

The Impact of the Class Action Fairness Act of 2005

Second Interim Report to the Judicial Conference Advisory Committee on Civil Rules

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This report was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

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Introduction

At the request of the Judicial Conference Advisory Committee on Civil Rules (acting in consultation with the chairs of the Committees on the Administration of the Bankruptcy System, Court Administration and Case Management, Judicial Resources, Federal–State Jurisdiction, and Rules of Practice and Procedure), the Federal Judicial Center has undertaken a long-term study of the impact of the Class Action Fairness Act of 2005 (CAFA) on the resources of the federal courts.

The following report presents preliminary data on the number, frequency, and types of class action filing and removal activity in the federal district courts between July 1, 2001, through June 30, 2005. We define class action activity to include original federal filings and removed cases in which class action status is sought at any stage of the proceedings. The CAFA study is designed to identify all such cases that are filed in or removed to federal court during the four years and beyond. The study includes the 85 districts that use the Case Management/Electronic Case Filing (CM/ECF) system and have created electronic docketing records for cases filed as of July 1, 2001.

This is the second of a series of interim reports to the committee. We expect to present the next report in the spring of 2007. At that time, we will analyze data for class actions filed in or removed to federal district courts between July 1, 2005, and June 30, 2006.

Caveat

The data presented below may differ slightly from data presented in the May 2006 preliminary report and may be revised slightly in later reports. As we update our search of docket records for class action activity we anticipate identifying cases filed during July 1, 2001, and June 30, 2005, that had not previously evidenced any such activity. We also expect that further analyses might uncover case events that we were unable to detect during this initial examination, such as cases that were transferred to another district after our initial examination of the docket records. For further discussion of such potential updates, see *Methods* on page 13.

Summary of Interim Results

Overall, data from 85 federal district courts show a substantial increase in class action activity during the period from January 1, 2001, through June 30, 2005, a time that spans the February 18, 2005, effective date of CAFA. More to the point, we found a substantial increase in class action activity during the months following CAFA's effective date. Because the Act's primary goal was to expand federal jurisdiction over state-law class actions, one would expect CAFA's impact on class action activity to be concentrated in cases involving state-law claims, especially diversity of citizenship cases, and not in cases involving federal statutory claims.

To distinguish between long-term trends and short-term effects of CAFA, time-series analysis using ordinary least squares regression (that is, measurement of relationships among variables) was applied to monthly filing and removal numbers over the entire four years. The time-series analyses demonstrate that filings and removals in certain types of cases, especially traditional federal question cases such as labor, civil rights, and securities, were not affected

by CAFA, just as one would anticipate. But time-series analyses do indicate a statistically significant increase in activity, post-CAFA, in diversity of citizenship cases and in removals to federal court, even after controlling for long-term trends. Indeed, CAFA appears to have reversed long-term downward trends in these types of cases.

More specifically, data from the 85 courts show the following:

- Class action filings in or removals to federal district courts post-CAFA brought class action activity to its highest level during the four-year period. Class actions were filed at a rate of 10.48 cases per filing day before CAFA (July 1, 2001, through February 17, 2005) and 11.96 cases per filing day after CAFA went into effect. This difference in filing rates is statistically significant.
- Increases in class action activity during the post-CAFA period occurred primarily in the nature-of-suit categories likely to include state-law claims: contracts, torts (almost entirely in property damage and not in personal injury cases), and “other fraud” cases (about half of which were based on diversity jurisdiction; many were filed originally in state courts). Increases in the contracts and fraud cases were statistically significant; the increase in property damage cases was not statistically significant.¹
- After CAFA, cases based on diversity of citizenship jurisdiction increased from 13% of all class action filings and removals to 19% of such cases. The percentage of federal question cases declined correspondingly. Time-series analysis confirmed that the increase in the number of diversity class actions in federal courts was associated with CAFA.
- After CAFA, cases removed from state courts increased from 18% of all class action activity to 23% of such activity. The percentage of original proceedings filed in federal court declined correspondingly. Time-series analysis confirmed that the increase in the number of class actions removed to federal courts was associated with CAFA.

The Center’s next report will shed additional light on whether the trends revealed during the first 134 days of CAFA’s existence continue.

Interim Results

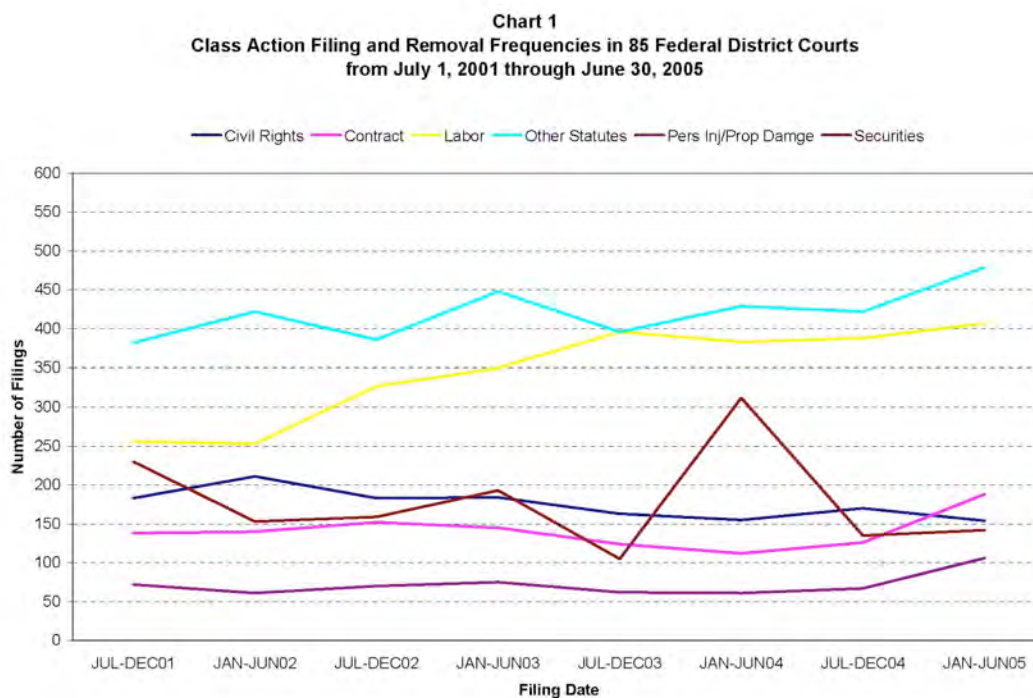
To identify class actions, the research team examined the dockets of thousands of cases and detected references to class action activity in 18,811 cases filed in or removed to 85 federal district courts from July 1, 2001, through June 30, 2005. By eliminating reopened cases and adjusting for consolidations (both interdistrict and intradistrict)—a combined total of 8,133 cases—we arrived at a total of 10,678 unique or lead class actions filed or removed during those four-years. See *Methods* on page 13.

1. Throughout this report we use the term *statistically significant* to refer to differences that are not likely to occur by chance more than once in twenty observations ($p < 0.05$).

Filing trends

For the analyses in this report, the charts present data measured at six-month intervals and connected graphically by lines. Chart 1 presents data on class action filings or removals in 85 federal district courts between July 1, 2001, and June 30, 2005, grouped by nature of suit.² CAFA went into effect on February 18, 2005. Filings and removals during the six-month periods ranged from 1,244 to 1,476. The high point was reached between January 1, 2005, and June 30, 2005, the period that includes CAFA's effective date.

Chart 1 reveals an immediate and substantial increase in filings and removals in the types of cases that are related to CAFA's purpose of shifting state-law claims to the federal courts. The data suggest that CAFA has had an immediate effect, and time-series analyses show statistically significant increases in class action filings and removals after the effective date of CAFA for certain natures of suit. Further testing by adding additional years of activity will enable us to learn more about the strength and endurance of the effects observed in this initial period under CAFA.



2. We did not include data regarding 21 counseled general habeas corpus actions; because of the small number of such cases, they are difficult to show in a chart with the other nature of suit categories.

We detected a difference in pre- and post-CAFA filing and removal rates over the 913 days on which at least one class action was filed or removed before CAFA (July 1, 2001–February 17, 2005) and the 93 such days after CAFA. Before CAFA, attorneys filed class actions in or removed them to federal courts at a rate of 10.48 cases per day. After CAFA, attorneys did so at a rate of 11.96 cases per day. The difference is statistically significant.

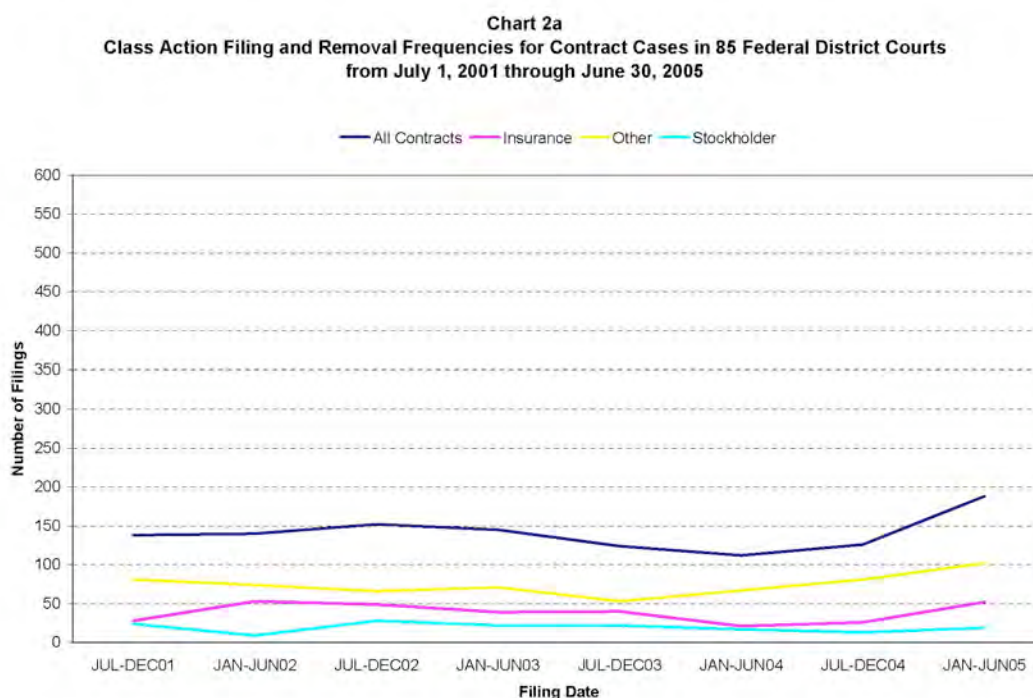
Nature of suit

The series of charts beginning with Chart 2a presents class action filing data for various types of cases during the four years. We collapsed all cases into six groups: (1) contracts, (2) personal injury/property damage, (3) “other” (a residual category including federal and state statutory actions and common-law fraud cases), (4) labor, (5) securities, and (6) civil rights. The groups of cases are based on nature of suit classifications identified by the plaintiff’s attorney at the time of filing. Similar nature of suit categories, such as “Insurance-contract” and “Other contract,” were collapsed into the “Contracts” category.

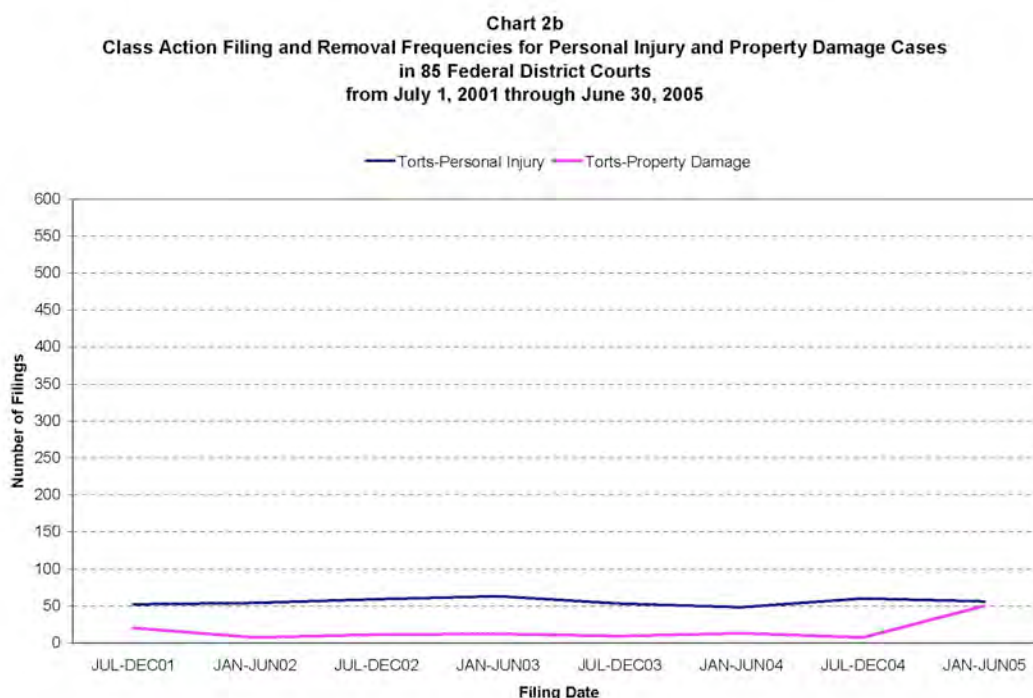
The discussion of the data represented in Charts 2a through 2f focuses on the number of class action cases filed during the time period after CAFA became effective, that is, February 18, 2005–June 30, 2005. Because CAFA is expected to have the largest impact on state-based claims filed in state courts (on behalf of classes with at least minimal diversity of citizenship), the legislation’s most significant effects will likely be found in the contract (Chart 2a) and tort (personal injury/property damage) (Chart 2b) cases. As Chart 1 shows, both categories had relatively low levels of activity throughout the four years.

Contract

As Chart 2a shows, contract filings and removals increased noticeably during the last six-month period. For more than three and a half years before CAFA, contract cases made up only about 10% of all class action cases. In the four and a half months after CAFA, contract cases made up 14.5% of class action cases. This change is statistically significant.



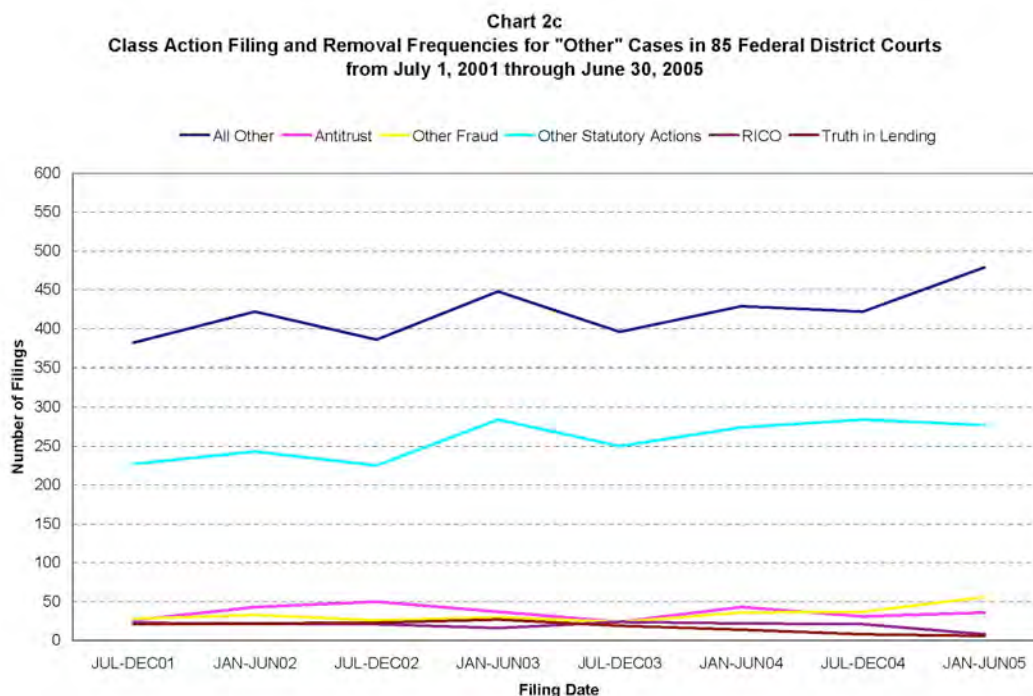
Time-series analysis of monthly filings in contract cases reveals both an overall downward trend in the filing and removal of such cases during the four years and an increase in filings since the effective date of CAFA. Both the overall trend and the post-CAFA effect are statistically significant. In the short run, at least, a measurable increase in contract case class action activity in the federal district courts is associated with CAFA. If this trend continues, federal courts will be coping with more contract class actions than in the past.



*Note: A substantial portion of the increase in property damage cases in the January-June 2005 period occurred before CAFA and was mostly made up of two sets of related cases that were not consolidated or coordinated. Because the chart is based on data points using six-month intervals, these pre-CAFA class actions should not be confused with post-CAFA activity.

Tort—personal injury and property damage

As Chart 2b illustrates, personal injury class actions were relatively constant over the four years, declining slightly after CAFA's effective date. This finding is not surprising given recent federal case-law developments. The percentage of property damage class actions was also relatively constant throughout the four years but increased by less than 1% after CAFA when compared with the percentage of property damage class actions filed or removed in the pre-CAFA periods. That change is not statistically significant. Another year of data should clarify the effect, if any, of CAFA in property damage cases. Time-series analysis of monthly filings in personal injury and property damage cases confirms the patterns observed in Chart 2b. In both models, CAFA did not have a statistically significant effect on monthly filings.

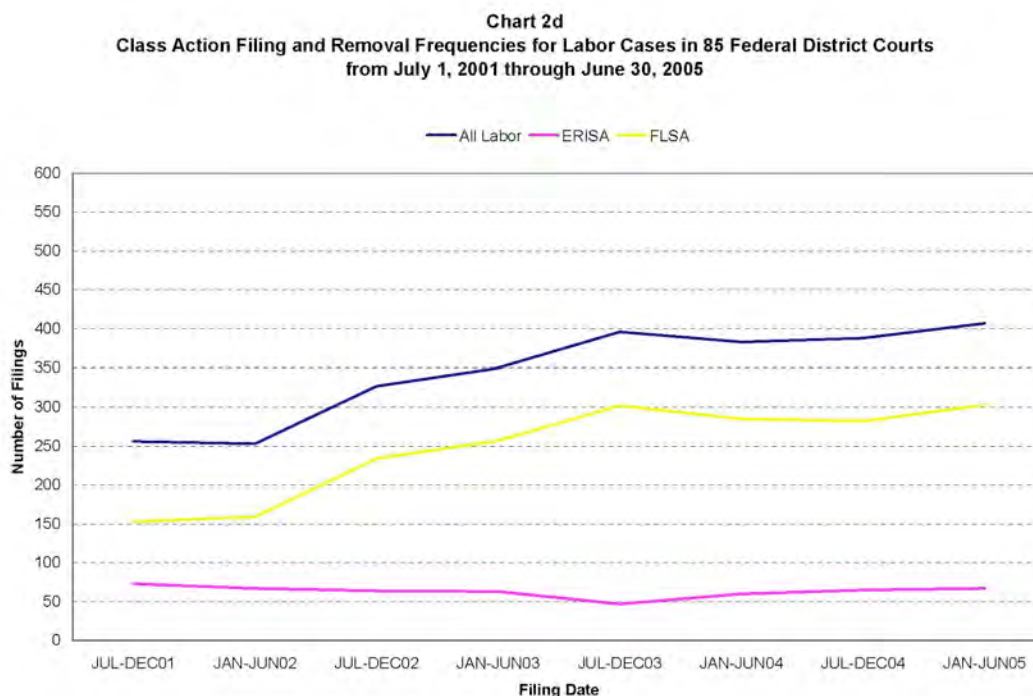


"Other" actions

The "other" actions category illustrated in Chart 2c includes a wide range of federal statutory actions, including antitrust, RICO, Truth in Lending, Fair Credit Reporting Act, Fair Debt Collection Practices Act, and "other fraud" cases as well as a small number of state statutory actions that do not fit into another nature of suit category. Overall, the percentage of other actions increased by slightly more than 1% from the pre-CAFA portion of the four-year period to the post-CAFA portion. Surprisingly, time-series analysis reveals a minor but statistically significant increase in monthly filings and removals in other cases post-CAFA.

"Other fraud"

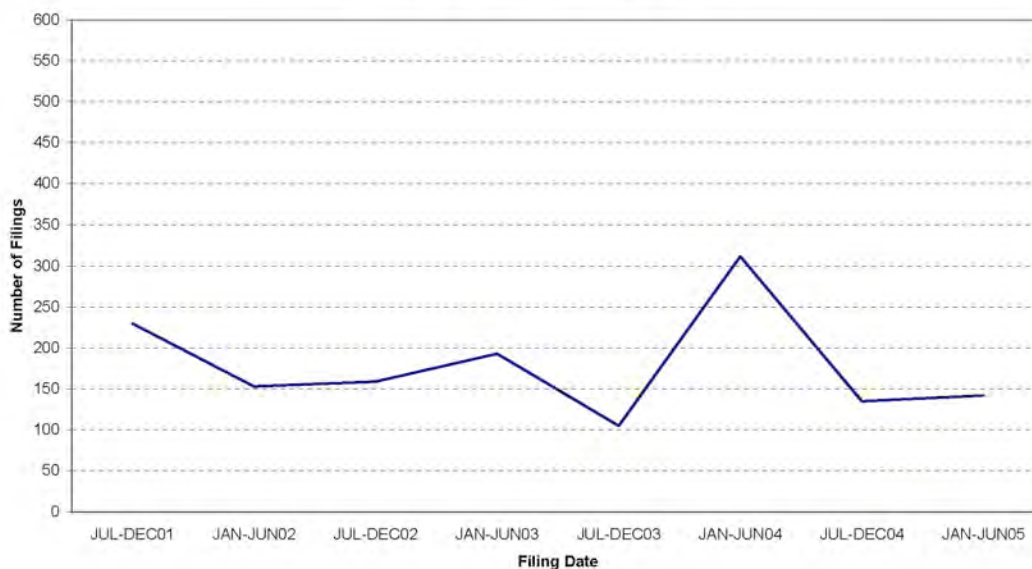
At least one subclass of the other class actions category increased in a substantively and statistically significant way. "Other fraud" cases increased from 2% of the pre-CAFA class action activity to 4% of the post-CAFA activity. Time-series analysis of monthly filings and removals of "other fraud" cases confirms a statistically significant post-CAFA increase in such activity. "Other fraud" cases appear to include a substantial number of state law claims. Slightly more than half of such cases asserted diversity of citizenship to be the basis for federal jurisdiction and more than 40% were originally filed in state courts.



Labor

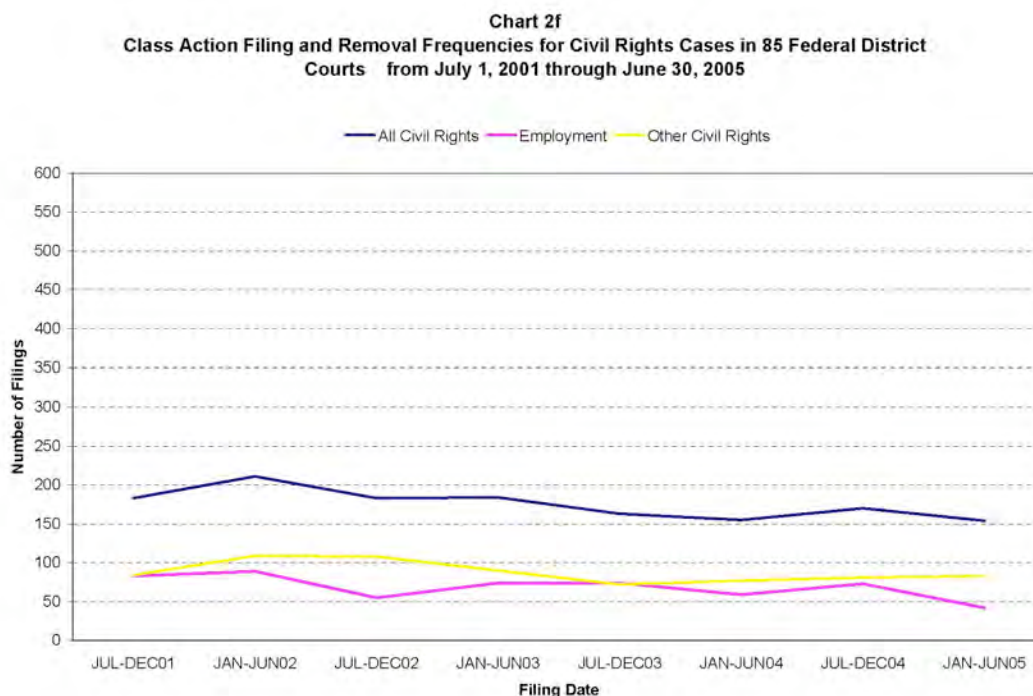
Labor cases, which consist primarily of federal Fair Labor Standards Act (FLSA) and Employment Retirement Income Security Act (ERISA) cases, increased somewhat after CAFA went into effect but not to a statistically significant degree. When compared with the pre-CAFA periods, labor cases increased from 26% to 27% of all class actions. Time-series analysis of monthly filings in labor cases indicates that the post-CAFA increase in the filing and removal of such cases is the result of the overall upward trend in the monthly filings of such cases over the entire four years and not the effect of CAFA itself. In the course of the four years studied, labor cases have increased substantially, from 256 cases in the first six-month period to 407 cases in the most recent period, with most of that increase preceding CAFA. Though not directly relevant to the purpose of the study, it is interesting to note that FLSA cases, which are opt-in class actions governed in part by statute, were the largest single category of class actions in the study: 1,975 cases, amounting to 18% of all class actions.

Chart 2e
Class Action Filing and Removal Frequencies for Securities Cases
in 85 Federal District Courts
from July 1, 2001 through June 30, 2005



Securities

Securities class actions make up the second largest category of class actions in the federal courts: 1,429 cases (after aggregating many consolidated cases), amounting to 13% of the cases in the study to date. The percentage of securities cases declined substantially from 14% of all class actions before CAFA to only 9% after CAFA. This is a noteworthy change in the composition of class actions filed in or removed to federal courts. Post-CAFA, securities class actions represented a smaller share of the federal docket than before, even though the filing and removal of such cases was relatively constant in the last year studied. Time-series analysis of monthly filings in securities cases confirms that CAFA had no impact on the filing and removal of securities cases. The analysis also indicates that the trend in filing and removal of such cases has been flat during the four years.



Civil rights

As Chart 2f shows, civil rights class action cases exhibited a noticeable decline. Before CAFA, civil rights cases represented 13% of all class actions; after CAFA, civil rights cases represented 11%. Time-series analysis again confirms the trends seen in Chart 2f. There is a statistically significant downward trend in the filing and removal of civil rights cases, nationwide, during the four years, which was not affected by CAFA.

Basis of federal jurisdiction

Chart 3 presents the basis of federal jurisdiction for class action cases filed in the 85 federal district courts during the four years. These data compare federal question jurisdiction with diversity jurisdiction and exclude any cases in which the basis for jurisdiction was the involvement of the United States as a defendant. Cases in which the United States is a plaintiff, such as Equal Employment Opportunity Commission actions on behalf of a class of employees, Federal Trade Commission actions, or Securities and Exchange Commission actions, are not included in this study because they are not Rule 23 class actions.

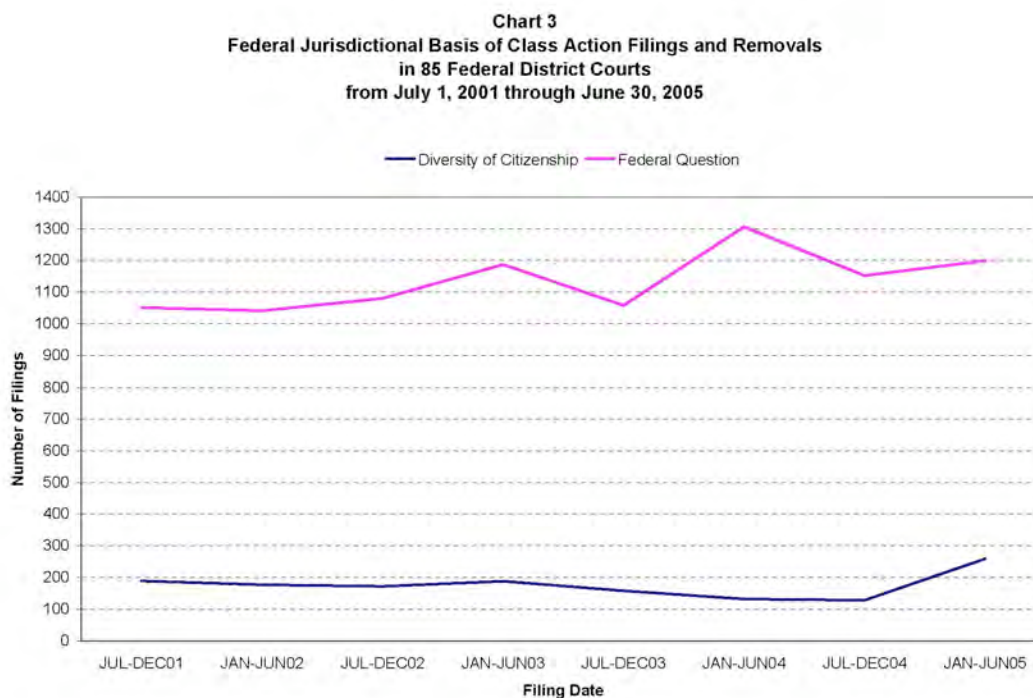


Chart 3 shows that the vast majority of class actions filed in the 85 federal districts relied on federal question jurisdiction. CAFA has affected the proportions of those two jurisdictional bases. In the three and a half years before CAFA, filings and removals based on federal question jurisdiction constituted 87% of all class actions; after CAFA federal question cases constituted 81% of class actions. The data show a corresponding increase in the percentage of diversity filings after CAFA, from 13% of all class actions before CAFA to 19% after CAFA. This change is statistically significant and substantively important. CAFA appears to have had an immediate impact on the nature of the class action cases filed in or removed to federal court.

Time-series analysis of monthly filings and removals of diversity of citizenship cases shows both a statistically significant downward trend in the numbers of such cases over the pre-CAFA period and a statistically significant increase post-CAFA. Time-series analysis of monthly filings and removals of federal question cases shows a statistically significant upward trend in monthly filings and removals of such cases over the entire four years, unaffected by CAFA. In the short term, then, CAFA has been associated with an upswing in the filing and removal of diversity of citizenship cases but has not affected the filing and removal of federal question cases.

Origin of cases

CAFA was designed to facilitate removal of class actions with state law claims, particularly those involving the laws of more than a single state. CAFA eases previous statutory restrictions on removal of cases and gives reason to expect that the number and percentage of cases that are removed will increase. On the other hand, CAFA makes removal more predictable and might encourage plaintiffs' attorneys to file actions in federal court and avoid any costs and delays associated with removal. The ultimate question is whether more state-based class actions end up in federal courts. This appears to be the case as of June 30, 2005.

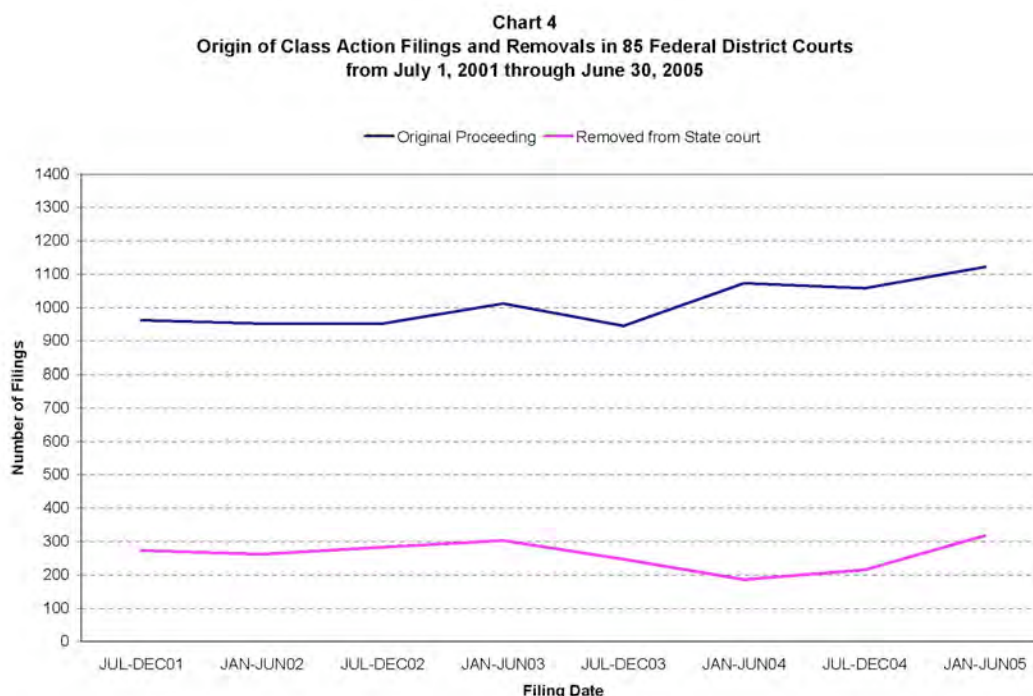


Chart 4 shows that the vast majority of class actions were filed in 85 federal district courts as original federal actions, not removals from state courts. (Cases remanded from an appellate court or transferred from another district or by the Judicial Panel on Multidistrict Litigation were excluded from this analysis.) After CAFA the percentage of removed cases increased from 18% to 23% while the corresponding percentage of original proceedings decreased from 82% to 77%. These changes are statistically significant. Moreover, they are substantively significant because they suggest that CAFA is having its intended effect.

Time-series analysis of removals indicates both that there was an overall downward trend in the removal of class actions pre-CAFA and that CAFA is associated with a statistically significant increase in removals since February 2005. These findings are similar to those for

contract cases and, in terms of the post-CAFA effect, for “other fraud” actions. Not coincidentally, those two categories of cases make up 58.6% of removed actions in the study population.

Together, data in Charts 3 and 4 indicate that CAFA has had an early impact on the number and percentage of class actions in federal courts that are based on diversity jurisdiction and on the number and percentage of class actions that are removed to federal court.

As Charts 3 and 4 suggest and underlying data confirm, plaintiffs who file federal question cases (including, of course, mixed federal question/state law cases) tend to file those claims in federal court as original matters (90%). A small minority (10%) were filed in state court and removed (this study, of course, cannot determine how many cases are filed in state court but not removed). By contrast, 40% of the cases in which federal jurisdiction was based on diversity of citizenship were filed originally in federal court. CAFA both expanded federal diversity jurisdiction over class actions and expanded the ability of defendants to remove cases. In this preliminary data it appears that plaintiffs continued to file diversity cases in state courts after CAFA and defendants removed a considerable number of those cases. Class actions now subject to removal under CAFA could also be filed as original actions in federal courts. In phase two of this study we will examine a sample of case files to determine whether attorneys seem to be adjusting to CAFA by filing more cases with state-law claims as original actions in federal courts.

Methods

To identify the population of class action cases, we first used national CM/ECF real-time back-up databases to identify cases with activities related to class actions. We searched electronically for the term “class” and eliminated all cases in which the reference was not to class action activity (for example, references to “first class mail” or “World Class Distributors”). We also looked in the replication database for a class action flag variable used by the Administrative Office (AO) and some courts to identify class actions at filing and at termination. We supplemented that search by including 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. We also included all cases identified as class actions by CourtLink, an electronic service produced by Lexis/Nexis. CourtLink identifies class actions via PACER docket records by searching for the terms “similarly situated” or “representative of the class” among the parties’ names, in the case caption.

We excluded all actions in which there was not an attorney on the plaintiff side of the litigation because pro se litigants do not have authority to represent a class. For similar reasons we also excluded cases dealing with prison conditions. We did not exclude counseled habeas corpus class action cases, such as those alleging illegal detention or challenging deportation policies, but the number of such cases is so small that separate analysis is not warranted. To identify and eliminate overlapping and duplicative actions, we searched the above dataset of class action docket records for terms including “consolidate,” “transfer,” “related case,” “MDL,” “JPML,” “conditional transfer order,” and for variations on those terms. If we found no such term or if the case was not consolidated with another, we counted the case as a single or “unique” case and included it in the study. For all related and consolidated cases,

both intradistrict and interdistrict (including multidistrict or MDL transfers and interdistrict transfers based on an order changing venue), we identified a single “lead” case for inclusion in the study and identified “member” cases for exclusion. The Clerk of the Judicial Panel on Multidistrict Litigation (JPML) and his staff³ 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. Almost all of the latter were “member” cases but we may find in our updates that some “unique” cases will have been transferred, reducing the number of unique class actions for these districts.

Overall, the number of unique, lead, and member cases was as follows:

Table 1: Frequency of Lead, Member, and Unique Cases Examined in Study of Class Action Filings Between July 1, 2001, Through June 30, 2005, in 85 Federal Districts

Class Action Case Filing Frequencies	Total	Percent
Lead-intradistrict consolidation	1154	6
Lead-multidistrict (JPML) consolidation	155	1
Unique	9,369	50
Subtotal-Cases <i>included</i> in study	10,678	57
Member-intradistrict consolidation	4,938	26
Member-multidistrict (JPML) consolidation	2,964	16
Member-interdistrict transfer by change of venue	231	1
Subtotal-Cases <i>excluded</i> from study	8,133	43
Total number of class action filings	18,811	

Table 1 shows that approximately 43% of proposed class actions overlapped with or duplicated other class actions filed in a federal district court.



In the spring of 2007 we will present to the committee a report with additional data on class action filings and removals from July 1, 2005, to June 30, 2006.

3. We are grateful to Jeffrey N. Lüthi, Clerk of the Judicial Panel on Multidistrict Litigation (JPML), and Ariana Estariel and Alfred Ghiorzi of the JPML clerk’s office for their timely and invaluable assistance.

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