THE IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: AN EMPIRICAL ANALYSIS OF FILINGS AND REMOVALS

EMERY G. LEE III & THOMAS E. WILLGING[†]

This Article presents preliminary findings from the Federal Judicial Center's (FJC) study of the impact of the Class Action Fairness Act of 2005 (CAFA) on filings and removals of class actions in the federal courts. After setting the FJC research in the context of the Judicial Conference's evolving position with respect to expanded federal court jurisdiction over class actions, the Article shows that the monthly average number of diversity of citizenship class actions filed in or removed to the federal courts has approximately doubled in the post-CAFA period (February 18, 2005, through June 30, 2006). The Article also presents preliminary findings on trends in federal question class action filings and removals, class action activity by nature-of-suit categories, and the geographic distribution of class action filings and removals in the federal courts.

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[†] The authors are senior researchers at the Federal Judicial Center. The team of researchers who have worked on this project includes George Cort, Laural Hooper, Marie Leary, Angelia Levy, Dean Miletich, Bob Niemic, Nicholle Reisdorff, and Shelia Thorpe. The study that yielded the data discussed in this report was undertaken by the Federal Judicial Center (FJC) in response to requests from a number of committees of the Judicial Conference of the United States (JCUS) and in furtherance of the FJC's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The authors would like to thank Judge Anthony Scirica, John Rabiej, and Stephen Burbank for their thoughtful comments on earlier versions of the Article. The views expressed in this Article are those of the authors and not necessarily those of the JCUS or any of its committees or of the FJC.

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INTRODUCTION

This Article presents empirical findings on the effects of the Class Action Fairness Act of 2005 (CAFA)[1] on the federal courts. Looking at filing patterns before and after CAFA, these preliminary findings focus primarily on what is knowable this early in CAFA's life: namely, what effect, if any, the Act has had in adding class actions to the federal dockets, whether in the form of new filings, removals, or both. Analysis of CAFA's impact on litigation practices—with the possible exception of remand activity in removed cases—will have to await the termination of cases filed or removed after CAFA went into effect.

Part I of this Article describes the evolving judicial branch policies that were a central part of CAFA's enactment and that provide a context for many of the empirical issues to be studied. Part II outlines the purposes of CAFA and its major statutory provisions as a framework for identifying expectations of the Act's proponents and of Congress, as well as for identifying research questions. Where empirical findings from prior studies are available, we summarize them. This Part also addresses predictions of CAFA's overall effect on the federal courts' caseload. Part III presents the research design of the ongoing Federal Judicial Center (FJC) study of CAFA's impact on the federal courts, and provides highlights of its preliminary findings on class action activity in the federal courts before and after CAFA's effective date. To date, the FJC study has found an increase in diversity class action filings and removals in the federal courts. The observed increase is consistent with the expectations of the judicial branch, members of Con-

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

gress, and proponents and opponents of CAFA, though our findings may represent a less dramatic increase than some anticipated. These findings describe changes in the number and types of cases filed in and removed to the federal district courts and include analysis of filings and removals in district courts, organized by circuits. Part IV then briefly identifies questions for continuing research, including questions to be addressed in the FJC's ongoing study and possible questions for other researchers, particularly at the state level.

I. EVOLUTION OF JUDICIAL BRANCH POLICIES

CAFA was signed into law on February 18, 2005, after years of contentious debate. Public attention focused on the arguments advanced by proponents of the controversial legislation, typically corporations and organizations representing business interests, and by its opponents, typically plaintiffs' attorneys and organizations representing consumers, employees, and other class litigants. Proponents of the legislation generally claimed that existing law allowed plaintiffs' attorneys to choose any state forum in which to litigate nationwide class action claims. Self-interest, the argument went, led to the filing of such cases in so-called "judicial hellholes,"[2] state courts predisposed to certify nationwide classes, sometimes hastily and without an opportunity for a hearing. The proposed solution was to expand federal jurisdictional and removal statutes to allow almost all class actions to be removed to and litigated in the federal courts. Opponents of the legislation generally defended the status quo as supporting the rights of states to enforce their own laws. Opponents also emphasized the importance of the class action device as a remedy for legal wrongs too trivial to support individual lawsuits. Some opponents expressed alarm at the potential addition of thousands of cases to the federal courts' dockets.

Dating back to legislative proposals to alter class action jurisdiction and removal provisions in the 1990s, the federal judiciary has shown an understandably keen interest in class action legislation. The proposed changes, after all, involved a potentially dramatic expansion of federal jurisdiction and a consequent increase in the federal caseload. But the consequences of expanded federal jurisdiction look

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[2] The term "judicial hellhole" appears to have been created by the American Tort Reform Association and was used extensively during the CAFA debates. *See* Am. Tort Reform Ass'n, Judicial Hellholes 2007, http://www.atra.org/reports/hellholes (last visited Apr. 15, 2008).

quite different when viewed from divergent perspectives. From a purely administrative perspective, the resulting increase in complex cases seemed dangerous, threatening to consume scarce judicial resources and to place additional pressures on an already overburdened federal judiciary. From a federalism perspective, expanded federal jurisdiction appeared as a different kind of threat, one potentially sweeping into the federal courts many class actions that really do not belong there, i.e., those involving claims of state residents based purely on state laws, cases arguably within the state courts' proper domain. From a national perspective, the expansion of federal jurisdiction could potentially serve important functions by providing for aggregation and by facilitating the efficient and fair national resolution of class actions raising issues affecting more than the interests of any single state. Under any of these perspectives, however, and in whatever terms they were expressed, the expansion of federal jurisdiction as a result of the legislative proposals was a legitimate cause for judicial branch interest and even concern.

During this lengthy legislative battle, little public attention was paid to the policy pronouncements of the federal judiciary. That is not to say that the legislature ignored the judicial branch's position. On the contrary, the judicial branch's final policy appears to have enabled some legislators and other participants to forge a compromise between the proponents and opponents of class action legislation. The principles asserted by the judicial branch serve as a conceptual backdrop for understanding the limits of the legislation and also provide an underpinning for the research that the FJC is conducting at the request of a number of committees of the Judicial Conference of the United States (JCUS). We outline here the evolution of the JCUS policies in order to put our research into context.

The logical starting point, given the related concerns of caseload and federalism, is the JCUS's official position with respect to the diversity jurisdiction of the federal courts. Beginning in 1977, the Conference expressed its general support for abolishing diversity jurisdiction.[3] In so doing, the JCUS viewed the expansion (or simply the scope) of federal jurisdiction primarily from the administrative perspective, although federalism concerns also played a role. The JCUS

[3] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8-9 (Mar. 1977).

continued to express its anti–diversity jurisdiction position throughout the 1970s and 1980s.[4]

In the 1990s, though, the JCUS began to carve out exceptions to that general position. In 1989 the Chief Justice, following congressional direction, appointed the Federal Courts Study Committee, a diverse group of judges, attorneys, and legislators, to study the issues then facing the federal judiciary. In its report, the Committee expressed an appreciation for the national dimensions of complex litigation, recognizing a role for the federal courts in cases raising issues that transcend the interests of any single state.[5] The Committee recommended that "Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens."[6] The stated rationale for the complex litigation exception, allowing diversity jurisdiction, was that in cases "involving scattered events or parties and substantial claims by numerous plaintiffs[,] . . . the national reach of a federal court would enable a single forum to resolve disputes involving multiple parties from many states."[7] In short, the Federal Courts Study Committee viewed the question of federal jurisdiction from the national perspective when it examined the complex litigation issue, even as it employed the administrative or federalism perspectives in other contexts.

In the 1995 long-range plan for the federal courts, the JCUS reiterated its opposition to diversity jurisdiction in general, asserting in the accompanying commentary that "[p]erhaps no other major class of cases has a weaker claim on federal judicial resources."[8] But at the same time, the long-range plan noted the Conference's prior support for legislation that would establish "'minimal' diversity criteria to allow federal court consolidation of multiple litigation involving personal injury or property damage arising out of a single event."[9] The Conference concluded, "the federalism principles counseling against federal litigation of state-law matters do not require abolition of diversity

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[4] JCUS, LONG RANGE PLAN FOR THE FEDERAL COURTS 31 & n.13 (1995). The conference also suggested ways to limit the extent of diversity jurisdiction—e.g., by treating corporations "as 'citizens' of every state in which they are licensed or registered to do business." *Id.* at 31.

[5] *See* FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 39-45 (1990).

[6] *Id.* at 38.

[7] *Id.* at 40.

[8] JCUS, *supra* note 4, at 30.

[9] *Id.* at 31 n.16 (citing REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21-22 (Mar. 1988)).

jurisdiction in all cases," and noted the suggestion "that Congress consider *extending* diversity jurisdiction in ways that could facilitate the efficient consolidation and resolution of mass tort litigation."[10] In 1995, then, the JCUS chose to view these issues from the national perspective, weighing possible advantages of an expansion of federal jurisdiction against possible administrative and federalism concerns, and coming down in support of some expansion of federal jurisdiction to serve national ends.

But the Conference sometimes saw things from a different angle, even on closely related issues. In 1999, the JCUS, acting on a recommendation from its Committee on Federal-State Jurisdiction, expressed its opposition to legislation then pending in Congress "that would have expanded federal jurisdiction over class action litigation by permitting, through the use of minimal diversity of citizenship, the initial filing in or removal to federal court of almost all such actions now brought in state court."[11] The JCUS expressed concern that the proposed legislation "was inconsistent with principles of federalism and would add substantially to the workload of the federal courts."[12] Viewing the legislation from the federalism and administrative perspectives, the Conference emphasized the general role of the state courts in handling class action litigation, as well as caseload concerns. Interestingly, the 1999 JCUS resolution made no distinction between intrastate and multistate class actions, that is, between cases affecting primarily the laws and interests of a single state and those transcending the interests of a single state.

During the same time period, the Advisory Committee on Civil Rules maintained a serious interest in the pending class action legislation. That interest grew out of a long-term comprehensive study, begun in 1992, of the workings of Federal Rule of Civil Procedure 23.[13]

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[10] *Id.* at 31.

[11] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Mar. 2003) [hereinafter JCUS 2003 RESOLUTION] (citing REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 45 (Sept. 1999)).

[12] *Id.*

[13] Memorandum from Hon. David F. Levi to Civil Rules Advisory Comm. 4-5 (Apr. 24, 2002) (on file with authors). Judge Levi became chair of the parent body, the Committee on Rules of Practice and Procedure, after the former chair, the Honorable Anthony J. Scirica, became Chief Judge of the United States Court of Appeals for the Third Circuit in 2003.

In commissioning the Center's 1994–1995 study of class action litigation, the Advisory Committee asked the FJC to look for, inter alia, cases in which claims similar to those raised in class actions were raised in other cases in state or federal courts. The

Prior to its spring 2002 meeting, District Judge David F. Levi, then chair of the Committee, wrote a memorandum to the Committee summarizing the group's exploration of problems relating to duplicative and overlapping class actions filed in state and federal courts, frequently including multistate claims.[14] Citing the Committee's extensive decade-long study, Judge Levi summarized its finding that

> overlapping and duplicating class actions in federal and state court create serious problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious counsel at a potential disadvantage.[15]

Judge Levi reported the Committee's conclusion that, after "close consideration" of several proposed amendments to Rule 23, such proposals "test the limits of the Committee's authority under the Rules Enabling Act."[16] Instead of proceeding with any of the proposed rule amendments, he recommended that the Rules Committees and the

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reporter to the Committee framed the request in terms of a "race to file" competing and overlapping class actions in different courts. Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 45, 51 (1996). FJC researchers responded with data documenting the numbers of consolidated and related cases in the four federal district courts studied. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 85-87 (1996). The Center found state court cases with similar claims in 1% to 3% of all class actions in four federal district courts during the study period. *Id.* at 87. Of those class actions, five appeared to involve overlapping classes. *Id.* at 166.

[14] Memorandum from Hon. David F. Levi to Civil Rules Advisory Comm., *supra* note 13, at 4-5.

[15] *Id.* at 15-16.

[16] *Id.* at 16. The proposed amendments would have

> (1) allow[ed] a court that has denied certification of a class action to preclude later courts from adjudicating the certification issue [in the same matter]; (2) allow[ed] a court to prevent settlement shopping by precluding attempts to persuade another court to approve a class-action settlement that has been rejected; and (3) provide[d] a court with broad discretion to bar class members from pursuing overlapping class action litigation in other courts.

Minutes of Meeting of Committee on Rules of Practice and Procedure 22-23 (June 10-11, 2002) [hereinafter June Minutes]. Those proposals had been included in Professor Ed Cooper's *Reporter's Call for Informal Comment: Overlapping Class Actions* of September 2001, *available at* http://www.uscourts.gov/rules/comment2002/Reporter_Call_for_Comment.pdf, which was communicated to the bench, bar, and academic communities. The Advisory Committee convened a special meeting in October 2001 at the University of Chicago Law School to discuss and debate the proposals. *See* June Minutes, *supra*, at 23 (describing the debate).

Committee on Federal-State Jurisdiction jointly support the proposed legislative "concept of minimal diversity [jurisdiction] for large multistate class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed."[17]

After considerable debate, the committees agreed, on the eve of the Judicial Conference meeting in March 2003, to support the concept of minimal diversity for large multistate class actions.[18] At that meeting, the JCUS adjusted its position regarding CAFA, adopting a resolution stating that "the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts."[19] The resolution went on to "oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses,"[20] and encouraged Congress

> to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions.[21]

The 2003 resolution, the product of extensive discussions between the JCUS Committee on Rules and the JCUS Committee on Federal-State Jurisdiction,[22] reflected a new synthesis of the administrative, federalism, and national perspectives. The Conference, through the give-

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[17] June Minutes, *supra* note 16, at 24.

[18] Telephone Interview with Hon. Anthony J. Scirica, Chief Judge, U.S. Court of Appeals for the Third Circuit and former Chair, Standing Comm. on Rules (Dec. 28, 2007).

[19] JCUS 2003 RESOLUTION, *supra* note 11, at 14.

[20] *Id.* The bills being referred to here were almost identical to each other and provided a jurisdictional threshold of $2 million, minimal diversity of citizenship (i.e., between a single class member and a single defendant), and the following exceptions: (1) where a substantial majority of a proposed plaintiff class and the primary defendants are all citizens of the state in which the action was originally filed and the law of that state will primarily govern the action; (2) where "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief"; or (3) where "the number of proposed class members is less than 100." H.R. 2341, 107th Cong. (as passed by House, Mar. 14, 2002); S. 353, 106th Cong. (as reported by Senate, Feb. 3, 1999).

[21] JCUS 2003 RESOLUTION, *supra* note 11, at 14.

[22] *Id.* at 13.

and-take of its committees, had found a way to balance the competing concerns of caseload, the interests of the states in protecting their own citizens, and the advantages of a federal forum for aggregation and resolution of multistate class actions.

During the spring of 2003, the Senate Judiciary Committee reviewed S. 274, the proposed Class Action Fairness Act of 2003,[23] and amended it to add restrictions on the expansion of minimal diversity jurisdiction. The changes appear to be designed to implement the JCUS suggestion to incorporate in the statute "sufficient limitations and threshold requirements" to protect both the state and federal courts' interests. The marked-up version of S. 274 increased the threshold amount in controversy for aggregated class claims from $2 million to $5 million,[24] eliminated federal jurisdiction when two-thirds of the members of the proposed class and the primary defendants are citizens of the state of original filing,[25] and gave district judges discretion to decline to exercise jurisdiction when more than one-third and fewer than two-thirds of the members of a proposed class and the primary defendants are citizens of the original filing state.[26] The Judiciary Committee's bill continued to exempt from the jurisdictional changes all class actions in which (1) the primary defendants are states, state officials, or other governmental entities against whom the court may be foreclosed from ordering relief; or (2) the proposed class has fewer than 100 members.[27]

After the Committee mark-up, but before the bill was reported to the full Senate, Senator Patrick J. Leahy, the ranking Democrat on the Senate Judiciary Committee, wrote to the JCUS and asked for legislative language to implement the Conference's March 2003 recommendations.[28] The Secretary to the JCUS responded that the JCUS had carefully stated its position in terms of general principles and "avoided specific legislative language, out of deference to Congress's judgment and the political process," noting that the "issues implicate fundamental interests and relationships that are political in nature and are pecu-

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[23] S. 274, 108th Cong. (as passed by Senate, Feb. 4, 2003).

[24] S. 274, 108th Cong. § 4(a)(2) (as reported by the Sen. Comm. on the Judiciary, June 2, 2003).

[25] *Id.* § 4(a)(4)(A).

[26] *Id.* § 4(a)(3) (listing five factors to consider in exercising that discretion).

[27] *Id.* § 4(a)(4)(B), (C).

[28] *See* Letter from Leonidas Ralph Mecham, Sec'y, JCUS, to Senator Patrick J. Leahy (Apr. 25, 2003) (referencing Senator Leahy's letters of April 9, 2003, and April 11, 2003) (copy on file with authors).

liarly within Congress's province."[29] Nonetheless the JCUS confirmed that it had

> no objection to proposals: (1) to increase the threshold jurisdictional amount in controversy for federal minimal diversity jurisdiction; (2) to increase the number of all proposed plaintiff class members required for maintenance of a federal minimal-diversity class action; and (3) to confer upon the assigned district judge the discretion to decline to exercise jurisdiction over a minimal-diversity federal class action if whatever criteria imposed by the statute are satisfied.[30]

The Class Action Fairness Act of 2005[31] incorporated the primary features of the 2003 proposal, including the provisions added in the Senate's markup of S. 274, as discussed above. Congress adopted the 2005 bill on February 17, 2005, and the legislation went into effect immediately upon the President's signing it into law the next day. The Senate Report referred to the JCUS's "significant shift in position" and its recognition that "the use of [expanded] diversity jurisdiction may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts."[32]

CAFA's expansion of federal jurisdiction raises a series of largely normative questions: Which courts should resolve class actions that will directly affect citizens of multiple states? What is the proper role of the federal courts in handling multistate class actions, which by definition involve the interests of citizens of many, and perhaps all, states? The judiciary's concerns about caseload were balanced by its own interest in finding solutions to the problems associated with multiple and overlapping class action litigation in the state and federal courts. Yet the judiciary continued to have concerns about caseload, and those empirically based concerns provided the impetus for the present study.

The evolution of views within the judicial branch also points to questions beyond whether CAFA has resulted in the expected increase in class action activity in the federal courts. The final point made in the JCUS resolution and in its letter to Senator Leahy emphasized that any legislation should not "'unduly intrude on state courts or burden

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[29] *Id.* at 3.

[30] *Id.*

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

[32] S. REP. NO. 109-14, at 12 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 13 (alteration in original) (internal quotation marks omitted) (quoting Letter from Leonidas Ralph Mecham to Senator Patrick J. Leahy, *supra* note 28, at 3).

federal courts.'"[33] This two-pronged standard raises a number of empirical questions: Do the limitations and jurisdictional parameters of CAFA protect the interests of the states by leaving intrastate class actions in the state courts, while at the same time facilitating removal of multistate class actions to the federal courts? Do the definitions of local controversies and the criteria for limiting federal jurisdiction based on the citizenship of class members accomplish their intended goal of keeping local controversies in the state courts? What is the distribution of citizenship of members of class actions that are filed in or removed to federal courts after CAFA? Is the removal-remand mechanism an adequate filter for separating intrastate from multistate class actions? Are the amount-in-controversy and size-of-class limitations workable in a system that typically makes jurisdictional decisions before discovery is undertaken, or will application of those limits impose an undue burden on the federal courts? The FJC study, when completed, will address these and other questions relating to the operation of CAFA.

II. PURPOSES OF CAFA AND EXPECTATIONS ABOUT ITS PROBABLE EFFECTS

Congress's findings regarding CAFA's jurisdictional provisions, its statement of purpose, and its other statutory terms parallel the jurisdictional principles espoused by the Judicial Conference discussed in Part I. In this Part we detail those components of CAFA to provide a framework for our empirical findings, discussed in Part III.

A. *Jurisdictional Findings, Purposes, and Statutory Terms*

1. Jurisdictional Provisions

Congress explicitly found that "[a]buses in class actions undermine the national judicial system" because "State and local courts are . . . keeping cases of national importance out of Federal court . . . [and] making judgments that impose their view of the law on other States and bind the rights of the residents of those States."[34] CAFA asserts that a primary purpose of the statute is to "provid[e] for Federal

[33] Letter from Leonidas Ralph Meacham to Senator Patrick J. Leahy, *supra* note 28, at 3.

[34] CAFA § 2(a)(4)(A), (C), 28 U.S.C. § 1711 note (Supp. V 2005).

court consideration of interstate cases of national importance under diversity jurisdiction."[35]

CAFA pursued that primary goal by making it easier both for plaintiffs to establish federal jurisdiction in original federal class actions and for defendants to remove class actions from the state courts. The mechanisms for bringing cases into the federal courts include creating a new minimal diversity of citizenship jurisdiction for class actions and expanding the opportunity for removal of a class action from state to federal court. The statute, however, incorporates a number of threshold criteria that restrict the new jurisdictional terms to cases likely to have substantial importance, as manifested by the amount in controversy and the size of the class. In effect, under CAFA, the number of claimants and the aggregate amount of their claims serve as surrogates for the importance of a case. Thus, when "any member of a class of plaintiffs is a citizen of a State different from any defendant," there is original federal jurisdiction for any class action in which "the matter in controversy exceeds the sum or value of $5,000,000."[36]

What impact is the amount in controversy likely to have? While there does not appear to be empirical information specifically focused on the amount in controversy as measured at the outset of class action litigation, there is empirical information on the amount of the outcomes (primarily settlements) in class action litigation in federal courts. A 2003 FJC survey of attorneys in recently terminated class actions yielded a finding that the median recovery in class action settlements was $800,000 and that 75% of the settlements were valued at less than $5.2 million.[37] Those findings suggest that the $5 million

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[35] *Id.* § 2(b)(2).

[36] 28 U.S.C. § 1332(d)(2)(A) (Supp. V 2005).

[37] Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 650 (2006) [hereinafter Willging & Wheatman, *Attorney Choice*]; *see also* THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 51 (2005) [hereinafter WILLGING & WHEATMAN, AN EMPIRICAL EXAMINATION], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Clacto5.pdf (reporting the same data); NICHOLAS M. PACE ET AL., RAND INST. FOR CIVIL JUSTICE, INSURANCE CLASS ACTIONS IN THE UNITED STATES 52 (2007) (finding that in 32 insurance class actions filed between 1992 and 2002 the "common fund was less than $5 million in size in 62.5 percent of the reported cases"). RAND researchers extrapolated that

> [i]f indeed 62.5 percent of interstate cases (i.e. those with a multistate class or a foreign defendant) had a value of less than $5 million as suggested by our limited data on settlement funds, then just 33 percent of state insurance class

CAFA limit might exclude a substantial majority of class actions, depending on the relationship between the amount in controversy and the final settlement amount. One might, of course, reasonably expect that the amount in controversy would be higher than the amount of settlement because the settlement implies that the parties had compromised higher claims. Yet no empirical study documents the amount in controversy in class action litigation.

CAFA's jurisdictional provisions regarding the size of the class are also designed to restrict federal filings and removals to only the largest and presumably most important classes. CAFA's minimal diversity jurisdiction does not apply to classes in which "the number of members of all proposed plaintiff classes in the aggregate is less than 100."[38] Empirical research suggests, however, that the 100-class-member restriction will have limited effect. The 2003 FJC survey found that the median size of class actions removed to federal courts and retained in the face of a motion to remand was 1000 members.[39] That survey also found, counterintuitively, that the median size of class actions that federal judges remanded to state courts was much larger—5000 members.[40] Median settlement values were also higher in the state class actions ($850,000 compared to $300,000), but the median recovery per class member was higher in federal court ($517) than in state court ($350).[41] These findings suggest the possibility that, before CAFA, state courts were more likely than federal courts to have jurisdiction over multistate diversity class actions with larger amounts at stake. CAFA's reach—in relation to the size of the class and, perhaps, the amount in controversy—is certainly wide enough to capture those class actions and allow them to be filed in or removed to the federal courts.

2. Jurisdictional Exceptions

CAFA's multilayered formula for dealing with the citizenship of class members, dubbed the "home-state exception," seems designed to leave some single-state cases in the state courts, reserving federal ju-

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> action filings would be removable under CAFA, compared with 89 percent if the threshold issue is ignored.

Id. at 61.

[38] 28 U.S.C. § 1332(d)(5)(B) (Supp. V 2005).

[39] Willging & Wheatman, *Attorney Choice*, *supra* note 37, at 639; *see also* WILLGING & WHEATMAN, AN EMPIRICAL EXAMINATION, *supra* note 37, at 40 (reporting the same data).

[40] Willging & Wheatman, *Attorney Choice*, *supra* note 37, at 639.

[41] *Id.*

risdiction for cases that have more of a national or multistate character. First, CAFA's minimal diversity provision applies by inference whenever fewer than one-third of the members of the proposed class (or classes, if multiple classes are proposed) are citizens of the home state.[42] Such cases belong in federal court, the Senate Report asserts, "because they have a predominantly interstate component—they affect people in many jurisdictions, and the laws of many states may be at issue."[43]

If between one-third and two-thirds of the class members, as well as the primary defendants, are citizens of the state in which the action was filed, a federal court may decline to exercise CAFA jurisdiction after considering six statutory factors.[44] Five of those six factors explicitly point to national and federalism concerns, directing the court to examine whether "the claims asserted involve matters of national or interstate interest," "the claims asserted [would] be governed by laws of the [forum] State . . . ," the forum state has "a distinct nexus with the class members, the alleged harm, or the defendants," "the number of citizens of the [forum] State . . . is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States," and "1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed."[45] These pointed references to national and federalism factors seem tailored to the principles put forth by the JCUS.

Likewise, CAFA's jurisdictional matrix is designed to keep local in-state class actions in state courts. A federal court must decline to exercise CAFA jurisdiction if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally

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[42] S. REP. NO. 109-14, at 36, *as reprinted in* 2005 U.S.C.C.A.N. 3, 35; *see also* Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1622 & n.34 (2006) ("There is likewise no exception to jurisdiction if one-third or fewer of the class members are citizens of the original forum . . . .").

[43] S. REP. NO. 109-14, at 36, *as reprinted in* 2005 U.S.C.C.A.N. 3, 35.

[44] 28 U.S.C. § 1332(d)(3) (Supp. V 2005).

[45] *Id.* § 1332(d)(3)(A), (B), (D)–(F). The sixth factor—"whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction," *id.* § 1332(d)(3)(C)—implicitly involves federalism concerns that might be evident in carving up a natural class into "a class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims." S. REP. NO. 109-14, at 37, *as reprinted in* 2005 U.S.C.C.A.N. 3, 36.

filed."[46] Along similar lines, a district court must decline federal jurisdiction under some circumstances even if only a single defendant is a citizen of the forum state so long as that defendant's conduct formed a "significant basis for the claims asserted" and the plaintiff seeks "significant relief" from that defendant.[47] The latter exception, however, applies only where the "principal injuries" resulted from conduct that occurred in the state[48] and where no other class action had asserted "the same or similar factual allegations against any of the defendants."[49]

Whether these jurisdictional carve-outs preserve state court jurisdiction over in-state class actions remains to be seen. That issue is included in the empirical inquiry the Center has undertaken. But, as discussed below, the most direct measure—whether significant numbers of in-state class actions continue to be filed in state courts and either are not removed or, if removed, remanded pursuant to CAFA—depends to a large extent on the availability of data showing state court activity before and after CAFA went into effect.

3. Judicial Interpretations of CAFA

The jurisdictional issues summarized above also point to a different measure of CAFA's impact on the federal courts: how much judicial time and effort will be consumed in applying the multifaceted screening process Congress has created? This and related empirical questions require a closer look at activity in cases filed in or removed to the federal courts. To answer these questions, in Phase II of the ongoing study we will examine how often, and at what length, litigants brief and argue motions to remand, dismiss, compel discovery over class issues, and the like. Likewise, we will document judicial responses to such motions, whether in the form of hearings or written rulings. We will then examine whether the new jurisdictional issues are comparable to their pre-CAFA counterparts, such as diversity of citizenship and the amount in controversy issues, in motions to remand or motions to dismiss for lack of subject matter jurisdiction.

For example, one question of interpretation that appears to have generated a substantial amount of litigation is the locus of the burden of proving federal jurisdiction. Despite some legislative history to the

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[46] 28 U.S.C. § 1332(d)(4)(B).

[47] *Id.* § 1332(d)(4)(A)(i)(II)(aa), (bb).

[48] *Id.* § 1332(d)(4)(A)(i)(III).

[49] *Id.* § 1332(d)(4)(A)(ii).

contrary, the burden of proving the elements of jurisdiction appears to be on the party asserting federal jurisdiction,[50] that is, the plaintiff in an original action or the defendant in a removal proceeding. Commentators have suggested that plaintiffs might bear the burden of showing that a particular case falls within one of the statutory exceptions to CAFA jurisdiction,[51] and a number of courts have placed the burden on the plaintiff in those circumstances.[52] In the end, the statute facilitates removal to federal court, thus ensuring that, if a defendant so chooses, a federal court will have the opportunity to apply CAFA and determine whether there is federal jurisdiction. Again, the impact of litigation about burden of proof issues is among those flagged for attention in the empirical study.

4. Removal Provisions

CAFA's removal provisions make it easier to remove actions successfully by limiting the reasons for remand and providing for expedited appellate review of remand decisions. CAFA permits removals of class actions "without regard to whether any defendant is a citizen of the State in which the action is brought," abrogates the one-year limitation on removal applicable to individual actions, eliminates the need for a defendant to obtain consent from codefendants before removing an action, and creates an opportunity for an expedited appeal of a remand order.[53] Comparing the remand rate before and after CAFA will identify any impact that CAFA has had on remands. The number of removed cases and the trends in removals before and

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[50] *See, e.g.*, Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1005477 (concluding that lower court decisions construing CAFA to alter the burden for proving diversity misread the statute); Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1662-65 (2006) (arguing that CAFA did not change the tradition of placing the burden on the defendant to prove diversity); Vance, *supra* note 42, at 1637-41 (arguing that the text, rather than legislative history, should be the focus of interpretation, and that this supports the traditional allocation of the burden). *But see* H. Hunter Twiford III, Anthony Rollo & John T. Rouse, *CAFA's New "Minimal Diversity" Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 10 (2005) ("[C]orrectly interpreted, CAFA's statutory text, purpose, and legislative history create a presumption in favor of finding that minimal-diversity jurisdiction exists . . . with the burden of proof on the party opposing jurisdiction.").

[51] *See, e.g.*, Vance, *supra* note 42, at 1640-41.

[52] *See, e.g.*, Frazier v. Pioneer Americas LLC, 455 F.3d 542, 546 (5th Cir. 2006); Evans v. Walter Indus., 449 F.3d 1159, 1164 (11th Cir. 2006).

[53] 28 U.S.C. § 1453(b), (c) (Supp. V 2005).

after CAFA will provide some indication about the rate of removal, but firm conclusions about CAFA's effect on removal rates would require more information on state class action activity than is presently available.

5. Class Action Settlements and Notices

Congress also found abuses in class action settlement terms and enacted both substantive limits on class settlements and procedural approaches to notifying public regulatory officials, thereby increasing participation in settlement review for the protection of class members' interests. Congress found, for example, that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," such as when "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value."[54] Congress also found that "confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights."[55]

To give effect to its finding that class members sometimes receive no benefit, or might even suffer a loss, from a class settlement, Congress enacted limitations on coupon settlements designed to ensure that class members receive fair value for their claims and that attorneys receive fees limited to a reasonable portion of the value of redeemed coupons, not their face value.[56] Congress also protected any class member who faces a loss in a settlement, by requiring that the court enter "a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss."[57] Center research will document the use of coupon settlements, identify any settlements that cost some class members more than they received, and compare those outcomes with prior empirical data. In the Center's 2003 survey, attorneys reported that about 1% of class action settlements were settled with nontransferable (and thus unmarketable) coupons as the only benefit to the class and that another 4% of class action settlements provided only transferable coupons to class members.[58] Prior research has not uncovered any cases in which the monetary costs to

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[54] CAFA § 2(a)(3)(A), 28 U.S.C. § 1711 note.

[55] *Id.* § 2(a)(3)(C), 28 U.S.C. § 1711 note.

[56] 28 U.S.C. § 1712.

[57] *Id.* § 1713.

[58] WILLGING & WHEATMAN, AN EMPIRICAL EXAMINATION, *supra* note 37, at 51. An additional 5% of cases included coupon recoveries as a portion of a larger recovery.

individual class members exceeded their monetary benefit, leading one to suspect that the infamous *Bank of Boston* case that led to § 1713[59] is a class of one, an anecdote based on an unusual case.

Congressional response to the notice issue was twofold. First, Congress ratified the amendments to Rule 23 that had advanced through the rulemaking process during the years CAFA was pending. Those amendments in fact became law before CAFA was enacted,[60] and included a directive that notice to the class "must clearly and concisely state in plain, easily understood language" a number of specific items.[61] Center research will document the information included in the notices of settlement, but will not attempt to judge the conformity of the document with the plain language standard.[62]

Second, Congress directed that detailed notices of the class litigation and settlement be sent to the appropriate regulatory officials.[63] Center research will document compliance with this requirement and also document any appearance by a public official at a settlement review hearing.

B. *Predictions of CAFA's Effects*

In reviewing the 2002 version of CAFA, which included a $2 million rather than a $5 million aggregate amount in controversy, the Congressional Budget Office (CBO) reported to Congress that "most class-action lawsuits would be heard in a Federal district court rather than a state court."[64] The CBO candidly stated that "the number of cases that would be filed in Federal court under this bill is highly uncertain" and indicated that "CBO expects that at least a few hundred

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[59] Kamilewicz v. Bank of Boston, 92 F.3d 506, 508-09 (7th Cir. 1996); *see also* S. REP. NO. 109-14, at 14-15 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 15 (citing *Bank of Boston* as a representative case for abusive attorneys' fee awards).

[60] CAFA § 7, 28 U.S.C. § 2074 note. The rule amendments went into effect on December 1, 2003. *See* Federal Rulemaking, http://www.uscourts.gov/rules/archive.htm (last visited Apr. 15, 2008).

[61] FED. R. CIV. P. 23(c)(2)(B).

[62] To view illustrative notices of class action certification and settlement that the FJC prepared at the request of the Advisory Committee on Civil Rules, see Fed. Judicial Ctr., The Federal Judicial Center's "Illustrative" Forms of Class Action Notices, http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376 (last visited Apr. 15, 2008).

[63] 28 U.S.C. § 1715.

[64] Letter from Dan L. Crippen, Dir., Cong. Budget Office, to F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (Mar. 11, 2002), *in* H.R. REP. NO. 107-370, at 27 (2002).

additional cases would be heard in Federal court each year."[65] Consistent with that analysis, the CBO estimated that the bill "would not require a significant increase in the number of Federal judges, so that any potential increase in direct spending . . . would probably be less than $500,000 a year."[66] In 2005, after the amount in controversy was raised to $5 million and additional carve-outs (as they have come to be called) were added, the CBO did not change its estimate of the number of cases expected to be added to federal court dockets.[67]

The CBO predictions are puzzling. If most of the class actions now in the state courts were removed to federal courts, there would be far more than the 300 new class action lawsuits estimated in the 2002 and 2005 CBO reports. FJC data from January 1996 through June 2001 found that between 1600 and 2000 non–securities class actions were filed in the federal courts each year.[68] In the five-year period between July 1, 2001, and June 30, 2006, the ongoing FJC study found approximately 16,700 single-case or lead-case class actions (including securities cases),[69] which translates to an average of 3340 class actions per year over the entire study period.

The best available estimate of the proportion of class actions in state courts indicates that almost 60% of all reported class action decisions occurred in the state courts.[70] Applying that proportion to the 3340 cases per year in the federal courts leads to an estimate of 8350 total cases in state and federal courts. If half of those 8350 were to

[65] *Id.* at 27-28. That number of cases would impose additional costs on the courts of about $6 million, based on an estimated cost of $20,000 to manage each class action lawsuit (thus indicating that the "few hundred additional cases" meant 300 cases).

[66] *Id.* at 28.

[67] CONG. BUDGET OFFICE, COST ESTIMATE, S.5 CLASS ACTION FAIRNESS ACT OF 2005 (2005), *reprinted in* S. REP. NO. 109-14, at 76-78 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 71-73.

[68] BOB NIEMIC & TOM WILLGING, FED. JUDICIAL CTR., EFFECTS OF *AMCHEM/ORTIZ* ON THE FILING OF FEDERAL CLASS ACTIONS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 7-8 & chart 1 (2002), *available at* http://www.fjc.gov/library/fjc_catalog.nsf. These data include only unique class actions plus the lead cases in intradistrict or multidistrict consolidations. *Id.* at 5.

[69] THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3 (2007), *available at* http://www.uscourts.gov/rules/CAFA_Third_Interim.pdf.

[70] DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 56 (2000), *available at* http://www.rand.org/pubs/monograph_reports/MR969/. In insurance class action litigation, which is generally based on state laws and regulations, 89% of the cases identified by RAND researchers had been filed in state court. PACE ET. AL, *supra* note 37, at 21.

end up in the federal courts, that would be 4175 cases, or an increase of 835 cases over the current caseload. If "most" of the 8350 cases were to end up in federal court, the increase would be dramatically larger. If a bare majority of the estimated 5010 state court class actions were removed to federal court—or filed as original federal actions—that would add more than 2500 class actions each year to the federal courts' dockets. In light of the above assumptions about state court class action activity, the CBO estimate is at the low end of the spectrum.

Critics of CAFA predicted that the 2002 version of CAFA "would result in wholesale removal of State law class actions from State courts to the Federal courts," causing an "epic reallocation of judicial responsibility that will further impair the ability of Federal courts to carry out the essential functions they are to serve under the Constitution."[71] CAFA will, the argument continued, "substantially expand the caseload of the Federal courts to include hundreds, if not thousands, of complex cases that do not involve questions of Federal law."[72] The resulting docket pressures would restrict the opportunities of plaintiffs in civil rights actions to obtain trial dates and "would also increase pressure on courts to dispose of class actions by denying certification altogether."[73]

One commentator, writing after CAFA's enactment, urged a strong qualifier to the "sweeping" CBO prediction that most class actions would be heard in federal court: "Certainly most *multistate* class actions will now be heard in federal courts."[74] That qualifier should narrow the wide range that other forecasters have urged. Because the range of predictions is so wide and because we have no information on how many multistate class actions were in the state courts before CAFA, the effect of CAFA on federal (and state) dockets remains ripe for empirical study.

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[71] *Class Action Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 12 (2002) (statement of Thomas J. Henderson, Chief Counsel, Lawyers' Committee for Civil Rights Under Law).

[72] *Id.*

[73] *Id.* at 13.

[74] Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1606 (2006).

III. THE FJC STUDY

The ongoing FJC study is designed to capture the impact of CAFA on class action activity in the federal courts by a detailed comparison of the pre- and post-CAFA periods. The study design consists of three major parts, or phases.[75] Phase I is designed to identify all class actions filed in or removed to the federal courts during the study period (July 1, 2001, through June 30, 2007) in order to determine whether CAFA has caused an increase in the federal caseload, as discussed above in Parts I and II.B. All of the findings presented in this Article relate to Phase I. At present, filing and removal data is only available through June 30, 2006; the research team is currently updating the class actions database to include class actions filed or removed between July 1, 2006, and June 30, 2007.

Phase II is designed to analyze the litigation activity in a sample of the class actions identified in Phase I of the study. Phase II will address the nature and source of law for the underlying claims, class discovery, remand motions and rulings, pretrial motions practice, class certification motions and rulings, and the settlement process. Comparisons of judicial activity in class actions filed or removed both pre- and post-CAFA will enable us to gauge the impact of CAFA on the federal courts' resources. Phase III is designed to analyze the litigation activity in the sampled cases in the courts of appeals. At present, the FJC research team is collecting Phases II and III data on a sample of pre-CAFA class actions, which will serve as a baseline for comparison to data to be collected on a sample of post-CAFA class actions.[76]

A. *Research Design (Phase I)*

1. Identifying Class Actions

Multiple methods were employed to identify instances in which class-action-related activities occurred in cases filed or removed between July 1, 2001, and June 30, 2006. The most time-consuming method started with a text-based search of the Case Manage-

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[75] Memorandum from Tom Willging to the Advisory Comm. on Civil Rules (Oct. 25, 2005) (on file with authors) (outlining the "proposal to study the impact of class action fairness").

[76] For a much more complete discussion of Phases II and III of the FJC study, see FED. JUDICIAL CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS 2-3 (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf.

ment/Electronic Case Filing (CM/ECF) replication databases maintained by the courts. Members of the research team then used CM/ECF to inspect the docket records to confirm the presence of class action allegations in cases in which the term "class" was detected.[77] Cases were kept in the database if class allegations were raised by the plaintiffs at any point in the litigation. Cases alleging class action status under Rule 23, derivative status under Rule 23.1, collective action status under the Fair Labor Standards Act (FLSA),[78] and class action status under state procedural rules (in removed cases) were all coded as class actions for study purposes. In most cases, class allegations appeared in the complaint (or an amended complaint). This visual inspection of docket records enabled the team members to eliminate false positives, i.e., cases in which the "class" reference was not to class action activity but instead to other uses of the word "class," including party names (e.g., "Touch of Class Florists" or "World Class Distributors"). Pairs of researchers for each district conducted this inspection of docket records. When the two researchers disagreed on whether a case met the class action criteria, a team leader resolved the dispute. Such disputes were infrequent.

In addition to the text search, the research team examined the docket records of cases in the replication databases in which the class action "flag" variable (which is used by the Administrative Office (AO) and some courts to identify class actions at case filing and at termination) indicated class allegations. The research team also examined the docket records of cases identified as class actions in the Integrated Data Base (IDB) maintained by the FJC, based on data provided by the courts to the AO. The same coding rules were applied to the "flag" and IDB-only cases as to the replication text search cases. Finally, we also included in the database all cases identified as class actions by CourtLink, an electronic service provided by LexisNexis. CourtLink identifies class actions through its own search of docket sheets, including a search for the terms "similarly situated" or "representative of the class" among the parties' names in the case caption.[79]

[77] The text-based search is designed to disregard certain common terms including the word "class," such as "first class mail" and "class A misdemeanor." The docket records in cases with these terms (and variations on them) were not inspected unless the text-based search detected other uses of "class."

[78] 29 U.S.C. § 216(b) (2000).

[79] For a thorough discussion of the CourtLink database and its use in a prior FJC study of class action filings, see NIEMIC & WILLGING, *supra* note 68, at 26-28.

The use of multiple methods to identify cases in which class action allegations were raised was, and continues to be, labor intensive, but we believe that this wide-ranging approach has enabled us to identify a very high percentage of all class action activity in the federal courts in the study period. We cannot say how great a percentage of class action activity, of course. But to escape our multiple searches, a putative class action would have to be one that evaded the CourtLink search of case records and case captions, the CM/ECF "flag" and IDB searches, and in which the term "class" was never used in the CM/ECF docket records. In other words, it would have to be a case in which the terms "class action complaint," "class allegations," "motion for class certification," "motion to certify a class," and "class settlement," among many others, never appeared in a docket entry. We have not identified every case, but it is probably safe to say that we have identified every case in which there was any activity related to class action status beyond the assertion of class action allegations in the complaint.

Even if class action activity was detected in a case, it was excluded from the analysis database under certain circumstances. Pro se matters were excluded because pro se litigants do not have authority to represent a class. Prison litigation, in general, was excluded from the analysis, even in the rare instances in which the plaintiffs (or habeas petitioners) had counsel at some point in the litigation. In an early stage of the research, we determined that the small number of counseled prisoner class actions made separate analysis impractical. Moreover, prison litigation, which in the federal courts tends to be based on federal question jurisdiction, is unrelated to CAFA's more business-oriented purposes and should be largely unaffected by the legislation.

We also excluded cases in which an agency of the U.S. government, such as the Equal Employment Opportunity Commission (EEOC) or the Securities and Exchange Commission, was the plaintiff, even though the term "class" is sometimes used in such cases. The EEOC, for example, has statutory authority to file a civil action on behalf of a group of aggrieved complainants[80] who might be referred to collectively as a class, but not a Rule 23 class.[81] Like the counseled prisoner cases and unlike the FLSA statutory opt-in class actions, we determined at an early point in the study that there would not be enough of these statutory class actions to warrant separate analysis.

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[80] 42 U.S.C. § 2000e-5(f)(1), (2) (Supp. V 2005).

[81] *See* Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 323 (1980) ("Rule 23 is not applicable to an enforcement action brought by the EEOC in its own name . . . .").

Moreover, CAFA does not affect the ability of the U.S. government to bring such actions on behalf of statutory classes.

2. Accounting for Overlapping and Duplicative Federal Class Actions

Following the preferences of the Advisory Committee on Civil Rules, the Center's study is designed to avoid double-counting "overlapping" and "duplicative" class actions in the federal courts. After identifying the population of cases in which class action allegations were raised, the docket records of those cases were searched a second time for terms including "consolidate," "transfer," "related case," "MDL," "JPML," "conditional transfer order," and variations on those terms. If one of the search terms appeared, two researchers visually inspected the docket records to determine whether the case had been consolidated with another case in the district court. For all consolidated cases, including multidistrict (MDL) transfers and interdistrict transfers based on an order changing venue, a single "lead" case was identified for inclusion in the study and "member" cases were identified and marked for exclusion from the analysis database.[82] The Clerk of the Judicial Panel on Multidistrict Litigation (JPML) and his staff provided statistical information that allowed us to double check whether any of the cases we had marked as "unique" were in fact part of an MDL consolidation. As a further check, we eliminated from the database all cases that had been terminated by transfer to another district, whether following a transfer order from the JPML or an order to change venue issued by a district court.[83]

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[82] For cases identified as "related," two researchers examined the record in the case and determined whether the related cases were managed in a way that was the equivalent of consolidated treatment.

[83] A possible criticism of our study of CAFA's impact on the workload of the federal courts is that, by eliminating overlapping and duplicative class actions from the study, we are actually *understating* the volume of class action activity in the federal courts. The primary interest of the committees of the Judicial Conference, as discussed in Part I, *supra*, is with the workload of the federal courts. For that reason, we take steps to avoid inflating the number of class actions identified by counting consolidated actions as multiple cases. That means in the end, however, that many filings and removals get excluded from the analysis database. We are certain that academic researchers, with a different set of concerns from those of the judicial branch, would pursue aspects of this research in other ways. But to assuage concerns that our reported results are somehow affected by our consolidation-data-cleaning step, we should note that the exact same procedures were followed for both pre- and post-CAFA cases, so any understatement of total class action activity in the federal courts should be constant across the study period. Moreover, consolidated lead and MDL

The cases in the analysis database—i.e., all unique class actions and one lead class action for each MDL or intradistrict consolidation—were then matched to the records for these cases in the IDB using district, office, year, and sequence numbers. The IDB provides the information on filing and termination dates, disposition, nature of suit, basis of jurisdiction, and origin (i.e., original proceeding or removal) in the analysis to follow, for the most part. However, because Phase II data collection has begun, the research team has identified a small number of miscoded cases in the IDB. These miscoded cases have been recoded in the Center's database. Moreover, the nature-of-suit codes found in the IDB have been collapsed into broader nature-of-suit categories, and some cases coded as "Other Statutory Actions" in the IDB have been recoded as Consumer Protection cases based on the United States Code Title and Section variables found in the IDB.

One final caveat is necessary. This is an ongoing project, and a number of the class actions in the analysis database are still pending in district court. Further research, including at least one more consolidation search, may lead to further refinements of the Center's analysis database. The findings reported below, in short, differ slightly from figures reported in earlier reports, and findings reported in the future may differ slightly from those reported below. The findings in Part III.B should thus be taken as preliminary, based on the current state of our research.

3. Determining Whether CAFA Has Impacted the Federal Courts

As discussed in Parts I and II, CAFA's primary impact on the caseload of the federal courts is expected to be an increase in the number of class actions raising state-law causes of action filed in or removed to federal court. For the most part, as discussed in this section, most of the expected increase will be in the number of class actions filed in or removed to the federal courts based on those courts' diversity of citizenship jurisdiction.

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lead cases made up virtually the same proportion of the post-CAFA analysis cohort as observed in the pre-CAFA cohort. In other words, there is no reason to believe that the consolidation-data-cleaning step is driving our post-CAFA findings; those findings did not result from a smaller proportion of consolidated or MDL-transferred cases in the post-CAFA period. Indeed, the relative proportion of the consolidated lead and MDL lead cases in the pre- and post-CAFA cohorts in the entire database, prior to the consolidation-data-cleaning step, are also roughly the same.

An observed increase in diversity class actions after CAFA's effective date, however, would not conclusively demonstrate that CAFA was the cause of the increase. It could be that a certain percentage of class actions based on state-law causes of action is more or less always filed in or removed to the federal courts. If the overall number of such cases increased because of factors unrelated to CAFA, the number of such cases in the federal courts would also increase, but that increase would reflect the growth in total class action activity and not a CAFA effect. Under these conditions, CAFA would not have shifted any class actions from the state courts to the federal courts; the proportion of state-law-based class actions in the state courts would remain unaffected by the legislation.

To demonstrate a CAFA effect on diversity cases conclusively, one would need accurate information about class action activity in the state courts comparable to that collected by the Center about class action activity in the federal courts. With such information, one could determine whether the increase, if any, in the number of diversity class actions in the federal courts coincided with a decrease in state court class action activity. That zero-sum relationship would indicate that CAFA is actually shifting class actions from the state courts to the federal courts. But information on class action activity in the state courts of this kind is not available at this time.[84]

It may be possible, however, to infer a CAFA effect based solely on an increase in class action filings and removals in diversity class actions under certain conditions. The first such condition, obviously, is timing. Although an increase in the filing and removal of diversity class actions that clearly occurred after CAFA's effective date, February 18, 2005, would not demonstrate a CAFA effect conclusively, it would suggest that CAFA is affecting the caseload of the federal courts. On the other hand, an increase that occurred or at least began prior to CAFA's effective date could not be attributed (solely) to CAFA.

The second condition is the magnitude of the change in the post-CAFA period. Not to put too fine a point on it, a dramatic increase in the number of diversity class actions filed in or removed to federal

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[84] Preliminary data provided by the Office of Court Research (OCR) of the Administrative Office of Courts in California indicate a decrease in class activity in seven California superior courts during the first year in which CAFA was in effect. FJC researchers found that during the same year (2005), class action activity increased markedly in the four California-based federal district courts. FED. JUDICIAL CTR., *supra* note 76, at 4-5. These preliminary data suggest the type of analysis that will be possible when further data become available.

court would provide stronger evidence for a CAFA effect than a less dramatic increase. If diversity class actions are observed to double in a short span of time, for example, it seems unlikely that the cause was a doubling of overall class action activity in the state and federal courts in that short time span. One would think that such a massive increase in total class action activity, in a short period of time, would have produced banner headlines. In other words, it is unlikely that the *only* evidence for a massive increase in overall class action activity in the state and federal courts, combined, would be an increase in federal diversity filings and removals. At a minimum, a dramatic increase in filings and removals in a short span of time makes it more likely that the increase was caused by CAFA than other factors.

Moreover, a dramatic change in filings and removals will more likely reflect a CAFA effect if the change also reflects a break with pre-CAFA filing and removal patterns. An increase in filings post-CAFA, for example, would provide stronger evidence for a CAFA effect if filings had not been increasing prior to the Act's effective date.

For the most part, federal question class action filing and removal patterns should not be affected by the legislation and thus should not change post-CAFA. Class actions raising federal-law causes of action were not affected directly by CAFA. The federal courts had jurisdiction over such cases before CAFA, and the statute did not alter the parameters of that jurisdiction in any way. It is possible, however, that CAFA may increase the number of federal question original proceedings indirectly, at the margins. Pre-CAFA, plaintiffs may have avoided pleading federal causes of action to prevent or defeat removal to federal court. Post-CAFA, the possibility of successful removal on diversity grounds by defendants is greater, so plaintiffs may have less reason to avoid federal causes of action in drafting their pleadings. In other words, plaintiffs' attorneys may reason that, if they file in state court and avoid federal causes of action, they will get removed anyway, and thus will decide to plead federal and state claims together and file in federal court. Any such indirect CAFA effect should be seen in original proceedings based on federal question jurisdiction only. There is little reason to expect that CAFA will affect the number (as opposed to the timing) of federal question removals in any systematic way. Phase II of the study will examine the claims raised in federal question class actions to determine whether plaintiffs were more likely to raise state causes of action in federal filings post-CAFA.

B. *Preliminary Findings*

1. Filings and Removals

This section presents preliminary findings from the FJC study to date. The logical place to begin is with all class action activity in the federal courts during the study period. Figure 1 presents an area graph of monthly class action filings (original proceedings) and removals, separated out by basis of jurisdiction,[85] from July 2001 through June 2006. The vertical line dissects the area at February 2005, the month in which CAFA became law. The post-CAFA period is to the right of the vertical line. As the figure clearly shows, overall class action activity in the federal courts increased across the study period, as the number of monthly filings and removals of class actions generally increased from around 200 per month in late 2001 to more than 300 per month during several months in 2005 and 2006. Interestingly, the single largest number of filings and removals (n = 376) was observed in March 2005, the first full month after CAFA's effective date.

As Figure 1 makes very clear, most class actions in the federal courts are federal question original proceedings, a category of cases that should not be directly affected by CAFA. The pattern in federal question original proceedings, overall, is interesting. The clear trend pre-CAFA was an increase in such filings, with the number of monthly filings positively correlated with time ($r = 0.467$, $p < 0.001$). In the post-CAFA period, however, this trend seems to have stalled, and the number of monthly filings of federal question class actions is not correlated with time ($r = 0.025$, $p = 0.892$).[86] In other words, for some reason, federal question original proceedings were increasing prior to CAFA, but have leveled off since it became law (as of June 30, 2006). This is in absolute numbers, not as a proportion of all class action activity, so this trend is not related to CAFA increases in other types of class actions. As will be seen in the next section, a large part of the increase in federal question original proceedings was actually driven by

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[85] All figures included in this Article omit the relatively small number of class actions in which federal jurisdiction was based on the fact that the United States was the defendant (U.S. Defendant jurisdiction).

[86] Here r is Pearson's correlation coefficient, which ranges from -1, for a perfect inverse relationship between the variables, to +1, for a perfect relationship between them, with 0 (zero) meaning no relationship (correlation); p is the probability of finding the correlation by chance in a population without an underlying correlation, included for tests of statistical significance. This information is included only to identify the trends in the data.

an increase in labor class (or collective) actions under the FLSA,[87] which have leveled off in the most recent months for which data is currently available. Federal question removals have remained a relatively steady, if small, part of the total class action activity throughout the study period.

Figure 1: Monthly Class Action Filings and Removals, by Basis of Jurisdiction, July 2001–June 2006

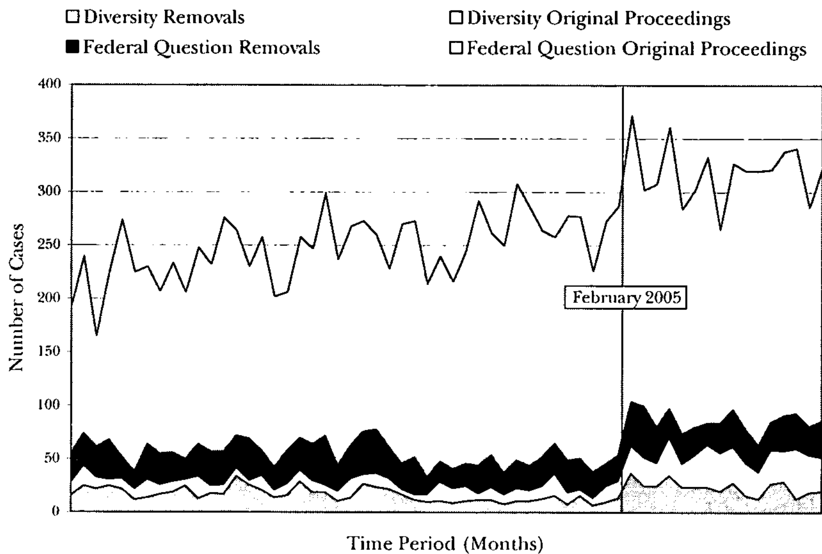


Figure 1 clearly indicates that the number of diversity class actions filed in or removed to the federal courts increased in the post-CAFA period. Because of the scale of the figure, it is difficult to gauge the increase. Figure 2 presents the same information, for diversity cases only.

The overall pattern obvious in Figure 2 is consistent with the hypothesis that CAFA led to an increase in the number of diversity class actions filed in and removed to the federal courts. The levels to the left of the vertical line, which represent the numbers of such cases, by month, pre-CAFA, are much lower than those to the right of the line. Indeed, the mean number of monthly diversity filings and removals, pre-CAFA, was 28; the mean number post-CAFA was 56, or double the

[87] 29 U.S.C. § 213 (2000).

pre-CAFA figure. That difference of means provides strong evidence for a CAFA effect on filings and removals of diversity cases.

Figure 2: Monthly Class Action Filings and Removals, Diversity of Citizenship Jurisdiction Only, July 2001–June 2006

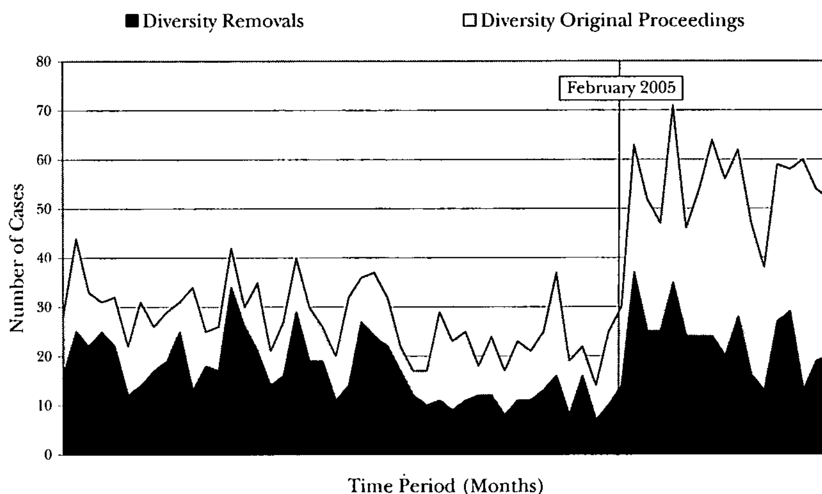
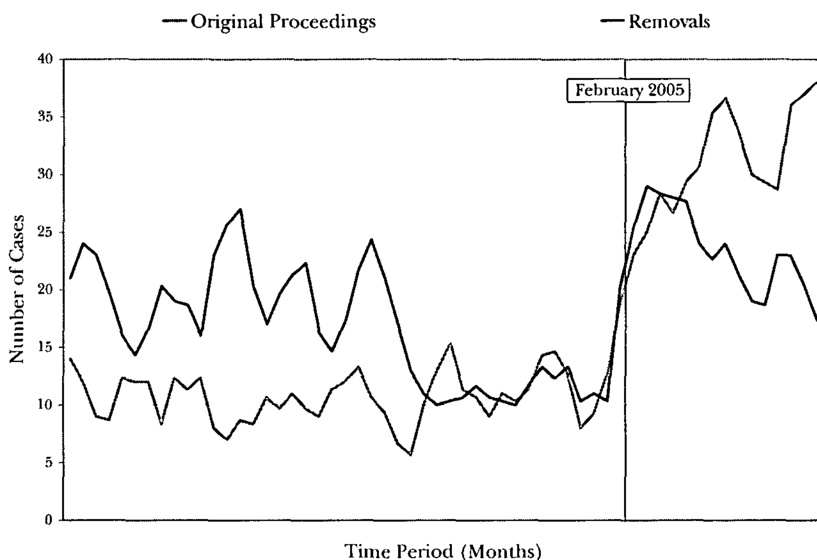


Figure 2 shows a second interesting pattern. In the pre-CAFA period, most diversity class actions in the federal courts were removed from the state courts. Although the number of removals declined in 2004, the pre-CAFA trend was for diversity removals to outnumber diversity original proceedings. This suggests that plaintiffs' attorneys in the pre-CAFA period generally chose to file class actions raising state-law causes of action in the state courts and that defendants were removing some unknown percentage of these to federal court. In the post-CAFA months, however, the number of diversity original proceedings increased dramatically. Although both diversity removals and original proceedings increased, comparing the pre- and post-CAFA periods, the greater increase is observed in the original proceedings. Pre-CAFA, the average number of monthly removals of diversity class actions was 16.6; post-CAFA, the comparable figure was 23.7, an increase of, on average, about 7 class actions. But pre-CAFA, the average number of monthly original proceedings of diversity class actions was 10.8; post-CAFA, the comparable figure was 31.5, an increase of about 20 class actions per month.

This finding strongly suggests that plaintiffs' attorneys in a large number of cases were choosing, post-CAFA, to file class actions raising state-law causes of action in the federal courts, a marked departure from the pre-CAFA period. This is further illustrated in Figure 3, which plots a three-month moving average for both types of cases across the study period. (The three-month moving average is intended only to smooth the jagged lines; it does not alter the substantive findings.)

Figure 3: Monthly Class Action Filings and Removals, Diversity of Citizenship Only, Three-Month Moving Average, July 2001–June 2006



As seen in Figure 3, diversity removals were actually declining in number and as a share of all diversity class actions in the federal courts in the pre-CAFA period. The number of monthly removals of diversity cases is negatively correlated with time ($r = -0.559$, $p = 0.001$), pre-CAFA. By way of comparison, the number of monthly diversity original proceedings was not correlated with time ($r = 0.013$, $p = 0.935$). For some reason, diversity removals were declining before CAFA, to the point that the number of such cases was essentially the same as the number of diversity original proceedings, which had held steady for the pre-CAFA period. As discussed in Part III.A.3, *supra*, the

sharp break with the pre-CAFA trends, coinciding with CAFA's effective date, provides strong evidence of a CAFA effect.

Both removals and original proceedings of diversity class actions increased in the post-CAFA period, but, as seen in Figure 3, original proceedings have remained at their new, much higher level (or perhaps increased somewhat in the last months), while removals have tailed off. In fact, the monthly number of removals in the last months for which data is currently available is similar to many months of the pre-CAFA period. The pattern for removals was one of decline, pre-CAFA, then a sharp increase immediately following CAFA, followed by another decrease, post-CAFA, to roughly pre-CAFA (and pre-2004) levels. In the post-CAFA period, the monthly number of diversity removals is again negatively correlated with time ($r = -0.410$, $p = 0.030$), and the monthly number of diversity original proceedings is again not correlated with time, at least at traditional levels of statistical significance ($r = 0.262$, $p = 0.162$).

This analysis provides support for the conclusion that the federal courts have seen an increase in diversity removals and, especially, original proceedings in the post-CAFA period as a result of the expansion of the federal courts' diversity of citizenship jurisdiction. The dramatic nature of the increase, again especially in diversity original proceedings, provides further support for the conclusion that CAFA is the cause of the observed trends. It is unlikely that the doubling in diversity class actions reflects a comparable increase in underlying class action activity in the state courts in such a short period of time. Moreover, the apparent change in plaintiffs' attorney filing decisions also supports the view that CAFA is driving the observed patterns.

The Center is continuing to collect filing and removal data in order to determine whether the observed post-CAFA trends are long lasting or merely temporary. But in the short run, at least, it appears that CAFA has led to an increase in class actions raising state-law claims in the federal courts.

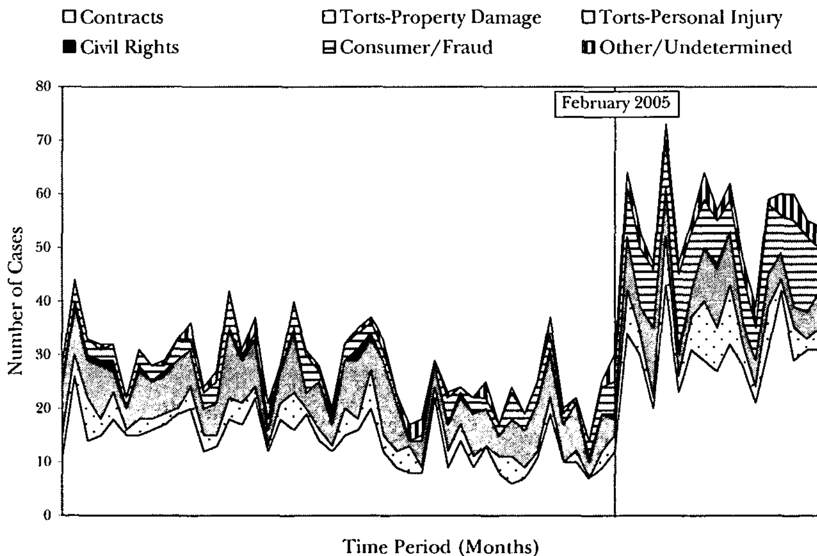
The next section addresses the types of cases comprising the diversity class actions in the federal courts and identifies the categories of such cases in which increased filings and removals have been identified since CAFA was enacted.

2. Nature-of-Suit Categories

The next question is what kinds of cases account for the observed increases in diversity filings and removals. Figure 4 presents an area

graph of diversity filings and removals grouped into the following nature-of-suit categories: Contracts, Consumer Protection/Fraud, Torts-Property Damage, Torts-Personal Injury, Civil Rights, and Other. It is clear in Figure 4 that much of the increase in diversity filings and removals has been driven by a large increase in the number of state-law Contracts actions filed in or removed to the federal courts. Comparing monthly filings, the mean number of such class actions increased from around 14 per month pre-CAFA to more than 30 per month post-CAFA. As discussed above, this doubling in the number of Contracts actions in the federal courts could be the result of factors unrelated to CAFA, but the dramatic nature of the change, coinciding with CAFA's effective date, strongly suggests that CAFA is the cause of at least some of the observed increase.

Figure 4: Monthly Class Action Filings and Removals, Diversity of Citizenship Only, by Nature-of-Suit Category, July 2001–June 2006



Consumer Protection/Fraud actions also increased in the post-CAFA period. This category of cases, in the diversity context, is comprised largely of class actions brought under state consumer protection statutes, such as California Business and Professional Code sec-

tion 17200.[88] Before CAFA's enactment, the federal courts saw very few such class actions, averaging only 2.7 filings and removals per month. In the post-CAFA period, the mean number of monthly filings and removals of Consumer Protection/Fraud class actions based on state law increased to around 10 per month, more than tripling. Although 10 class actions per month is not that many relative to the overall caseload of the federal courts, the observed increase does suggest that CAFA is shifting some class actions based on state-law causes of action from the state courts to the federal courts.

Although the increase is less stark, and thus less clear, in Figure 4, the number of Torts-Property Damage class actions based on diversity jurisdiction also saw an increase in the post-CAFA period. Pre-CAFA, there were, on average, 2.5 such class actions filed in or removed to the federal courts per month. Post-CAFA, the mean monthly filings and removals of these class actions have increased to 5.9 per month.

Although Contracts, Consumer Protection/Fraud, and Torts-Property Damage class actions have all increased in numbers in the federal courts in the post-CAFA period, there has been no change in the monthly filings and removals of Torts-Personal Injury class actions in the study period. Indeed, the mean number of Torts-Personal Injury class actions filed in or removed to the federal courts was 7.1 per month both before and after CAFA's effective date. This part of the federal docket appears to have been unaffected by passage of CAFA, which is somewhat unexpected. Even if jurisprudential developments in recent years have made it less likely that plaintiffs' attorneys would file personal injury class actions in the federal courts, one would have expected that defendants would have taken advantage of expanded federal diversity jurisdiction to remove such cases initiated in the state courts. That this does not appear to have occurred may signal some frustration of congressional intent (assuming that Torts-Personal Injury class actions are being filed at the state court level).

The four categories of diversity class actions discussed above make up the bulk of diversity class actions in the federal courts. Figure 4 also shows two other categories of class actions, Civil Rights and Other, about which little need be said. There are too few state-law Civil Rights class actions in Figure 4 to analyze separately—only 20 Civil Rights class actions coded as based on diversity of citizenship jurisdiction were found in the entire study period. The vast majority of Civil Rights class actions in the study involved federal law. The Other

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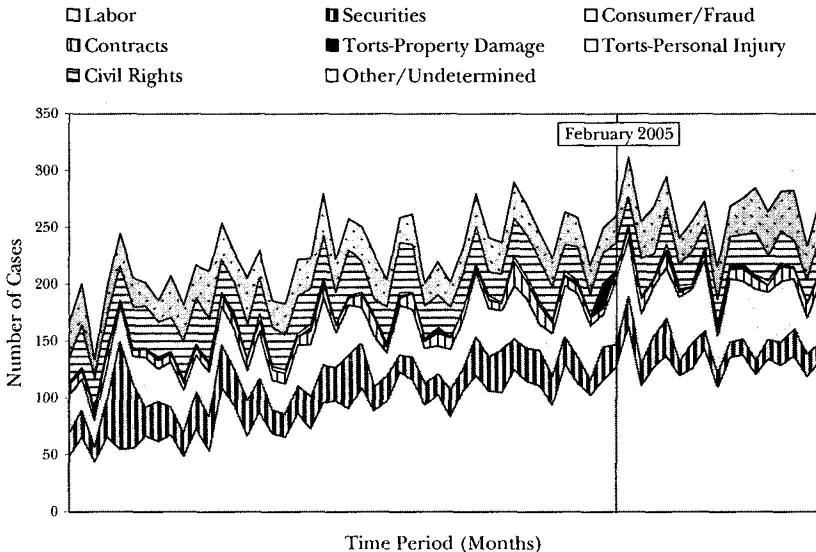
[88] CAL. BUS. & PROF. CODE § 17200 (West 2008).

category consists mostly of cases for which there is inadequate information on the nature of the case in the IDB to assign the cases to a nature-of-suit category. It is interesting that the number of such Other diversity class actions filed in or removed to the federal courts also appears to have increased in the post-CAFA period.

Figure 5: Monthly Class Action Filings and Removals, Federal Question Jurisdiction Only, by Nature-of-Suit Category, July 2001–June 2006



For purposes of comparison and completeness, we have also prepared an area graph displaying the nature-of-suit categories comprising the federal question class actions that have been identified in the study. As discussed with respect to Figure 1, the pattern in Figure 5 shows an increase in the number of federal question class actions overall in the pre-CAFA period and then a leveling off of federal question class action activity in the post-CAFA period. Several categories of federal question cases have held relatively constant across the entire study period; the relatively small number of Contracts, Torts-Property Damage, and Torts-Personal Injury class actions based on federal question jurisdiction has not changed significantly in the post-CAFA period. But some trends are apparent in Figure 5, most notably the increases in Labor and Consumer Protection/Fraud class actions, especially in the pre-CAFA period.

Both Labor and Consumer Protection/Fraud class actions reached their highest observed level in 2005, the year in which CAFA became law. But that, in itself, is not evidence of a CAFA effect. The trend for both nature-of-suit categories in the pre-CAFA period had been decidedly upward; for both nature-of-suit categories in the pre-CAFA period, the monthly filings and removals variable was positively correlated with time (Labor, $r = 0.844$, $p < 0.001$; Consumer Protection/Fraud, $r = 0.367$, $p = 0.016$). That the highest level of such cases is seen in the year of CAFA's enactment may be an artifact of that trend alone. Moreover, since CAFA's effective date, neither category of case has continued to increase. In the post-CAFA period, the monthly filings and removals variable is not correlated with time for either category of class action (Labor, $r = -0.142$, $p = 0.600$; Consumer Protection/Fraud, $r = -0.100$, $p = 0.712$). It appears that, as of June 2006, both categories have leveled off at this new, higher level of monthly filings and removals.

It is not possible at present to say that CAFA did not affect the number of filings of Labor and Consumer Protection/Fraud cases based on federal question jurisdiction. As discussed in Part III.A.3, *supra*, it may be that some of the increase in the numbers of such cases filed or removed after CAFA's effective date is accounted for by plaintiffs' attorneys filing class action complaints raising claims arising under federal statute in the post-CAFA period when they would have avoided raising federal claims prior to the Act's effective date to avoid or defeat federal jurisdiction. In Phase II of the study, we will compare the nature of claims raised in federal question class action complaints before and after CAFA to determine whether plaintiffs' attorneys were more likely, post-CAFA, to raise state-law claims in federal question cases. Such a finding would provide support, albeit indirect, for the notion that CAFA has affected federal question filings as well as diversity filings and removals.

3. Circuit-Level Analysis

To this point, we have analyzed CAFA's potential impact nationwide. But it is likely that CAFA's impact will vary from circuit to circuit. In the words of one federal district judge, "it is safe to predict that [after CAFA] the parties will continue to engage in strategic behavior when it comes to choosing a forum."[89] Plaintiffs may exercise

[89] Vance, *supra* note 42, at 1642.

their choice of forum by filing class actions as original actions in a district court within the circuit that they view as having favorable procedural and legal rules, geographic connection to the litigation, or judges that they perceive to be predisposed to rule in favor of class certification.[90] Defendants in turn may exercise their removal rights in accordance with their own strategic perceptions about favorable procedural and legal rules and judicial predispositions.[91]

Figure 6: Diversity Class Action Filings and Removals, by Circuit, Comparing Twelve-Month Periods Before and After CAFA's Effective Date

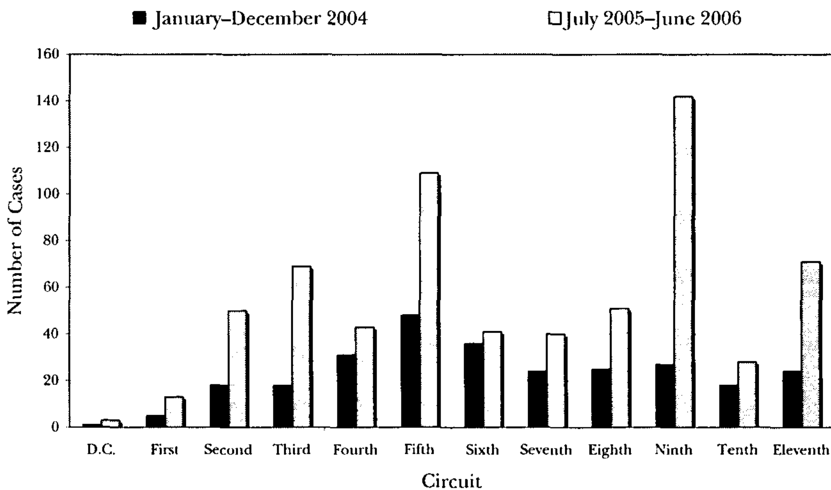


Figure 6 compares the number of diversity filings and removals in the district courts in each circuit in calendar year 2004 and in the last twelve months for which data is presently available, July 2005 through June 2006. The figure clearly shows that class action activity based on diversity of citizenship increased in the district courts in every circuit, post-CAFA. This suggests that CAFA, to date, has affected courts nationwide, although some courts have seen greater increases in diversity caseloads than others. Diversity filings and removals were at least twice as high in July 2005 through June 2006, compared to calendar year 2004, in eight of the twelve circuits: the D.C., First, Second,

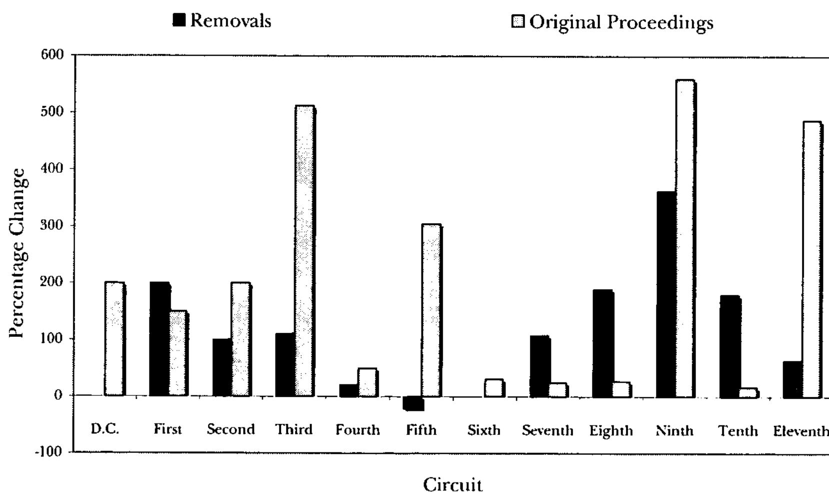
[90] *See* Willging & Wheatman, *Attorney Choice*, *supra* note 37, at 607-15.

[91] *See id.* at 615-18.

Third, Fifth, Eighth, Ninth, and Eleventh Circuits. The district courts in the Third Circuit experienced almost a fourfold increase between the two periods, and those in the Ninth Circuit more than a fivefold increase in diversity filings and removals.

Figure 6 does not address which party chose the federal forum, however. Diversity class action activity would be observed to increase in the district courts in a circuit if plaintiffs' attorneys were choosing, post-CAFA, to file more state-law class actions in those districts. Indeed, given the discussion related to Figures 2 and 3 above, that must have occurred in a number of district courts, at least. But diversity class action activity would also be observed to increase if defendants were removing more cases to federal court after CAFA, as well. Figure 7 presents the percentage change in both removals and original proceedings based on diversity jurisdiction between calendar year 2004 and July 2005 through June 2006, organized by circuit. This figure sheds some light on which party has been choosing the federal forum in the post-CAFA period in each circuit.

Figure 7: Percentage Change in Removals and Original Proceedings, Diversity of Citizenship Jurisdiction Only, Comparing Twelve-Month Periods Before and After CAFA's Effective Date



As seen in Figure 7, in four circuits the percentage increase in removals, post-CAFA, was greater than the percentage increase in

original proceedings based on diversity jurisdiction. In the First, Seventh, Eighth, and Tenth Circuits, it appears that the observed increase in class action activity based on diversity jurisdiction has been driven by defendants choosing to remove more class actions from the state courts in the post-CAFA period. The Seventh Circuit saw removals more than double between the two periods, and the Eighth and Tenth Circuits saw almost threefold increases in removals between the two periods, without experiencing anything resembling a comparable increase in original proceedings based on diversity jurisdiction. But seven circuits experienced larger percentage increases in original proceedings based on diversity jurisdiction between the two periods than in removals based on diversity jurisdiction. In the D.C., Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits, the observed increase in class action activity based on diversity jurisdiction appears to have been driven largely by plaintiffs' attorneys' initial choice of a federal forum.

At present, we are unable to offer an explanation for the different patterns observed in the circuits. Of course, filing and removal patterns have complex causes. But differences in circuit law with respect to class certification and similar issues probably explain some of the observed patterns. In October 2007, Professor John Coffee and Stefan Paulovic commented on recent developments in class certification in the circuits, concluding that "the relevant standards appear to be varying with the Circuit, with the Second, Third, and Ninth Circuits taking a more liberal stance [i.e., more likely to certify a class] than other Circuits, while the Fourth, Fifth and Seventh Circuits generally seem the most conservative [i.e., least likely to certify a class]."[92] Based on this expert analysis, and assuming that plaintiffs' attorneys will tend to file class action complaints where the law is more favorable to class certification, one would expect to see large percentage increases in diversity original proceedings in the Second, Third, and Ninth Circuits and smaller increases in the Fourth, Fifth, and Seventh Circuits.

This expectation is not completely borne out by the data. The Fifth Circuit, which Coffee and Paulovic identify as one of the more "conservative" circuits with respect to class certification, actually experienced one of the largest percentage increases in class action filings. Of course, the relevant period almost certainly contains litigation arising from insurance disputes related to Hurricane Katrina,

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[92] John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002–2007*, 8 Class Action Litig. Rep. (BNA) S-787, S-819 (Oct. 26, 2007).

which, generally speaking, would be filed in a district in the Fifth Circuit. This is a useful reminder, perhaps, that circuit law is only one factor in the plaintiffs' attorney's decision of where to file a class action. Still, the Second, Third, and Ninth Circuits all experienced large percentage increases in diversity original proceedings between the two periods, which suggests that circuit law with respect to class certification does, indeed, factor into a plaintiffs' attorney's decision about which federal forum to choose.

Based on the Coffee and Paulovic commentary, moreover, one would expect to see large percentage increases in the removal of class actions based on diversity jurisdiction in the Fourth, Fifth, and Seventh Circuits. Again, this expectation receives mixed support from the data. Consistent with expectations, the Seventh Circuit did experience more than a doubling of class action removals based on diversity jurisdiction between the two periods, which suggests that defendants in the districts in that circuit were taking advantage of expanded diversity jurisdiction to remove cases in the post-CAFA period. The Fifth Circuit actually saw a percentage decrease in removals between the two periods, although this finding may be closely related to the increase in diversity filings in that circuit. (Given the sharp increase in the number of diversity filings in the district courts in the Fifth Circuit between the two periods, it would be especially interesting to know how many class actions were filed in the state courts in Texas, Louisiana, and Mississippi and not removed to federal court during this period.) The Fourth Circuit saw only modest increases in both removals and original proceedings, as seen in Figure 6.

IV. QUESTIONS FOR CONTINUING RESEARCH

The findings described in Part III.B provide strong support for the conclusion that CAFA has caused the number of diversity class actions filed in and removed to the federal courts to increase appreciably. These findings are consistent with commonly held expectations of the legislation's probable effects, though more modest than some of the predictions and extrapolations discussed in Part II.B. We leave the normative implications of these findings to others—it is beyond our role to answer the query, put by the organizers of this Symposium, "fairness to whom?" But a number of important empirical questions remain, with respect both to filings and removals and to litigation activity in the identified class actions.

The first question for additional research is, simply put, what is happening in the state courts post-CAFA? As discussed in Part III.A.3, the lack of equivalent state court data on class action filings means that the ongoing FJC study cannot speak to several issues of importance in understanding CAFA's overall impact. We have identified the class actions removed to the federal courts, but we do not know what percentage of class actions filed in state court are removed. Has the removal rate (the number of removals divided by the number of class actions in state court) increased, post-CAFA? The increase in removals compared to the immediate pre-CAFA period suggests that it has, but we just do not know. Similarly, we do not know whether the increase in original proceedings in diversity class actions has coincided with a comparable decrease in the filing of class actions in the state courts. In analyzing CAFA's overall impact, these are important questions. The lack of state court data on class actions stems from multiple sources, including the lack of necessary resources to collect the data in the state systems and the lack of common computerized case management systems. This is clearly, however, a promising avenue of research for enterprising and energetic scholars. We would enthusiastically cooperate with such researchers. Systematic and reliable information about state court class action activity would not simply round out the research presented here, it would greatly inform the policy debate.

The second set of questions involves the permanence of CAFA's effects on the federal system: Will the trends we have observed to date continue? Will diversity class actions continue to be filed in the federal courts at the new, higher level? Will diversity removals continue to trend downward in the post-CAFA period? There is reason to think that the expansion of the federal courts' diversity jurisdiction will have lasting consequences. But additional research is needed to determine how plaintiffs and defendants adjust their filing and removal strategies in the post-CAFA period. As discussed in Part III.A, the ongoing FJC project is currently collecting data on filings and removals from July 1, 2006, through June 30, 2007. Analysis of that data will shed some light on these questions.[93]

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[93] For a preliminary report on those data, see THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

The third set of questions, discussed in Part III.A, involves what happens in class action cases once they are filed in or removed to federal courts. The FJC research team is now collecting data on a wide range of litigation activities in a sample of the class actions in Phases II and III of the study. Analysis of these data, when complete, will shed a great deal of light on how CAFA has affected class actions in the federal courts, from the nature and sources of the causes of actions raised in complaints, to the residences of class members, to class settlement practices, to appellate review of class certification rulings. Key questions relate to the composition of class membership in class actions filed in or removed to federal courts. How effective has CAFA's jurisdictional filter been in retaining multistate class actions in federal courts and not disturbing state court jurisdiction over single-state class actions? Again, state court data would illuminate this set of questions as to cases that remain in or are remanded to state courts. Federal data will shed direct light on the residences of class members for class actions certified by federal judges. In addition to increasing the caseload of the federal courts, has CAFA increased the courts' workloads as well? The answers to these questions, in turn, will inform the judicial branch's administrative and rulemaking response to CAFA and might even affect the judicial branch's evaluation of any need for additional resources or for proposing amendments to Rule 23 or to CAFA.