

# CAFA's Impact on Litigation as a Public Good

*Elizabeth Chamblee Burch*  
Cumberland School of Law

**Theory:** Class actions augment government policing and generate external societal benefits. These positive externalities are the spillover effects from facilitating small claims litigation. But, in federalizing class actions through the Class Action Fairness Act (CAFA), Congress impeded class action practice, thereby negating its positive externalities and inhibiting backdoor regulation.

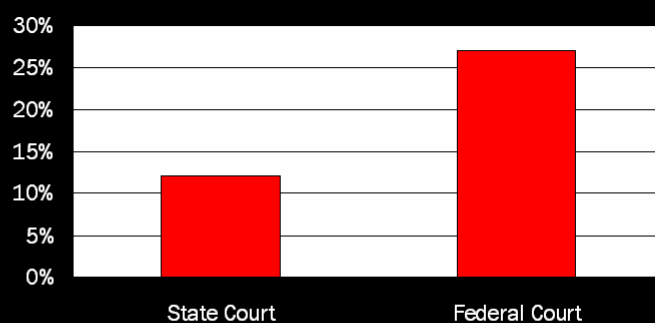
## Class Litigation's Spillovers:

- Enables private actors as supplemental regulators
- Shapes acceptable procedures for processing aggregate claims
- Establishes rules of conduct that delineate boundaries for acceptable social behavior and decrease the need for future lawsuits.
- Creates a viable litigation threat to actors engaging in a cost-benefit analysis
- Makes information about corporate products and practices publicly available
- Prompts policy changes that extend beyond the litigants and to the public.

## On Certification:

CAFA creates a mismatch: it generates a federal forum for nationwide classes but causes courts not to certify them since applying various state laws may make the class unmanageable under Rule 23(b)(3). This creates fewer class certifications and more nonclass settlements.

Percentage of Class Certifications Denied  
(Federal Judicial Center)



## On Information-Sharing:

Noncertification disaggregates plaintiffs, making information-sharing difficult, but does not disaggregate defendants. This allows defendants to capitalize on transaction cost efficiencies and aggregate settlements to pay less than the full costs of their conduct.

## On Transparency:

Nonclass certification increases private settlements, removing controversial litigation from public scrutiny.

## On Deterrence:

Noncertification thwarts deterrence by:

- Allowing defendants to avoid internalizing the full costs of their conducts by making some collective actions too costly to bring
- Decreasing opportunities for legal opinions to clarify the law, for open debates to prompt structural transformation, and for law to perform its behavior guiding function.

## On Procedural Justice:

By splintering putative classes into nonclass actions, CAFA prompts concerns that collective process without the judicial quality control provided for certified classes is less procedurally fair. Moreover, the influx of complex cases increases judicial bureaucratization.