

The Impact of the Class Action Fairness Act of 2005 on the Federal Courts

*Fourth Interim Report to the
Judicial Conference Advisory Committee on Civil Rules*

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Introduction

The Class Action Fairness Act of 2005 (CAFA) (Pub. L. No. 109-2, 119 Stat. 4 (2005)) expanded the federal courts' diversity of citizenship jurisdiction over class action litigation. Congress's intent was, in part, to shift some class action litigation from the state courts to the federal courts. Passage of the Act sparked concerns about the impact of these additional class actions on the federal courts' procedures and workload. In light of these concerns, the Judicial Conference's Advisory Committee on Civil Rules (Advisory Committee)¹ asked the Federal Judicial Center (FJC) to study the impact of CAFA on the federal courts. This report marks the end of the first phase of the FJC study on the impact of CAFA on the number of class actions initiated in the federal courts. This report presents interim findings on class actions filings and removals in the federal courts from July 1, 2001, through June 30, 2007. These findings are consistent with the hypothesis that CAFA has caused an increased number of class actions based on diversity of citizenship jurisdiction to be filed in the federal courts.

The second and third phases of the study will examine class action litigation activity in the district and appellate courts in a sample of cases drawn from the population of cases identified during this first phase. These phases will focus on identifying any impact CAFA may have had on judicial activity and resources needed to manage and resolve class actions. The next interim report, planned for the fall of 2008, will introduce the second phase by presenting findings on class action litigation in the district and appellate courts from a sample of terminated cases filed before CAFA's effective date. 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.

Summary of Findings

Overall, we found a 72 percent increase in class action activity in the eighty-eight district courts we studied (see Appendix A: Methods) when we compared the period January–June 2007 with the period July–December 2001 (see Figure 1 in Appendix B). Much of that increase was in federal question cases, especially labor class actions and class actions filed under federal consumer protection statutes. Since CAFA's effective date in February 2005, however, we have also observed an increase in the number of class actions initiated in the federal courts on the basis of diversity of citizenship jurisdiction.

The most important findings of our study were the following:

- There has been a dramatic increase in the number of diversity class actions filed as original proceedings in the federal courts in the post-CAFA period. The pre-

1. In requesting the study, the Advisory Committee acted in consultation with the chairs of the Judicial Conference Committees on the Administration of the Bankruptcy System, Court Administration and Case Management, Federal-State Jurisdiction, Judicial Resources, and Rules of Practice and Procedure.

CAFA average of such filings per month was 11.9; the post-CAFA average was 34.5 per month (see Figures 2 and 3 in Appendix B).

- Diversity class action removals increased in the immediate post-CAFA period over their 2004 levels but have been trending downward since 2005. In the last months of the study period, diversity removals were at levels similar to those in the pre-CAFA period (see Figures 2 and 3 in Appendix B).
- The increase in diversity class action original proceedings was widespread. Diversity class action original proceedings increased overall in the districts in eleven of the twelve circuits, when we compared filings for calendar years 2002 and 2003 with those for the last two years of the study period, July 1, 2005–June 30, 2007 (see Figure 4 in Appendix B). Diversity class action original proceedings also increased between the two time periods in all but one of the districts with substantial numbers of diversity class actions during the study period (see Figures 5 and 6 in Appendix B).
- The results we found for diversity class action removals were more varied. When we compared removals in calendar years 2002 and 2003 with those in the last two years of the study period, we found that they decreased in the last two years of the study period in five circuits (see Figure 4). However, when we analyzed the districts separately, we found that most of the districts with substantial numbers of diversity class actions experienced some increase in diversity removals (see Figures 5 and 6 in Appendix B).
- The increase in diversity class actions is due largely to increases in the numbers of contracts, consumer protection/fraud, and torts-property damage class actions being filed in or removed to federal court in the post-CAFA period. Torts-personal injury cases have not increased in the post-CAFA period (see Figure 7 in Appendix B).

Findings

To study the impact of CAFA on the federal courts, we found it necessary to first identify the total population of class actions filed in and removed to the federal courts during the study period, July 1, 2001, through June 30, 2007. For this reason, we are also able to present findings with respect to overall class action activity in the federal courts in this report. Some of these findings are not directly relevant to the impact of CAFA on the federal courts. For example, in the next section we present findings with respect to securities class actions, a class of cases specifically excluded from CAFA’s provisions. The bulk of the report, however, focuses on the category of class actions most likely to be impacted by CAFA—those filed or removed under the federal courts’ diversity of citizenship jurisdiction.

In the study, we defined the term “class action” broadly to include all cases filed as original proceedings in or removed from the state courts to the federal courts in which class action allegations were raised at any stage of the proceedings. The term is not limited to cases in which a motion for class certification was filed or granted.

Overall class action activity

Figure 1, in Appendix B, displays class action filings and removals occurring in eighty-eight federal district courts. These class action cases are grouped into six-month periods and separated into areas that represent categories of cases based on nature of suit. The nature of suit categories are contracts, torts-property damage, torts-personal injury, civil rights, consumer protection/fraud, securities, labor, and other/undetermined. The top line of the shaded areas represents the total number of class actions initiated in the federal courts during each six-month period, once overlapping and duplicative class actions have been excluded (for a detailed discussion see Appendix A).

As Figure 1 makes clear, the number of class actions filed in or removed to the federal courts increased over the study period, from 1,370 in July–December 2001, the first six-month period for which data are available, to 2,354 in January–June 2007, the last six-month period for which data are available—a 72 percent increase. In the Third Interim Report, overall class action activity was shown to have increased 46 percent between July–December 2001 and January–June 2006. As Figure 1 shows, after dipping slightly in the last six months of 2006, class action filings and removals in the federal courts reached a new high in the first six months of 2007. Indeed, total filings and removals in the period January–June 2007 were 14 percent higher than in the period January–June 2006.

Much of the increase in total class action activity in the federal courts is driven by increases in filings of class actions based on federal question jurisdiction and thus not directly attributable to CAFA's expansion of the federal courts' diversity of citizenship jurisdiction.² The most notable increase of this kind in Figure 1 is in labor class actions. Most of the class actions in this category are opt-in collective actions brought under the Fair Labor Standards Act (FLSA) and not, with a few exceptions, Rule 23 class actions. As such, FLSA actions may have a different impact on the courts than Rule 23 class actions, an issue to be examined in future reports. The increase in labor class actions, both in absolute numbers and as a proportion of all class action activity in the federal courts, is striking. In absolute numbers, labor class actions increased from 337 in the first six-month period to 1,104 in the last six-month period—a 228 percent increase. (The January–June 2007 figure for labor class actions is rather large, a 36 percent increase over the figure for July–December 2006. But even if we compare July–December 2001 with July–December 2006, the increase is still 141 percent.)

Labor class actions also represented a much larger proportion of all class action activity in the federal courts in January–June 2007 than they did at the beginning of the study period; this is evident in the much larger area, relative to the other areas, in Fig-

2. Overall federal question class action activity increased by 74 percent from July–December 2001 through January–June 2007, and overall diversity of citizenship jurisdiction activity increased 72 percent, comparing the same periods. As we note in the discussion of Figure 2, most class actions filed in or removed to the federal courts are based on federal question jurisdiction; accordingly, most of the overall increase in class action activity from the period July–December 2001 through the period January–June 2007, about 86 percent, was accounted for by the increase in federal question class action filings and removals.

ure 1, especially on the right side of the figure. In July–December 2001, labor class actions constituted almost one-quarter of all class actions identified, 24.6 percent. In January–June 2007, labor class actions constituted almost one-half of all class actions identified, 46.9 percent. We have little more to say about labor class actions in this report, but these are remarkable trends.

The consumer protection/fraud class actions in Figure 1 also increased as a percentage of all filings and removals over the study period. This category constituted 20.8 percent of all class action filings and removals in January–June 2007, up from 13.9 percent of all class actions in July–December 2001. In absolute numbers, consumer protection/fraud class actions increased from 191 filed or removed in July–December 2001 to 489 in January–June 2007, an increase of 156 percent. However, as we discussed in the November 2007 progress report to the Advisory Committee,³ the addition during the study period of a new nature of suit code for cases based on federal debt collection and credit reporting statutes may account for some of this observed increase, especially in the number of federal question consumer credit class actions. Consumer protection/fraud class actions based on diversity of citizenship jurisdiction are examined more fully below in the discussion of nature of suit codes for diversity cases only.

Figure 1 also shows that contracts class actions saw an increase in absolute numbers during the study period, from 142 in July–December 2001 to 213 in January–June 2007 (and 249 in July–December 2006), an increase of 50 percent (an increase of 75 percent when comparing July–December 2006 with July–December 2001). Still, given the large increases in labor and consumer protection/fraud class actions, contracts class actions decreased slightly as a percentage of all class action activity, from 10.4 percent in July–December 2001 to 9.0 percent in January–June 2007. Contracts class actions now constitute a majority of the diversity class actions filed in or removed to the federal courts, a finding we discuss below in connection with Figure 7.

As Figure 1 shows, a number of nature of suit categories actually declined in absolute numbers during the study period. Securities class actions declined from a peak of 240 in July–December 2001 to 85 in January–June 2007, a decrease of 65 percent. Securities class actions declined as a proportion of all class action activity, from 17.5 percent of all class actions in the federal courts in July–December 2001 to 3.6 percent of all class actions in January–June 2007. There is no reason to think that these trends are in any way related to CAFA. Moreover, it is worth noting that the period July–December 2001 may be an outlier in terms of the number of securities class actions; the largest observed single-month figure for filings of such class actions was that for November 2001. More securities class actions were filed in that month than in the six months from January to July 2007. In other words, using July–December 2001 as the

3. Federal Judicial Center, Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts, November 2007, at 4–6. Judges and court staff can find the report on the Center’s intranet site, FJC Online, at cwn.fjc.dcn. The report is also available on the Internet at www.fjc.gov under “Publications.”

baseline for comparison may make the drop-off in the numbers of such class actions appear more dramatic than it really is.

Like securities class actions, civil rights class actions declined in absolute numbers, from 195 in July–December 2001 to 162 in January–June 2007, a decrease of 17 percent. Civil rights class actions constituted 6.9 percent of total class action filings and removals in January–June 2007, compared with 14.2 percent in July–December 2001. As one might expect, few of the civil rights class actions identified in the study were filed or removed on the basis of diversity of citizenship jurisdiction. There is no reason to think the overall decline in the numbers of such actions is related to CAFA.

Although the scale of Figure 1 makes it somewhat difficult to see, torts-personal injury class actions declined from 52 in July–December 2001 to 35 in January–June 2007, a decrease of 33 percent. Personal injury class actions constituted 1.5 percent of class action activity in January–June 2007, down from 3.8 percent in July–December 2001. Torts-property damage class actions increased slightly in the middle of the study period, but in the last six-month period were at approximately the same level as they were in the first six-month period—33 such class actions were filed or removed in July–December 2001, in comparison with 29 in January–December 2007. The increase in the middle of the study period occurred in January–June 2005, the same six-month period in which CAFA was enacted. The timing suggests that, at least in part, this increase was related to CAFA. We examine property damage class actions based on diversity jurisdiction below in the discussion of Figure 7; we found that the number of such cases has increased, slightly, in the entire post-CAFA period. Even so, property damage class actions constituted 1.2 percent of all class action activity in January–June 2007, compared with 2.4 percent in July–December 2001. As Figure 1 indicates, class actions based on tort theories do not account for a large percentage of class actions in the federal courts, once overlapping and duplicative filings are excluded from the analysis.

Finally, the number of other/undetermined class actions increased by 32 percent, from 180 in July–December 2001 to 237 in January–June 2007. Other/undetermined class actions constituted 10.1 percent of all class actions in January–June 2007, compared with 13.1 percent in July–December 2001. This category of class actions includes both class actions based on federal statutes that do not fit in other categories of cases and class actions for which meaningful nature of suit information is not available. As explained in the November 2007 progress report,⁴ we have attempted to derive as much information about nature of suit as possible. Because most of these cases are based on federal question jurisdiction, the lack of meaningful nature of suit information most likely does not impair our analysis of the impact of CAFA on the federal courts.

Class action activity by origin and basis of jurisdiction

Figure 2, in Appendix B, displays monthly filings and removals from July 2001 through June 2007, separated into areas representing four categories of class actions:

4. *Id.* at 3–4.

federal question original proceedings, federal question removals, diversity of citizenship original proceedings, and diversity of citizenship removals.⁵ As in Figure 1, the top line of the shaded areas represents the total number of class action filings and removals. Figure 2 also includes two vertical lines to aid in interpretation: one dividing the areas into pre-February 2005 and post-February 2005 sections to mark the pre-CAFA and post-CAFA periods, and one indicating where the data new to this report begin, after June 2006.

As Figure 2 shows, federal question class action filings have increased across the study period, from an average number of filings in the pre-CAFA period of 188.5 per month to an average of 236.4 per month from March 2005 through June 2006, and an average of 258.3 per month from July 2006 through June 2007. As discussed above, this increase in federal question filings is largely driven by an increase in labor class actions and, to a lesser extent, an increase in consumer protection/fraud class actions. It is unlikely that CAFA has directly led to an increase in the number of federal question filings. However, as discussed in the November 2007 progress report, we will examine the possible indirect effect of CAFA on federal question filings in Phase II of the study.

Unlike federal question filings, federal question class action removals have remained relatively constant during the study period, averaging 27.2 per month from July 2001 through January 2005, 30.4 per month from March 2005 through June 2006, and 31.3 per month from July 2006 through June 2007.

The direct impact of CAFA on the caseload of the federal courts, if any, should be seen in an increase in the number of class actions filed in or removed to the federal courts based on diversity of citizenship jurisdiction. Figure 2, in Appendix B, indicates that both diversity filings and removals increased in the post-CAFA period, although the scale of the figure, which must be large enough to encompass the federal question filings, somewhat hides the increase. In the pre-CAFA period, diversity class action filings in the federal courts averaged 11.9 per month, and diversity class action removals, 17.2 per month. From March 2005 through June 2006, the average number of diversity class action filings increased to 33.3 per month, and the average number of diversity class action removals increased to 25.1 per month. In the last twelve months for which data are available, July 2006 through June 2007, diversity class action filings increased slightly, again, to average 36.0 per month. Diversity class action removals decreased in the same time period, however, to 18.1 per month, a figure comparable to the number of diversity class action removals observed in the pre-CAFA period.

To better illustrate the trends in diversity class action filings and removals, Figure 3, in Appendix B, presents the monthly filings and removals of class actions based on diversity jurisdiction as lines, with a vertical line separating the pre-CAFA and post-

5. For purposes of this analysis, the small numbers of class actions identified in the study with another origin code (e.g., interdistrict or MDL transfer) or based on U.S. government defendant jurisdiction are excluded. Such cases are included in Figure 1, however. In addition, Figure 2, like Figures 3 and 7, presents monthly filings and removals, as opposed to the six-month data presented in Figure 1. Most of the statistical analyses use these monthly filing and removal numbers.

CAFA periods at February 2005. Figure 3 also includes statistical information about the correlation between the time variable (in months) and the monthly number of filings or removals for both the pre-CAFA and post-CAFA periods. The figure r is Pearson's correlation coefficient, which varies from -1 (perfect inverse relationship between the variables) to $+1$ (perfect relationship), with 0 representing no relationship between the variables. Also included is the p -value, for tests of statistical significance.

As Figure 3 makes clear, prior to CAFA's effective date, the number of monthly filings of diversity class actions was neither increasing over time nor decreasing over time; the correlation coefficient is close to zero and does not reach statistical significance at the .05 level. But the number of such class actions increased sharply after CAFA's effective date. Moreover, in the post-CAFA period, diversity class action filings in the federal courts appear to be increasing over time, with the r indicating a statistically significant relationship between the number of such filings and time. One likely impact of CAFA on the caseload of the federal courts, then, has been a relatively large and apparently continuing increase in the number of class actions filed as original proceedings based on diversity of citizenship jurisdiction.⁶

The trends for diversity class action removals in Figure 3 are very different. Although diversity class action removals, like filings, increased in the immediate post-CAFA period, the prevailing trend for such cases in both the pre-CAFA and post-CAFA periods is downward. In both the pre-CAFA and post-CAFA periods, the number of diversity removals is negatively correlated with the time variable, and the correlation coefficients reach statistical significance in both periods. As the discussion of Figure 2 above indicated, diversity class action removals have been initiated in federal court in the last twelve months of the study period at about the same rate as they were in the pre-CAFA period. CAFA appears to have temporarily increased the number of diversity class action removals to the federal courts, especially in comparison with the immediate pre-CAFA period, when removals of such cases were few. But in both the pre-CAFA and post-CAFA periods, the trend has been for fewer class actions to be removed to federal court on the basis of diversity of citizenship jurisdiction.

The findings with respect to increases in diversity class action filings strongly suggest that CAFA has altered class action plaintiffs' forum choices, at least in some circumstances. The findings on removals may also suggest a change in the choice of forum being made by class action counsel. Because we lack comprehensive, comparable data on class action activity in the state courts—a subject discussed in the November 2007 progress report—we cannot determine whether the declining number of removals indicates that there are fewer class actions in the state courts and thus fewer to remove, or determine whether the declining number of removals indicates that class action defendants in the state courts are choosing to remove fewer cases to federal court. The

6. We say “relatively large” in light of the increase over pre-CAFA figures for such class actions. There has been about a threefold increase—from an average of 11.9 filings per month pre-CAFA to an average of 34.5 per month for the entire post-CAFA period. Compared with federal question class action filings, however, this post-CAFA figure is still a relatively small number of cases, representing about 14 percent of the average number of federal question class action filings per month in July 2006–June 2007.

increase in the number of diversity class actions being filed in the federal courts as original proceedings suggests that there may be fewer cases in state court to remove. But data presented in the November 2007 progress report suggest that class actions are still being filed in substantial numbers in California, the only state for which data are available.

District-level effects

Figure 4, in Appendix B, displays the percent change in both diversity class action filings and removals in the district courts, grouped by circuit, comparing a two-year baseline before CAFA—calendar years 2002 and 2003—with a two-year period after CAFA—July 1, 2005, to June 30, 2007. These time periods were selected for comparison because we wanted to avoid calendar year 2004, in which diversity removals had dropped to their lowest level during the study period, and the first six months of 2005, which included CAFA’s effective date and a sharp, but temporary, increase in removals. At this time, we believe that these periods provide the most stable litigation environments for purposes of assessing CAFA’s impact on the district courts’ caseload.

Figures 4, 5, and 6, in Appendix B, divide the diversity caseload into removals and filings (original proceedings) to permit further analysis of the choice of forum issue addressed in the previous section. The central question is not just CAFA’s impact on the number of federal class actions, but whether plaintiffs are choosing to file in federal court in larger numbers or whether defendants are taking advantage of expanded diversity jurisdiction to remove additional cases. Stating the changes in the form of percent changes, rather than in terms of raw numbers, permits us to compare pre-CAFA and post-CAFA periods and to account for the size of the pre-CAFA district (or circuit) caseload. In interpreting these figures, however, the reader should bear in mind that some circuits and districts have very limited diversity caseloads. Thus, a relatively large percent change in a given circuit or district may not reflect a large increase in the absolute number of cases. Moreover, the largest percent increases often occur in districts that had few diversity class actions in calendar years 2002 and 2003.

Similar to the findings displayed in Figure 3, Figure 4 indicates that, between calendar years 2002 and 2003 and the final two years of the study period, July 1, 2005, through June 30, 2007, the number of diversity class actions filed as original proceedings in the district courts basically tripled, increasing by slightly more than 200 percent. The number of diversity class actions initiated in state court and then removed, however, was relatively stable between the two time periods, increasing by only about 6 percent.

The number of diversity removals doubled (increased by 100 percent or more) in the district courts in only three circuits, the D.C., First, and Ninth Circuits, two of which are relatively small circuits in terms of diversity cases. In the districts in the Ninth Circuit, however, there was a very substantial increase in the number of cases removed to federal court on the basis of diversity of citizenship jurisdiction, from 62 cases in calendar years 2002 and 2003 to 130 cases in the last two years of the study period.

The number of removals actually decreased in the later period, relative to the earlier period, in the districts in five of the circuits—the Fourth, Fifth, Sixth, Eighth, and Tenth Circuits. Moreover, the districts in the Eleventh and Seventh Circuits experienced relatively small increases in diversity class action removals, in comparison with their 2002–2003 diversity class action caseload, and the districts in the Second and Third Circuits experienced increases of less than 100 percent.

The pattern with respect to diversity class actions filed in the federal courts as original proceedings is strikingly different from that for removals. Eight of the twelve circuits saw at least a doubling of diversity class action filings between the two periods. The districts in the Third Circuit registered a fivefold increase in diversity class action original proceedings, the districts in the Ninth and Eleventh registered more than a fourfold increase, and the districts in the Fourth Circuit registered a threefold increase. Indeed, only the D.C. Circuit saw a decrease in diversity filings between the two periods (a decrease from four cases in the earlier period to three in the later period), and only the D.C. and First Circuits experienced a larger percent increase in diversity removals than in diversity filings.

In short, the increases in diversity class actions filed in the federal courts as original proceedings (identified in Figures 2 and 3) appear to have been widespread, not concentrated in a small number of districts or circuits. To the extent that diversity class actions removed to the federal courts declined or increased less dramatically than original proceedings in the post-CAFA period, they also did so in many districts and circuits.

Figure 5, in Appendix B, presents the same information for the largest district, in terms of diversity class action caseload, in each circuit: Massachusetts (First), New York-Southern (Second), New Jersey (Third), South Carolina (Fourth), Louisiana-Eastern (Fifth), Ohio-Northern (Sixth), Illinois-Northern (Seventh), Minnesota (Eighth), California-Central (Ninth), Colorado (Tenth), and Florida-Southern (Eleventh).⁷

The pattern in Figure 5 is similar to that in Figure 4: the percent increase in diversity class actions filed as original proceedings in federal court was larger than the percent change in removals in every district but Minnesota, which actually saw decreases in both categories, and Massachusetts, which saw a small increase in filings but more than a doubling of removals between the two periods. The only other district in Figure 5 to experience a doubling in diversity removals in the last two years of the study period, compared with calendar years 2002 and 2003, was California-Central. As discussed above, the districts in the Ninth Circuit experienced a large increase in diversity class action removals between the two periods. The district courts in Colorado, Minnesota, South Carolina, and New York-Southern experienced decreases in the number of diversity class actions removed in the last two years of the study period, compared with calendar years 2002 and 2003.

7. The figure excludes the D.C. Circuit, which includes only one district, found in Figure 4.

A number of districts in Figure 5 saw substantial increases in diversity filings as original proceedings between the two periods. Louisiana-Eastern saw an elevenfold increase; Florida-Southern and New Jersey, more than sevenfold increases; California-Central, more than a fivefold increase; Ohio-Northern, more than a fourfold increase; and Colorado and Illinois-Northern, threefold increases. Diversity class action filings in New York-Southern more than doubled between the two periods. Only Minnesota experienced a decrease in diversity class action filings between the two periods.

Figure 6, in Appendix B, displays the same information for fourteen additional districts, selected on the basis of the number of diversity class actions filed or removed during the study period; every district with at least forty diversity class actions during the study period is included in the figure. Those districts are, from the top: Washington-Western, California-Southern, California-Northern, Illinois-Southern, Michigan-Eastern, Texas-Southern, Texas-Eastern, Georgia-Northern, Florida-Northern, Mississippi-Southern, Alabama-Northern, West Virginia-Southern, Pennsylvania-Eastern, and New York-Eastern. Together, the 25 districts included in Figures 5 and 6 account for 68 percent of diversity class actions filed in or removed to the federal courts during the study period.

None of the districts in Figure 6 saw a decrease in the number of diversity class actions filed as original proceedings between calendar years 2002 and 2003 and the last two years of the study period. In fact, only Michigan-Eastern, Texas-Southern, and Texas-Eastern experienced less than double the number of diversity filings in the last two years of the study period compared with calendar years 2002 and 2003. Several of the districts included in Figure 6 saw quite dramatic percent increases in diversity class action filings in the last two years of the study period. Even districts with relatively large diversity class action caseloads in calendar years 2002 and 2003, such as California-Northern, saw large increases in diversity filings in the last two years of the study period.

At the same time, diversity removals decreased between the two time periods in several of the districts included in Figure 6—Michigan-Eastern, Texas-Southern, Texas-Eastern, Florida-Northern, Mississippi-Southern, and West Virginia-Southern. Alabama-Northern saw no change, and Illinois-Southern saw a small increase in removals between the two time periods. Removals increased in several of the districts included in Figure 6, with the largest percent increases in California-Southern, New York-Eastern, and Pennsylvania-Eastern. It is important to remember, however, that large percent increases might not always reflect large increases in raw numbers. For example, the increase in New York-Eastern was from one diversity class action removal in all of 2002–2003 to seven in the last two years of the study period. That is a large percent increase, but not a massive influx of new class action cases over the two-year period.

Taken together, Figures 4, 5, and 6 indicate that the increase in diversity class actions filed as original proceedings in the federal courts seen in Figures 2 and 3 has occurred in many courts across the country. In the districts presented in these figures, only the District of Columbia and Minnesota have experienced decreasing numbers of

diversity original proceedings in the post-CAFA period. With respect to diversity class actions initially filed in state court and then removed to the federal courts, the changes are more varied by district and circuit. In many courts, diversity class action removals have increased in the post-CAFA period, but in many others the numbers of such cases have either remained stable or decreased.

Diversity class actions by nature of suit categories

Figure 7, in Appendix B, presents monthly diversity class action activity during the study period, separated into areas based on nature of suit categories. As in the previous figures, two vertical lines have been added to aid in interpretation—one dividing the total area into pre-CAFA and post-CAFA periods, at February 2005, and one at June 2006 to indicate where the data new to this report begin. As Figure 7 makes evident, contracts, represented by the area at the bottom, is the most common nature of suit category among diversity class actions, once overlapping and duplicative class actions are excluded from the analysis (see Appendix A). This was so prior to CAFA's effective date and has remained consistent throughout the post-CAFA period.

As discussed in the third interim report to the Advisory Committee,⁸ a large part of the increase in diversity class action activity observed in the post-CAFA period is accounted for by the increase in contracts class actions. The average number of contracts class actions filed in or removed to the federal courts in the forty-three months of the study period before February 2005 was 14.58. Moreover, the trend for such class actions, prior to CAFA's effective date, was downward. This finding dovetails with the finding, illustrated in Figure 3, that diversity removals were decreasing in the pre-CAFA period. Because almost half of all diversity class actions in that period were contracts class actions, an overall decrease in class action removals is likely to coincide with a decrease in contracts class actions.

The average number of contracts class actions filed in or removed to the federal courts increased dramatically in the post-CAFA period. The average for March 2005 through June 2006 was 32.13, and for July 2006 through June 2007, the last twelve months of available data, the average was 30.75. These findings, based on more than two years of post-CAFA data, indicate that the average number of contracts class actions initiated in the federal courts per month has doubled in the post-CAFA period. Although there is a slight drop-off in contracts class actions in the last twelve months of data, for the entire post-CAFA period the number of such class actions initiated in the federal courts is not correlated with the time variable. In other words, the trend appears to be that the number of contracts class actions based on diversity of citizenship jurisdiction filed in or removed to the federal courts is holding steady in the post-CAFA period.

8. Federal Judicial Center, *The Impact of the Class Action Fairness Act of the 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, April 2007.

Consumer protection/fraud class actions based on diversity of citizenship jurisdiction have also increased in the post-CAFA period. Prior to CAFA's effective date, the average number of such class actions initiated in federal court per month was 2.81. That figure increased to 10.56 per month during the period from March 2005 through June 2006, then decreased slightly to 8.83 per month from July 2006 through June 2007. The average for the entire post-CAFA period is 9.82 consumer protection/fraud class actions filed in or removed to federal court per month, more than triple the pre-CAFA average. As with contracts class actions, the number of monthly filings and removals of consumer protection/fraud class actions based on diversity jurisdiction is not correlated with the time variable in the post-CAFA period.

Property damage class actions based on diversity jurisdiction have also increased in the post-CAFA period, although not as dramatically as contracts and consumer protection/fraud class actions. The average monthly number of property damage class actions initiated in the federal courts in the pre-CAFA period was 3.00, which increased to 5.25 during the March 2005–June 2006 period and 4.92 during the July 2006–July 2007 period. The average for the entire post-CAFA period is 5.11 property damage class actions filed in or removed to federal court per month. Although this increase is less dramatic than that for contracts and consumer protection/fraud, the difference in means is statistically significant.⁹

Personal injury class actions based on diversity of citizenship jurisdiction present a very different pattern from that for contracts, consumer protection/fraud, and property damage class actions. The average number of personal injury class actions initiated in the federal courts has actually dropped slightly in the post-CAFA period, from 7.30 per month pre-CAFA to 6.25 per month post-CAFA. That small difference in means does not reach statistical significance, however.

The other nature of suit categories—labor, civil rights, and the catchall, other/undetermined—compose a small proportion of the class actions in federal court based on diversity of citizenship jurisdiction and have been excluded from Figure 7 for the sake of clarity.

Conclusion

With the benefit of an additional year of filings and removals data, this report confirms trends documented in earlier reports to the Advisory Committee. Class action activity in the federal courts has increased dramatically during the study period. Much of this increase was in federal question cases. Diversity class action filings have also increased since February 2005, however, a finding consistent with the hypothesis of a CAFA effect. The post-CAFA increase in diversity class actions has not been driven

9. In discussing Figure 1, we noted that the number of property damage class actions based on both federal question and diversity jurisdiction had declined in the last six months of the study period to the same level as in July–December 2001. However, when we compared the entire pre-CAFA and post-CAFA periods, not just two six-month periods, we found that the average number of property damage class actions filed or removed on the basis of diversity jurisdiction per month had increased slightly.

primarily by removals. Indeed, the last year of data makes that crystal clear. Most of the increases in diversity class actions occurred in the contracts and consumer protection/fraud nature of suit categories.

Future FJC research will examine whether CAFA has had an indirect effect of bringing state-law claims into the federal courts via federal question jurisdiction. We will also examine closely any effect CAFA may have had on judicial workload by changing the contours of class certification, other pretrial aspects of class action litigation, and judicial review of settlements. Our next report to the Advisory Committee will address class litigation in a sample of closed cases that were filed or removed before CAFA went into effect. That report will serve as a baseline for comparison with an equivalent sample of closed cases filed after CAFA's effective date.

Appendix A: Methods

In constructing the database used in preparing this report, we used several searches to identify the population of class action cases. The most resource-intensive of these is an electronic search of the courts' CM/ECF (Case Management/Electronic Case Files) real-time replication databases for the term "class." Members of the research team then examined the docket records of cases identified in this search so that we could eliminate cases in which there was no class action activity. False positive search results included cases with various references to "first class mail" or to party names, such as "World Class Distributors." In addition, we included in this search all cases with the relevant values in the class action field in CM/ECF and all cases identified as class actions in the Integrated Data Base (IDB), maintained by the FJC. The docket records of the cases identified in these ways were also examined in order to eliminate false positives. In addition, all cases identified as class actions by CourtLink, an electronic service produced by Lexis/Nexis, were included in the study population. 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. CourtLink also searches electronically the first five docket entries of each docket sheet for the term "class action complaint." To evade our searches altogether, a case in which class allegations were raised would have had to have been one in which the term "class" was not used in a single docket entry; would have had to have also evaded CourtLink's search of docket records and case captions; and would have had to have been miscoded in both CM/ECF and the IDB.

Using these searches, we identified in eighty-eight federal district courts¹⁰ more than 30,000 cases with some class-action-related activities during the study period (from July 1, 2001, through June 30, 2007) for potential inclusion in the analysis database. These cases were then subjected to a number of data-cleaning steps to arrive at the analysis database, which comprises approximately 21,000 cases, overall.

The most significant data-cleaning step was the exclusion of overlapping and duplicative class actions from the analysis database. The Advisory Committee has requested that we exclude overlapping and duplicative cases so that our results serve as an estimate of the impact of filings and removals on the workload of the courts. The key assumption is that member cases consolidated with a lead case do not add substantially to the courts' workload. This data-cleaning process began with a second electronic search of the docket records of the identified cases for terms including "consolidate," "transfer," "related case," "MDL," "JPML," and "conditional transfer order." Members of the research team then examined the docket records of the cases identified in this search to determine whether each case was part of an intradistrict or interdistrict

10. Because our electronic searches for class actions largely depend on the CM/ECF system, we had to exclude from the study the six districts that do not use CM/ECF or that have not created electronic docketing records for cases filed as of July 1, 2001. The excluded districts are Alaska, Guam, Indiana-Southern, Northern Mariana Islands, Virgin Islands, and Wisconsin-Western.

consolidation. For all intradistrict and interdistrict consolidated cases, including multidistrict or MDL transfers, we identified a single lead case for inclusion in the analysis database and identified member cases for exclusion. The Clerk of the Judicial Panel on Multidistrict Litigation (JPML) and his staff¹¹ provided information that allowed us to check whether any of the cases we had deemed unique were in fact part of an MDL consolidation. A large number of cases identified as class actions were excluded from the analysis database as member cases.

For the next data-cleaning step, we matched the cases identified to case information in the IDB. Most of the information in this report about jurisdiction, origin, and nature of suit is derived from the IDB, which is based on data reported by the courts to the Administrative Office of the U.S. Courts. At this stage, matching the cases to the IDB enabled us to identify cases in which the plaintiff is either pro se or the United States. Pro se plaintiff cases, which we define narrowly as cases in which there is no attorney on the plaintiff side at any point of the litigation, were excluded because pro se litigants do not have statutory authority to represent a class. This step eliminated most cases brought by prisoners. For this reason, and because CAFA should not affect prisoner litigation, we excluded the rest of the cases in the database identified in the IDB as prisoner or habeas corpus cases, even when counseled. United States plaintiff cases were excluded because such cases are typically not Rule 23 class actions.

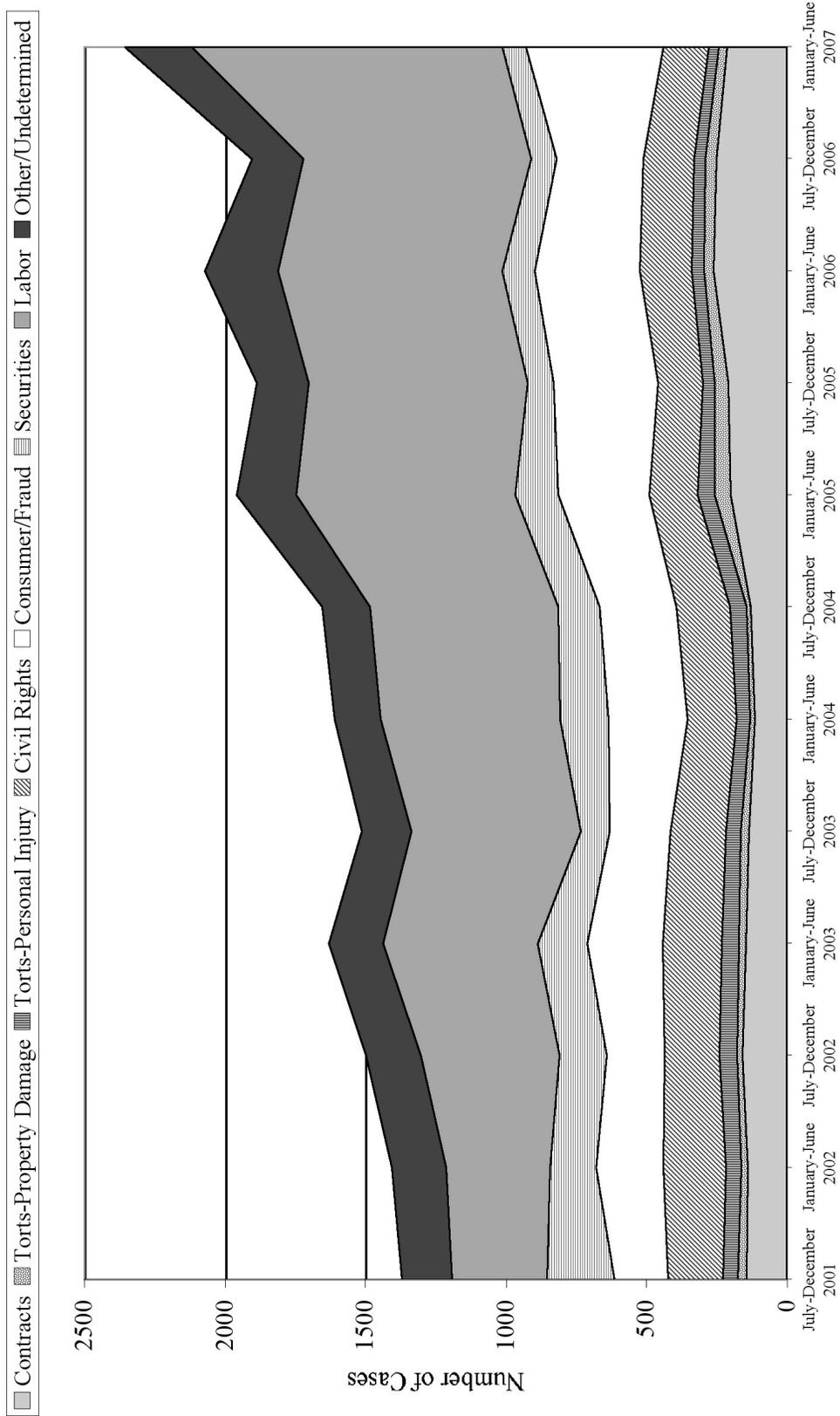
Finally, we excluded from the analysis database all cases that had been terminated by transfer to another district, whether following a transfer order from the JPML or an order to change venue issued by a district court. This data-cleaning step served as a final screen on MDL member cases and, moreover, prevented interdistrict transfer cases from being counted twice (i.e., once in the transferor district and once in the transferee district). For similar reasons, we searched for cases that were coded in the IDB as originating in a transfer from another district; many of these were also excluded from the analysis database as member cases.

The findings presented in this report differ slightly from those presented in the previous interim reports and may be subject to revision in later reports.

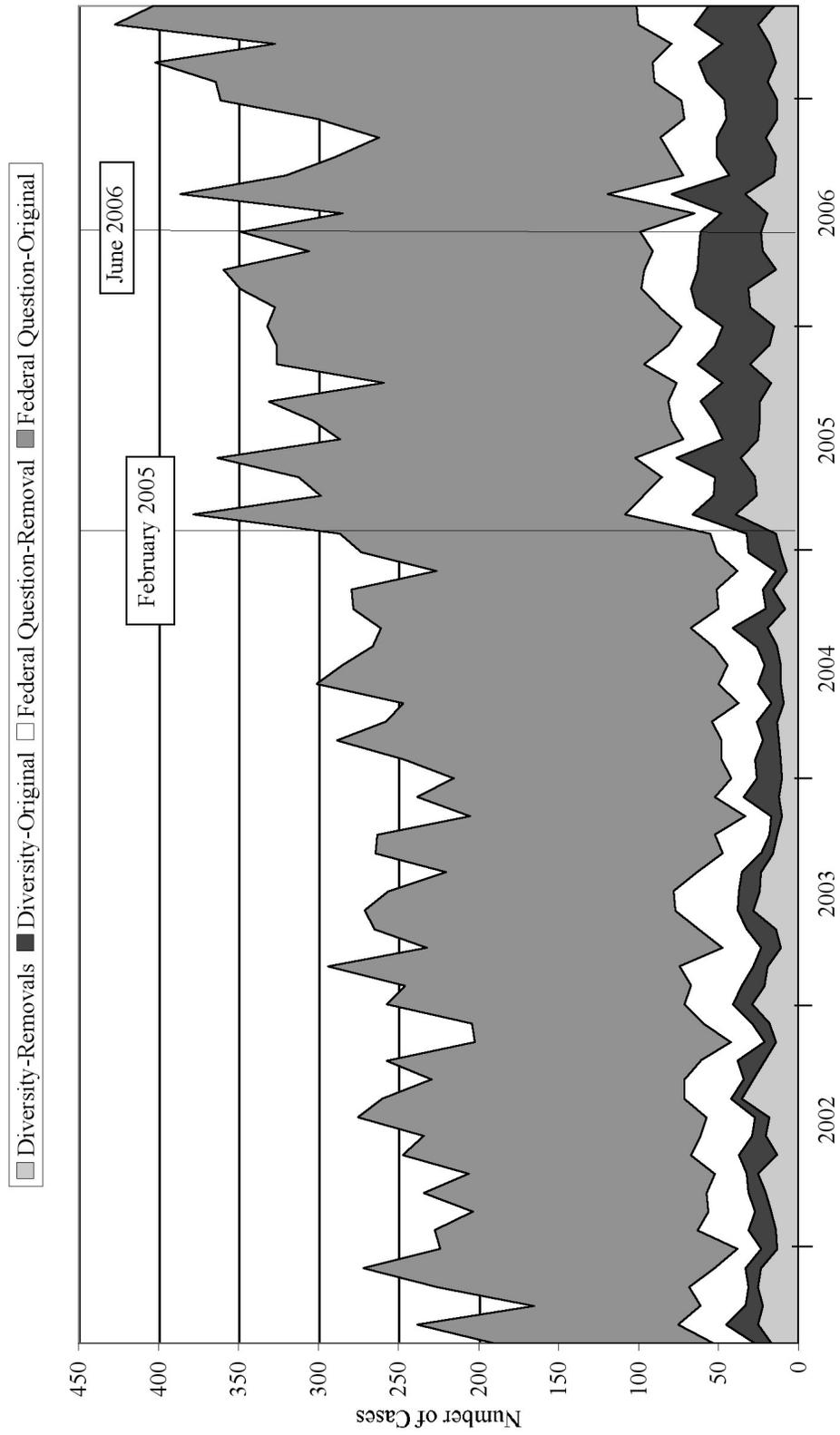
11. We are grateful to Jeffrey N. Lüthi, Clerk of the JPML, and Ariana Estariel and Alfred Ghiorzi, of the JPML clerk's office, for their timely and invaluable assistance.

Appendix B: Figures

Figure 1: Class Action Filings and Removals, by Nature of Suit Category, 88 Federal District Courts, July 2001–June 2007



**Figure 2: Monthly Class Action Filings and Removals,
By Jurisdiction and Origin, July 2001–June 2007**



**Figure 3: Monthly Class Action Filings and Removals,
Diversity of Citizenship Only, July 2001 –June 2007**

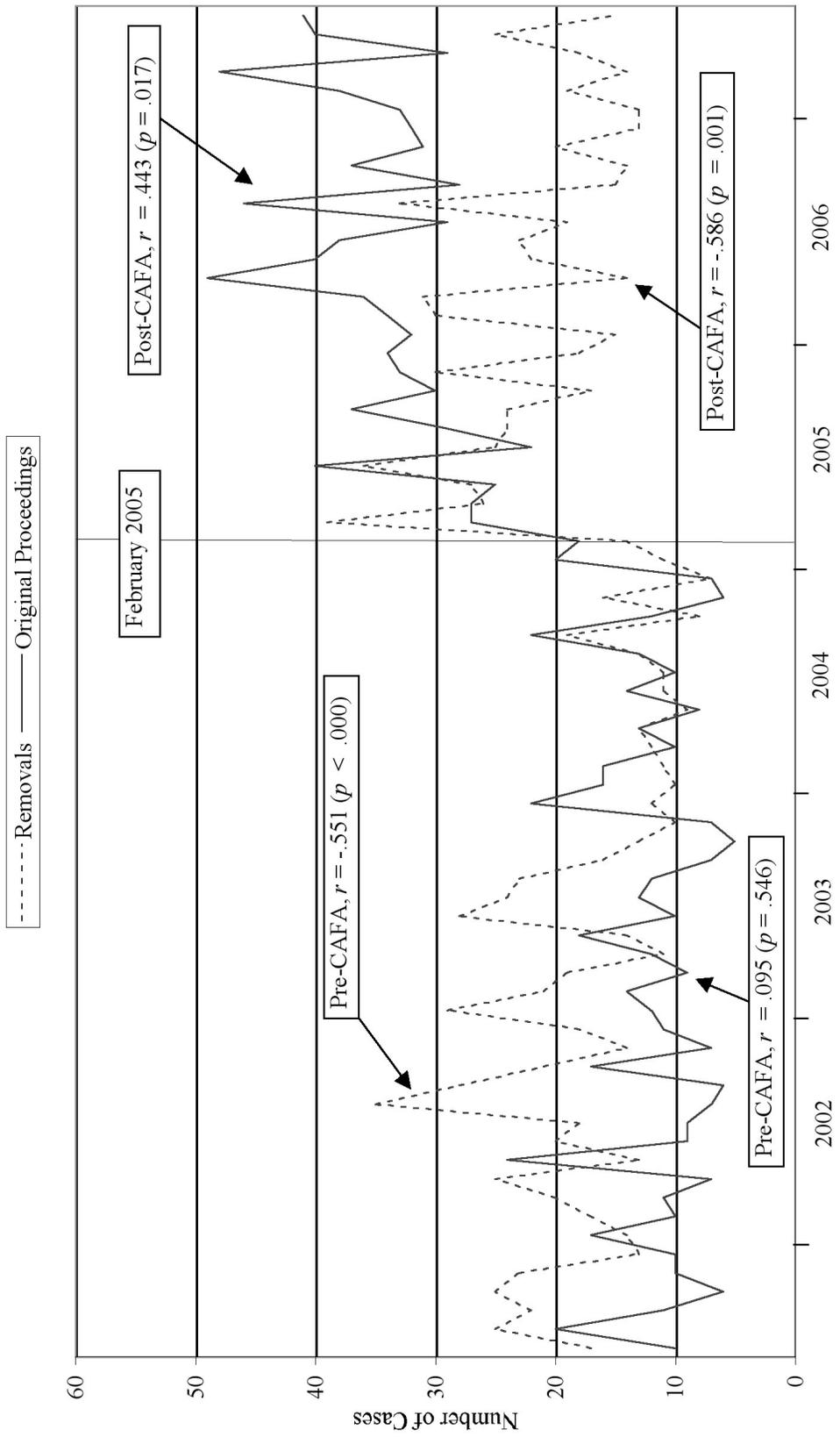


Figure 4: Percent Change in Diversity Class Action Filings and Removals, by Circuit, Comparing 2002–2003 with July 1, 2005–June 30, 2007

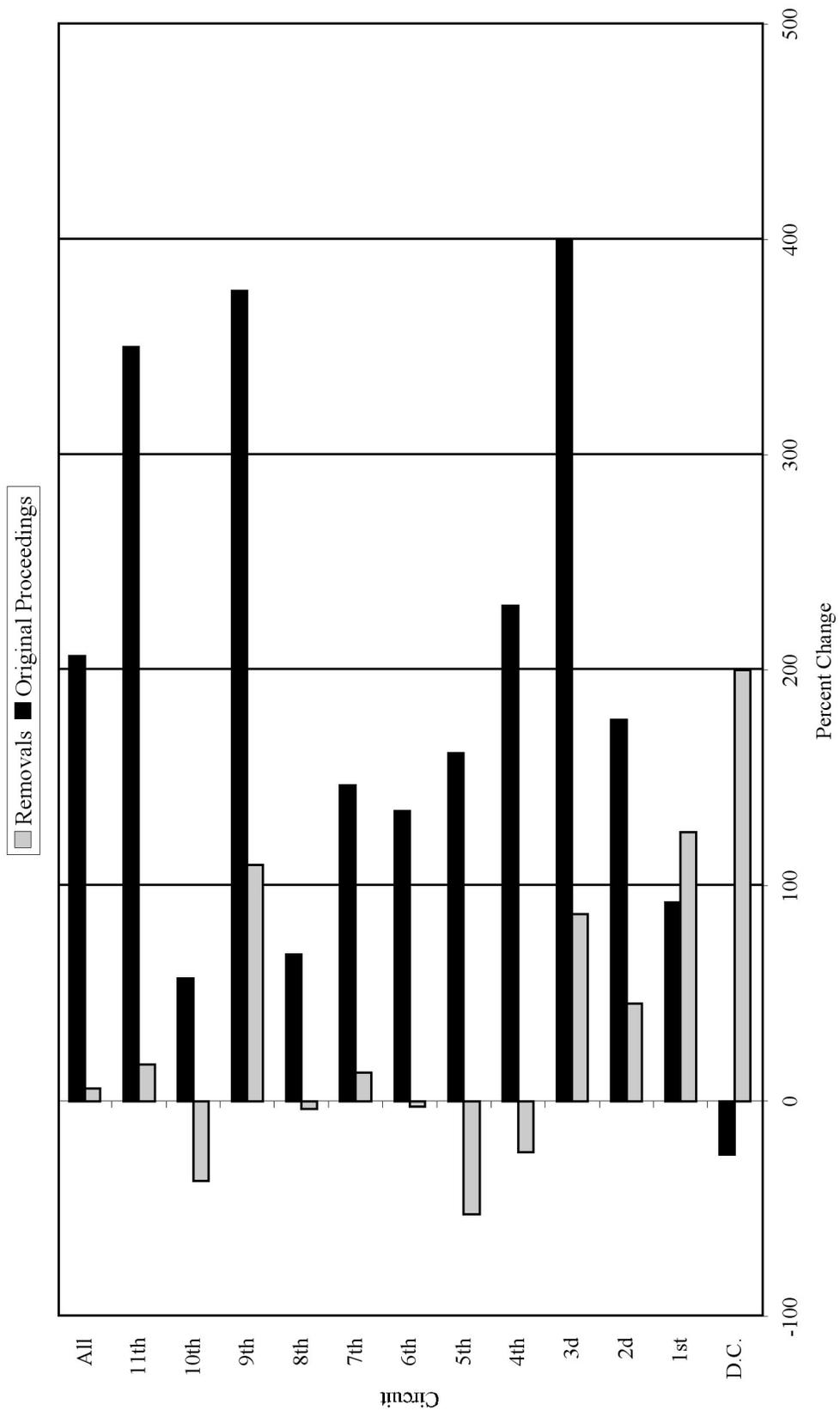


Figure 5: Percent Change in Diversity Class Action Filings and Removals, in Largest Diversity District in Each Circuit, Comparing 2002–2003 with July 1, 2005–June 30, 2007

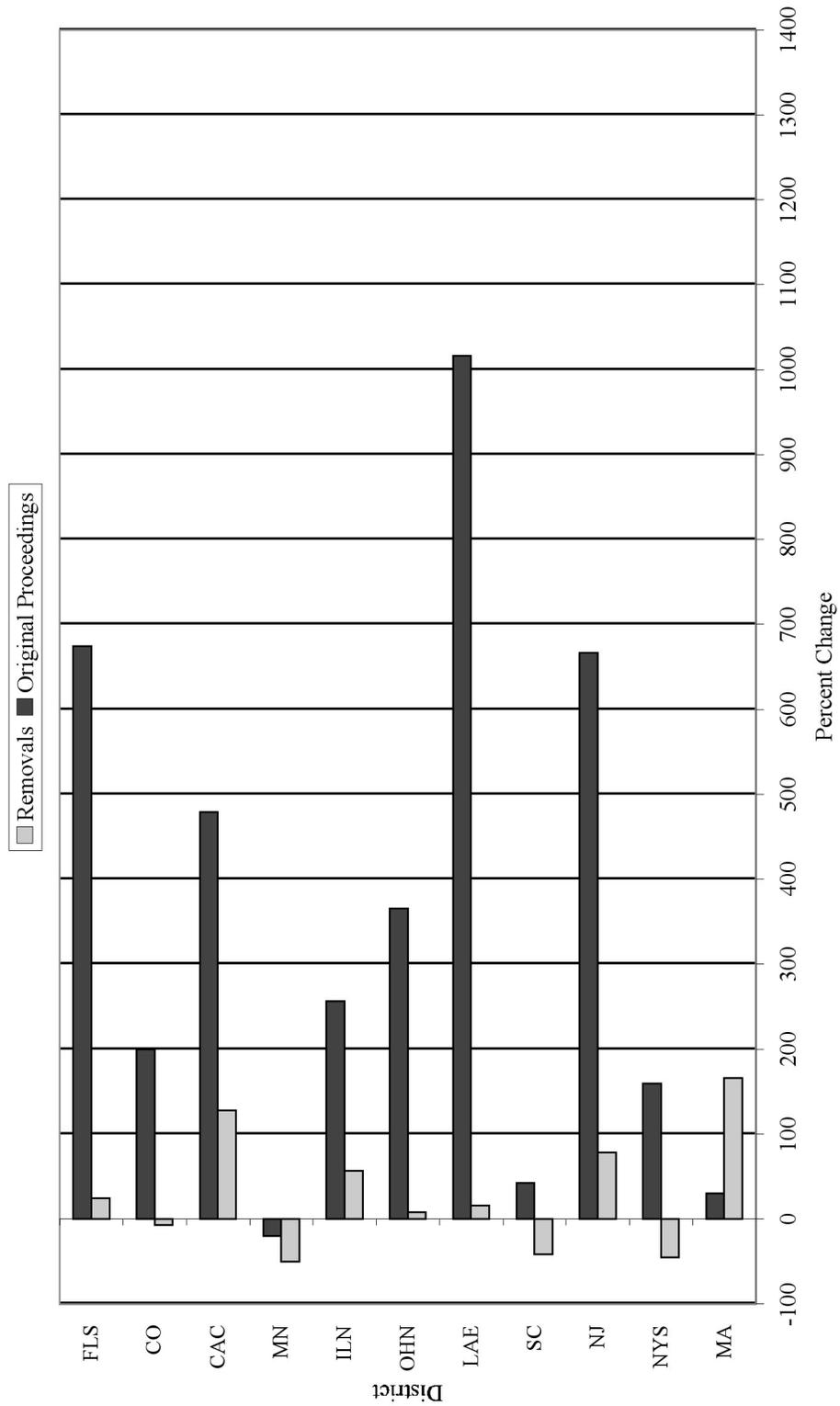
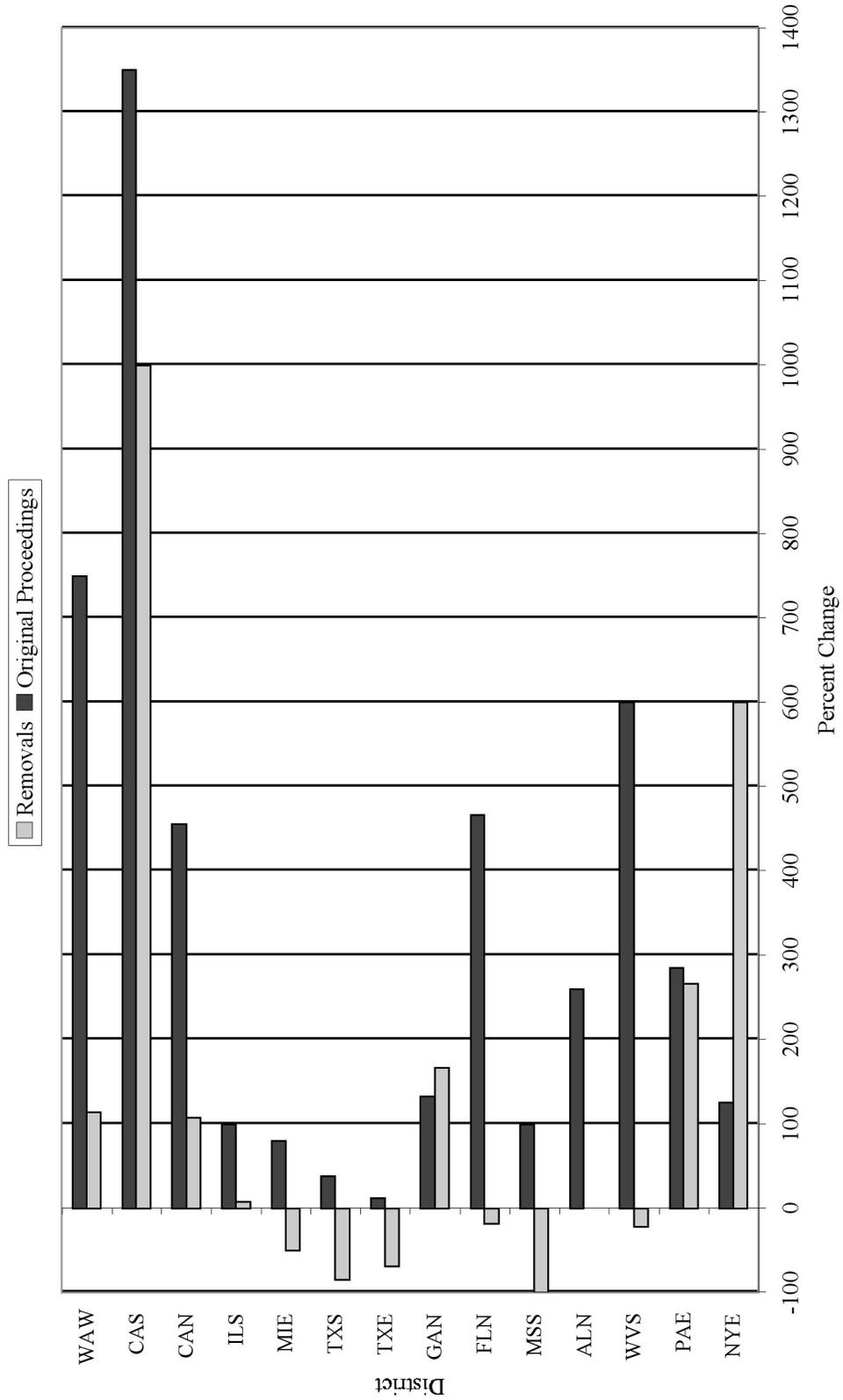


Figure 6: Percent Change in Diversity Class Action Filings and Removals, in Selected Districts, Comparing 2002–2003 with July 1, 2005–June 30, 2007



**Figure 7: Monthly Class Action Filings and Removals, Diversity of Citizenship Only,
By Nature of Suit Category, July 2001–June 2007**

