

Impact of the Class Action Fairness Act on the Federal Courts

Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions

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Introduction

This report presents preliminary findings from Phase Two of the ongoing study of the impact of the Class Action Fairness Act of 2005 (CAFA) on the federal courts. Phase One found that the number of class actions based on diversity of citizenship jurisdiction filed in or removed to the federal courts increased after CAFA's effective date. Phase Two will, when complete, measure CAFA's impact on litigation activity and judicial rulings in class actions in the federal courts. This report presents an initial description and overview of the litigation activity, outcomes, and case characteristics of class actions based on diversity of citizenship jurisdiction filed in or removed to the federal courts in the two years preceding CAFA's effective date. Future reports will compare these findings—to the extent that meaningful comparisons are possible—with prior empirical research and discuss any apparent differences.

The sample consists of a set of 254 diversity class actions. This report is limited to 231 of those cases, 91%, representing the sampled cases that had reached final disposition in district court to date. The class actions and findings described in this report represent the “before” portion of a “before and after” study of CAFA's impact on the courts. For more information on the study design, see the Appendix at the end of this report.

Throughout the report the term *class action* is used to describe any civil action in which the plaintiff raises class action allegations in the original complaint, in state or federal court, or at any subsequent stage in the proceedings. The term *class action* applies regardless of whether plaintiffs ever moved for class certification. This definition is the same as that used in earlier reports to the Advisory Committee on Civil Rules.

Part I of this report describes the characteristics of the sampled cases, addressing the types of cases, the types of classes sought, the number and types of motions filed, the disposition of the cases, and their duration. Part II analyzes the sample of cases in relation to their dispositions: remand, dismissal on motion, voluntary dismissal, and class settlement. Part III describes the class settlements and reports on certification motions, the settlement review process, notification procedures, objectors and opt-outs, settlement amounts, and attorney fees.

Executive Summary

The principal findings from the pre-CAFA sample of diversity class actions are:

- Plaintiffs filed motions to certify a class in fewer than one in four class actions;
- Judges granted six motions, in five cases, to certify a litigation class, and all five cases resulted in a class settlement;
- Before a class settlement, plaintiffs typically had to overcome at least one challenge to the merits in the form of a dispositive motion;
- Parties proposed class settlements in twenty-one, or 9%, of the 231 class actions;
- Judges approved all twenty-one proposed class settlements; in three cases approval came only after modification of the settlement;
- Plaintiffs filed motions to remand in 75% of the removed cases and judges granted remand motions almost 70% of the time, resulting in the remand of more than half of the removed cases;
- Voluntary dismissal was the most frequent disposition of cases not remanded, occurring 38% of the time;
- Motions activity was relatively infrequent in the sample: 56% of the class actions had one or zero motions filed; and
- One in five cases was terminated by the court granting a dispositive motion.

The preliminary findings presented in this report suggest that, in diversity class actions, there is less to class allegations than one would expect. There was relatively little motions activity in the typical case, and the majority of cases not remanded to state court were voluntarily dismissed. Most plaintiffs did not move to certify a class. But all class actions in which a class was certified, whether for litigation or settlement purposes, ended with class settlements.

I. Description of the Sample of Class Actions

Type of Case

Table 1 shows nature-of-suit information for sampled diversity of citizenship cases. Almost two-thirds are common-law contract or statutory consumer protection class actions, including insurance cases and those alleging fraud, breach of warranty, and other contract-related claims. Almost one-third are tort actions, including product liability cases. The majority of the tort cases raise personal injury damage claims, with the minority raising property damage claims. A small number of sampled cases do not fit into either of these categories and are described as Other.

Table 1. Nature of Suit Categories of Sampled Cases ($N=231$)

<i>Nature of suit</i>	<i>Number & percentage</i>
Contract and Consumer Credit	150 (65%)
Tort—Personal Injury and Property Damage	75 (32%)
Other	6 (3%)

Type of Class Sought

Plaintiffs alleged classes under a variety of class action rules. Class actions filed originally in state court generally referred to the applicable state class action rule or rules. Because a majority of the sampled pre-CAFA diversity cases were removals, state class action rules accounted for a majority of the rules cited in class action complaints. Table 2 shows that the federal rule most commonly cited was Rule 23(b)(3), which was raised in about one class action complaint in four. It is likely that the Rule 23(b) unspecified cases are largely 23(b)(3) opt-out classes; these are cases in which the class action complaint did not specify a subsection of the rule. If that is so, Rule 23(b)(3) was the basis for more than three in ten cases and for a substantial majority of class actions filed initially in federal court. Rule 23(b)(1) and (b)(2) were also cited in a number of diversity class actions, 10% and 15%, respectively.

Table 2. Types of Classes Alleged in Sampled Cases (N=231)*

<i>Nature of suit</i>	<i>Number & percentage</i>
Rule 23(b)(1)(A) or (B)-Mandatory	22 (10%)
Rule 23(b)(2)-Injunctive Relief-Mandatory	35 (15%)
Rule 23(b)(3)-Opt out	55 (24%)
Rule 23(b)(unspecified)	18 (8%)
Opt-in class	1 (<1%)
Derivative class	5 (2%)
State class action rule	132 (57%)
Unable to determine	14 (6%)

*Note: In some cases plaintiffs alleged more than one type of class.

State and Federal Law Claims

The sampled diversity class actions primarily raised claims based on state law. Table 3 shows the frequency of state and federal law claims in class action complaints. All of the cases raised at least one state-law claim, but only twenty cases (9%) raised at least one federal-law claim. The median number of state-law claims was 3 and the mean was 4.1.

Table 3. Frequency of Claims Based on State and Federal Law in Sampled Cases (N=231)

<i>Number of claims</i>	<i>State Law</i>	<i>Federal Law</i>
1	33 (14%)	14 (6%)
2	40 (17%)	2 (1%)
3	51 (22%)	3 (1%)
4	21 (9%)	
5	27 (12%)	
6	21 (9%)	
7	14 (6%)	
8	11 (5%)	
9	3 (1%)	1 (<1%)
10	2 (1%)	
11	4 (2%)	
12	3 (1%)	
17	1 (<1%)	

Motions Activity

Table 4 shows the number of cases that had at least one motion of the type identified in the left column. The most frequently filed motion was a motion to remand a removed case to state court, which occurred in 101 cases, 44% of all the cases in the sample. Putting to one side the ninety-seven cases filed as original

actions in federal court, a remand motion was filed in 75% of removed cases. The next most frequently observed motion was a Rule 12(b)(6) motion to dismiss for failure to state a claim, occurring in approximately two out of five cases.

Despite the presence of class allegations in all of the sample cases, plaintiffs filed a motion to certify a class in slightly fewer than one in four of the cases. Motions for summary judgment—almost all filed by defendants—were even less frequent, occurring in 16% of the sample. Part II will discuss motions activity in relation to the various case outcomes. Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction were filed in 10% of the sampled cases. Other types of motions were filed in less than 10% of sampled cases.

Table 4. Motions Activity in Pre-CAFA Diversity Class Actions ($N=231$)

<i>Type of motion</i>	<i>Number of class actions with at least one such motion</i>
Motion to remand	101 (44%)
Motion to dismiss for failure to state a claim	91 (39%)
Motion to certify a class	56 (24%)
Motion for summary judgment (plaintiff or defendant)	37 (16%)
Motion to dismiss for lack of subject matter jurisdiction	24 (10%)
Motion to dismiss for lack of personal jurisdiction	12 (5%)
Motion for a more definite statement	6 (3%)
Motion for judgment on the pleadings	5 (2%)
Motion to dismiss for insufficient service of process	4 (2%)
Motion to dismiss for improper venue	3 (1%)
Motion to dismiss for insufficiency of process	1 (<1%)
Motion to dismiss for failure to join a party	0

Table 5 presents a count of the number of motions of the types listed in Table 4 that were filed in the sample cases. The median number of motions filed in a sampled class action is 1.0 and the average number is 1.8. In a total of 129 cases, representing 56% of the sample, the parties filed one or zero motions of the types listed in Table 4. The maximum number of motions of the types listed in Table 4 was seven motions, filed in three cases.

Table 5. Number of Motions in Sampled Cases ($N=231$)

<i>Number of motions</i>	<i>Number and percentage of cases</i>
0	34 (15%)
1	95 (41%)
2	42 (18%)
3	33 (14%)
4	11 (5%)
5	11 (5%)
6	2 (1%)
7	3 (1%)

Dispositions

Table 6 categorizes the dispositions of the sampled class actions. In the order of the frequency of each disposition, class actions were terminated by voluntary dismissal (38%), remand to state court (30%), judicial ruling granting a motion to dismiss or for summary judgment (21%), class settlement (9%), and administrative closing (3%). Two-thirds of the cases were either voluntarily dismissed or remanded to state court. Not a single case was resolved by summary judgment for plaintiff or by a verdict of any kind.

Pending class actions are, of course, still proceeding through pretrial processes. As noted in the Introduction, twenty-three class actions, 9% of the total sample of 254 class actions, were still pending as of September 2008. Excluding these pending cases from this preliminary analysis is likely to lead to an underestimate of the likelihood of class settlement—and possibly of verdict—as case dispositions, assuming that these two dispositions are correlated with longer case pending times (the excluded cases have been pending at least 3.5 years). Future reports will include analysis of these cases.

Table 6. Outcome of Sampled Cases ($N=231$)

<i>Outcome</i>	<i>All cases ($N=231$)</i>	<i>Cases not remanded ($N=161$)</i>
Voluntary dismissal without class certification or class settlement	88 (38%)	(55%)
Remand to state court	70 (30%)	—
Judicial ruling dismissing entire complaint	46 (20%)	(29%)
Ruling on motion to dismiss	28 (12%)	(17%)
Sua sponte dismissal	4 (3%)	(3%)
Summary judgment	14 (6%)	(9%)
Class settlement	21 (9%)	(13%)
Administrative closing	6 (3%)	(4%)

Table 5 indicated that the median case involved a single motion and the average case fewer than two motions. Together the findings presented in Tables 5 and 6 suggest that many of the class actions filed or removed in the two years prior to CAFA's effective date did not have a large impact on the resources of the federal courts.

The third column in Table 6 presents the outcomes of class actions that were not remanded to state court. This allows one to look separately at the outcomes for cases retained in the federal court until the court or the parties terminated the litigation. A majority (55%) of class actions not remanded to state court were resolved by a voluntary dismissal of plaintiffs' claims without either class certification or class settlement. Of the remaining class actions, 29% were resolved by a judgment dismissing the entire complaint and 13% resulted in a class settlement.

Duration

Table 7 shows the duration of sampled class actions, grouped by disposition. The median remanded case was resolved in about three and a half months and the mean remanded case in about four and a half months. The median voluntarily dismissed case was terminated in nine months and the mean voluntarily dismissed case in twelve months. Cases dismissed on motion typically lasted more than a year, and class settlements generally took more than a year and a half to reach termination.

Table 7. Duration of Sampled Cases, by Disposition ($N=225$)*

<i>Outcome</i>	<i>Median (months)</i>	<i>Mean (months)</i>	<i>75th percentile</i>
Remanded ($N=70$)	3.5	4.6	5.9
Voluntarily dismissed ($N=88$)	9.0	12.0	18.6
Dismissed on motion, sua sponte order, or summary judgment ($N=46$)	14.0	16.1	23.8
Class settlement ($N=21$)	18.4	21.2	30.0

* Six cases that were closed administratively are not included in the table.

II. Analysis of Case Outcomes and Motions Activity

This part presents analyses of motions activities for the various case dispositions. Table 8 presents findings on the number of motions filed per case, broken out into categories based on disposition. The motions counts are limited to the types of motions listed in Table 4 and do not include, e.g., motions for extension of time or pro hac vice motions.

Table 8. Total Motions Activity Per Case, By Disposition

	<i>Motions/Case Mean</i>	<i>Motions/Case Median</i>	<i>N</i>
All cases	1.8	1.0	231
Remand			
Remanded	1.6	1.0	70
All other dispositions	1.8†	1.0	161
Voluntary dismissal			
Voluntarily dismissed	1.3	1.0	88
All other dispositions, excluding remands	2.6***	2.0	73
Dispositive motions			
Dispositive motions granted	2.3	2.0	46
All other dispositions, excluding remands	1.7*	1.0	115
All other dispositions, excluding remands and voluntary dismissals	3.0†	3.0	27
Class settlement			
Class settlements	3.2	3.0	21
All other dispositions	1.6**	1.0	210
All other dispositions, excluding remands	1.7**	1.0	140
All other dispositions, excluding remands and voluntary dismissals	2.3†	2.0	52

† p < .1 * p < .05 ** p < .01 *** p < .001

Not surprisingly, few motions are filed in cases that are ultimately remanded to state court (1.6 motions per case) or voluntarily dismissed (1.3 motions per case). More motions are filed in cases disposed of on a Fed. R. Civ. P. 12 motion or by summary judgment (2.3 motions per case) than in remands and voluntary dismissals, but fewer than in cases that result in class settlement (3.2 motions per case). Interestingly, the mean number of motions in class settlement cases is still somewhat low; even the average class action settlement based on diversity of citizenship, pre-CAFA, did not involve that much motions activity. All of the differences of means presented in Table 9 reach statistical significance at the .1 level or better, meaning that it is likely that the observed differences are not the result of sampling error but exist in the underlying population of diversity class actions filed in the two years preceding CAFA's effective date.

Remands

Remand motions were filed in 101 of the 134 removed cases in the sample (75.4%). A remand motion was granted in 70 of these cases, or 69.3% of cases in which at least one remand motion was filed; remand was the disposition of fully 52.2% of the removed cases in the sample.

As seen in Table 8, only 1.6 motions were filed, on average, in remand cases. After motions to remand, the most common motions filed in cases resulting in remands were, from most common to least, motions to dismiss for failure to state a claim (filed in 30% of remand cases), motions to dismiss for lack of subject-matter jurisdiction (4.3%), motions to dismiss for lack of personal jurisdiction (4.3%). In the 70 remand cases, one motion to certify a class was filed, and one motion for summary judgment. In short, the motions activity in the remand cases consisted almost entirely of remand motions and motions to dismiss for failure to state a claim.

Voluntarily Dismissed Cases

The average number of motions filed in voluntary dismissal cases was 1.3. No single type of motion was filed in a majority of these cases. The most commonly filed motion in the voluntarily dismissed cases was a motion to dismiss for failure to state a claim, filed in 30 of 88 cases, 34.1%. Remand motions were filed in 20.5% of voluntarily dismissed cases, motions to certify a class in 18.2%, motions for summary judgment in 11.4%, and motions to dismiss for lack of subject matter jurisdiction in 9.1%. No other type of motion was filed in more than four cases (4.5%).

Cases Dismissed on Motion or Summary Judgment

The average number of motions filed in these cases was 2.3. Among the forty-six cases disposed of by a judicial ruling on a motion to dismiss or for summary judgment, the most commonly filed motion was a motion to dismiss for failure to state a claim, filed in twenty-eight, or 60.9%, of the cases. Motions for summary judgment were filed in 34.8%, motions to certify a class in 32.6%, motions to dismiss for lack of subject matter jurisdiction in 23.9%, motions to remand in 17.4%, and motions to dismiss for lack of personal jurisdiction in 10.9%. No other type of motion was filed in more than two of these cases.

Class Settlements

The average number of motions filed in class settlement cases was 3.2. At least one motion to certify a class was filed in every class settlement—the average number of such motions, including motions for preliminary approval of a class settlement, was 1.6 per class settlement case. The next most commonly filed motion was a motion to dismiss for failure to state a claim, filed in nine, or 42.8%, of the class settlements. Motions for summary judgment were filed in 38.1%, and motions to remand in 19%. Motions for a more definite statement were filed in two class settlement cases, and a motion to dismiss for lack of subject-matter ju-

isdiction was filed in one case. These findings suggest that, in the typical class settlement case, the plaintiffs generally have to overcome at least one challenge directed at the merits of the case—a motion to dismiss or for summary judgment.

The voluntary dismissal cases present something of a mystery. They make up the largest group of cases in the pre-CAFA sample and represent a majority of non-remanded class action cases based on diversity jurisdiction. But neither plaintiffs nor defendants seem to have pursued them very aggressively—filing, on average, only 1.3 motions in these cases. Defendants, for example, were less likely to file dispositive motions in these cases than in other types of cases. (Of course, it is possible that there would be fewer cases in this category, had defendants filed more dispositive motions in these cases.) Comparing voluntary dismissed cases to class settlements, for example, defendants were more likely to file motions to dismiss for failure to state a claim in class settlements, 42.9% to 34.1%, and more likely to file motions for summary judgment, 38.1% to 11.4%. Both relationships are statistically significant at the .05 level or better.

Voluntary dismissals may represent a financial or equitable-relief settlement of the individual claims of the named plaintiffs or a dismissal of such claims without a settlement. As of the date of this report, we have not attempted to distinguish between these two forms of voluntary dismissal. Dismissal without a settlement can also be divided into two types of cases: those dismissed for all time because of lack of merit or a solvent defendant, and those dismissed with an eye toward litigating the same case in another court. Docket records almost never indicate which of those scenarios is applicable to a given case. In the voluntary dismissals, plaintiffs and defendants may have agreed to file a proposed class settlement in another forum. Or, in removed cases, 39% of the voluntary dismissals, plaintiffs may have plans to pursue the dismissed claims in another, presumably more favorable, federal venue. Such subjective intentions and side-agreements are not likely to appear in the docket records.

III. Class Certification and Class Settlements

This part describes class certification motions activity and class settlements in the sampled cases. As seen in Table 6, 21 class actions—or 9% of the total sample and 13% of the class actions that were not remanded to state court— resulted in a settlement for the class. Because of the limited number of class settlements in the sample, the findings outlined in this section may not be generalizable to class settlements beyond this example.

Class Certification Motions

In the 231 sampled class actions, 70 motions to certify a class were identified. Table 9 presents information on the outcomes of the certification motions filed. The difference between the class settlement cases and all other dispositions is striking. Every case in which a motion to certify was granted, unconditionally or for settlement purposes, resulted in a class settlement. In all other dispositions, the most common outcome for certification motions was denial, in 44.4% of motions, followed by no judicial action, in 30.6%, and an order finding the motion moot, in 19.4%.

Table 9. Class Certifications Motions Activity in Sample

	Class Settlements	All other dispositions
Certified for settlement purposes before parties have agreed to a settlement	4 (11.8%)	0
Certified for settlement purposes after parties have agreed to a settlement	20 (58.8%)	0
Certified without restriction	6 (17.6%)	0
Denied	2 (5.9%)	16 (44.4%)
Deferred	1 (2.9%)	2 (5.6%)
Decertified	0	0
Mooted	1 (2.9%)	7 (19.4%)
No action taken	0	11 (30.6%)
Unable to determine	0	0
Total	34 (100%)	36 (100%)

Note: Some cases had more than one motion to certify.

Class Settlements

The class settlement cases are similar in many respects to the entire sample. As with the entire sample, two-thirds of the twenty-one class settlements involved contract/consumer credit cases and the other third involved tort-personal in-

jury/property damage cases. Contract and tort class actions were equally likely to produce a class settlement: about one in seven cases did so. Like the cases in the full sample (see Table 3), the typical class settlement involved a case with three state law claims and no federal law claims. Two of the twenty-one class actions had a single federal law claim; all of the others had none. Eleven of the class actions had been removed from state court and ten had been filed as original actions in federal court.

Settlement Approval Procedures

This section describes the class settlement review process in the sampled class settlements.

Hearing and notice. As Rule 23(e) requires, all of the class actions included judicial review of the proposed settlement. In each case a copy of the settlement was filed; the court made a preliminary finding that the proposed settlement was within an acceptable range of reasonableness and fairness; and the court directed that a notice of the proposed settlement be communicated to the class. Notice took the following forms. As Table 10 shows, in some class actions multiple forms of notice were used.

Table 10. Forms of Notice to Class Members of a Proposed Class Action Settlement

<i>Form of Notice</i>	<i>Number (N=21)</i>
Individual postal mailing or personal delivery	21 (100%)
Individual electronic mailings to class members	0
Publication in newspaper or other print medium	9 (43%)
Advertisement on radio or television	0
Posting electronic notice (e.g. on internet website)	8 (38%)

Content of notices. Rule 23(c)(2)(B) specifies certain categories of information that the “notice must clearly and concisely state in plain, easily understood language.” The categories specified in the rule are presented in bold in the first column of Table 11. This study does not, however, present any judgments about the conformity of the notices with Rule 23’s plain language standard.

Table 11. Content of Notice of Proposed Class Action Settlements

<i>Subject of statement</i>	<i>Number and percentage</i>
Nature of the action	20 (95%)
Definition of the class	20 (95%)
Class claims, issues, and defenses	16 (76%)
Class member may appear through an attorney	18 (86%)
Court will exclude any member who so requests	18 (86%)
Time and manner for requesting exclusion	18 (86%)
Binding effect of a judgment	21 (100%)
State total value of monetary portion of settlement	12 (58%)
State amount of attorney fees requested	17 (81%)
State the approximate size of the class	3 (14%)
Present information to enable class member to calculate share of settlement	14 (67%)
Establish a procedure for making a claim or otherwise participating in the settlement by a fixed date	18 (86%)
Specify a time and place for a hearing	21 (100%)
State a distribution plan	12 (57%)
Describe equitable relief, if any	5 (24%)

Notices in the majority of class actions covered the mandatory topics. The most frequent omission dealt with amended Rule 23’s requirement that the notice state the “class claims, issues, or defenses.” About one-fourth of the cases did not specify claims, issues, and defenses. In all but one of those instances, the notice stated the nature of the case, but did not describe further the claims, issues, or defenses. The single case that did not describe the nature of the case was a settlement of a consumer contract case for \$175,000, minus attorney fees and expenses. The settlement included a claims process but the court records did not disclose how many class members made claims. The fact that a cy pres award was made to a bar association suggests that the notice had not been entirely successful in reaching class members and motivating them to file claims. *McBride v. Preferred Warranties*, No. 8:4cv23296 (D.S.C.).

Size of class. For twelve of the twenty-one class actions researchers found no information regarding the approximate size of the class. For the remaining nine class settlements, the range was wide: the numbers are 25, 52, 106, 132, 186, 4,100, 5,400, 77,000, and 200,000 members. These numbers are too few to draw any inferences about class size in general.

Opt outs. In nineteen of the twenty-one class actions, the record included information about whether there were opt-out class members. In seven of those nineteen class settlements, there were no opt outs. In the remaining twelve class

settlements, there were 1, 2, 4, 9, 19, 40, 82, 161, 514, 520, 946, and 1061 class members who opted out.

Objections. In nine of the class settlements no objections were filed with the court. In four settlements, one or more objectors asserted that the monetary amount of the settlement was insufficient to compensate the class members for their injuries; that groups of claimants were unfairly favored; and that the attorney fees were disproportionate with the class settlement. In one case an objector claimed that nonmonetary portions of the settlement, such as coupons or discounts, provided little or no benefit to class members. Because CAFA expressly bars some of these provisions, researchers looked for but did not find any indication of objections that monetary costs to some class members exceeded the monetary benefits to those class members; that a settlement provided greater recovery to class members solely because they are located closer to the courthouse; that relief as a whole was inadequate to deter future wrongdoing; that groups of claimants were unfairly favored; or that the settlement was based on collusion between the named representatives or attorneys and the opposing party.

Judicial action on proposed settlements. Judges approved without changes all but three of the proposed settlements. In the other three cases (14%), judges approved the proposed settlement after the parties made changes in the agreement. In one of those cases, the court delayed approval of the settlement and ordered a claims administrator to contact by telephone all class members who had not responded to the first mailed notice of settlement and to send an additional letter specifying the member's share of the settlement. The court also reduced counsel's request for attorney fees. In another case—one that did not literally require a change in the agreement—the parties agreed to include attorney fees of up to 40% of settlement and the court awarded 29%. In the third case involving a change in the agreement, the court allowed a \$32,000 claim of a class member who had filed the claim one day late (which the claims administrator had rejected as untimely); reduced the incentive award to a named plaintiff from \$31,000 to \$20,000; and reduced the attorney fee request from \$323,437 to \$275,000.

Amounts of settlement. In eighteen of the twenty-one settlements information on the monetary amount of the settlement was available. The median amount was \$2,950,000 and the mean amount was \$9,480,967. Six of the settlements included a declaratory judgment or an injunction. Five settlements involved nonmonetary relief in the form of coupons, discounts, securities, or similar remedies. In four of those settlements there was also monetary relief or injunctive relief, or both. In the remaining settlement there was no class-wide monetary fund created, but there was a provision that the defendant reimburse class members for repair costs already incurred.

Class representative allocation. In fourteen of the twenty-one settlements information on the amount awarded to class representatives was available. The median award was \$12,500 and the mean was \$21,370.93.

Attorney fee requests. Attorneys representing plaintiffs and the class requested fees in all class actions, in the median amount of \$1,100,000. The average fee request for the twenty-one class actions was for \$3,053,236.

Attorney fee awards. Courts awarded attorney fees in the amount requested in sixteen of the class settlements, slightly more than three out of four. In the other five cases, courts awarded 62%, 65%, 73%, 79%, and 85% of the request. For all twenty-one class settlements, the median award was \$770,749 and the average award was for \$3,054,251.

Cy pres allocations. Four of the settlements resulted in a distribution of some of the proceeds to an entity in lieu of distributing that portion of the proceeds to class members. The recipients of these funds were a bar association (in *McBride*, *supra* p. 13), the American Red Cross Katrina Relief Fund, the public schools in the district that were affected by the pollution alleged in the class complaint, and a “home for the holidays” program.

Conclusion

Preliminary findings indicate that in diversity class actions there is less to class allegations than one would expect. Most of the plaintiffs in cases that raised class allegations did not take the next step and move to certify a class. All class actions that were certified, whether for litigation or settlement purposes, ended with class settlements—about 10% of the sample. Relatively little motions activity took place in the typical case, and many cases—the majority of cases not remanded to state court—ended in a voluntary dismissal. Further analysis and comparison with class actions based on federal questions may shed further light on these observations.

Appendix: Methods

The study design defines a class action to include any civil action in which a plaintiff makes a class action allegation in the original complaint or at any subsequent stage in the proceedings. For the first phase of this study we created a database of all class actions filed in or removed to the federal courts between July 1, 2001, and June 30, 2007. To create that database, we used three methods: (1) an electronic search for the term *class* in the electronic docket records of the eighty-eight (of ninety-four) federal district courts that participate in the Case Management/Electronic Case Filing (CM/ECF) system, followed by elimination of false positives, such as cases that referred to *first class mail*; (2) inclusion of cases identified as class action in the Integrated Data Base (IDB); and (3) inclusion of cases identified as class actions in the CourtLink electronic service compiled by Lexis/Nexis. To evade these three searches, 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 also evaded CourtLink's search of docket records and case captions for the terms *class* and *similarly situated*; and would have had to have been miscoded in both CM/ECF and the IDB.

From the population of more than 30,000 class actions produced by the above methods, we eliminated overlapping and duplicative federal class actions by searching for indications of consolidations within or between districts and excluding all but the lead case for each consolidation. Cases transferred by the Judicial Panel on Multidistrict Litigation (JPML) were represented by a single case for each MDL number. Finally, we excluded all cases in which a pro se litigant sought to represent a class and all cases involving prison litigation. All of the above steps produced a database of approximately 21,000 class actions.

The sample

CAFA expands diversity of citizenship jurisdiction by employing the concept of minimal diversity, in which at least one plaintiff and one defendant are citizens of different states, and by permitting aggregation of the amount in controversy. CAFA also facilitates removal of class actions filed originally in state courts, for example by eliminating the need for all defendants to consent to removal and by eliminating the need to remove within one year of the filing of the action. CAFA's primary purpose is to bring certain class actions with state-law claims and at least minimal diversity of citizenship into the federal courts. Following CAFA's design, we concentrate our attention on diversity class actions.

The sample of class actions covers the period from February 18, 2003, through February 17, 2005, the day before CAFA went into effect. This sample will serve as the baseline measure of pre-CAFA activity. A second sample has been drawn to represent the two years after CAFA went into effect. We will then compare the litigation activities and outcomes in the two samples to measure any effect CAFA may have had.

Of the 21,000 class actions in the filings and removals database, approximately 600 had been classified in the IDB as having been brought into federal court between February 18, 2003, and February 17, 2005, on the basis of diversity of citizenship jurisdiction. A random sample of approximately half (301) of those class actions was drawn.

In examining the docket records and coding the 301 class actions, we determined that 45 of them had been filed in or removed to federal court solely on the basis of federal question jurisdiction and apparently miscoded in the IDB. Two cases proved not to be class actions, that is, they did not contain class allegations presented by a plaintiff who was represented by counsel in a non-prison context. Those 47 cases were excluded from the sample. Of the remaining 254 class actions, 23 were pending as of mid-September 2008. The remaining 231 terminated class actions serve as the sample from which the findings in this report are drawn.