

Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts

Federal Judicial Center, November 2007*

Introduction

At the request of the Advisory Committee on Civil Rules (acting in consultation with the chairs of the Judicial Conference 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) (Pub. L. No. 109-2, 119 Stat. 4 (2005)) on the resources of the federal courts.

The study design consists of three major parts, or phases. 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. Phase II is designed to analyze the litigation activity in the district courts 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 rulings; pretrial motions practice; class certification activity; and the process of reviewing settlements. Comparisons of class actions filed or removed both pre- and post-CAFA will enable us to gauge the impact of CAFA on the resources of the federal courts. Phase III is designed to analyze the litigation activity in the sampled cases in the courts of appeals.

The following report presents an account of the progress of this long-term study as well as new information on class action activity in California and new data on consumer protection class actions and remand rates for removed cases. Both nationally and in California federal district courts, the FJC study has shown a marked increase in the number of diversity cases filed in or removed to the federal courts in the post-CAFA period. Reexamination of federal statutory cases enabled us to isolate federal consumer protection cases and identify for further study a possible CAFA effect in those cases. Data on remand rates for removed cases suggest a possible CAFA-related change that also warrants further study.

Phase I: Filings and Removals

The Third Interim Report, presented to the committee in April 2007, provided preliminary findings on the number, frequency, and types of class actions filed in or

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removed to federal district courts between July 1, 2001, through June 30, 2006. During that period, the Third Interim Report identified more than 16,000 class actions filed in or removed to federal court. Class action activity is defined broadly to include original federal filings and removed cases in which class action status is asserted or sought at any stage of the proceedings. The study includes the 88 districts¹ 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. Unless otherwise specified, discussion of cases and class actions refers to all class action activity, including both original proceedings and removals, in all 88 federal district courts.

At present, the research team is identifying class actions filed in or removed to the federal courts through June 30, 2007. This is Wave 3 of data collection—Wave 1, which was the basis for the Second Interim Report, covered the dates July 1, 2001, through June 30, 2005, and Wave 2, which was the basis for the Third Interim Report, covered filings and removals through June 30, 2006. We expect that the preliminary analysis of the Wave 3 filing and removal data will be reported to the committee in 2008. For further information on the findings presented previously, please consult the Third Interim Report, which is available to the judicial branch at FJC Online on the courts' intranet site at cwn.fjc.dcn and to the public on the FJC Internet site at www.fjc.gov, under "Publications."

Phases II & III: Litigation Activity in the District and Appellate Courts

Because it would be impractical to collect data on litigation activity in more than 16,000 class action cases, the design of Phases II and III envisions an in-depth study of a sample of class actions identified as such in Phase I. The study design calls for four separate samples: two for diversity of citizenship cases, one pre-CAFA and one post-CAFA, and two for federal question cases, one pre-CAFA and one post-CAFA.

Because one of CAFA's primary purposes was to expand the diversity of citizenship jurisdiction of the federal courts, its major impact on the work of the federal courts should be in that category of cases. Thus, more data will be collected in diversity of citizenship cases, pre- and post-CAFA, to determine the impact of the legislation on litigation activity. The design of the coding instrument and the database was completed in the first half of 2007, and a sample of approximately 300 pre-CAFA diversity cases was drawn. The sample was drawn from approximately

1. There are 94 federal district courts. The 88 districts in the study accounted for 98% of the 244,441 civil cases filed in federal district courts between July 1, 2005, and June 30, 2006. The excluded districts are Alaska, Guam, Indiana Southern, Northern Mariana Islands, Virgin Islands, and Wisconsin Western.

600 diversity class actions filed or removed in the two years immediately preceding CAFA's effective date, February 18, 2005.

The collection of data from this sample is ongoing. Because a substantial proportion of the pre-CAFA cases in the diversity sample remain pending in the district and appellate courts, it is impossible to report any pre-CAFA findings at this time.

After the completion of Phase I, a second sample of diversity cases will be drawn from the diversity class actions filed or removed in the two years immediately after CAFA's effective date. The same type of information will then be collected as was collected about the pre-CAFA cases, enabling a "before and after" comparison of class action litigation pre- and post-CAFA. In addition, the coding instrument will also identify the effects of specific CAFA-related issues that arise during this period.

The study design also includes a much narrower approach to class action activity in federal question cases. This part of Phases II and III focuses on (1) the nature and source of law for the claims raised in complaints and (2) class certification. It is possible that in expanding the diversity jurisdiction of the federal courts and increasing defendants' ability to remove cases not including federal claims, CAFA may affect federal question cases indirectly: After CAFA, plaintiffs may plead claims based on federal law when they might have pleaded only state-law claims before CAFA.

The design of the coding instrument and the database for federal question cases was completed in the summer of 2007, and a sample of approximately 650 federal question cases was drawn from approximately 4,800 federal question cases filed or removed in the two years immediately preceding CAFA's effective date, February 18, 2005. The collection of data from this sample is also ongoing.

After the completion of Phase I, a second sample of federal question cases will be drawn from the federal question class actions filed or removed in the two years immediately after CAFA's effective date. This will enable us to test the hypothesis that federal question complaints filed post-CAFA are likely to contain more state-law-based claims than federal question complaints pre-CAFA. The pre- and post-CAFA data will also provide a comprehensive study of class certification in the federal courts.

California Class Action Activity

Through the efforts of Rick Marcus, Reporter to the Advisory Committee on Civil Rules and Professor of Law at Hastings Law School, the Center is collaborating with the Office of Court Research (OCR) of the Administrative Office of Courts in California, to study interrelationships among the California state and federal courts

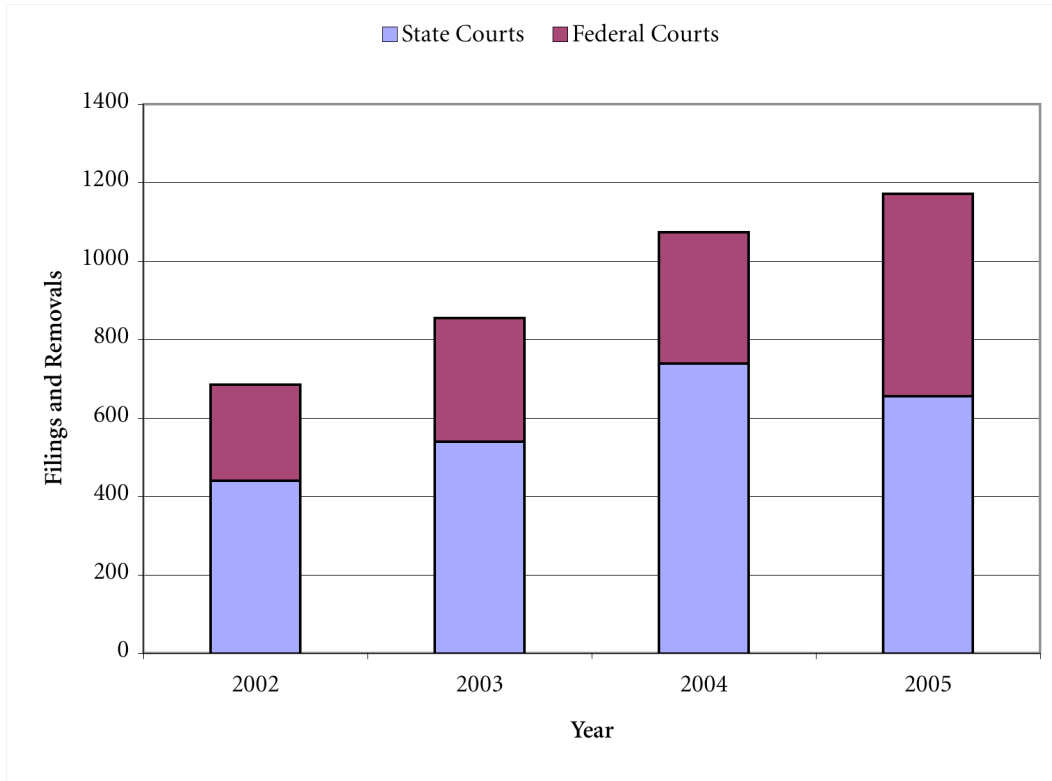
with respect to class actions. After initial contacts by telephone and email, Tom Willging met with OCR researchers in September 2007. In October 2007, Emery Lee and Tom Willging participated in a joint presentation of preliminary research on class action activity in California state and federal courts at a complex civil litigation workshop for California superior court judges in Santa Ana, California.

This collaboration provides an excellent opportunity to address one inherent limitation of the FJC study on CAFA's impact on the federal courts: To date, both nationally and in California federal district courts, the FJC study has shown a marked increase in the number of diversity cases filed in or removed to the federal courts in the post-CAFA period. The data are consistent with the hypothesis that CAFA, in expanding the federal courts' jurisdiction, is responsible for the observed increase. The observed increase is thus explained as representing the relocation of class actions from the state courts to the federal courts. But this finding is also consistent with the hypothesis that overall class action activity has increased, in both the state courts and the federal courts, and thus that CAFA has not relocated any class action activity to the federal courts from the state courts.

To test these rival explanations, one would really need reliable data on both the state courts and the federal courts. However, reliable data on class action activity in most state court systems simply do not exist. The efforts of the OCR will provide such data in one large state and may encourage researchers in other states (both in the judicial branch and in the academic community) to pursue similar lines of research.

Figure 1 presents preliminary data on total class action activity in seven California superior courts (including Los Angeles County and representing 60% of all civil unlimited filings in the state and 77% of the identified state class actions) and all four federal district courts in California since 2002. The OCR found a decrease in California class action activity between 2004 and 2005 in those seven superior courts; however, the number of class action found in 2005 still represented an increase over 2002 and 2003. By comparison, the FJC found a marked increase in class action activity in 2005 in the four California federal district courts—especially in the Central District of California, which includes Los Angeles County. Figure 1 indicates that in 2005, the year in which CAFA was enacted, total class action activity increased in California and that a larger proportion of that activity was in the federal courts, compared to earlier years, a finding consistent with CAFA-based expectations. These findings are preliminary only, but suggest that continued collaboration with the OCR—and with researchers in other states, when possible—will provide valuable insights into the effects of CAFA on the federal courts.

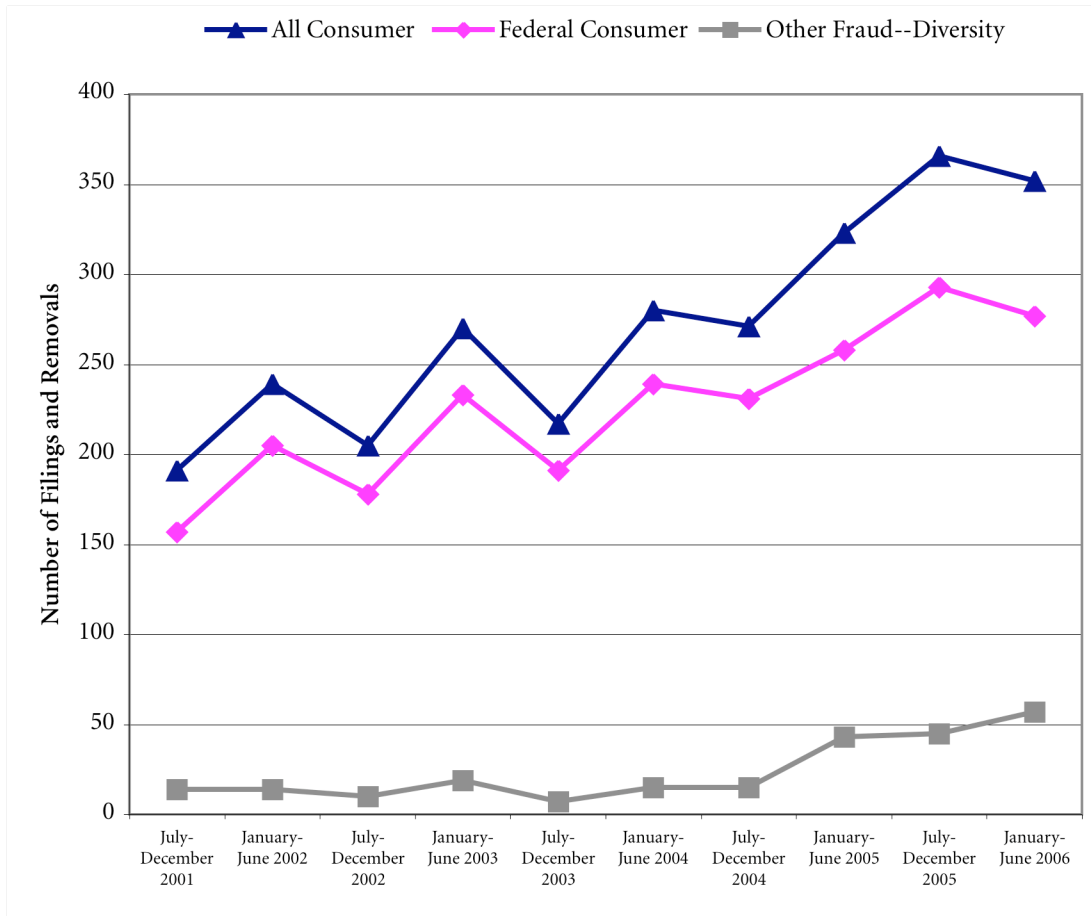
Figure 1: State and Federal Class Action Filings in California, 2002-2005



Consumer Protection Class Action Activity

The three previous reports have included a figure displaying class action activity in the Other Actions category. In the Third Interim Report, the Other Actions figure included information about Federal Consumer class actions and Other Fraud class actions. The Other Fraud actions consist primarily of state-law consumer protection claims, including violations of state deceptive sales practices statutes and common-law fraud actions. Additional investigation revealed that many of the cases coded as Other Statutory Actions, the generic catch-all category in the Other Actions category, were actually federal consumer protection class actions. We were thus able to reclassify a large number of Other Statutory Actions as Federal Consumer class actions and to produce Figure 2.

Figure 2: Class Action Filing and Removal Frequencies for Consumer Protection Actions in 88 District Courts, July 1, 2001–June 30, 2006



The Federal Consumer category consists of class actions brought primarily under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and the Truth in Lending Act. Federal Consumer class actions increased from 157 filings and removals in the first six-month period, July–December 2001, to 277 in the last six-month period for which data is available, January–June 2006—a 76% increase. Although the increase in such actions was not steady across six-month periods (the figure tends to be higher in the first half of the year, for some reason, until 2006), the annual number of such actions has increased every full year in the study period: 386 in 2002; 424 in 2003 (10% increase over 2002); 470 in 2004 (11% increase over 2003); and 551 in 2005 (17% increase over 2004). What happened in 2006 is impossible to say at this time, but the first six months of the year saw a decrease compared to the last six months of 2005. That the largest percentage increase in the number of such cases occurred in the same year as CAFA became law suggests a

CAFA effect. As discussed above, when Phase II of the study is completed, we will be able to determine whether some of this increase was caused by more consumer cases being brought as federal question cases because of CAFA. But overall, Federal Consumer class actions have been increasing across the study period.

The pattern for the number of diversity of citizenship other-fraud class actions in Figure 2 is strikingly different than that for federal question cases. For most of the study period, the number of other fraud class actions filed in or removed to federal court showed little pattern, fluctuating from 14 in the first two six-month periods, July–December 2001 and January–June 2002, down to 10 in July–December 2002, up to 19 in January–June 2003, down to 7 in July–December 2003, and then up to 15 in both January–June 2004 and July–December 2004. But post-CAFA, the number of such cases increased to 43 in the first six months of 2005 (37 post-CAFA cases), then to 45 in July–December 2005 and 57 in the first six months of 2006. In annual figures, there were 24 such cases in 2002, 26 in 2003 (8% increase over 2002), 30 in 2004 (15% increase over 2003), and 88 *in 2005* (193% increase over 2004). Fully 82 of the other-fraud class actions filed in 2005 were filed or removed after the effective date of CAFA, which translates to a 173% increase over the number of such cases filed in or removed to the federal courts in all of 2004. As we discussed in the Third Interim Report, it is likely that CAFA is responsible for some, if not most, of the observed increase in state-law other fraud class actions. These post-CAFA trends will become more clear with the completion of data collection for Phase I, described above.

Remand Rates for Removed Class Actions

A final analysis of remand rates pre- and post-CAFA will not be possible until Phase I data collection is completed. At present, however, we have 16 months of post-CAFA data and one full year of data on the disposition of the latest-filed cases in the FJC's Integrated Data Base (IDB).² A preliminary analysis of the remand rates in removed cases is thus possible.

The overall remand rate for the entire study period is 30.4% for all class actions removed to federal court from state court based on diversity of citizenship jurisdiction in the 88 districts included in the study. The post-CAFA remand rate is slightly lower than the pre-CAFA remand rate. Of all class actions removed to federal court from state court from July 1, 2001, until February 17, 2005, based on diversity of citizenship jurisdiction, 32.5% (332 remands out of 1,023 removals) were remanded to state court. For class actions removed from February 18, 2005,

2. The IDB is based on data reported by the courts to the Administrative Office of the U.S. Courts. The IDB Civil data is currently updated through June 30, 2007.

through June 30, 2006, based on diversity of citizenship jurisdiction, 27.5% had been remanded to state court, as of June 30, 2007 (127 remands out of 462 removals). That difference, while not large, is statistically significant at the .10 level.

It is probably too soon to conclude, however, that the remand rate is lower, post-CAFA, even slightly. Many of the post-CAFA cases included in this analysis are still pending in the district court, and thus it is possible that the number of post-CAFA remands for cases removed between February 15, 2005, and June 30, 2006, may increase. Most remands occur within one year of removal. For the pre-CAFA diversity removals, the median time from removal to remand was 97 days, or 3.2 months ($n=332$); for post-CAFA diversity removals, the comparable figure is 116 days, or 3.8 months ($n=127$). However, about 5% of the pre-CAFA remands occurred more than one year after removal. If a similar pattern holds for post-CAFA cases, then the remand rate post-CAFA would more closely parallel the pre-CAFA remand rate.

Conclusion

As explained in the Third Interim Report, the findings presented in this progress report are preliminary and subject to revision in later reports. In spring 2008, we will report on Wave 3 of Phase I and, if the data permit, on the “before” portion of Phase II.

Respectfully submitted

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