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Where's the Party: Do Class Action Plaintiffs Really Prefer State Courts?

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By: Neil J. Marchand

Abstract of Article

Scholars and interest groups have discussed litigants’ behavior in the class action context. This paper uses empirical data to determine whether class action plaintiffs actually prefer to litigate their suits in state courts. Despite well-reasoned conjectures on the subject, to date there is a paucity of empirical data on class action litigation, especially at the state court level. This scarcity has thwarted analysis of the likelihood of class certification in the state courts, the Class Action Fairness Act of 2005’s (CAFA) total impact on the judiciary, and the predictability of class action litigation. This study aims to start filling the void in empirical analysis of class action suits by focusing on one representative state: Michigan. The goal of this empirical analysis is to help inform the larger debates over class action litigation.

Four hypotheses are tested. The first hypothesis is whether plaintiffs prefer to file their class action suits in Michigan’s state courts. The data in this study shows that plaintiffs prefer to file their labor and civil rights class action suits in Michigan’s federal courts and their contract, consumer protection, property, and tort class action cases in Michigan’s state courts. Combined with other data, this suggests that plaintiffs prefer to file class actions based on federal substantive law in federal court and state substantive law in state court. However, this forum selection is disrupted by the presence of a non-resident party because diversity of citizenship provides an alternate basis for federal jurisdiction.

The second hypothesis is whether the total amount of class action activity has increased since CAFA’s enactment. An alternative hypothesis is whether CAFA is relocating class action activity to the federal courts. The results of this study show that both propositions can be answered in the negative, for total class action activity has decreased and CAFA may have failed to relocate any category of class actions to the federal courts. This finding suggests that CAFA is not fulfilling its purpose of relocating class actions to federal court. This conclusion is qualified, however, by the limitations of the databases used to perform the research.

Finally, the fourth hypothesis analyzed is whether plaintiffs in the post-CAFA period are alleging more federal question claims in their complaints now that federal diversity and removal jurisdiction has been expanded. The data shows that plaintiffs who file contract class actions may be alleging more claims based on federal law and the same plaintiffs may be choosing to file their case in federal court. This suggests that CAFA may have had an indirect effect on class action litigation.

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1 The George Washington University Law School, J.D. expected 2009; B.A. The George Washington University, 2006; neil.marchand@gmail.com. I would like to thank Professor Roger H. Trangsrud, Thomas E. Willging, and Emery G. Lee III for their sage advice and thoughtful comments on earlier drafts of this article. My special thanks to my dad, Daniel J. Marchand, for traveling with me to the state court buildings and helping me gather the data. Finally, I would like to thank my parents and my sisters for their love, guidance, and encouragement.
I. Scope of the Analysis

To date, there is a disappointing amount of empirical data on class action litigation, particularly at the state court level. Fortunately, researchers at the Federal Judicial Center have been publishing interim reports on the Class Action Fairness Act’s (CAFA) effects on the federal courts, and Tom Willging and Emery Lee have recently published an article analyzing CAFA’s impact on the federal courts in terms of filings and removals. However, as they have noted, there has been a lack of equivalent data and analysis on the state court level. This data is essential to determining CAFA’s total impact on the judicial system, the likelihood of class certification in the state courts, and litigants’ probable behavior. This article starts to fill the void of empirical analysis on state class action suits.

This paper will analyze plaintiff’s choice of forum for class action litigation and the Class Action Fairness Act’s effects on Michigan’s federal and state courts. Michigan was selected for this analysis because the state has a balance of industries, especially manufacturing and agriculture, and because Michigan is a moderately sized state in terms of geographical area and population. Furthermore, Michigan’s class action rule is similar to Rule 23 of the Federal Rules

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3 Tom Willging & Emery Lee are senior researchers at the Federal Judicial Center.


5 Lee & Willging, Empirical Analysis, supra n.4, at 1763.

of Civil Procedure.\textsuperscript{7} In drafting the Michigan Court Rules, the drafters “borrowed from a number of sources, including the Federal Rules of Civil Procedure and other states’ rules.”\textsuperscript{8} Despite the similarities in prerequisites to certification and a provision in the Michigan Court Rules requiring court approval of dismissal and settlement,\textsuperscript{9} there are several important differences between the Michigan Court Rules for class actions and Federal Rule 23. First, the requirements of Federal Rule 23(b)(3), including the class member’s right to opt-out, apply to all Michigan class actions.\textsuperscript{10} Second, Michigan Court Rule 3.501(B) requires the motion for class certification to be filed within ninety-one days of the filing of the complaint unless an extension is ordered “on stipulation of the parties or on motion for cause shown.”\textsuperscript{11} By contrast, Rule 23 states that a motion for class certification must be filed “at an early practicable time.”\textsuperscript{12} Third, Michigan Court Rule 3.501 does not contain any provisions that are analogous to Federal Rule of Civil Procedure 23(g) on the appointment of class counsel or Rule 23(h) on attorney’s fees.\textsuperscript{13} However, Michigan Court Rule 3.501(C) establishes requirements for notice to class members that are very similar to the 2003 Amendments to Federal Rule 23(c).\textsuperscript{14} Finally, as the court stated in \textit{Zine v. Chrysler Corp.}, “[t]here being little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule (F[ed]. R. Civ. P. 23) for guidance.”\textsuperscript{15}

\textsuperscript{9} See M.C.R. 3.501(A) & (E).
\textsuperscript{10} Egan, \textit{supra} n.8, at 258.
\textsuperscript{11} M.C.R. 3.501(B)(1).
\textsuperscript{12} Fed. R. Civ. P. 23(c)(1)(A).
\textsuperscript{13} See M.C.R. 3.501.
\textsuperscript{14} Compare M.C.R. 3.501(C) with Fed. R. Civ. P. 23(c).
The next section will explain the research methods used to collect the data for this study while the third section will describe the findings of this empirical analysis. The fourth part of this paper will analyze Michigan’s state and federal court trends as a whole to test the four hypotheses posed in the introduction. The goal of this analysis is to determine: (1) in which forum plaintiffs prefer to file their class action suits; and (2) whether CAFA is fulfilling its purpose. Finally, the fifth section will summarize the findings of this article.

II. Research Methods Employed

To collect reliable data for this study and permit a comparison between Michigan’s state and federal courts, the methods used in the Federal Judicial Center studies were adopted here with some additional provisions tailored for the state court research. Using data provided by the Federal Judicial Center, I accessed the docket records for Michigan’s federal class action cases via PACER to determine the status of the class certification decision. Importantly, this study includes every class action filed in Michigan’s federal courts from July 2001 to June 2007.

To locate Michigan’s state court cases I ran a Westlaw docket search for “class” after 1999, retrieving over 27,000 results filed from January 2000 to December 2007. After reviewing a random sampling of several hundred cases, I compiled a list of terms used on Michigan’s state court cases.

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17 I am very grateful for Tom Willging’s and Emery Lee’s willingness to share their data on Michigan’s federal district court filings from July 2001 through June 2007.

18 According to Westlaw, Westlaw’s Dockets Michigan State Courts Combined database contains docket information on active and inactive cases filed in the Michigan Supreme Court, Court of Appeals, and Circuit Courts of Michigan, including the counties of Genesee, Macomb, and Oakland. This database is updated with new filings on a daily basis, and the dockets are updated 45 days after the initial filing date and upon demand via the “Update Link.” A typical search result will yield the party names, case number, case type, attorney names, and docket proceedings, including the dates and document descriptions. Researchers should take note of the case number as this is frequently used to locate the case file at the courthouse. Westlaw reports that docket coverage for Michigan’s State Courts Combined began in January of 2000 and continues through the present, though the Macomb county sub-database only covers January 1, 2002 through September 12, 2006. Finally, this database permits the researcher to search by party name, case number, docket number, and traditional terms and connectors.
court docket sheets and re-ran the search, retrieving 395 results.\(^\text{19}\) I then examined the docket record of each identified case, eliminating the false positive search results such as “first class certified mail” and scrubbing the list to exclude overlapping class actions that were consolidated with a lead case. Having compiled a list of over 100 class actions filed in Michigan’s state courts from 2000 to the end of 2007, I went to the various state court buildings where I then reviewed each case’s court record to collect the data. For the four class actions that were filed in northern or western counties, I paid the court to mail me the relevant copies of the court record. Finally, during the data collection I used the Federal Judicial Center’s Integrated Data Base civil documentation field description guide to code the causes of action for the state class actions, thus permitting a comparative analysis between Michigan’s state and federal courts.

There are two important limitations to this study. First, the Westlaw database only covers circuit court filings for three counties: Genesee, Macomb, and Oakland. While this includes suburban Detroit and Flint, the circuit courts for Wayne, Washtenaw, Ingham, and Kent counties are excluded. These counties are important because they are the counties in which the cities of Detroit, Ann Arbor, Lansing, and Grand Rapids are located. The result of this limitation is that the Westlaw search did not capture all class action cases filed in Michigan. The cases most likely missed by the search are those class action suits certified for settlement and the cases where the parties never moved for class certification. The search did capture all class action cases filed in the three counties mentioned above and any class action suit that was appealed to Michigan’s Court of Appeals. The level of class action activity outside of these courts remains

\(^{19}\) The search used was: “class act!” “class counsel” “cert! class” “certification denied” “motion for class” “class action cert!” “class cert!” “class actn” “class certn” “class member!” “ident! Class” “proposed class” “class notice.” To ensure this list was accurate, I ran several subsequent searches for “representative of class,” “others similarly situated,” the iterations of class and settlement, and the combinations of certify and grant. The relevant results in these searches were all captured by the initial search. Notably, “representative of class” and “others similarly situated” were not particularly useful search terms in the Westlaw docket search because the docket description rarely contained these exact terms. The most useful terms were those that described an event that routinely occurs in the course of litigating a class action.
unknown, and the data in this study likely represents approximately twenty percent of Michigan’s state class action activity.\textsuperscript{20} The second limitation of this study is that there are only fifteen identifiable post-CAFA class action filings in Michigan’s state courts. This limitation is the result of a timing issue where cases appear in the Westlaw database only upon appeal. Reasonable and insightful conclusions can still be reached regarding plaintiff’s choice of forum for class action litigation; however, the reader should be aware that the CAFA conclusions are not as strong as if there were hundreds or thousands of post-CAFA class action filings.

III. Empirical Findings

Overall, class action activity in Michigan’s federal and state courts has been in a general decline. As displayed in Figure 1, total class action activity peaked in 2002 with 80 class actions filed in Michigan’s courts, and filing rates have been steadily declining since 2004. Class action activity peaked in Michigan’s state courts in 2000 while activity in Michigan’s federal courts peaked in 2004. Though the state and federal court trends will be discussed separately below, a common theme throughout the study period is the preference for Michigan’s state courts as the forum to litigate class action suits.

\begin{footnotesize}
\begin{itemize}
\item I reached this estimate by reviewing the rate of appeals in the three counties where trial court records are available on Westlaw. In Macomb county, 33.3\% of the class action cases were appealed. In Oakland county, 17.8\% of the class action cases were appealed. Finally, in Genesee county, none of the sixteen trial court filings was appealed. Based on the parties involved, the allegations in the complaint, and the stakes of the litigation, my impression is that the discrepancy between the appellate rate in Genesee county and Oakland and Macomb counties is likely the result of simpler factual disputes in the Genesee cases.
\item There are two important implications arising from this data. First, appellate cases in general are atypical because the vast majority of class actions are not appealed. Second, the weighted average appellate rate for Macomb and Oakland counties is 19.6\%. Additionally, Macomb and Oakland counties are representative of the state as a whole because these two counties account for 20.28\% of the state’s population. See Estimated Population of Michigan Counties, 2000-2006, Library of Michigan (Mar. 2007), available at http://www.michigan.gov/census. Assuming the rate of appeal in Michigan state class action cases is 19.6\%, then this study did not capture 254 state class action suits.
\end{itemize}
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Figure 1: State and Federal Class Action Filings in Michigan, 2000-2007*

![Bar chart showing filings in state and federal courts from 2000 to 2007.](image)

*For Michigan's state courts, select data representing approximately 20% of total class action litigation is available from January 2000 through December 2007. For Michigan's federal courts, all data is available from July 2001 through June 2007. Thus, the federal data for 2001 and 2007 represents six months of class action filings.

A. Class Action Filing Rates

1. Class Action Filing Rates in Michigan’s State Courts

As shown in Figure 1, class action filing rates have declined in Michigan’s state courts. State court class action activity peaked in 2000 when 35 class actions were filed; however, by 2007 only 3 class action suits were filed in Michigan’s state courts. The most precipitous decline occurred between 2002 and 2004 when class action filings dropped 71% from 31 actions to 9 cases. Since 2004, the number of class actions filed each year has remained relatively constant: 9 in 2004; 6 in 2005, all post-CAFA filings; 6 in 2006; and 3 in 2007. Notably, the state data represents approximately 20% of Michigan’s total class action activity. Therefore, Figure 1 shows that plaintiffs prefer to litigate their class action suits in Michigan’s state courts.
The reason for the drastic decline in class action filings between 2002 and 2004 is unknown. Michigan’s class action rule was enacted in 1983 and was not amended during this time span.\textsuperscript{21} Though there is a limited amount of case law interpreting Michigan’s class action rule, Michigan’s appellate courts have suggested referring to federal case law for guidance on class certification.\textsuperscript{22} A partial explanation for the decline in class action filings may be the limitations of the Westlaw database. Another possible explanation for the decline in class action filings may be the view among plaintiffs’ lawyers that Michigan’s state courts are pro-business. This perception may arise from the judicial campaign contributions made by the Michigan Chamber of Commerce, the Michigan Bankers Association’s political action committee (“PAC”), the local chambers of commerce, and other similar organizations. For example, in 2002 the Michigan Chamber of Commerce donated $15,000 to one campaign for Michigan’s Supreme Court.\textsuperscript{23} Furthermore, in another 2002 Supreme Court campaign, the Michigan Chamber PAC donated $15,000, the Michigan Bankers Association PAC gave $10,000, and the Michigan Association of Realtors PAC donated over $17,000.\textsuperscript{24} Both justices won in the 2002 election and are still sitting on Michigan’s Supreme Court.\textsuperscript{25}

\textsuperscript{21} Egan, \textit{supra} n.8, at 258.
\textsuperscript{23} Mich. Dep’t of State, Bureau of Elections, No. 211939, Itemized Contributions Schedule 1A for Candidate Comm. 507022-2 (2002).
\textsuperscript{24} Mich. Dep’t of State, Bureau of Elections, No. 211922, Itemized Contributions Schedule 1A for Candidate Comm. 509671-4 (2002).
\textsuperscript{25} I have the utmost respect for and confidence in Michigan’s judges and justices. Furthermore, I do not intend to question any judge’s or justice’s independence, integrity, or impartiality. I raise the issue of campaign contributions only to suggest the origin of plaintiffs’ and their lawyers’ view regarding the pro-business philosophy of Michigan’s judiciary.
Moreover, the American Tort Reform Foundation\textsuperscript{26} considered Michigan’s legal environment before 2007 to be “historically reasonable and balanced.”\textsuperscript{27} The American Tort Reform Foundation based their opinion, at least in part, on Michigan’s consumer protection statutes, which currently provide immunity against product liability lawsuits for drugs approved by the federal Food and Drug Administration.\textsuperscript{28} While this immunity was enacted in 1996,\textsuperscript{29} these laws combined with the 2002 judicial elections may have created a perception that Michigan’s judiciary is more pro-business. Hopefully, the class certification analysis below will help inform the debate as to how pro-business the Michigan state courts are, in fact.

2. Class Action Filing Rates in Michigan’s Federal Courts

Class action activity in Michigan’s federal courts has declined. As displayed in Figure 1, class action activity in Michigan’s federal courts had high points in 2002 and 2004 with 49 and 53 class action filings, respectively. The year 2003 appears to be an outlier for federal class action filings due to the sharp decline in filings from 2002 and then the sharp increase to the number of 2004 filings. From the 2004 high of 53 filings, class action activity declined by 30.2\% to 37 class action suits in 2006. The federal class action value for 2007 represents the 20 suits filed from January through June 2007; this value is about one half of the 2006 figure.

The case per month filing rate for 2007 is 8.1\% higher than the 2006 case per month filing rate; however, when compared to the number of class actions filed in Michigan’s federal courts from July to December 2001, the number of January to June 2007 filings is 4.8\% lower than the last six months of 2001. This 4.8\% decline in class action activity is inconsistent with

\textsuperscript{26}The American Tort Reform Foundation is affiliated with the American Tort Reform Association. The American Tort Reform Association (“ATRA”) is “the only national organization exclusively dedicated to repairing our civil justice system.” The ATRA works to “bring greater fairness, predictability and efficiency to America’s civil justice system.” To this end, the ATRA identifies and champions “elected officials and judges who want to fix the system.” The ATRA website is http://www.atra.org.


the national trend of a 72% increase in class action activity when comparing the same two periods. Finally, while Michigan’s state class action filing rates remained constant since 2004, Michigan’s federal class action filing rate declined, an acutely important trend for the Class Action Fairness Act of 2005 analysis infra.

3. Analysis by Nature of Suit

Currently available data suggests that plaintiffs who file a class action suit in Michigan tend to file their case in federal court. The analysis of Michigan state cases will address the same six categories as in the Michigan federal district court nature of suit analysis. The most common types of class action suits are contract, labor, and consumer protection cases. Though less common, property, tort, and civil rights class action cases will also be discussed. These six categories account for 81.4% of all identified state class actions and 76.8% of all identified federal class actions.

Due to the methods used in the state court research, it is possible to examine the types of secondary claims alleged in class action suits. Most class actions allege secondary claims that are within the same category as the original claim; however, consumer protection class actions allege a variety of secondary claims. Therefore, the consumer protection section will be supplemented with a brief discussion on the types of secondary claims alleged in these actions.

(i) Contract Class Actions

Class actions based on contract theories have decreased in Michigan’s state courts. As displayed in Figure 2, state contract class action filings peaked in 2002 at 6 cases then fell to 1 contract class action filing per year from 2004 to 2007, a decline of 83.3%.

For Michigan’s federal courts, class action suits alleging contract claims have had an erratic but overall increasing filing trend. As Figure 2 shows, no contract class actions suits were

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filed in the last six months of 2001 but 6 contract class action suits were filed in 2002, a relative maximum for the first three years of the study period. After dropping to 4 actions in 2003, federal contract class action filings spiked to 11 cases in 2004 then declined to 6 cases in 2005. Since 2005 the federal contract class action filing rate has been steadily increasing to 8 filings in 2007. The 8 filings in 2007 are particularly interesting because the number of filings is higher than the previous year and the federal data set only covers the first six months of 2007. Finally, this finding is consistent with the fact that contract class actions constitute a greater proportion of filings in Michigan’s federal courts as compared to the national filing trend. In Michigan’s federal courts, contract filings constituted 40% of all identified class actions in the January-June 2007 period. Nationally, however, contract class actions accounted for 9% of all identified class action filings.  

Figure 2: State to Federal Comparison of Contract, Labor, and Consumer Protection Class Action Filings

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(ii) Labor Class Actions

As Figure 2 shows, labor class action filings in Michigan’s state court are rare. From January 2000 through December 2007 a total of five labor class actions were filed in Michigan’s state courts: one in 2001; two in 2002; and one labor class action in both 2003 and 2004.

In Michigan’s federal courts, however, labor class actions are the most common category of class action suits; a total of 65 cases were filed during the study period. As displayed in Figure 2, the labor class action filing rate increased until 2004 when the filing rate plateaued at 14 cases. Labor class action filings remained at 14 cases in 2005 even as total class action activity in Michigan’s federal courts began to decline. In 2006, labor class actions began to follow the broader trend, dropping to 12 suits. In the first six months of 2007 only 3 labor class action suits were filed in Michigan’s federal courts. Importantly, the labor class action trend in Michigan’s federal courts is significantly different than the national trend. When the July-December 2001 period is compared to the January-June 2007 timeframe, labor class actions on the national level went from constituting 24.6% of all class actions identified to comprising 46.9% of all identified class actions.32 Examining the same time periods in Michigan’s federal courts, labor class actions went from comprising 23.8% of all identified Michigan federal class actions to constituting only 15% of all identified class actions. The reason for this discrepancy is unknown but may be a result of Michigan’s economic recession.

(iii) Consumer Protection Class Actions

The category of cases with the most dramatic decline in Figure 2 is the consumer protection class action suits category. The state court consumer protection class action filing rate started at 14 cases in 2000, dipped in 2001 but rebounded to 10 actions in 2002, then dropped to

32 Lee & Willging, Fourth Interim Report, supra n.16, at 3-4.
1 class action suit per year by 2006. This represents an overall decline of 92.9%, and a 90% reduction in consumer protection filings from 2002 to 2007.

Unlike the other class action categories, state consumer protection class actions often allege secondary claims based on a different legal theory. During the study period a total of 45 consumer protection class actions were filed in Michigan’s state courts. Of the 45 consumer protection cases, 29 suits, or 64.4%, alleged secondary claims that were based on a different legal theory. Contract law was the legal theory for the secondary claims in 21 of the 29 actions. Tort law provided the legal basis for the secondary claims in 4 cases, and antitrust law was the legal theory for the secondary claims in the remaining 4 consumer protection class action suits.

Except for 2007, the consumer protection class action filing pattern in Michigan’s federal courts follows the total class action activity pattern for Michigan’s federal courts. As shown in Figure 2 and contrary to the state trend, consumer protection class actions in Michigan’s federal courts declined from 8 suits in 2002 to 4 cases in 2003, then increased to 8 actions in 2004. Like the state court trend and the pattern for all class action filings in Michigan’s federal courts, consumer protection filings declined in 2005 to reach the 2006 low of 3 filings, or 8.1% of all identified class actions. In 2007, however, consumer protection class action filings increased to 7 suits. These 7 cases represent 35% of all class actions filed in the first six months of 2007 and a 133.3% increase in filings over July-December 2001. A similar increase has been observed at the national level where consumer protection filings increased by 156% over the same period.33

(iv) Property Class Actions

Contrary to the general theme, Michigan’s state courts are the preferred forum for property class action suits. As displayed in Figure 3, the number of property class actions filed in Michigan’s state courts was equal to or exceeded the number of property suits filed in federal

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court, except for 2003. In fact, while Michigan state court class action activity has been in a general decline, the rate of property class action filings increased from 1 action in 2003 to 3 suits in 2006.

Property class actions are rarely filed in Michigan’s federal courts. In the first three years of the study Michigan’s federal property class action filing rate followed an opposite trend when compared to overall federal class action activity in Michigan: while 2001 and 2003 were relative minimums for Michigan’s total class action activity, these years were the relative and absolute maximum for federal property class action filings. In 2001, 2 property class actions were filed in Michigan’s federal courts. Federal property class action filings fell to only 1 case in 2002, then increased to 3 cases in 2003. Since 2003, property class action filing rates have declined by one action per year until 2006 when no property class actions were filed in Michigan’s federal district courts. A property class action has not been filed in Michigan’s federal courts since 2005.

**Figure 3: State to Federal Comparison of Property, Tort, and Civil Rights Class Action Filings**
(v) **Tort Class Actions**

As shown in Figure 3, tort class actions tend to be filed in Michigan’s federal courts, when they are filed. In Michigan’s state courts, tort class action filings declined from 4 cases in 2000 to 1 case in 2001, then increased to 3 cases in 2002. Current data shows that a tort class action has not been filed in Michigan’s state courts since 2002. The lack of tort class action suits in Michigan’s state courts is likely due to Michigan Court Rule 3.501’s superiority requirement applying to all class actions, a requirement that is difficult to satisfy in tort cases.34

Tort class actions have an unpredictable filing pattern in Michigan’s federal courts. Tort class action filings were constant in both 2001 and 2002 with 2 suits filed in each year. No tort class action suits were filed in Michigan’s federal courts in 2003, but 2 tort class actions were filed in 2004 and 4 cases were filed in 2005. Since 2005 tort class action filings have declined to only 1 filing in 2006 and zero tort class action filings in 2007. The lack of tort class actions may indicate a lack of mass torts in Michigan. The more likely explanation, however, is that mass tort class actions will not be certified because “a significant proportion of the liability issues cannot be adjudicated on a class basis.”35

(vi) **Civil Rights Class Actions**

Like tort class actions, civil rights class actions are rarely filed in Michigan’s state courts. Figure 3 shows that only 4 civil rights class actions were filed in Michigan’s state courts during the study period: one class action in 2000, one in 2002, and one suit in both 2006 and 2007.

Civil rights class action filings in Michigan’s federal courts also have an irregular filing pattern. Michigan federal civil rights class action filings increased from 4 suits in 2001 to 8 cases in 2002 then declined to 3 filings by 2004. Federal civil rights class action filings

35 Trangsrud, *Joinder Alternatives*, supra n.34, at 791.
increased from the 2004 rate to 5 cases in 2005 and 6 in 2006; however, no civil rights class action suits were filed in the first six months of 2007.

B. Class Certification Rate for Michigan’s State and Federal Courts

1. Class Certification Rates in General

Class certification is more likely to be expressly granted or denied in Michigan’s state courts. In Michigan’s state courts, class certification was granted in 27.9% of the actions and denied in 34.9% of the suits. A decision on class certification is pending in 2.3% of the suits while the parties did not move for class certification in 9.3% of the cases. Finally, in 24% of the actions the issue of class certification was moot, meaning the parties moved for class certification but the case was dismissed or withdrawn without a ruling by the court.

In Michigan’s federal courts, however, class certification was granted in 21.7% of the cases and denied in 8.7% of the actions. The federal rates for pending and moot decisions on class certification are close to the state rates, for in Michigan’s federal courts a certification decision is pending in 3.2% of the cases and the issue of certification is moot in 20.1% of the actions. A major difference between Michigan’s state and federal courts is the rate at which the parties moved for class certification. In Michigan’s federal courts, a motion for class certification was not filed in 45.3% of the class action suits. In fact, out of the 115 cases that lack a motion for class certification, only 27 cases, or 23.5%, are still being litigated. This federal rate of 45.3% greatly surpasses the 9.3%36 of state cases that lacked a motion for class certification upon a final disposition of the suit. A partial explanation for this discrepancy may be Michigan’s rule requiring the parties to move for class certification within 91 days of filing the complaint.37 Another explanation is that the data used in this study does not include class

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36 9.3% represents 12 state class action suits.
37 See M.C.R. 3.501(B)(1).
action suits where: (1) the suit was filed outside of Genesee, Macomb, and Oakland counties; and (2) the case was not appealed.

Finally, these findings are contrary to the results of a previous study comparing the outcomes of class certification decisions in state and federal court. This previous study found that: (1) “[c]lass actions were equally unlikely to be certified in both state and federal courts;” (2) “[f]ederal courts were more likely to deny class certification explicitly;” and (3) “state courts were more likely to take no action regarding class certification.”38 The Michigan class action data described above shows that class certification trends in Michigan’s courts are different, though the Michigan data is incomplete. Three tentative conclusions can be drawn from the available state court data. First, Michigan’s state courts are slightly more likely to grant class certification than Michigan’s federal courts. Second, Michigan’s state courts are more likely to rule on the issue of class certification and explicitly deny certification. Finally, Michigan’s federal courts are twice as likely to take no action regarding class certification. These conclusions are the result of a data set dominated by extensively litigated cases that were subsequently appealed. Though the previous study did not focus on Michigan cases, the previous study may be the more accurate depiction of certification rates because it captured a wider variety of suits.

2. Certification Analysis by Nature of Suit

(i) Contract Class Actions

Class certification for contract class actions is granted more often in Michigan’s federal courts and denied more frequently in Michigan’s state courts. During the study period, class certification was granted in 9.5% of the state contract class actions and in 16.7% of the contract

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class actions filed in Michigan’s federal courts. Furthermore, class certification was denied in 42.9% of the contract class actions filed in Michigan’s state courts but only 4.8% of the actions filed in federal court. The parties moved for class certification at a higher rate in the state cases, and the issue of class certification was more likely to be moot at the state court level. A motion for class certification was not filed in 4.8% of the state cases, but this motion was lacking in 50% of the federal contract class action suits. Additionally, the issue of class certification was moot in 33.3% of the state contract actions but only 19% of the federal contract suits. Finally, a certification decision is pending in approximately 4.8% both the state and federal contract class action cases.

(ii) Labor Class Actions

Labor class actions are likely to be certified in both Michigan’s state and federal courts. Though labor class actions are rarely filed in Michigan’s state courts, when they are filed labor class actions are certified 60% of the time.\(^{39}\) In Michigan’s federal courts, class certification is granted in 40% of the cases while certification is denied in only 7.7% of the actions. Finally, a decision on class certification is pending in 3.1% of the federal cases, a motion for class certification is absent in 33.8% of the actions, and the issue of class certification is moot in 13.8% of the federal labor class action suits.

(iii) Consumer Protection Class Actions

Class certification for consumer protection class actions is more likely to be granted and denied certification when the suit is filed in Michigan’s state courts. In Michigan’s state courts class certification was granted in 20% of the cases and denied in 37.8% of the suits.

\(^{39}\) During the study period only 5 labor class actions were filed in Michigan’s state courts: class certification was granted in 3 of these cases; class certification was denied in 1 case; and a decision on class certification is pending in the fifth action.
Furthermore, the issue of class certification was moot in 37.8% of the state consumer protection cases, and the parties did not move for class certification in 2.2% of the suits.

If the 29 state consumer protection class actions that alleged secondary claims based on contract, antitrust, or tort law are separated into a subset, the rate at which a class is certified decreases. For this subset, class certification was granted in 13.8% of the cases and denied in 41.4% of the suits. Additionally, the issue of class certification was moot in 41.4% of the actions and a decision is pending in 3.4% of the cases. This data may indicate that alleging a secondary claim based on a different legal theory actually highlights the differences between the plaintiffs, thus causing state judges to deny certification because common questions do not predominate.

In Michigan’s federal courts class certification was granted in only 2.7% of the consumer protection class actions and certification was denied in 13.5% of the cases. Additionally, the parties did not move for class certification in 64.9% of the federal cases, and the issue of certification was moot in 18.9% of the federal consumer protection class actions. The high rates at which the issue of class certification was moot or the parties never moved for certification suggest that plaintiffs in state and federal consumer protection cases are using class action procedure for their individual gain.

(iv) Property Class Actions

When filed, property class actions are likely to be certified in both Michigan’s state and federal courts. In Michigan’s state courts, class certification was granted in 54.5% of the cases, denied in 40.9% of the suits, and the issue of certification was moot in 4.5% of the property class actions. The certification rate was the same in Michigan’s federal courts where 55.6% of the class actions were certified, and the issue of class certification was moot in the remaining 44.4% of the federal property class action suits.
(v) **Tort Class Actions**

Tort class actions are more likely to be certified in Michigan’s state courts. Class certification was granted in 25% of the state tort class action suits and denied 12.5% of the cases. Furthermore, a motion for class certification was lacking in 25% of the actions and the issue of class certification was moot in 25% of the state tort class actions.\(^{40}\) For Michigan’s federal courts, class certification was granted in 9.1% of the cases and denied in 9.1% of the cases. Finally, a motion to certify a class was not filed in 45.5% of the federal tort actions and the issue of class certification was moot in 36.4% of the tort class action suits. When compared to the other categories, class certification is not granted as frequently in tort class action cases. The most likely explanation for the lower certification rate is that “a significant proportion of the liability issues cannot be adjudicated on a class basis.”\(^{41}\)

(vi) **Civil Rights Class Actions**

Civil rights class actions are more frequently filed in Michigan’s federal courts but are more often certified as class actions in Michigan’s state courts. During the study period, 75% of the civil rights class actions filed in Michigan’s state courts were granted class certification and certification was denied in 25% of the cases. In Michigan’s federal courts, however, class certification was granted in 22.6% of the civil rights class actions, denied in 19.4% of the cases, and the issue of class certification is moot in 19.4% of the cases. Finally, the parties did not move for class certification in 35.5% of the federal civil rights class actions, and a decision is pending in 3.2% of the cases.

\(^{40}\) In the eighth state tort class action, class certification was granted and then the class was decertified later in the litigation.

\(^{41}\) Trangsrud, *Joinder Alternatives*, supra n.34, at 791.
C. Origin & Jurisdiction\textsuperscript{42} of Michigan’s Federal Class Action Suits

The origin and jurisdiction of class action filings in Michigan’s federal courts has changed over the study period. The origin of the suit designates whether the suit was originally filed in Michigan’s federal courts or whether the suit was removed from state court. The jurisdiction of the suit denotes whether the court’s jurisdiction is based on federal question or diversity of citizenship. As displayed in Figure 4, the percentage of cases originally filed in Michigan’s federal courts increased from 77% prior to the Class Action Fairness Act’s (CAFA) enactment to 86% in the post-CAFA period. By contrast, the percentage of cases removed to federal court decreased from a pre-CAFA rate of 23% to 14% in the post-CAFA timeframe.

Figure 4: Origin & Jurisdiction of Michigan’s Federal Class Action Suits

<table>
<thead>
<tr>
<th></th>
<th>Pre-CAFA</th>
<th>Post-CAFA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Proceeding</td>
<td>Federal Question</td>
<td>Original Proceeding</td>
</tr>
<tr>
<td></td>
<td>69%</td>
<td>Federal Question</td>
</tr>
<tr>
<td></td>
<td>10%</td>
<td>73%</td>
</tr>
<tr>
<td>Original Proceeding</td>
<td>Diversity</td>
<td>Original Proceeding</td>
</tr>
<tr>
<td></td>
<td>8%</td>
<td>Diversity</td>
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<tr>
<td></td>
<td>13%</td>
<td>13%</td>
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<tr>
<td>Removal Federal</td>
<td>Question</td>
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<td>7%</td>
</tr>
<tr>
<td>Removal Diversity</td>
<td>13%</td>
<td>7%</td>
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</tbody>
</table>

Figure 4 also shows the jurisdictional basis for these original proceeding and removal cases. For the 77% of pre-CAFA cases originally filed in federal court, diversity of citizenship provided the jurisdictional basis for 8% of the total suits while federal question jurisdiction

\textsuperscript{42} This jurisdiction analysis excludes cases where the United States is the named defendant. This approach complies with the methods used in the Federal Judicial Center’s national study on the Class Action Fairness Act. I adopted this approach to facilitate the CAFA analysis \textit{infra}.
accounted for 69% of the class actions. Post-CAFA, the 86% of suits originally filed in federal court consisted of 13% based on diversity of citizenship jurisdiction and 73% based on federal question jurisdiction.

For the 23% of pre-CAFA removal cases, 10% of the total suits were based on federal question jurisdiction and 13% were based on diversity of citizenship jurisdiction. After CAFA’s enactment, federal question and diversity of citizenship jurisdiction each accounted for 7% of the total 14% for removal suits. The decrease in removal suits does not necessarily suggest that CAFA’s removal provisions are ineffective. If more cases that are eligible for a federal forum are originally filed in federal court, then fewer state court cases would qualify for removal to a federal forum; thus, the percentage of removals would decrease.

IV. Analysis of Class Action Litigation in Michigan’s State and Federal Courts

A. Choice of Forum Analysis

When initially filing a claim, current data shows that plaintiffs choose Michigan’s state courts almost as often as they select Michigan’s federal courts. As displayed in Figure 5, plaintiffs initially file 46.5% of their complaints in Michigan’s state courts and 53.5% of their suits in Michigan’s federal courts. Once litigation begins, however, 27.5% of the class actions initially filed in Michigan’s state courts are removed to federal court, making Michigan’s federal courts the forum for 66.3% of Michigan’s class action activity. During the study period, 49 cases were removed from Michigan’s state courts but only 1 case was remanded after removal. This suggests that if a party files a notice of removal and removes the case to federal court, then it is unlikely that the case will subsequently be remanded. If, as previously estimated, the available state court data represents 20% of the total state class action activity, then Figure 5 also suggests that plaintiffs strongly prefer to litigate in Michigan’s state courts.
Figure 5 also shows that Michigan’s federal courts are the preferred forum for labor and civil rights class action suits, as well as those class actions that do not fall into one of the six primary categories. The most likely explanation for plaintiffs’ selection of Michigan’s federal courts as the forum to litigate their labor and civil rights cases is the fact that all of the labor and civil rights class action suits in Michigan’s federal courts were based on federal question jurisdiction. When combined with the removal statistics, this suggests that plaintiffs choose to file their labor and civil rights class action claims in Michigan’s federal courts to avoid removal by the defendants.

Figure 5 shows that Michigan’s state courts are the preferred forum for plaintiffs to file their contract, consumer protection, property, and tort class action suits. Michigan’s state courts may be the preferred forum for these types of class actions because: (1) Michigan’s state courts are more likely to grant a motion for class certification in consumer protection, tort, and property class actions; and (2) Michigan’s state courts are only slightly less likely to grant class certification in contract class action suits. Furthermore, most contract, property, and tort class
actions in Michigan’s federal courts are based on diversity of citizenship jurisdiction. This finding implies that these class actions are largely based on state substantive law and there is a non-resident party, which explains the plaintiff’s decision to file in state court and the higher removal rates in contract, property, and tort class actions. This conclusion is also consistent with the fact that almost all of the consumer protection class actions in Michigan’s federal courts are based on federal question jurisdiction and plaintiff’s strong preference to initially file federal consumer protection class actions in federal court. Combined, these two findings suggest that: (1) plaintiffs generally file class actions based on federal substantive law in federal court; (2) plaintiffs file class actions based on state substantive law in state court; and (3) plaintiffs’ preference for state court is disrupted by the presence of a non-resident party.

Finally, to determine where most cases are litigated, the cases removed from state court must be included in the total class action activity of Michigan’s federal courts. The result shows that most contract, labor, tort, and civil rights class actions are litigated in Michigan’s federal courts. However, even after excluding the removed cases from the state court figures, most consumer protection and property class actions are still litigated in Michigan’s state courts.

B. Analysis of CAFA’s Affect on Michigan’s Courts


The Class Action Fairness Act (CAFA)\(^{43}\) made significant and controversial changes to federal class action procedure.\(^{44}\) Designed to “assure fair and prompt recoveries for class members with legitimate claims” and to “restore the intent of the framers [. . .] by providing for Federal court consideration of interstate cases of national importance under diversity


jurisdiction," CAFA has three primary sets of provisions. First, CAFA created a consumer class action bill of rights to: (1) regulate coupon settlements and settlements where class members would suffer a net monetary loss; (2) require notice of all proposed class action settlements to be sent to certain state and federal officials; and (3) prohibit judicial approval of proposed settlements that allocate different monetary sums to different class members based solely on the class member’s geographic proximity to the court.

Second, CAFA expanded diversity jurisdiction by allowing the class members’ claims to be aggregated to meet the $5,000,000 amount in controversy requirement and by lowering the diversity threshold to minimal diversity of citizenship between the plaintiffs and defendants. The expanded diversity jurisdiction provisions do not apply to class actions with fewer than 100 members, actions that meet the local controversy exception, securities or derivative suits, or cases where the primary defendants are states, state officials, or other governmental entities. Finally, CAFA facilitates the removal of state class actions by permitting removal by any defendant, regardless of citizenship and without the consent of the other defendants, even after 28 U.S.C. § 1446(b)’s one year limitation has passed.

2. The Controversy Surrounding CAFA’s Enactment

The controversy surrounding CAFA grew out of its anticipated effects on class action litigation. Proponents of CAFA argued that these provisions would reduce forum shopping for magnet state courts and ensure adequate, federal, supervision over class action litigation and

settlements.\textsuperscript{51} Furthermore, proponents, including large corporate interests,\textsuperscript{52} believed that the “dramatic increase in the number of class actions litigated in state courts” was stretching the resources of the state court systems\textsuperscript{53} and subjecting out-of-state defendants to local bias\textsuperscript{54} from state court judges who were “less careful than their federal court counterparts about applying the procedural requirements that govern class actions.”\textsuperscript{55} Proponents also felt that federal courts were more sensitive to choice-of-law decisions\textsuperscript{56} and “less sympathetic to class actions and to plaintiffs’ cases than certain state courts.”\textsuperscript{57} Finally, proponents believed that CAFA’s jurisdictional provisions would move the bulk of class action litigation to the federal courts\textsuperscript{58} where certification was perceived to be more difficult to obtain.\textsuperscript{59} Thus, supporters favored CAFA’s passage because they thought CAFA would result in fewer certified class actions, thereby reducing corporate exposure to liability from large scale class actions.\textsuperscript{60}

Opponents of CAFA based their arguments on federalism and the effect CAFA would have on plaintiffs. Opponents, including the National Conference of State Legislatures and the National Association of State Attorneys General, argued that CAFA would extend federal jurisdiction to areas of state civil and criminal law that do not need or require federal review.\textsuperscript{61}

\textsuperscript{53} S. REP. NO. 109-14 at 13.
\textsuperscript{55} S. REP. NO. 109-14 at 14.
\textsuperscript{56} David Marcus, Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction, 48 Wm. & Mary L. Rev. 1247, 1308 (2007).
\textsuperscript{59} See Marcus, supra n.56, at 1296-97.
\textsuperscript{60} See id.
\textsuperscript{61} Id. at 1301-02.
Opponents believed CAFA would “force most state class actions into federal courts” and “prevent state courts from considering class action cases which involve solely violations of state laws, such as state consumer protection laws” and state environmental protection laws. These changes, opponents claimed, would adversely impact “the ability of consumers [. . .] to obtain compensation” and hamper plaintiffs from pursuing environmental litigation, thus reducing the polluter’s incentive to comply with environmental laws. Furthermore, the shift in cases to the federal courts would make it “far more burdensome, expensive, and time-consuming” for plaintiffs to obtain access to justice, choking the federal court dockets and delaying or foreclosing the timely determination of many federal actions, particularly civil rights cases. Finally, opponents shared proponents’ belief that it is “more difficult and time consuming to certify a class action in federal court;” however, they viewed this as an argument against the legislation that would prevent some victims from obtaining relief, particularly those individuals with negative value claims.

3. CAFA’s Affect on Michigan’s Courts

(i) Increase in Overall Class Action Activity?

Two issues posed in the introduction were: (1) whether overall class action activity has increased in both state and federal courts, and thus CAFA has not relocated any class action activity; and / or (2) whether CAFA has relocated class action suits from state to federal court. The data described supra showed that, since 2004, the number of class actions filed in Michigan’s state courts has remained constant, with the exception of 2007. In Michigan’s

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62 S. REP. NO. 109-14 at 87.
63 S. REP. NO. 109-14 at 89.
64 S. REP. NO. 109-14 at 83.
federal district courts, however, class action activity has declined by 4.8% from 21 filings in July-December 2001 to 20 actions in January-June 2007. When combined, the filing data for Michigan’s state and federal courts does not support the conclusion that class action activity has increased after CAFA’s enactment. In fact, total class action activity has declined in Michigan’s courts. Furthermore, these findings are inconsistent with the 72% national increase in federal class action activity from July-December 2001 to January-June 2007.67 The decline in Michigan state court filings in 2007 is likely a result of the limitations associated with the collection of state court class action data. Future years of data will have to be collected to determine the significance of the decline in 2007 state filings.

(ii) Relocation of Class Action Suits?

When class action filings are analyzed by the category of suit an unexpected conclusion is reached: CAFA has not relocated class action activity to Michigan’s federal courts. A typical CAFA effect would manifest itself in an increase in federal filings, especially cases based on diversity of citizenship, while state filings of a particular class action category simultaneously decreased. Although the origin and jurisdiction analysis supra showed an increase in original proceeding suits, this pattern is not present in any of the six major categories of suits analyzed in this study. As noted in the introduction, the lack of available state court data does limit the strength of these conclusions.

a. Contract Class Actions

First, CAFA is not having a direct effect on contract class action cases. The filing rate for state contract class actions has remained constant since 2004. Furthermore, filings of federal contract class actions dropped by 45.5% from 2004 to 2005, but the filing rate increased by 33.3% since 2005. While the origin analysis above showed an increase in cases originally filed

in federal court, CAFA likely does not explain the increase in federal contract class action filings because the percentage of federal contract class action suits based on diversity of citizenship jurisdiction actually decreased post-CAFA. These findings suggest that CAFA is not having a direct effect on the location of contract class action suits because state filings remained constant and contract class action filings based on federal question jurisdiction increased post-CAFA.

However, CAFA may have had two indirect effects on contract class action litigation. First, plaintiffs may be alleging more federal claims in their contract complaints now that federal jurisdiction is harder to avoid. Additionally, CAFA’s expanded removal provisions may have encouraged plaintiffs to select the federal forum when it is available. These suggestions are supported by the increase in the original proceedings rate in Michigan’s federal courts and the increase in the number of contract class actions based on federal question jurisdiction.

b. Labor Class Actions

Second, labor class action suits have not been affected by CAFA. No state labor class actions have been filed since 2004, and the federal labor class action case per month filing rate has declined by 57.1% from 2005 to 2007. Furthermore, all labor class actions litigated in Michigan’s federal courts were based on federal question jurisdiction, and almost all of these actions were original proceedings. Thus, CAFA is not affecting labor class action cases because these labor trends are not premised on federal diversity or removal jurisdiction.

c. Consumer Protection Class Actions

Third, CAFA has not had a direct effect on consumer protection class action activity. State consumer protection suits have been declining since 2002, with an 80% decline from 2003 to 2006. Federal consumer protection class action filings declined by 62.5% from 2004 to 2006, then increased by 133.3% from 2006 to 2007. Although the origin analysis showed an increase
in original proceeding suits post-CAFA, the jurisdiction of almost all of the federal consumer protection claims remained based on federal question jurisdiction. The delayed post-CAFA increase in filings and the high rate of federal question cases suggest that CAFA is not having a direct effect on consumer protection class action suits.

d. Property Class Actions

CAFA is not having an effect on property class action suits. State filings of property class action cases have increased since 2003 while federal filings have decreased since 2003. Furthermore, only one property class action has been litigated in Michigan’s federal courts post-CAFA, and this suit was based on federal question jurisdiction. These trends suggest that CAFA is not having any effect on property class action filings because the trends are the inverse of CAFA’s intended affect.

e. Tort Class Actions

Tort class action filings are sporadic, at best. A tort class action has not been filed in Michigan’s state courts since 2002 while federal filings peaked in 2005 and have since declined to zero filings. Furthermore, the increase in the number of suits originally filed in federal court is not explained by the tort class action category because tort class action filings have been decreasing since 2005. These findings suggest that CAFA is not having an effect on the location of tort class action filings.

f. Civil Rights Class Actions

CAFA is not having an effect on civil rights class action suits for two reasons. First, all civil rights actions litigated in federal court were based on federal question jurisdiction. Second, almost all of the federal cases were originally filed in federal court. Therefore, civil rights class actions were not impacted by CAFA’s expansion of federal diversity and removal jurisdiction.
(iii) Analysis of the Rationale for CAFA’s Enactment

While the fears of CAFA’s opponents have not been realized, the identified class action data provides mixed support for CAFA’s enactment. The total class action activity discussion and the empirical conclusions on the relocation of class action activity to Michigan’s federal courts both undermine the rationale for CAFA’s enactment of expanded diversity and removal provisions. These analyses showed that CAFA failed to achieve its stated purpose of shifting most class action activity to the federal courts.

However, the choice of forum analysis supra showed that most class actions are litigated in Michigan’s state courts. This finding supports the argument that defendants are commonly subjected to “local bias” from state court judges who are “less careful” about applying the procedural requirements that govern class actions.68 Furthermore, the origin analysis indicates that CAFA may be indirectly affecting litigation by encouraging plaintiffs to file their suit in a federal forum when it is available. Thus, these results may indicate that procedural rules directed at vertical forum shopping are futile when they are left vulnerable to the tricks of litigation.

V. Conclusion

This paper analyzed class action activity in Michigan’s state and federal courts to determine if class action plaintiffs prefer to litigate their suits in state courts. The available data showed that plaintiffs have a slight preference for Michigan’s federal courts when initially filing their suit. The data also demonstrated that plaintiffs prefer to file class actions based on federal substantive law in federal court and state substantive law in state court. However, this forum selection is disrupted by the presence of a non-resident party because diversity of citizenship provides an alternate basis for federal jurisdiction. After including cases removed from state

court, Michigan’s federal courts serve as the forum where almost 70% of the class action suits are litigated.

The data also indicated that litigants’ behavior may have been indirectly affected by the Class Action Fairness Act. Though potentially encouraging plaintiffs to select the federal forum when it was available, the data indicated that CAFA may have failed to directly shift any category of class action litigation to Michigan’s federal courts. Finally, while Michigan state court class action data is currently limited, planned technological updates to the case management infrastructure hopefully will provide greater access to data on class action activity in Michigan’s courts.