

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*

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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 Advisory Committee on Civil Rules (Advisory Committee) (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. 109-2, 119 Stat. 4 (2005)) on the resources of the federal courts.

The following report presents preliminary data on the number, frequency, and types of class actions filed in or removed to federal district courts between July 1, 2001, through June 30, 2006. 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 study includes the eighty-eight 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.

This is the third in a series of interim reports to the Advisory Committee. The overall study is designed to examine three phases of class action activity: filing and removal of cases; litigation in the district courts; and appellate review. This report and previous reports have been devoted to the first phase. The next interim report, in the fall of this year, will introduce the second phase by presenting data on class action litigation in the district courts as gleaned from a sample of terminated cases filed before CAFA’s effective date. In that phase of the study we will examine the entire litigation process, particularly the nature and source of law for the underlying claims; discovery; pretrial motions practice; class certification activity; and the process of reviewing settlements. That sample of cases will serve as the “before” portion of a “before and after” study of the impact of CAFA on the resources of the federal courts. We expect to present the next update on CAFA filing activity in the spring of 2008.

Caveat

The data presented below differ from data presented in the May 2006 and September 2006 interim reports and are subject to revision in later reports. This report includes data for the entire five-year study period from three district courts not included in the previous report (the Southern District of California, the Southern District of Florida, and the District of New Mexico); the CM/ECF system was recently installed in these districts, making their inclusion in the study possible. Also, in updating our search of

1. There are ninety-four federal district courts. The eighty-eight 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 districts not included in the study are Alaska, Guam, Indiana Southern, Northern Mariana Islands, Virgin Islands, and Wisconsin Western.

docket records, we continue to identify cases raising class allegations filed between July 1, 2001, and June 30, 2006, that had not previously evidenced any class action activity. Future analyses may uncover case events that we were unable to detect during this initial examination, such as cases that were consolidated within a district or transferred to another district after our initial examination of the docket records. For further discussion of such potential updates, see “Methods Appendix” *infra*.

Summary of Interim Results

Overall, we find a 46% increase in class action activity in the eighty-eight study districts as a whole in the most recent six-month period for which data is available, January–June 2006, compared to the first six months of the study period, July–December 2001. Much of that increase was in federal question cases, especially labor class actions, and thus not attributable to the effects of CAFA. In the sixteen months since CAFA went into effect on February 18, 2005, however, we find a substantial increase in class action activity based on diversity of citizenship jurisdiction. Given that one of the legislation’s primary purposes was to expand the diversity jurisdiction of the federal courts, it is likely that much of this observed increase in diversity removals and, of particular interest, original proceedings in the federal courts is attributable to CAFA.

More specifically, data from the eighty-eight courts show the following:

- Comparing diversity filings and removals in the last calendar year before CAFA’s effective date, 2004, with the last twelve months for which data is available, July 2005 through June 2006, we find an increase of 364 diversity cases in the 88 study districts. (For further information, see Figure 3 and accompanying text.)
- Average monthly numbers of diversity class actions increased from a pre-CAFA level of 27.0 cases per month to a post-CAFA level of 53.4 cases per month—or 26.4 additional diversity class action filings and removals per month.² (See Figure 3 and accompanying text.)
- The observed increase in diversity cases resulted from both an increase in the number of removals and an even greater increase in the number of original proceedings. In the last twelve months of the study period, original proceedings based on diversity jurisdiction outnumbered removals based on diversity jurisdiction, the reverse of the general pre-CAFA pattern. (See Figure 4 and accompanying text.)
- The increase in diversity class actions in the CAFA period is largely concentrated in cases raising state-law contract and fraud claims. The average number of monthly filings and removals in contract cases has more than doubled after CAFA, and the average number of monthly filings and removals in fraud cases has tripled. (See Figures 1, 2a, and 2c and accompanying text.)

2. All reported differences in average monthly filings and removals, pre- and post-CAFA, are statistically significant at the .05 level or better, unless otherwise noted.

- Tort class actions in the federal courts have not greatly increased in the CAFA period. The average number of monthly filings and removals in property damage cases based on diversity jurisdiction has doubled (to slightly more than four per month) after CAFA, but the average number of monthly filings and removals in personal injury class actions based on diversity jurisdiction was unchanged after CAFA. (See Figures 1 and 2b and accompanying text.)
- In every circuit the district courts as a whole (but not every district) have experienced an increase in diversity class action filings and removals in the CAFA period. In seven of the twelve circuits the number of diversity cases at least doubled. (See Figure 5 and accompanying text.)
- Seventy percent of the study districts experienced an increase in diversity class action filings in the last twelve months of the study period, July 2005 through June 2006, compared to the last full calendar year before CAFA went into effect, 2004. (See Figures 6 and 7 and accompanying text.)

Interim Results

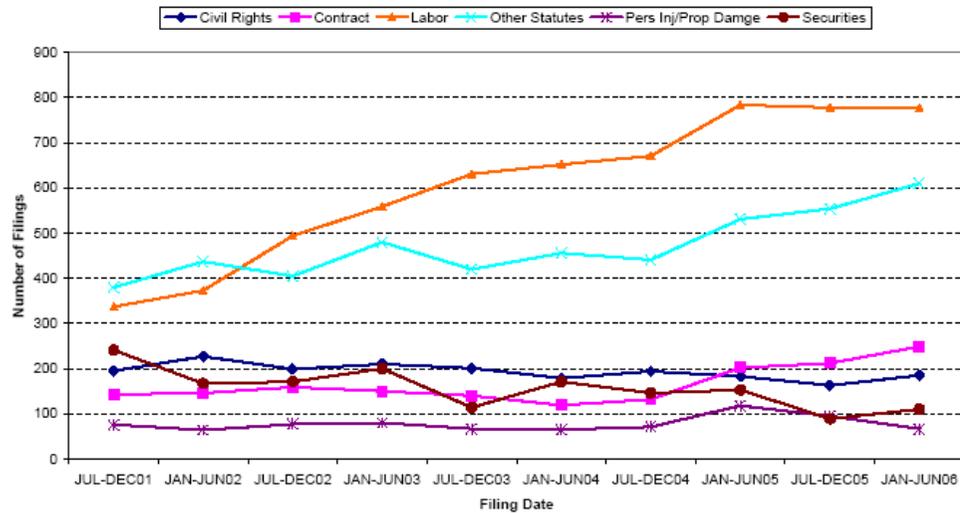
To identify class actions, the research team examined the dockets of hundreds of thousands of cases and detected class action activity in 26,541 cases filed in or removed to the eighty-eight federal district courts included in the study between July 1, 2001, through June 30, 2006. By eliminating reopened cases and adjusting for inter- and intra-district consolidations (a combined total of 9,841 cases), we arrived at a total of 16,700 single-case or lead class actions filed or removed in the study districts during the five-year study period. See “Methods Appendix.”

Filing trends

Figures 1 through 4 present data collapsed into six-month time periods. Figure 1 presents data on class action activity in the eighty-eight study districts between July 1, 2001, and June 30, 2006, grouped by nature of suit. The effective date of CAFA, February 18, 2005, is located in the six-month period January–June 2005.

Figure 1 displays class action activity in all nature-of-suit categories. All class actions identified in the study were assigned to one of six categories: (1) Contract; (2) Personal Injury/Property Damage; (3) Other Actions (a catch-all category including federal and state statutory actions and common-law fraud cases); (4) Labor; (5) Securities; and (6) Civil Rights. The groups are based on nature-of-suit classifications identified by the plaintiff’s attorney at the time of filing. Similar nature-of-suit classifications were combined; for example, “Insurance-Contract” and “Other Contract” were collapsed into “Contracts.”

Figure 1
 Class Action Filing and Removal Frequencies for all Natures of Suit
 in 88 Federal District Courts
 from July 1, 2001, to June 30, 2006



Class actions ranged from a low of 1,372 during the first six months of the study period, July–December 2001, to a high of 1,998 during the most recent six-month period, January–June 2006. That difference represents a 46% increase in class action activity during the study period. As Figure 1 makes clear, however, a great deal of that increase in class action activity was in labor cases, and thus was not attributable to CAFA. As discussed below, labor and other nature-of-suit categories composed largely of federal question cases tended to increase steadily throughout the study period. Instead, we expect to observe CAFA’s impact in nature-of-suit categories that include a large percentage of diversity cases. In Figure 1, this is seen most clearly in the observed increase in contract class actions in the last three six-month periods. Indeed, in July–December 2005 and January–June 2006, the two complete six-month periods after CAFA’s effective date, contract class actions outnumbered both securities and civil rights class actions, a change in the pattern earlier in the study period when securities and civil rights class actions each tended to outnumber contract class actions.

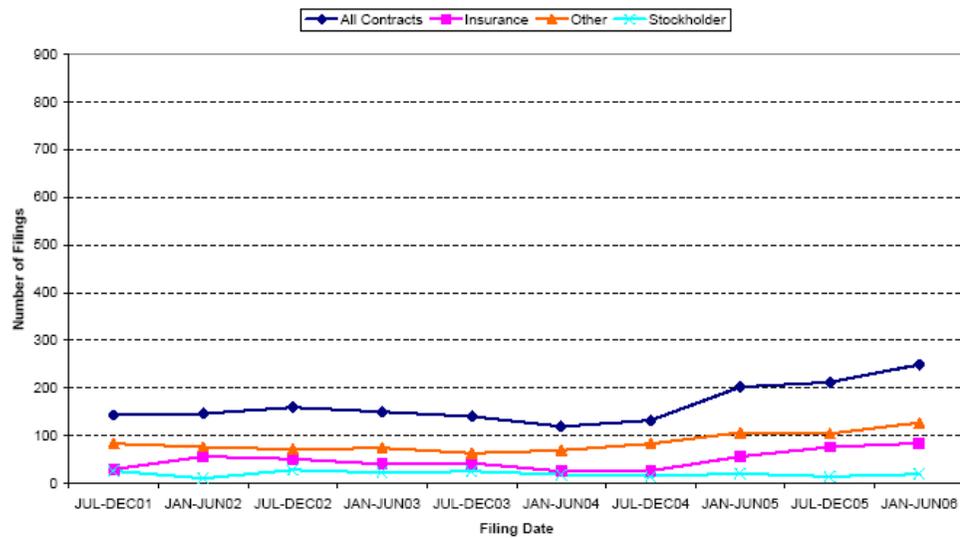
Perhaps what is most striking about Figure 1 is the extent to which labor class actions dominate. Labor cases leveled out just below the 800 mark during the last year of the study. The only other nature-of-suit category that exceeded 300 class ac-

tions in any six-month period covered by the study is the catch-all “Other Actions” category. The other lines in the figure tend to cluster around 100 to 200 class actions per six-month period. It is also worth noting that, once consolidations are taken into account, personal injury and property damage class actions (i.e., tort class actions) typically represent the smallest nature-of-suit category in Figure 1.

The following discussion focuses on each of these categories in turn. Because CAFA is expected to have the largest impact on state-law 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 (Figure 2a), tort (Figure 2b), and common-law fraud cases (Figure 2c). The discussion thus begins with these nature-of-suit categories. It then turns briefly to nature-of-suit categories largely based on federal statutory grounds, such as labor (Figure 2d), securities (Figure 2e), and civil rights (Figure 2f).

Contract

Figure 2a
Class Action Filing and Removal Frequencies for Contract Cases in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



As seen in Figure 2a, contract cases in general dipped from 159 class actions in July–December 2002 to 119 class actions in January–June of 2004. Contract cases then increased from 132 in July–December 2004 to 202 in the first six months of 2005 (the six-month period that includes CAFA’s effective date), then rose to 212 in the next six-month period, and to 249, its highest level in the study period, in Janu-

ary–June 2006. The pattern is similar for both insurance and other contract subcategories. In January–June 2006, both of these subcategories also reached highs: 127 class actions for the other contract subcategory, and 84 for the insurance subcategory. The small number of class actions in the stockholder suits subcategory was relatively constant throughout the study period.

Additional analysis indicates that the increase in the number of contract class actions after CAFA is the result of an increase in cases based on diversity of citizenship. On a monthly basis, the average number of diversity contract class actions increased by sixteen cases, from almost fourteen per month before CAFA to almost thirty per month after CAFA. However, the average number of monthly federal question contract class action cases did not change, remaining a constant 8.5 cases per month before and after CAFA's effective date.

In terms of case origin, there has been a greater increase in original filings in federal court of diversity contract class actions than in removals of such cases from state courts. The average increase of about sixteen cases per month in diversity contract class action cases after CAFA consisted of eleven original federal proceedings and five removals. In other words, plaintiffs after CAFA are increasingly filing diversity contract actions as original proceedings in federal court.

Because Hurricane Katrina occurred during the study period, it was necessary to examine whether insurance litigation following the worst natural disaster in United States history was driving these findings. For that reason, a similar analysis was conducted after excluding all contract cases filed in or removed to the Eastern District of Louisiana (the district in the affected region with the most diversity class action activity overall). Although the average number of monthly contract diversity cases declined slightly as a result, the findings were consistent: the average number of monthly original filings of contract class action cases increased after CAFA by almost ten cases per month, and the average number of monthly removals of contract class action cases increased after CAFA by more than four cases. In sum, most of the increase in diversity contract cases after CAFA was not a product of Hurricane Katrina insurance class actions.

Tort—Personal Injury and Property Damage

Figure 2b
 Class Action Filing and Removal Frequencies for Tort Cases
 in 88 Federal District Courts
 from July 1, 2001, through June 30, 2006

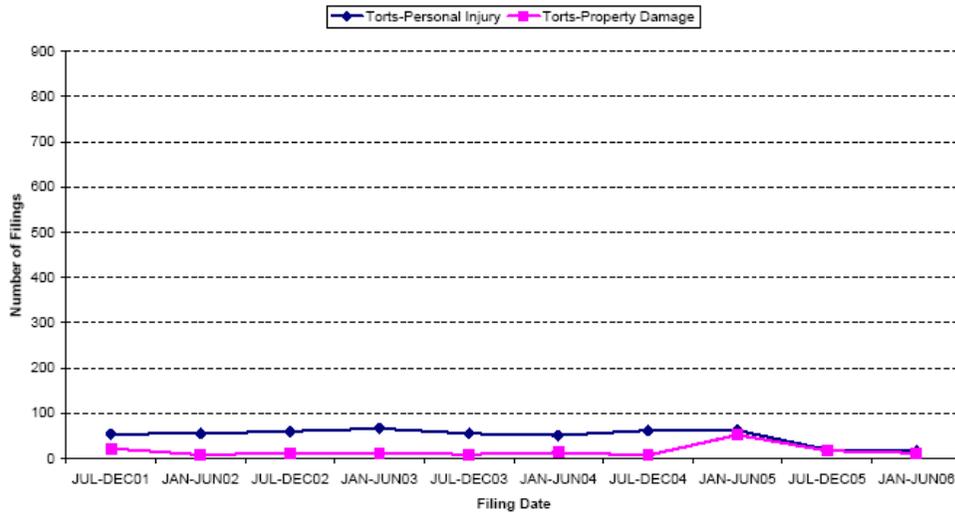


Figure 2b presents the number of class actions in two subcategories of tort cases: property damage and personal injury. The two show markedly different patterns. Property damage cases represented a very small number of cases for most of the study period, accounting for just thirteen class actions in January–June 2004 and seven in July–December 2004. In the first six months of 2005, however, there were fifty-two class actions in property damage cases in the eighty-eight study districts. A substantial portion of those cases, however, were actually filed before CAFA’s effective date. But in the next two six-month periods, property damage cases continued to be filed and removed at high levels—thirty-nine cases in July–December 2005 and twenty-six in January–June 2006. The timing of this increase points to CAFA as a likely explanation.

Personal injury cases, on the other hand, actually reached their lowest level in the study period in January–June 2006—forty-one cases, down from sixty-six cases in January–June 2005. The high point for personal injury class action filings and removals was in January–June 2003 when there were sixty-eight personal injury filings and removals. Unlike property damage filings and removals, personal injury filings

and removals have not increased since CAFA's effective date. Such cases face strict limits on class certification in federal courts.

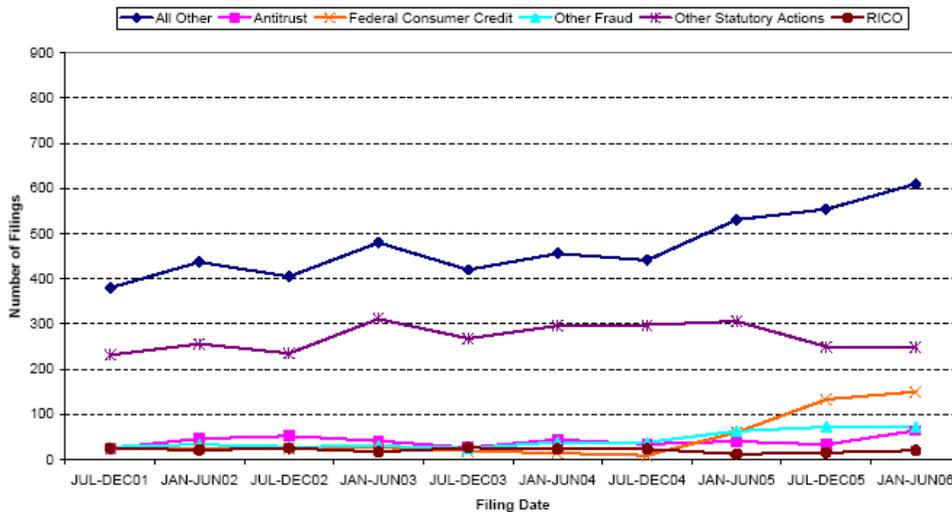
The increase in property damage cases has been driven by an increase in the number of such cases in federal court on the basis of diversity jurisdiction. Analysis of monthly property damage class actions reveals that diversity cases have increased, on average, from 1.7 cases per month before CAFA to 4.2 cases per month after CAFA. Property damage class actions based on federal question jurisdiction are essentially unchanged. The data also show, interestingly, that removals of diversity property damage cases are down slightly after CAFA. This indicates that the additional property damage class actions, after CAFA, were diversity cases filed as original proceedings in federal court.

Monthly personal injury tort class actions remained the same, on average, before and after CAFA. Those based on diversity jurisdiction averaged 6.7 class actions per month before its enactment and 6.8 per month after. It does not appear so far that CAFA has led to an increase in the number of personal injury class actions in federal court. Similarly, personal injury class actions based on federal question jurisdiction averaged 1.9 per month before CAFA and 1.8 after.

Other Actions

The other actions category illustrated in Figure 2c includes two broad sets of cases: federal statutory actions, including antitrust, RICO, Truth in Lending Act, Fair Credit Reporting Act, and Fair Debt Collection Practices Act; and state-law cases, including common-law fraud. Federal statutory actions generally are original actions filed in federal court based on federal question jurisdiction. State-law claims generally are based on diversity of citizenship jurisdiction and include a number of cases initially filed in state court and removed to federal court.

Figure 2c
Class Action Filing and Removal Frequencies for Other Actions
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



As Figure 2c shows, other fraud, federal consumer credit, and antitrust class actions were trending upward at the end of the study period. Of these categories, only the other fraud category contains cases based on diversity of citizenship. Further analysis indicates that other actions based on federal question jurisdiction have increased during the study period, driven almost entirely by an increase in original federal proceedings. This change in the filing of federal question class actions is not likely because of CAFA, which does not directly apply to such cases, but rather the result of other trends affecting federal question cases, trends which we will examine in the next phase of our study. Class action activity in antitrust, federal consumer

credit (including the consumer credit and truth in lending nature of suit)³ and other federal question nature-of-suit categories, including labor (Figure 2d) has increased, while class action activity in securities (Figure 2e) and civil rights (Figure 2f) cases has declined.

Looking at primarily state-law cases in Figure 2c, diversity class actions in the other actions category have increased in the CAFA period. On average, diversity cases have increased by slightly more than eight cases a month after CAFA, from 4.2 to 12.3. This increase is divided between original proceedings, which have increased, on average, by five cases, from 1.9 to 6.9 per month, and removals, which have increased by an average of over three cases, from 2.3 to 5.4.

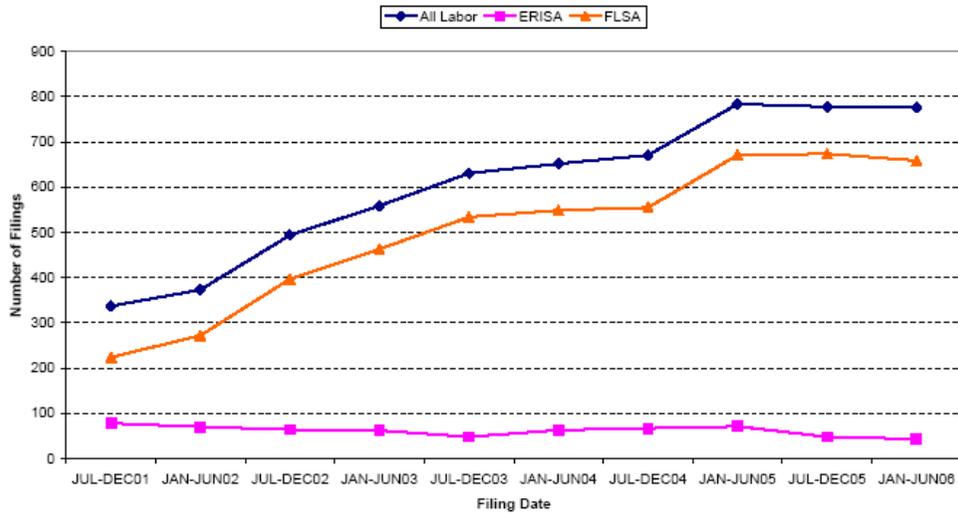
Most of these additional cases are of the other fraud type. The number of such cases filed in or removed to federal court has increased in the CAFA period, including a substantial number of state-law cases. As seen in Figure 2c, 72 other fraud class actions were brought into federal court in the six-month periods of July–December 2005 and January–June 2006. Sixty-three fraud class actions were brought in January–June 2005. These figures all exceed the 38 such cases that were brought in both January–June 2004 and July–December 2004.

Analysis of the monthly other fraud class actions reveals an interesting trend. The average number of diversity other fraud class actions has jumped from 2.3 cases per month before CAFA to 8.4 cases after CAFA. The average number of federal question other fraud class action cases, on the other hand, has remained relatively stable, at approximately three per month. This suggests that CAFA is responsible for the observed increase in other fraud class actions.

3. The apparent increase in federal consumer credit class actions after CAFA may be an artifact of the 2004 addition of a nature-of-suit code that encompasses cases filed under the Fair Credit Reporting Act and the Fair Debt Collection Practices Act.

Labor

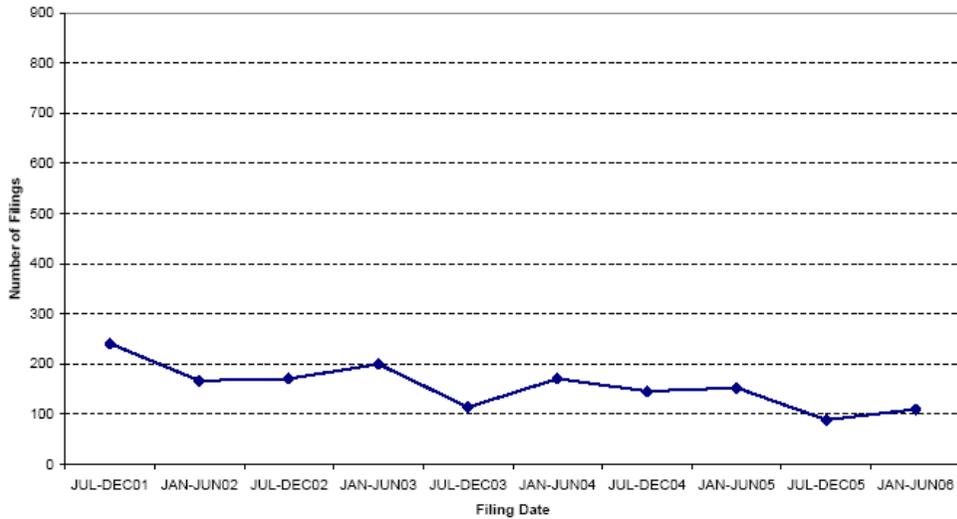
Figure 2d
 Class Action Filing and Removal Frequencies for Labor Cases
 in 88 Federal District Courts
 from July 1, 2001, to June 30, 2006



The labor category is composed of cases based on federal law, primarily the Fair Labor Standards Act (FLSA), but also the Employment Retirement Income Security Act (ERISA). Labor is also the largest single category of class actions identified in the study, accounting for fully 36% of class actions in the eighty-eight districts (see Figure 1). Figure 2d shows a clear pattern: labor class actions increased in every six-month period until July–December 2005, at which point the number of cases filed in or removed to federal court leveled off at just under 780 cases in both July–December 2005 and January–June 2006. There is no reason to think that CAFA affected labor cases, as none of the 6,056 labor class actions identified in the study were based on diversity of citizenship.

Securities

Figure 2e
Class Action Filing and Removal Frequencies for Securities Cases
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



As seen in Figure 2e, securities cases have fallen from 241 class actions in July–December 2001 to 110 in January–December 2006. Although the number of such cases has not fallen in every succeeding period, the downward trend is clear. In the CAFA period, on average, fewer than twenty securities class action cases were being filed each month in the eighty-eight study districts. As in the labor cases, it is unlikely that CAFA affected securities cases, as these cases are based on federal question jurisdiction rather than diversity jurisdiction.

Civil Rights

Figure 2f
Class Action Filing and Removal Frequencies for Civil Rights Cases
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006

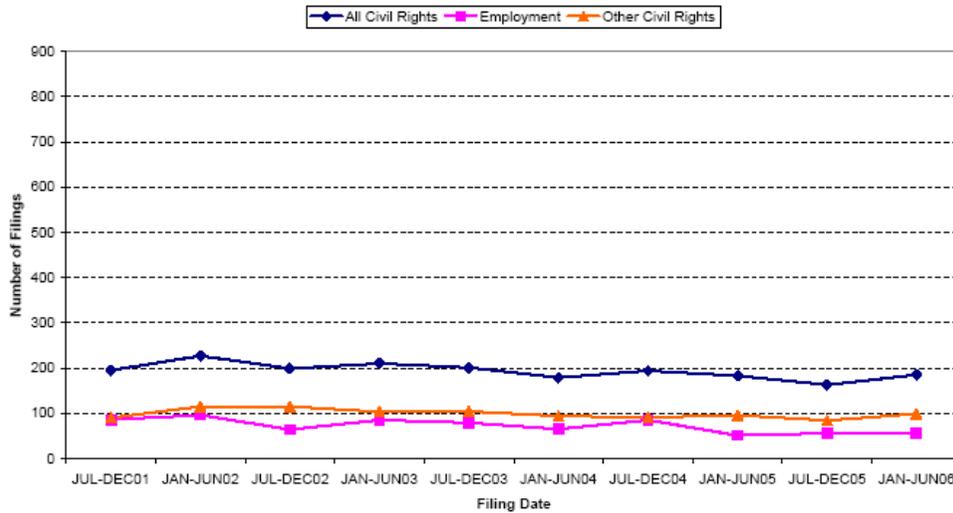


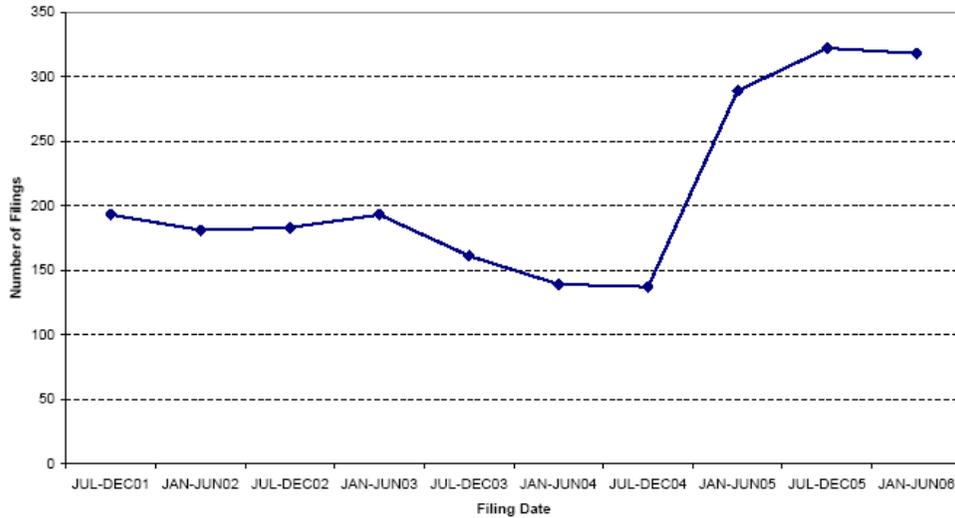
Figure 2f shows that civil rights cases have also been trending downward, declining from a high in the study period of 227 class actions in January–June 2002 to 163 in July–December 2005 and 185 in January–December 2006. As with labor and securities, it is unlikely that CAFA has had any effect on the filing and removal of such cases. Ninety-five percent of these cases are based on federal question jurisdiction.

Basis of federal jurisdiction

Figure 3 presents data on the filing and removal of class actions based on diversity of citizenship jurisdiction. The pattern seen in Figure 3 is clear. Before January–June 2005, the six-month period that includes CAFA’s effective date, the number of diversity cases filed in or removed to the eighty-eight study districts had been trending downward, from a high of 193 filings and removals in both July–December 2001 and January–June 2003, to 139 in January–June 2004 and 137 in July–December 2004. Starting with January–June 2005, however, the number of diversity cases filed in or removed to federal court increased to 289—almost 100 cases more than in the previ-

ous high in the study period. The number of diversity cases continued upward to 322 in July–December 2005 and then settled to 318 in January–June 2006.

Figure 3
Diversity Class Action Filings and Removals
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



Calendar year 2004 experienced the fewest diversity cases during the study period—totaling only 276. In the last twelve months of the study period, the number of diversity class actions was 640, more than double the 2004 figure and 75% greater than the 2002 figure (354). In all, 364 additional diversity cases were filed in or removed to federal court in the last twelve months of the study period compared to calendar year 2004. Given the observed downward trend in diversity cases before CAFA’s effective date, it is reasonable to conclude that CAFA is responsible for much of the observed increase in diversity class actions.

Analyzing the data in terms of monthly activity, the average number of diversity class actions increased from a pre-CAFA average of 27.0 cases per month to a post-CAFA average of 53.4 cases per month—an increase of 26.4 cases per month. Because this increase in the average number of filings and removals is based on the entire range of pre-CAFA data, and not just on the relatively low 2004 figures, it yields a lower estimate of CAFA’s impact than the comparison between calendar year 2004 and the last twelve months of the study period. Over a twelve-month period, the per month increase yields an estimate of approximately 317 additional class actions per

year, over the average annual number of class actions observed in diversity cases from July 2001 through January 2005. Again, this figure is smaller than the 364 case difference observed between calendar year 2004 and the last twelve-month period for which data is available because 2004 saw the lowest level of diversity cases in the study period. However, if one assumes that the downward trend observed in the pre-CAFA periods in Figure 3 would have continued, had CAFA not been enacted, an estimate of CAFA's impact on diversity case filings and removals greater than 317 cases per year would be reasonable.

As discussed in previous subsections, a great number of these additional diversity cases will be state-law contract and fraud class actions. Together, the observed increases in these two categories account for about three-quarters of the overall increase in diversity cases—with contracts increasing by about sixteen cases per month, or approximately 192 per year, and other fraud cases increasing by six cases per month, or approximately seventy-two cases per year.

Origin of cases

The potential effect of CAFA on the origin of cases—whether more diversity cases would be filed as original proceedings in federal court by plaintiff attorneys, or whether the federal courts would see more removals after CAFA—was and is hard to predict. On one hand, CAFA was designed to facilitate removal of class actions with state-law claims, particularly those involving the laws of more than one state, based on minimal diversity. CAFA also eased previous statutory restrictions on removal of cases and thus provided reason to expect that the number and percentage of cases removed would increase after CAFA. But these changes in the law would be as clear to plaintiff attorneys as to anyone. As removal becomes more predictable, plaintiff attorneys might decide to file actions initially in federal court to avoid the costs and delays associated with removal. Thus, in terms of diversity cases, CAFA potentially could increase removals or original proceedings, or both.

Figure 4
Origin of Diversity Class Action Filings and Removals
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006

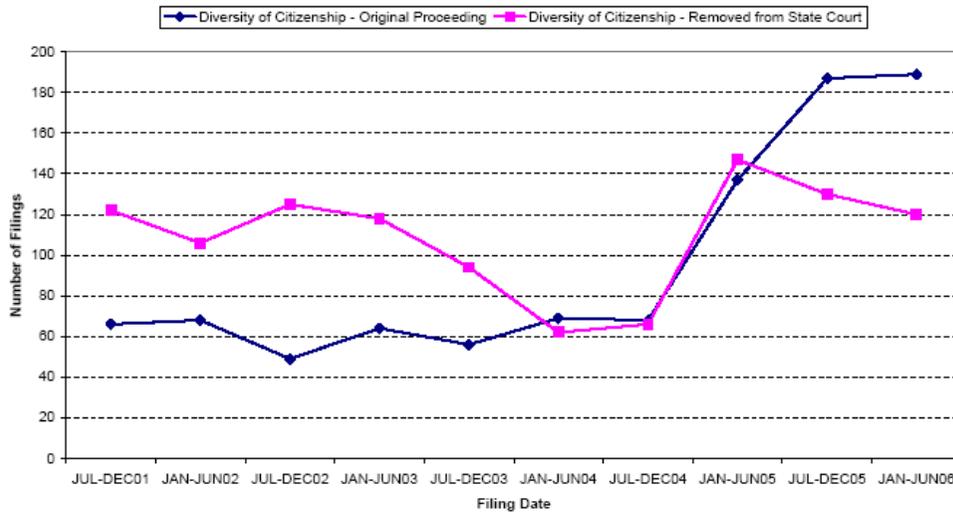


Figure 4 presents data on the origin of diversity cases in the eighty-eight district courts during the study period. As the figure indicates, original proceedings and removals exhibited very different patterns before CAFA’s enactment. Pre-CAFA, the number of original diversity actions in federal court was relatively stable, always be-

tween 50 and 70 filings every six months. The number of removals of diversity actions, on the other hand, had actually been falling during the study period, from 122 in July–December 2001 and a high of 125 in July–December 2002 to 94 in July–December 2003, 62 in January–June 2004, and 66 in July–December 2004. The downward trend seen earlier in Figure 3, then, appears to have resulted from a decrease in removals and not from any change in original proceedings. Starting in January–June 2005, the six-month period spanning CAFA’s effective date, both original and removed diversity actions increased. Original proceedings totaled 137 in January–June 2005, 187 in July–December 2005, and 189 in January–June 2006. Removals totaled 147 in January–June 2005, but then dropped to 130 in July–December 2005 and 120 in January–June 2006—a figure similar to the number of removals in earlier six-month periods. Interestingly, original diversity class actions outnumber diversity removals in both the July–December 2005 and January–June 2006 periods.

Similarly, in monthly filing and removal terms, most of the increase in diversity class actions after CAFA appears in the form of original actions filed in federal courts. Original diversity cases account for 19.7 of the 26.4 additional diversity cases per month; only 6.7 of the additional cases entered federal courts by removal from state courts. These average monthly figures, it should be noted, are based on the entire pre-CAFA period and not just on calendar year 2004, when removals were at their lowest point, so the average increase in removals is smaller than that of original proceedings. The increase in removals in Figure 4 is actually slightly larger than the increase in original proceedings in January–June 2005, although removals leveled off in the last two six-month periods and original proceedings continued to increase.

These findings suggest that plaintiff attorneys may be anticipating the removal of class actions on the basis of CAFA’s minimum diversity provisions and are filing them in federal court as original proceedings. In that way, plaintiff attorneys retain a choice of forum at least to the extent that, in a given case, jurisdiction and venue rules allow filing in more than one federal forum.

Circuit level impact

CAFA’s impact is expected to 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.”⁴ Plaintiffs may exercise their choice of forum by filing class actions as original actions in a district court within the circuit they view as having favorable procedural and legal rules, geographic connections to the litigation, or judges they perceive to be predisposed to ruling in favor of class certification.⁵ Defendants in turn may exercise their removal

4. Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tulane L. Rev. 1617, 1642 (2006).

5. 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, 602–03, 607–15 (2006).

rights in accordance with their own strategic perceptions about favorable procedural and legal rules and judicial predispositions.⁶

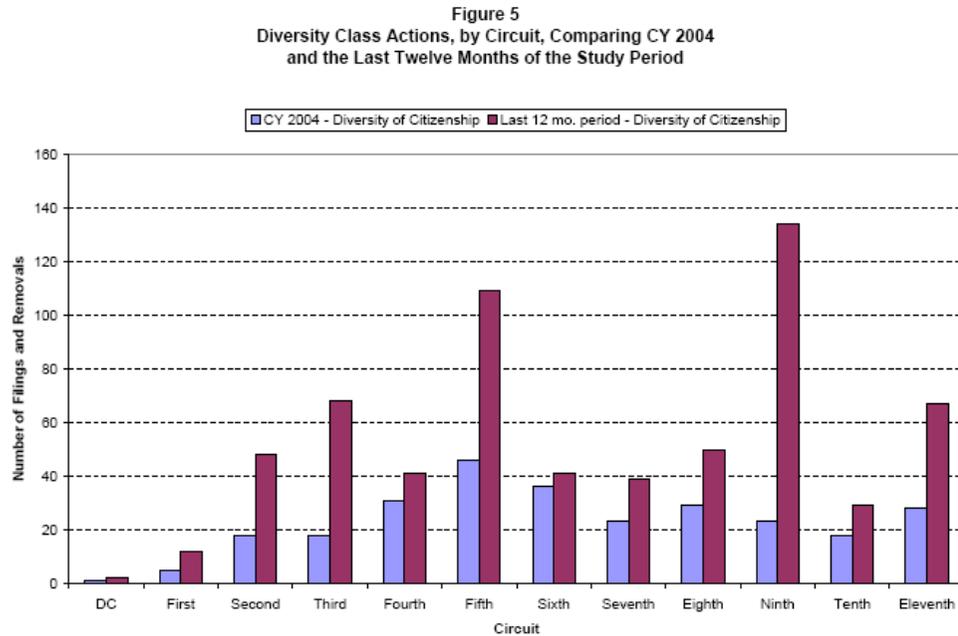


Figure 5 illustrates changes in diversity class actions in the study courts in each circuit by comparing one year of pre-CAFA filing and removal activity (2004, the last complete calendar year preceding enactment of CAFA) with one complete year of CAFA activity (July 1, 2005-June 30, 2006). The figure shows that the level of activity increased in the district courts in all twelve circuits. In seven of the twelve circuits the number of diversity-based class actions at least doubled. In the Ninth Circuit, the level of diversity class action activity in the district courts increased almost six-fold after CAFA, compared to calendar year 2004, accounting for 30% of the overall increase. Together, the district courts in the Fifth and Eleventh Circuits also experienced substantial increases, accounting for 28% of the overall increase. The district courts in the Third Circuit saw a tripling in the filing and removal of diversity class actions compared to calendar year 2004.

6. *Id.* at 615–18.

District court impact

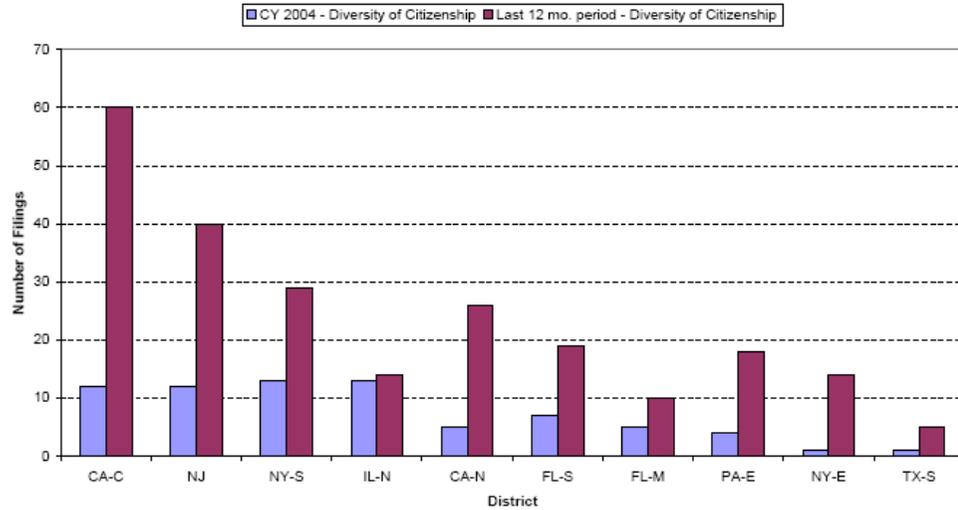
Choice of forum, of course, begins at the district court level. In examining data at the district court level one would expect plaintiff attorneys to compare the procedural and class certification rules of the circuit in which the district court sits with the procedural and class certification rules of the state in which the district court sits.⁷ While such an analysis is beyond the scope of our study, others might wish to analyze the forum-selection factors that might be driving the data reported here.

Of the eighty-eight study districts, sixty-two (70%) experienced increases in diversity class actions between calendar year 2004 and the last twelve-month period for which data is available; twelve (14%) experienced no change; and fourteen (16%) experienced decreases. The largest decrease was in South Carolina, where the number of diversity cases went from eighteen in 2004 to eleven from July 1, 2005, through June 30, 2006. Three other districts experienced decreases of four cases each.

Figure 6 presents data for the ten districts with the highest overall level of class action activity during the study period (measured in terms of all class actions, regardless of the basis of jurisdiction or nature-of-suit code). The ten largest overall districts, in order of the total number of *diversity* class action filings in the study period, are the Central District of California, the District of New Jersey, the Southern District of New York, the Northern District of Illinois, the Northern District of California, the Southern District of Florida, the Middle District of Florida, the Eastern District of Pennsylvania, the Eastern District of New York, and the Southern District of Texas. These ten districts account for 30.7% of the diversity class actions in the study. As in Figure 5, Figure 6 compares the number of diversity cases during a one-year period before CAFA (calendar year 2004) with the number of such cases during the last twelve-month period for which data is available, July 1, 2005, through June 30, 2006.

7. See, e.g., Willging & Wheatman, *supra* note 5, at 631–33.

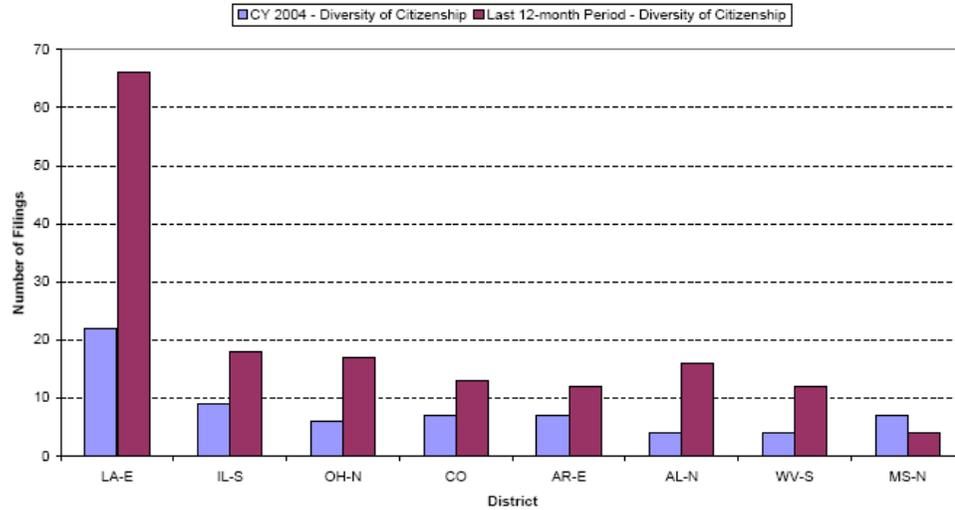
Figure 6
Diversity Class Actions Before and After CAFA
in the Ten Districts with the Largest Number of Class Actions
from July 1, 2001, to June 30, 2006



Nine of the ten largest districts saw at least twice as many diversity cases in the last twelve-month period as in calendar year 2004. The exception to this trend is the Northern District of Illinois, which went from thirteen to fourteen cases. These data strongly indicate that CAFA has had its intended effect of bringing state-law-based diversity class actions into the federal courts.

To further explore the effect of CAFA on diversity cases filed in and removed to the study districts, a similar analysis was performed for the eight additional study districts with more than forty diversity cases in the five-year study period (most of the study districts see very little diversity class action activity). Those eight districts are the Eastern District of Louisiana, the Southern District of Illinois, the Northern District of Ohio, the District of Colorado, the Eastern District of Arkansas, the Northern District of Alabama, the Southern District of West Virginia, and the Northern District of Mississippi. Figure 7 presents the number of diversity filings and removals in these eight districts in calendar 2004 and in the twelve-month period from July 1, 2005, through June 30, 2006.

Figure 7
Diversity Class Actions Before and After CAFA
in Eight Additional Districts with 40 or More Such Actions
from July 1, 2001, to June 30, 2006



Seven of the eight districts included in Figure 7 saw increases in diversity class action activity in the last twelve-month period for which data are available, compared to 2004. The exception is Mississippi Northern, which saw a decrease from seven to four. Although the increase in Louisiana Eastern may be largely the result of litigation based on Hurricane Katrina, it is likely that much of the increase in the six other districts is related to CAFA. It is particularly noteworthy that Illinois Southern, which includes Madison County, one of the “magnet” courts discussed in the run-up to CAFA, saw a doubling of diversity class actions, from nine to eighteen, between the two periods.

Conclusion

CAFA to date has had its intended effect of bringing more state-law diversity class actions into federal district courts. The CAFA period has seen a marked increase in the number of diversity class actions in federal court, both in terms of removals and original proceedings. Estimates based on the data in this report suggest that, conservatively, CAFA’s impact is an increase of more than 300 diversity class actions in federal court per year over pre-CAFA levels. These additional cases so far have primarily been contract and common-law fraud cases, plus a small number of property damage class actions. In the next phase of this study we will examine the impact of

those cases on judicial resources and will explore, in depth, most aspects of the class action litigation process.

Methods Appendix

To identify the population of class action cases, we first used national CM/ECF real-time replication databases to identify cases with class action related activities. 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 by 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 Federal Judicial Center, 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 in the case caption for the terms “similarly situated” or “representative of the class” among the parties’ names.

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 excluded cases dealing with prison conditions. We also excluded counseled habeas corpus class action cases, such as those alleging illegal detention or challenging deportation policies, because the number of such cases is so small that separate analysis is not warranted. We excluded all cases in which the United States was the plaintiff because such cases are almost always not Rule 23 class actions.

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 no information that the case was consolidated with another, we counted the case as a single or “unique” case and included it in the study. For all 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 staff⁸ 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 MDL “member” cases but we may find in our updates that some “unique” cases have been transferred, reducing the number of unique class actions for these districts.

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

The table below displays the number of unique, lead, and member cases.

Table 1. Frequency of Lead, Member, and Unique Cases Examined in Study of Class Action Activity from July 1, 2001, Through June 30, 2006, in 88 Federal Districts

Class Action Case Frequencies	Total	Percent
Lead–intradistrict consolidation	1,495	5.5
Lead–multidistrict (JPML) consolidation	196	1.0
Unique	15,009	56.5
Subtotal–Cases <i>included</i> in study	16,700	63.0
Member–intradistrict consolidation	5,934	22.3
Member–multidistrict (JPML) consolidation	3,907	14.7
Subtotal–Cases <i>excluded</i> from study	9,841	37.0
Total number of class actions	26,541	

Table 1 shows that approximately 37% of class actions overlapped with or duplicated other federal class actions.