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To: Advisory Committee on Civil Rules
From: Tom Willging and Emery Lee*
Date: May 22, 2006
Subject: Interim Progress Report on Class Action Fairness Act Study

Introduction

At the request of the 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) on the resources of the federal courts. The following report presents preliminary descriptive baseline information on the number, frequency, and types of cases filed as class actions in three federal district courts between July 1, 2001 through June 30, 2005. The districts are the Eastern District of Pennsylvania (PAE), based in Philadelphia; the Northern District of Illinois (ILN), based in Chicago; and the Northern District of California (CAN), based in San Francisco. These districts are three of the four districts included in the Center study of class actions terminated in 1992-94. The report also includes preliminary information on the frequency of removal of class actions from state to federal court in those three districts. This is the first of a series of interim reports to the Committee. We expect to present the next report in September 2006 and, if possible, to include data for all of the more than 80 district courts currently using the CM/ECF electronic filing system.

Caveat

The data presented below 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 the study period that had not as yet evidenced any such activity. We also expect that further analysis might uncover anomalies that we were unable to detect during this initial examination of three districts, 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," below.

Summary of Interim Results

Overall, interim data from three federal district courts show dramatic increases in class action activity from the levels for those same courts reported in the Center's initial study of class actions in

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1992-94. Our current data do not yet allow us to tell whether there have been significant changes in class action filings in federal district courts generally.

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

- two of the three districts experienced increases in the number of class actions filed in federal court during the six-month period that included CAFA's effective date. Most of this six-month period occurred after CAFA's February 18 effective date and one can infer that the increase took place after that date. If other districts follow this pattern one should expect substantial increases in federal class action activity to show up in future reports;
- contract and tort (personal injury and property damage) class actions constituted a negligible proportion of the class actions filed during the study period. If CAFA achieves its objective of shifting the litigation of state-based actions to federal courts, one can reasonably expect future data to show substantial increases in contract and tort class actions; and
- the overwhelming majority of federal class actions in the study were filed as original actions in federal court and were based on federal question jurisdiction. Few were removed from state court. These data suggest that plaintiff attorneys in state-law class actions newly subject to removal and expanded diversity jurisdiction under CAFA might choose to bypass the removal process and file cases as original actions in federal court.

The Center's next report should shed additional light on the patterns suggested by the interim data.

Interim results

After eliminating duplicative and overlapping filings, we found a total of 348 class actions filed in PAE, 1,062 in ILN, and 465 in CAN during the four-year study period—1,875 cases overall. At this early stage, the filing data appear to represent a dramatic increase in class action activity in the last decade or so. In the 1996 Federal Judicial Center study of class actions terminated in four federal districts (the above three courts plus the Southern District of Florida) over a two-year period, we found a total of 407 cases in the four districts combined.¹ Though the time period in the current study was twice as long and the cases studied were filings and not terminations, those differences do not account for the more than fourfold difference in the number of cases.

After we collect data from all of the more than 80 districts in the current study, we will compare national filing rates with the data compiled for the Advisory Committee in the *Amchem/Ortiz* study in 2002. That study reported that approximately 1,450 class actions were filed in 80 federal district courts during the six months immediately prior to the current study, that is between January 1, 2001 and June 30, 2001.²

Filing trends. All of the charts in this report present data measured at six-month intervals and

¹ Thomas E. Willging, Loral L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts 7* (Federal Judicial Center 1996).

² Bob Niemic & Tom Willging, *Effects of Amchem/Ortiz on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules*, September 9, 2002, at pp. 8-9, available at http://www.fjc.gov/library/fjc_catalog.nsf under "Class action litigation."

connected graphically by lines. Chart 1 presents data on the filing of class actions in the three federal district courts between July 1, 2001 and June 30, 2005. CAFA went into effect on February 18, 2005. Widespread reports of increased class action filings in state courts prior to CAFA's effective date would lead one to expect that federal filings during this period might be lower than in prior years. Commentators theorized that plaintiffs' attorneys would file actions in state courts, deplete their inventory of class actions prior to February 18, 2005 and have fewer class actions to file in the following months. On the other hand, the breadth of the statute gives ample reason to anticipate that CAFA will ultimately achieve its goal of facilitating the removal of class actions from state to federal courts, thereby increasing federal class action activity in the long run.

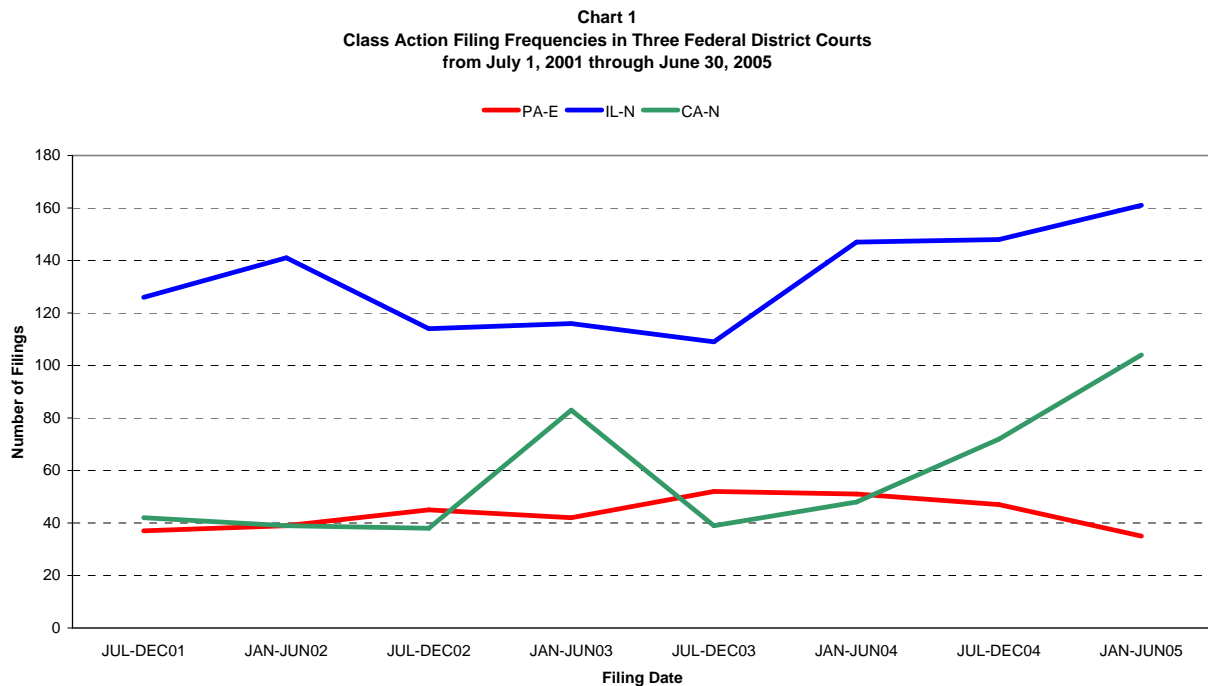


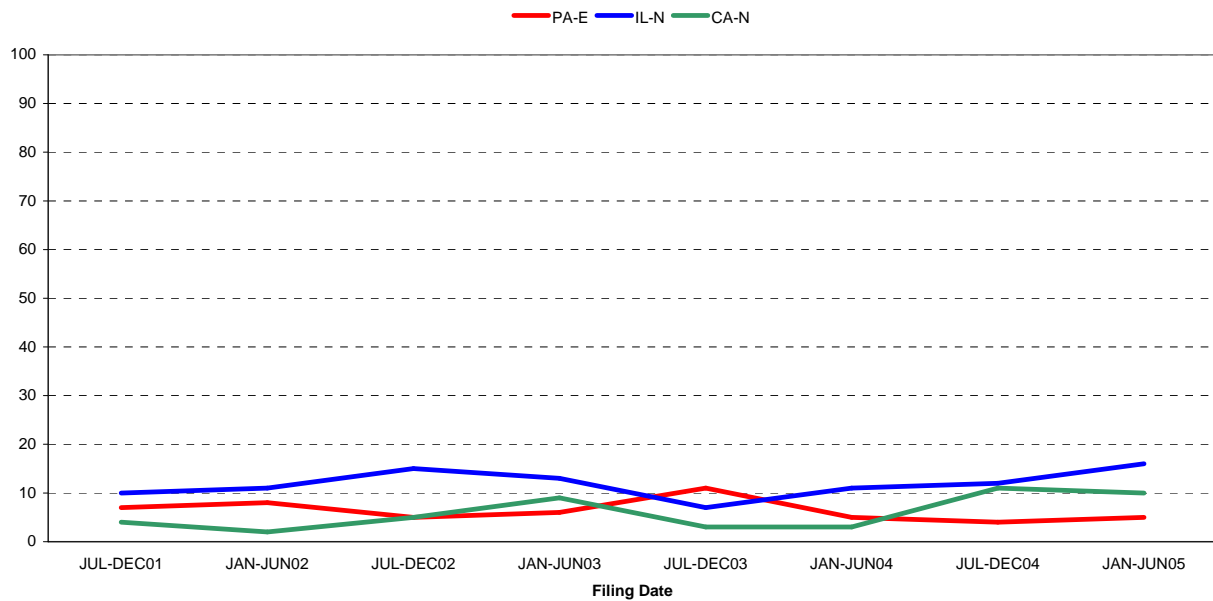
Chart 1 reveals that, contrary to the expectations of some, class action filings increased in CAN and ILN during the first six months of 2005. The increase brought both district courts to their highest level of class action filing activity during the four-year study period. In those districts, CAFA may have had an immediate effect—a proposition we will test further. In PAE, filings declined by a relatively small number during the first half of 2005. In the next sections we will examine the changes in the types of cases filed in the three districts during the study. Further testing, using time-series analyses, will enable us to examine more closely the relationship between the legislation and class action filings in federal district courts nationally.

Nature of suit. The series of charts beginning with Chart 2a presents class action filing data for various types of cases during the same time period. We grouped all cases into six groups: civil rights, contracts, labor, personal injury/property damage, securities, and “other” (which are mostly federal statutory actions). 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 “civil rights-employment” and “civil rights-housing” are collapsed into a single category.

The discussion of the data represented in Charts 2a through 2f will focus on the number of class action cases filed in the most recent six-month period, January-June 2005, during which CAFA became effective. 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), one might look to the contract (Chart 2b) and personal injury/property damage (Chart 2d) cases as the probable focal points for any CAFA impact. As those charts show, both of those categories currently show extremely low levels of activity in all three districts.

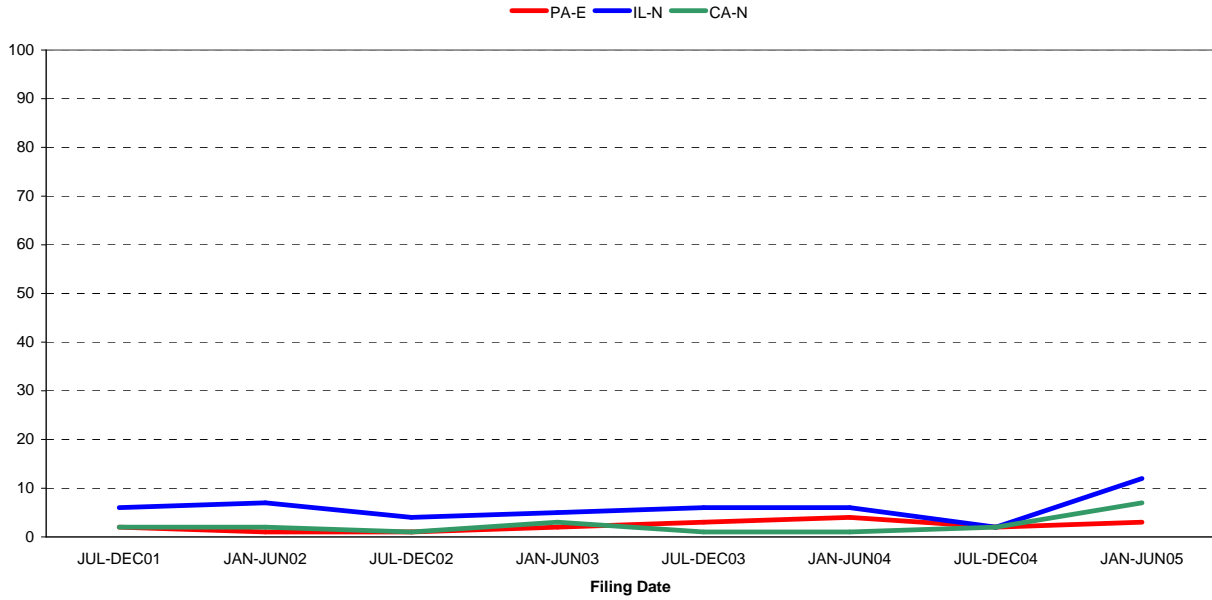
Overall, ILN saw increases in class action filings in civil rights and contract cases; in most other categories the number of filings in January-June 2005 was basically the same as in the previous six months. CAN saw increased class action filings in every category of case discussed *infra* except for civil rights. PAE saw decreased class action filings in securities cases and in the other statutory actions category; as with ILN, in the remaining categories the number of filings in January-June 2005 was similar to that in July-December 2004.

Chart 2a
Class Action Filing Frequencies for Civil Rights Cases in Three Federal District Courts
from July 1, 2001 through June 30, 2005



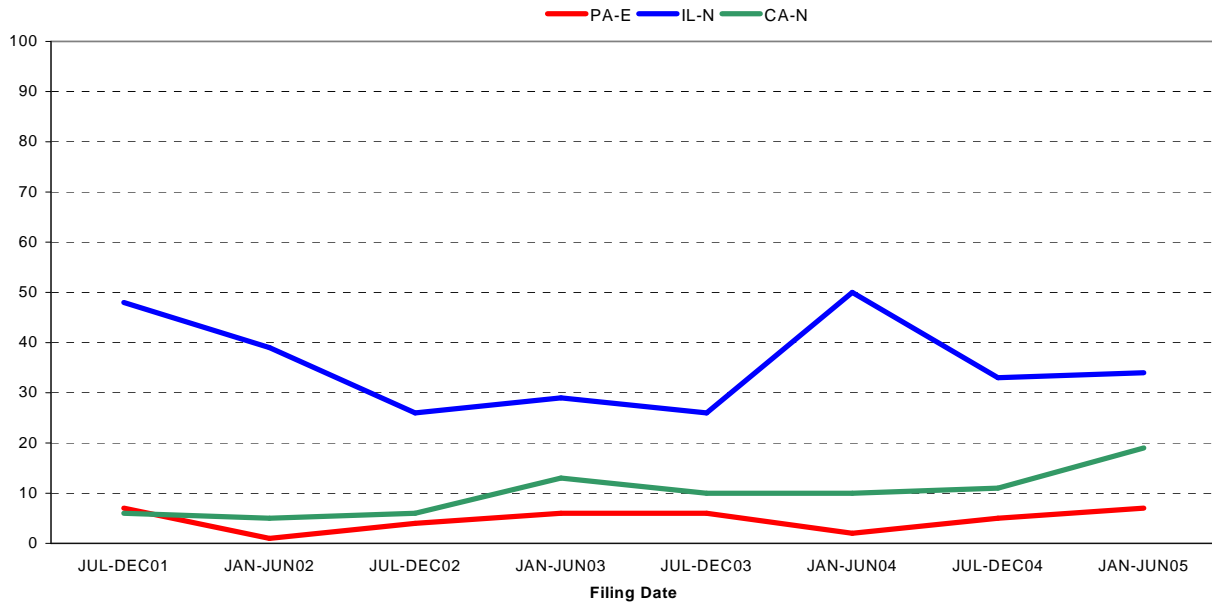
ILN saw an increase of 4 additional civil rights class action filings in January-June 2005 compared to July-December 2004, which represents a 33 percent increase. The number of filings in January-June 2005 in the other two districts was consistent with the previous six-month period, although there was variation in the number of civil rights class action cases filed in all three districts in earlier six-month periods.

Chart 2b
Class Action Filing Frequencies for Contract Cases in Three Federal District Courts
from July 1, 2001 through June 30, 2005



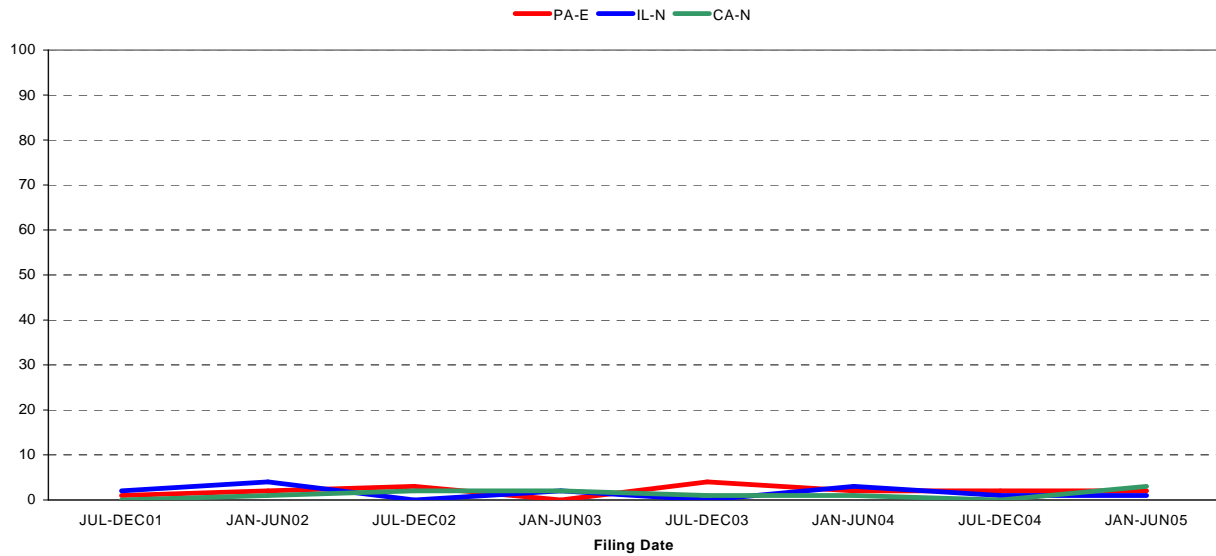
As Chart 2b illustrates, contract filings make up a small part of the total number of class action filings. All three districts saw an increase in contract class action filings in January-June 2005, with an increase in ILN from 2 filings in July-December 2004 to 12 in January-June 2005.

Chart 2c
Class Action Filing Frequencies for Labor Cases in Three Federal District Courts
from July 1, 2001 through June 30, 2005



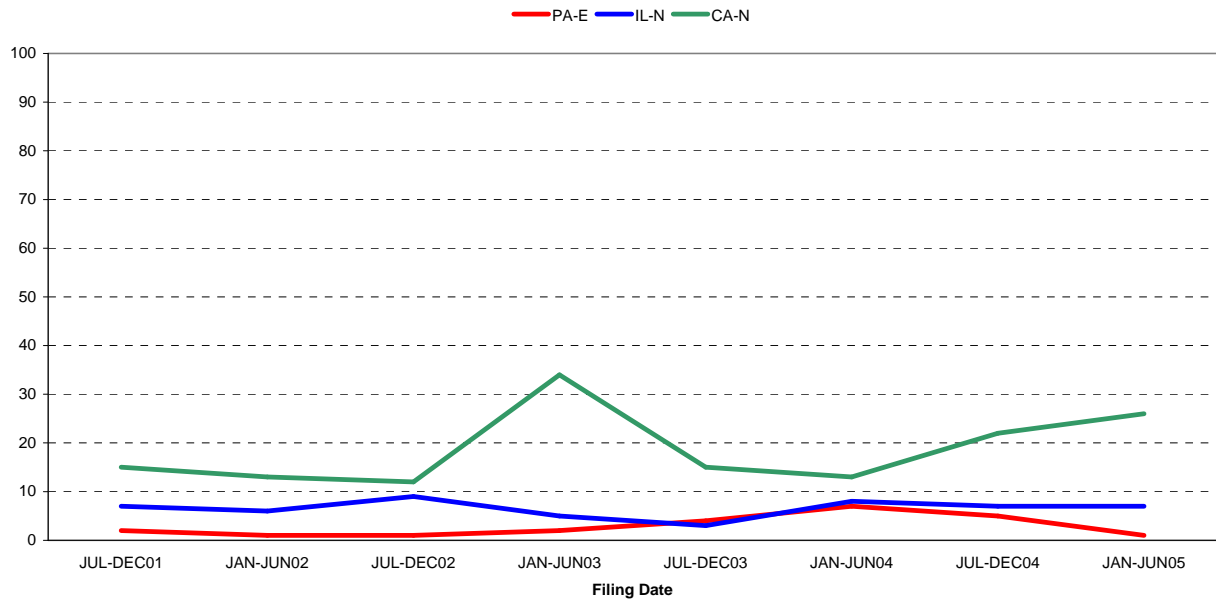
The number of labor class action cases filed in CAN increased from 11 in July-December 2004 to 19 in January-June 2005. In the other two districts, the number of labor class action filings in January-June 2005 was basically consistent with the numbers in July-December 2004, although ILN did experience a sharp spike in the filing of labor class action cases in January-June 2004, returning the number of such cases to that experienced in July-December 2001.

Chart 2d
Class Action Frequencies for Personal Injury and Property Damage Cases in Three Federal District Courts
from July 1, 2001 through June 30, 2005

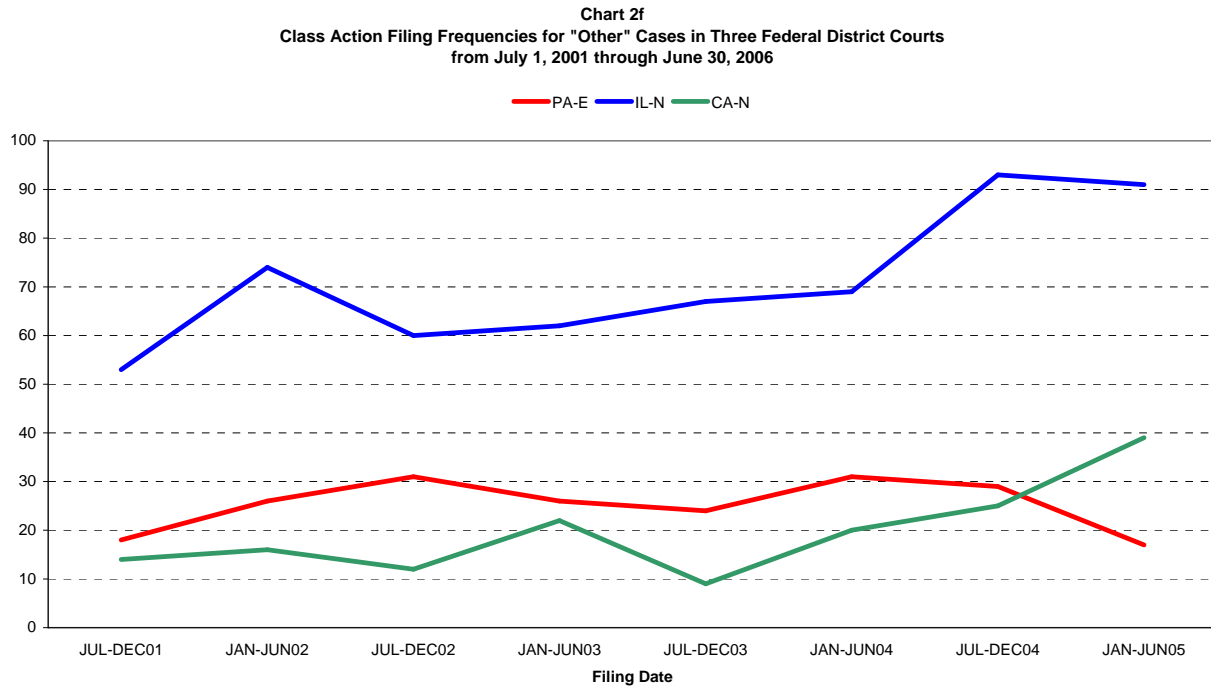


The flatness of the lines in Chart 2d and their location at the bottom of the chart tell the story. None of the districts has had more than four personal injury and property damage cases in any of the six-month periods covered by this study.

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



The Northern District of California saw a sharp spike in securities class action filings in January-June 2003, but it also experienced increased filings in this category in July-December 2004 and again in January-June 2005. The Northern District of Illinois saw no change in the number of filings in January-June 2005, compared to the previous two six-month periods, and the Eastern District of Pennsylvania actually saw a decrease in the number of securities class action filings from 5 in July-December 2004 to only 1 in January-June 2005.



The other statutory actions category includes a wide range of federal statutory actions, including antitrust, RICO, Federal Debt Collection Practices Act, and Truth-in-Lending Act cases. CAN experienced an increase in class action filings in other statutory actions from 25 in July-December 2004 to 39 in January-June 2005. PAE and ILN saw a decrease in the number of filings of such cases during the same period. The filings in PAE decreased by 41 percent, from 29 in July-December 2004 to 17 in January-June 2005.

Origin of cases. Chart 3 presents the number of cases filed in the three federal district courts as original federal actions and the number of cases removed from state courts to those federal district courts. Chart 4 will present data regarding the basis for federal jurisdiction. CAFA was designed to facilitate removal of class actions with state law claims, particularly those involving the laws of more than a single state. The data in Charts 3 and 4 serve primarily as baseline information

from which to measure whether, as some expect, removal of class actions will increase in the future.

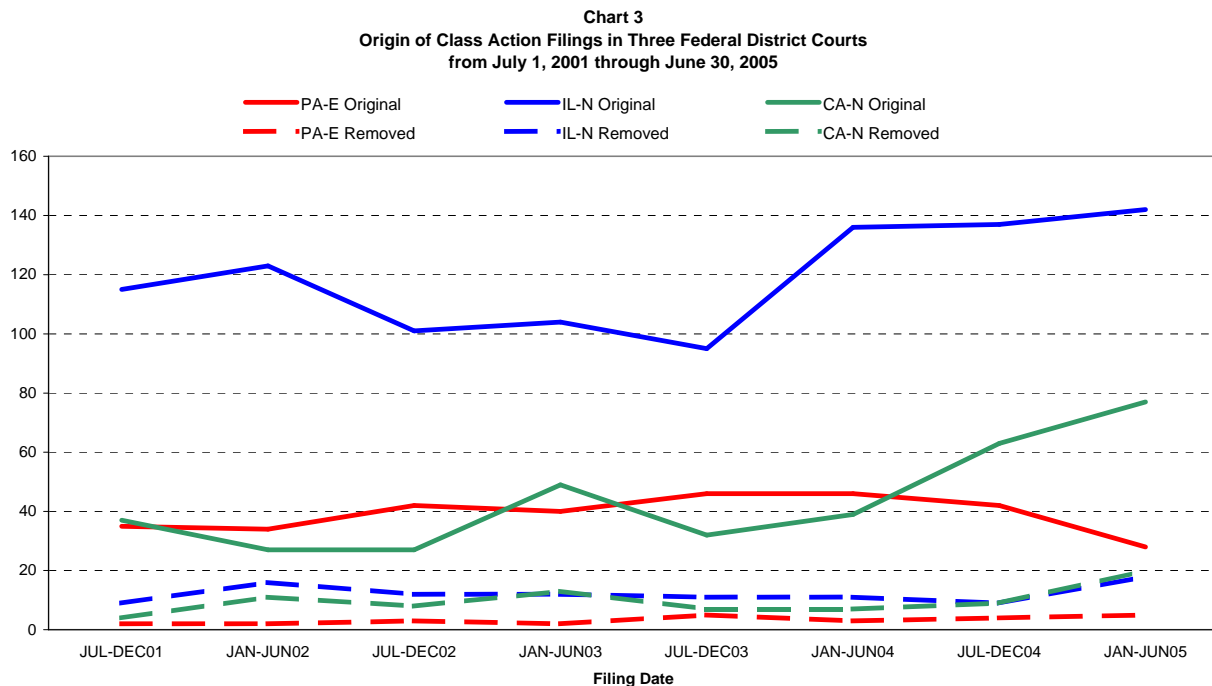


Chart 3 shows that the vast majority of class actions in federal courts result from original filings and that relatively few cases were removed from state to federal court during the study period. The proportion of original filings to removals in ILN far exceed that of the other two courts. This suggests that ILN has experienced a higher proportion of class action claims that arise under federal law (see Chart 4).

CAFA eases previous statutory restrictions on removal of cases and gives reason to expect an increase in the percentage of cases that are removed. On the other hand, CAFA makes removal more predictable and might encourage plaintiffs' attorneys to file actions in the federal court of their choice and avoid the removal step altogether. The ultimate question is whether more state-based class action claims end up in federal courts—a question that will require examination of complaints and other documents in phase 2 of this study.

Basis of federal jurisdiction. Chart 4 presents the basis of federal jurisdiction for class action cases filed in the three federal district courts during the study period. 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 treated as class actions for purposes of this study because they are governed by statute rather than by Federal Rule of Civil Procedure 23.

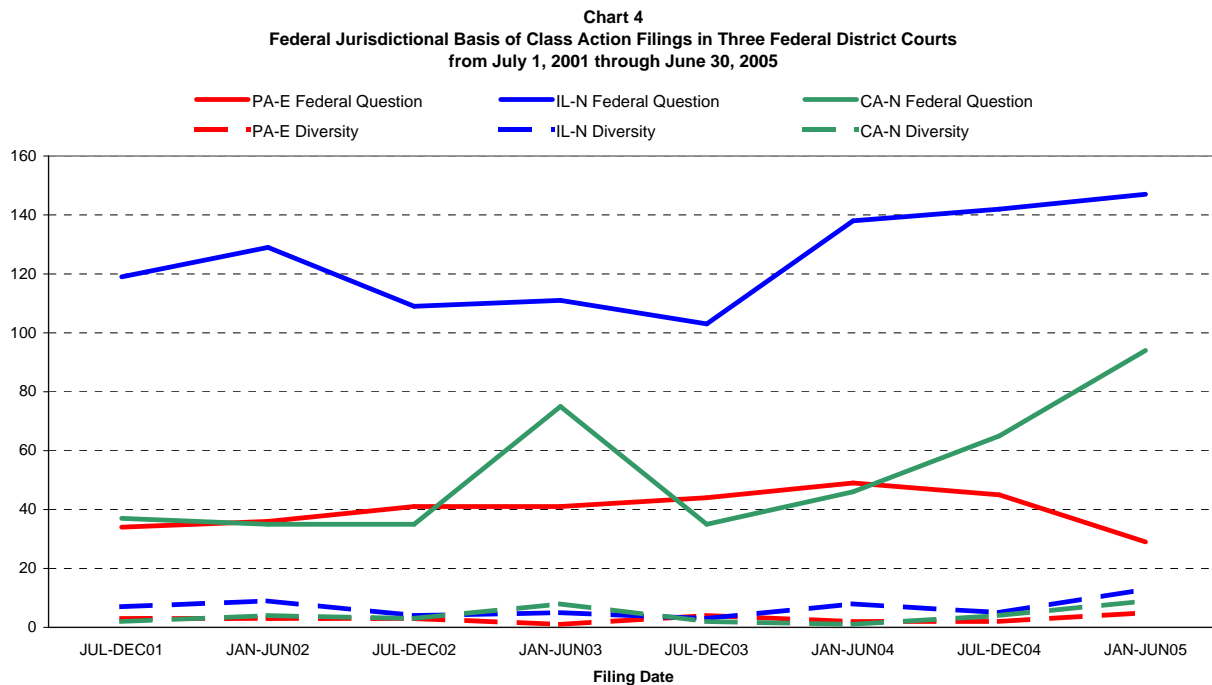


Chart 4 shows that the vast majority of class actions filed in the three federal districts relied on federal question jurisdiction. As expected based on the data in Chart 3, ILN has a higher proportion of federal question to diversity class actions than the other two districts.

Data from Charts 3 and 4 suggest that plaintiffs who file federal question cases or mixed federal question/state law cases tend to file those claims in federal court as original matters; few appear to be filed in state court and removed (this study, of course, cannot determine whether some cases might be filed in state court and not removed). CAFA expands federal jurisdiction over class actions and expands the ability of defendants to remove cases. Class actions now subject to removal under CAFA might be filed as original actions in federal courts. In other words, plaintiff attorneys might show a preference for filing removable cases (i.e., those with federal subject matter jurisdiction under CAFA) in federal court in the first instance.

Methods

We used a number of methods for identifying the population of class action cases. Primarily we used national CM/ECF real-time back-up, or 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 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 Administrative Office (AO). We also included all cases identified as class actions by CourtLink (an

electronic service produced by Lexis/Nexis that identifies class actions via PACER docket records) by searching 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. 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.

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, we marked the case as a “unique” or single 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 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. 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 three 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 Three Federal Districts

Class Action Case Filing Frequencies	PAE	ILN	CAN	Total
Lead-intradistrict consolidation	28	83	130	241
Lead-multidistrict (JPML) consolidation	6	8	3	17
Unique	314	971	332	1617
Subtotal-Cases <u>included</u> in study	348	1062	465	1875
Member-intradistrict consolidation	102	245	532	879
Member-multidistrict (JPML) consolidation	270	54	25	349
Member-interdistrict transfer by change of venue	58	12	17	87
Subtotal-Cases <u>excluded</u> from study	430	311	574	1315
<u>Total</u> number of class action filings examined	778	1373	1039	3190

Table 1 shows that approximately 41% of the class actions overlapped or duplicated other class actions filed in a federal district court.