sort of comparative state law analysis to determine if application was in fact unmanageable.

In the late 1990s, certain Firestone tires and Ford Explorer SUVs contained defects resulting in injuries and deaths. As a result many lawsuits were filed. Persons whose Firestone tires or Explorers had yet to malfunction filed suit for the risk of failure reflected in the diminished resell value. The MDL Panel transferred these suits filed in, or removed to, federal court to the Southern District of Indiana in October of 2000. Shortly after the plaintiffs filed a motion for certification under Rule 23(b)(3). In December of 2001 Judge Barker granted certification of two nationwide class actions: a Tire Class representing owners and lessees of various Firestone tires, and an Explorer class representing owners and lessees of various Ford Explorer models.

The Seventh Circuit, expressing its blanket opposition to multi-state diversity class actions, stated that “[n]o class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of [Rule 23](b)(3).” In its independent analysis, the court determined that the class claims were governed by the laws of fifty states, the Dis-

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94. Id. at 1014.
95. Id.
96. Id. at 1015.
98. Id.
100. Id. The Seventh Circuit’s hostility towards multi-state class actions is not unique to the Bridgestone/Firestone case. The Seventh Circuit routinely denies certification of multi-state diversity suits based on mass torts, warranty, fraud, and products liability. See, e.g., In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995); Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001).
Without conducting an analysis into whether the applicable state laws varied significantly on the substantive issues as to render the class unmanageable, the court concluded that this class action and all multi-state diversity class actions are per se unmanageable. 102

Contrary to the Seventh Circuit’s opinion, class actions can be properly certified under Rule 23(b)(3) even when the litigants are governed by more than one legal rule. The manageability analysis under Rule 23(b)(3) can be divided into four steps. First, determine if the substantive law of more than one state is implicated, and if so, determine which law governs each claim. Second, identify the substantive, or primary, issues likely to be disputed in the case. Third, compare the laws of each relevant jurisdiction on the substantive issues. Fourth, if the comparison reveals variations in law, develop a trial plan that deals with the variations in a manageable fashion.

A. Step One: The Court Must Determine Whether the Laws of More Than One State Are Involved, However, the Court Need Not Distort the Choice-of-Law Analysis to Facilitate Certification

The manageability analysis begins with the determination of whether the case implicates the laws of more than one jurisdiction. If a multi-state diversity action involves a uniform nationwide contract with a choice-of-law clause, providing that the law of a single state applies, the clause is usually enforced. 103 If there is no uniform choice-of-law provision, 104 it is almost certain that, with respect to events or transactions taking place in each class member’s state of residence, the law of each class member’s state of residence will apply to each class member’s claims. 105 Where class actions are filed on behalf of

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101. Bridgestone/Firestone, 288 F.3d at 1016.
102. Id. at 1018.
104. Although choice-of-law provisions can eliminate this issue with respect to contract claims, “tort claims are usually not covered by such agreements . . . . As long as multistate tort class actions continue to be filed, the choice-of-law analysis will remain relevant to certification.” Jeremy T. Grabill, Comment, Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts, 80 TUL. L. REV. 299, 304 (2005).
105. Phair, supra note 55, at 840 (“Since most of the [choice-of-law] methodologies consider a state to have a significant interest in protecting its citizens and in regulating activities within its own boundaries, they place a heavy emphasis on the plaintiff’s domicile as the relevant factor in determining the applicable law. In a nationwide Rule 23(b)(3) class action, which includes domiciliaries of each of the fifty states, a district court is con-
residents of more than one state, or where a number of related state-wide class actions are multi-districted, it is a foregone conclusion that the laws of the plaintiffs' residences will be implicated—whether the class involves fifteen or fifty states' laws.106

In Bridgestone/Firestone, Judge Barker, persuaded by plaintiffs' argument, concluded that Illinois's choice-of-law rule, lex loci delicti, dictated that the law of a single state, rather than each claimant's resident state, applied to each class action.107 According to the Seventh Circuit, the district judge chose this route for fear that the application of multiple states' laws would prevent certification.108 The connection between choice-of-law and satisfaction of Rule 23(b)(3)'s manageability requirement is obvious and presents a formidable obstacle to certification, especially in the Seventh Circuit.109

On appeal, the Seventh Circuit rejected the plaintiffs' and the district court's choice-of-law analysis, concluding that, "in all but exceptional cases [the lex loci delicti approach] applies the law of the place where harm occurred."110 Since the harm in this case was financial loss, the locus of that harm was where the vehicles and tires were purchased and resold, which occurred in all fifty states, the District of Columbia, Puerto Rico, and Guam.111

Distorting choice-of-law rules, as Judge Barker did, in an effort to simplify complex litigation is a common practice in federal court, especially in MDL cases.112 However, a district court need not violate states' choice-of-law principles to properly certify a multi-state class action. Even if the court concludes that the laws of each plaintiff's state of residence must be applied, it does not necessarily follow that class certification must be denied. This is only the first step in a proper

fronted with a scenario in which each state may have a significant interest in protecting its own citizens and ensuring compensation for the injuries suffered by them.

106. Steven P. Zabel & Jeffrey A. Eyres, Conflict-of-Law Issues in Multistate Product Liability Class Actions, 19 HAMLINE L. REV. 429, 429 ("Under the Erie doctrine and the choice-of-law rules of most states, the individual claims of each class member will be governed by the law of the state in which the class member is domiciled.").


108. See Bridgestone/Firestone, 288 F.3d at 1015 ("No class action is proper unless all litigants are governed by the same legal rules. . . . The district judge, well aware of this principle, recognized that uniform law would be essential to class certification.").

109. See supra notes 100–102 and accompanying text.

110. Bridgestone/Firestone, 288 F.3d at 1016.

111. Id.

112. See Kramer, supra note 12, at 547–61 (conducting a thorough analysis of the trend in federal courts to distort choice-of-law analysis).
inquiry as to whether the need to apply the law of multiple jurisdictions defeats manageability. Once "a trial court determines that class claims will require adjudication under the laws of multiple states, the court must then ascertain [the extent to which] variations exist among the applicable laws [relating to the issues actually in dispute]."  

B. Step Two: The Court Must Determine the Core Issues Likely to Be in Substantial Dispute at Trial

The initial pleadings filed in class action cases often create the impression that the case is more complicated than it actually is. Plaintiffs routinely "assert every conceivable claim arising from a set of facts," and "defendants often assert numerous inapplicable affirmative defenses in an answer to a complaint."  

However, the pretrial process and focused discovery will make it possible to identify a much smaller set of core issues substantially in dispute. The parties can often eliminate issues by stipulation or by concession. Moreover, the pretrial process in federal court provides numerous tools for a judge to make complex cases "manageable" by eliminating marginal claims and defenses and forcing the parties to concentrate on the core issues substantially in dispute—provided the judge is willing to use these tools fairly aggressively.

A task essential to the evaluation of a 23(b)(3) class action's manageability is the reduction of legal issues and sub-issues to manageable proportions. The court can reduce the complexity of a case by using the pre-trial process to eliminate minor issues and compel the parties to concentrate on the handful of major issues that constitute the heart of the case.

Federal Rule of Civil Procedure 16 was designed to encourage judicial control during the pretrial process and bestows on courts a broad range of power in an effort to improve planning and management. The court may order the parties to participate in mandatory

114. ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS 316 (2002) [hereinafter NEWBERG].
116. Id.
117. See FED. R. CIV. P. 16(c)(1); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.33 (2004).
118. Phair, supra note 55, at 853.
119. FED. R. CIV. P. 16(c)(1) advisory committee's notes ("Increased judicial control during the pretrial process accelerates the processing and termination of cases.").
120. Id. Empirical studies reveal that when a trial judge intervenes personally at an early state the case is "disposed of by settlement or trial more efficiently and with less cost
meetings in which counsel must decide the issues on which they agree and those that are in contentation.\textsuperscript{121}

If the parties fail to reduce the issues to a manageable number, the court may be able to isolate and grant certification with respect to core issues only under Rule 23(c)(4)(A).\textsuperscript{122} To facilitate certification, the court can defer dealing with management concerns surrounding the severed issues until the class action portion of the trial is complete.\textsuperscript{123} Although questions exist as to the constitutionality of issue severance and partial certification,\textsuperscript{124} Rule 23(c)(4)(A) may prove to be a useful tool capable of facilitating certification when the issues in contention are too numerous as to make the case unmanageable as a class action.

For example, in Bridgestone/Firestone, the Master Complaint filed on January 2, 2001, contained fourteen causes of action.\textsuperscript{125} Actually litigating fourteen causes of action in a nationwide class action based on state law would most likely be impossible to manage. By the time the trial court granted certification, however, on December 31, 2001, merely three theories of relief from the Master Complaint had survived—consumer fraud, breach of express and implied warranty, and unjust enrichment.\textsuperscript{126}

Once the relevant jurisdictions and the substantive issues in dispute are identified, the court must analyze whether there are any sig-

and delay than when the parties are left to their own devices.” \textit{Id}. The advisory committee’s notes also indicate that the intention of Rule 16 is to encourage better planning and management in the pretrial process and that increased judicial control facilitates these goals. \textit{Id}.

\textsuperscript{121} See Newberg, \textit{supra} note 114, at 317.

\textsuperscript{122} Fed. R. Civ. P. 23(c)(4)(A) (stating when appropriate an action may be brought or maintained as a class action with respect to particular issues).

\textsuperscript{123} Newberg, \textit{supra} note 114, at 446–47, 449.

\textsuperscript{124} \textit{In re} Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir. 1995) (questioning whether certifying a class with respect to particular issues only under Rule 23(c)(4)(A) violated litigants Seventh Amendment right to trial by jury).


significant differences in the law of each jurisdiction on each substantive issue.

C. Step Three: Conduct a State-by-State Comparative Analysis of the Law Governing the Core Issues Substantially in Dispute, Which Will Frequently Reveal Relative Uniformity Among the Jurisdictions

Judge Posner opined that "before entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states." If the relevant jurisdictions are in virtual agreement on an issue, meaning minor variations do not affect the outcome, then manageability will not be an issue.

When the laws of multiple states are implicated, proponents of class certification have the burden of establishing that, despite the applicability of multiple states' laws, the class action satisfies Rule 23(b)(3)'s manageability requirement. This analysis is difficult, but not impossible and given the relative uniformity of the laws of the states, it is likely that no more than three or four different formulations will govern each substantive issue.

Since the proponent of class certification carries the burden, any plaintiffs' counsel representing a multi-state diversity class should be capable of conducting a state-by-state survey and comparison of the relevant law on the substantive issues. It has been suggested that class

129. See, e.g., Gariety v. Grant Thornton, LLP, 368 F.3d 356, 370 (4th Cir. 2004) (In a Rule 23(b)(3) class action, "[t]he plaintiffs have the burden of showing that common questions of law predominate, and they cannot meet this burden when the various laws have not been identified and compared."); Spence v. Glock, Ges.m.b.H., 227 F.3d 308, 313 (5th Cir. 2000) (holding that Plaintiffs failed to meet their burden of showing that common questions of law predominate because they did not present sufficient choice-of-law analysis, including a sub-class plan in case the court found that multiple states' laws applied); In re Baycol Prods. Litig., 218 F.R.D. 197, 208 (D. Minn. 2003) ("The Court has not received from Plaintiffs a thorough analysis of the differences in state law, nor suggestions as to how the state laws can be divided into subclasses."); Wash. Mut. Bank v. Superior Court, 15 P.3d 1071, 1082 (Cal. 2001) (holding that the party seeking class certification bears the burden of demonstrating, by detailed analysis of the laws of the various states, that complexity does not make a multi-state class unsuitable).
130. Kramer, supra note 12, at 582 ("States tend to copy their laws from each other, and may use identical or virtually identical rules. In practice, the court will seldom have to deal with more than three or four formulations, and the choice will often be between two alternatives.").
counsel’s ability to provide such an analysis should be part of Rule 23(a)’s adequacy of representation inquiry.\textsuperscript{131}

A state-by-state survey of the law is the most difficult part of the manageability analysis, but complex litigation does not become unmanageable simply because it is necessary to conduct this survey, even if it is nationwide in scope.\textsuperscript{132} The process is aided by a number of sources. Research databases such as LexisNexis and Westlaw expedite the process significantly. Additionally, since class action attorneys “tend to be repeat players,” class counsel may look to others in their field, or within their own firm for comparable surveys to use as a starting point.\textsuperscript{133}

Once the proponents and opponents of class certification have briefed the relevant laws,\textsuperscript{134} the trial court must examine the results to ensure they are not “skewed by adversarial bias.”\textsuperscript{135} Some commentators assert that the task of ascertaining the laws of many states is itself an unmanageably difficult task for a district court.\textsuperscript{136} However, courts have tools available to help them compare the relevant law accurately and efficiently. Aided by the growing body of independent comparative multi-state analyses,\textsuperscript{137} courts can cross-reference the analyses presented by the parties rather than conduct their own entirely from scratch. If the law of a particular jurisdiction is difficult to ascertain,\textsuperscript{138} one possible, although somewhat extreme, solution is to certify the question to the Supreme Court of that state under the Uniform Certi-

\begin{footnotes}
\item[131.] See Phair, supra note 55, at 857 n.104.
\item[132.] See Kramer, supra note 12, at 584.
\item[133.] Phair, supra note 55, at 857.
\item[134.] Although plaintiffs bear the burden of demonstrating manageability, the defendant normally provides an analysis to argue that certification is improper due to the substantial variations in state law on the core issues in the case.
\item[135.] Phair, supra note 55, at 857.
\item[136.] Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips v. Petroleum Co. v. Shutts, 96 YALE L.J. 1, 64 (1986). As Miller and Crump state, “In order to group the states, the court initially must make decisions about the meanings of the laws of each.” Id. Miller and Crump analogize the task of deciding the meanings of the laws of each state to “a first-year law student who, instead of a course in contracts, is required simultaneously to enroll in fifty courses, each covering the contract law of a single state, and to apply each body of law correctly on the final examination.” Id.
\item[137.] Phair, supra note 55, at 857.
\item[138.] Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 HARV. L. REV. 718, 742 (1979). The author argues that choice-of-law may present the danger of an unwarranted intrusion into another state’s legal affairs through a mistaken application of its laws. The court should thus consider its own familiarity with the other state’s law, the degree to which that law is unclear or unsettled, and the extent to which it implicates important interests of the other state.
\end{footnotes}
fication of Questions of Law Act of 1967. The bottom line is that district courts are charged with adjudicating diversity cases and diversity cases often require the application of foreign law. The difficulty in determining a foreign state’s law on a particular issue should be the same whether the court is required to determine the law of a single state in ten different cases or to determine the law of ten states in a single case.

Although Judge Barker in Bridgestone/Firestone elected to apply the law of Illinois to a nationwide class, attorneys for plaintiffs and defendants had anticipated the need to apply the law of each claimant’s residence. Plaintiffs’ Opening Brief in Support of Motion for Class Certification (“Plaintiffs’ Brief”) puts forth a state-by-state analysis and comparison on the laws of each relevant jurisdiction as to the class’s state law claims. Not surprisingly, Plaintiffs’ Brief concludes that the laws in each of these areas are relatively uniform from state-to-state.

For example, the claims for breach of express and implied warranty are primarily governed by section 2-313 and 2-314(1) respectively, of the Uniform Commercial Code (“UCC”). The UCC has been enacted in every American jurisdiction except Louisiana. Ten

139. Unif. Certification of Questions of Law Act § 1 (1990). Although this tool is infrequently resorted to, the Act is currently adopted in twenty-five states and the Commonwealth of Puerto Rico. Id. The Act allows a state court to answer questions of state law that have been certified to it by any federal court including the Judicial Panel on Multidistrict Litigation. Id.

140. Under Erie, every time a federal court hears a diversity action it must determine and apply the law of the state in which it sits. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Likewise, under Van Dusen, a federal court, hearing a case transferred under Fed. R. Civ. P. 1407, must determine and apply the law of each state from which a case was transferred. Van Dusen v. Barrack, 376 U.S. 612, 625 (1964). Therefore, the analysis should not be foreign to district judges.

141. See Plaintiffs’ Opening Brief in Support of Motion for Class Certification at 24–46, In re Bridgestone/Firestone, Inc., ATX, ATX II, and Wilderness Tires Prods. Liab. Litig., No. 00-9373 (S.D. Ind. Feb. 2, 2001), available at http://www.insd.uscourts.gov/Firestone/default.htm [hereinafter Plaintiffs’ Brief]. Class counsel attached as exhibits to their brief detailed analyses and comparisons of each state’s laws on each substantive issue and graphically illustrated for the court the variations in state law. These exhibits are unavailable online.

142. Id. at 44–45. Notably, the plaintiffs’ conclusion that relative uniformity among state law exists comports with what Professor Kramer’s hypothesis postulated several years earlier. See Kramer, supra note 12, at 583. Kramer predicted there will never be fifty different substantive rules, or even fifteen or ten. States tend to copy their laws from each other, and may use identical or virtually identical rules. In practice, the court will seldom have to deal with more than three or four formulations and the choice will often be between two alternatives.

143. Plaintiffs’ Brief, supra note 141, at 30, 34.

144. Id.
states add a reliance element to the express warranty claim.\textsuperscript{145} Certain states require privity to recover for economic loss from breach of an implied warranty. Lastly, all states that follow the UCC have adopted section 2-714(2) to determine the measure of damages for breach of warranty claim.\textsuperscript{146}

Equally foreseeable, defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Class Certification ("Defendants’ Brief") found numerous material variations, state-to-state.\textsuperscript{147} Defendants’ analysis of express and implied warranty naturally resulted in different conclusions. They agreed that the UCC has been adopted in every state except Louisiana; however, they cite to case law and various secondary references to support their assertion that the UCC is not uniform.\textsuperscript{148}

Found nowhere in the opinions of the district court or the Seventh Circuit is an examination of the parties’ briefs on this issue, nor is there an explicit determination of whether the laws regarding the core issues in dispute in Bridgestone/Firestone contained too many substantial variations as to render the class unmanageable.

The need to apply various states’ laws to a class action does not make it per se unmanageable.\textsuperscript{149} Class counsel should provide the court with a detailed trial plan demonstrating how state law variances can be dealt with by way of subclasses.\textsuperscript{150}

\textsuperscript{145} Id. at 32.
\textsuperscript{146} Id. at 36.
\textsuperscript{147} See Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Class Certification, at 11–17, In re Bridgestone/Firestone, Inc., ATX, ATX II, and Wilderness Tires Prods. Liab. Litig., No. 00-9373 (S.D. Ind. Apr. 3, 2001), available at http://www.insd.uscourts.gov/Firestone/default.htm. Like class counsel, defendants’ counsel attached as exhibits to their brief detailed analyses and comparisons of each state’s laws on each substantive issue and graphically illustrated for the court the variations in state law. Unfortunately, these exhibits, like plaintiffs’ exhibits, are unavailable online.
\textsuperscript{148} Id. at 15. In support of the proposition that the UCC is not uniform, the defendants cited to Walsh v. Ford Motor Co., 807 F.2d. 1000 (D.C. Cir. 1986); Osborne v. Subaru of America, Inc., 243 Cal. Rptr. 815 (Ct. App. 1988); E. Hunter Taylor, Jr., Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions, 30 Hastings L.J. 337 (1978); E. Hunter Taylor, Jr., Federalism or Uniformity of Commercial Law, 11 Rutgers L.J. 527 (1980).
\textsuperscript{150} Id.
D. Step Four: Once the Issues Are Defined and the Applicable Law Is Ascertained, Federal District Courts Can Use Several Tools to Manage Class Claims that May Initially Seem Unmanageable

By their nature complex cases are difficult to litigate.\textsuperscript{151} Nevertheless, federal courts are well equipped with procedures and litigation devices to adjudicate multi-state diversity actions, without violating Rule 23(b)(3).\textsuperscript{152}

"[C]ertification of a nationwide class in which the law of the 50 states, rather than federal law, must be identified and applied, places the burden upon plaintiffs to 'credibly demonstrate through an "extensive analysis" of state law variances, "that class certification does not present insuperable obstacles."'\textsuperscript{153} Class counsel should submit to the court a "blueprint for trial,"\textsuperscript{154} consisting of a proposal for subclasses with separate class representatives, sample jury instructions, and special verdicts.

1. Courts Can Manage Variations in the Law Through the Creation of Subclasses

The state-by-state analysis supplied by plaintiffs' counsel in \textit{Bridgestone/Firestone} argued that merely a few variations in state law existed as to each substantive issue. These variations fell into a few, clearly defined categories.\textsuperscript{155} The categories outlined class counsel's proposal for subclasses.\textsuperscript{156}

For instance, Louisiana is the only state that does not follow the UCC with respect to breach of express and implied warranty.\textsuperscript{157} Therefore, a subclass could have been created to account for this clearly defined variation. The ten states that add a reliance element to express warranty claims would have neatly fit into their own subclass. In addition, class members from those states requiring privity for breach of implied warranty who failed to meet this requirement at

\textsuperscript{151} Bough & Bough, \textit{supra} note 10, at 26.
\textsuperscript{152} \textit{Newberg}, \textit{supra} note 114, at 463.
\textsuperscript{154} \textit{Id.} at 356.
\textsuperscript{155} Plaintiffs' Brief, \textit{supra} note 141, at 18.
\textsuperscript{156} For discussion of the variations in states' laws and corresponding subclasses as to breach of express warranty claims, see \textit{id.} at 32–34. For discussion of the variations in states' laws and corresponding subclasses as to breach of implied warranty of merchantability and damages for breach of warranty, see \textit{id.} at 34–37.
\textsuperscript{157} \textit{Id.} at 30, 34.
trial simply would not have recovered damages if damages were awarded for this claim.\(^{158}\)

Each subclass must independently satisfy the requirements of Rule 23(a).\(^{159}\) Rule 23(a), detailing the prerequisites to class certification, requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class."\(^{160}\) When a class is divided according to differences in state law, the claims and defenses of each subclass will vary accordingly. To facilitate certification, separate representatives for each subclass should be appointed to ensure that the class action satisfies Rule 23(a)'s adequacy of representation requirement.\(^{161}\) Had the district court in Bridgestone/Firestone conducted the proper choice-of-law analysis and created subclasses to account for the variations in law, it would have been prudent to appoint class representatives to each subclass to avoid conflicts of interest between the representatives and the unnamed class members.

2. Courts Can Protect the Rights of Parties Litigating Under Multiple State Laws Through Jury Instructions and Special Verdicts

Litigating a case governed by multiple laws can be confusing. In a bench trial the court can keep the factual presentation in a logical order by adjusting the order of proof as necessary.\(^{162}\) At the end of trial, the judge can make written findings to distinguish among subclasses.\(^{163}\) Jury trials, however, present additional challenges. Jurors may resist making different awards for different groups of plaintiffs who have suffered the same injuries based on differences in geography.\(^{164}\)

Had the Bridgestone/Firestone case proceeded as a multi-state class action, Judge Barker could have required class counsel to provide the court with a more detailed trial plan. A trial judge has the discretion to require the proponent of class certification to submit sample jury instructions and special verdict forms demonstrating how the substanz-

\(^{158}\) Id. at 34.


\(^{160}\) FED. R. CIV. P. 23(a)(3).

\(^{161}\) Miller & Crump, supra note 136, at 64 ("A court hearing a multistate class action ordinarily should provide separate representation for subgroups with conflicting interests.").

\(^{162}\) Kramer, supra note 12, at 585.

\(^{163}\) Id.

\(^{164}\) The judge should instruct the jury as to why the differences in applicable law exist and the importance of respecting these differences. Id.
tive theories will be presented to the jury "in a way that fairly represents the law of [each jurisdiction] while not overwhelming jurors with hundreds of interrogatories and a verdict form as large as an almanac." 165

The judge, with the help of counsel, may craft special jury verdicts pursuant to Federal Rule of Civil Procedure 49(a). 166 Such verdicts can be tailored to the relevant factual issues of each subclass. 167 A special verdict allows a jury to record findings on specific issues of fact 168 and reduces the need for "explanations of legal issues or hypothetical instructions demonstrating how to apply the law to [a given set of] facts." 169 The district judge may then take the jury's findings of fact and apply them to the sub-classes. By simplifying jury instructions, the special verdict avoids the "impossible task of instructing a jury on the laws of the fifty states." 170

3. Courts Can Divide Class Actions that Remain Unmanageable Due to the Numerosity of Issues into a Few Smaller, More Manageable Class Actions

When adjudication of the issues requires an unduly large number of subclasses to account for all the variations in law, proceeding as a single class action is no longer the superior method of disposing of the claims. "[T]here are limits outside of which the subclassification system ceases to perform a sufficiently useful function to justify the maintenance of the class action." 171 If a nationwide class action is no longer beneficial, the court should consider dividing the action into smaller classes, each representing as much of the overall litigation as possible. 172

Dividing the action into multiple independent class actions may not achieve the same economies of scale that a single class action would, but it is still more cost effective than each claimant bringing an individual action or fifty statewide class actions. "Regional multi-state

166. FED. R. CIV. P. 49(a).
167. Phair, supra note 55, at 861.
169. Phair, supra note 55, at 862 (citing Elizabeth A. Faulkner, Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts, 21 ARIZ. L.J. 297, 314 (1989)).
171. City of San Jose v. Superior Court, 525 P.2d 701, 712 n.10 (Cal. 1974).
class actions may be easier to get certified, cheaper to litigate and still make proper use of scarce judicial resources."173

Conclusion

Multi-state class actions based on state law claims are in danger. The combination of federal case law and CAFA will likely bar many, if not most, state law class actions involving more than one state.174 Currently, many federal courts, like the district court and the circuit court in Bridgestone/Firestone, assume application of multiple states' laws is per se unmanageable, without endeavoring to find out. Although certification post-Amchem will undoubtedly require competent class counsel and a courageous judge, if federal courts conduct the requisite analysis, given the relative uniformity of states' laws and the management tools available to them, multi-state class actions can be manageable.