

CLASS ACTIONS

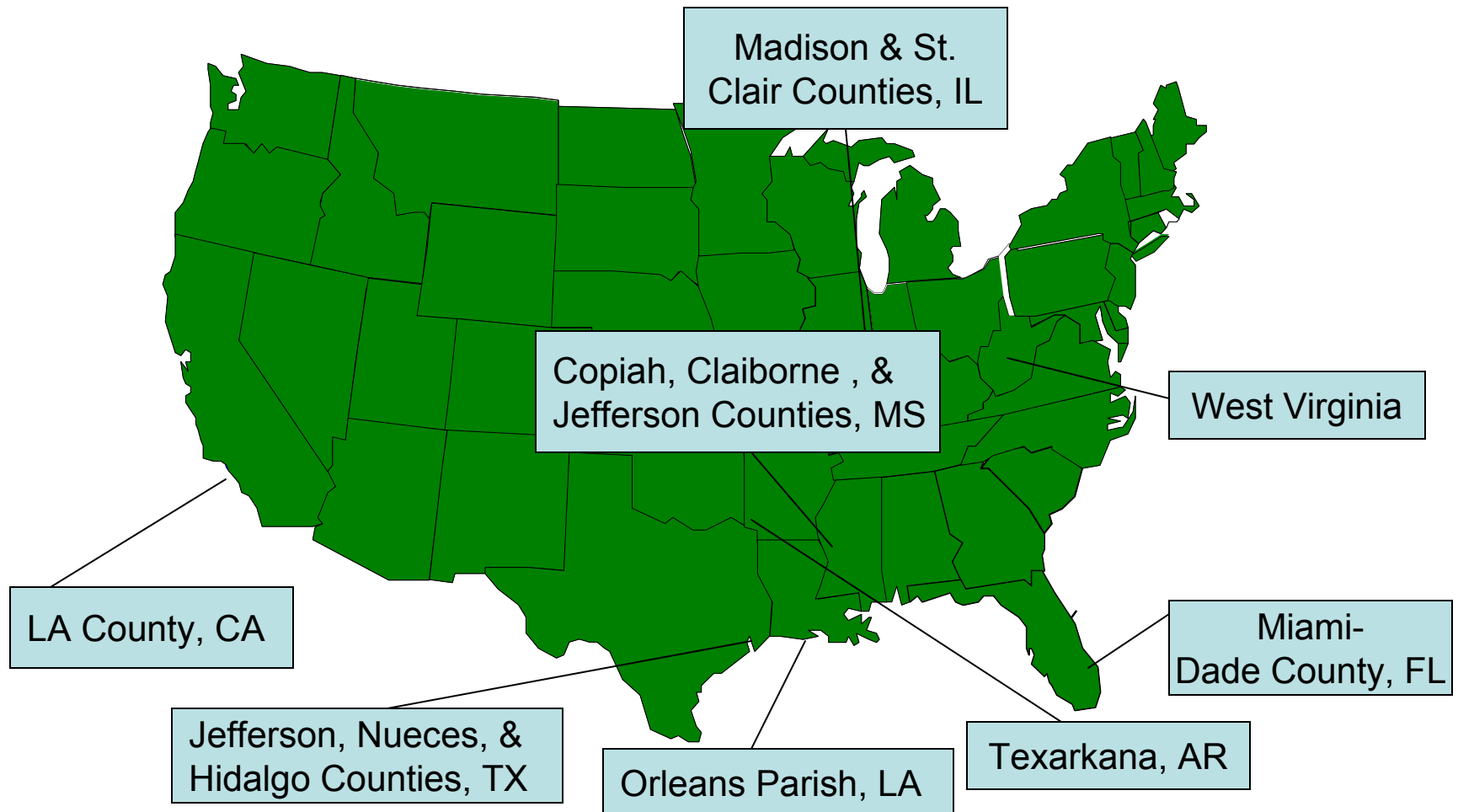
**Keeping the Barbarians Outside the Gate
(or at least from plundering your castle)**

Mark A. Johnson

Where We Were: state court class actions run amuck

- State venues friendly to class actions
- Nationwide class actions applying one state's law decided by local judge
- Cost of defense and heightened exposure from class actions forced settlements unrelated to merits
- \$1.2B judgment against State Farm in nationwide class applying Illinois consumer protection statute

Magnet Jurisdictions



Pre-CAFA Case Study: Hensley v. Computer Science Corp.

- Filed in 2005 in state court in Texarkana, Arkansas, two days before Class Action Fairness Act became effective
- 15 plaintiffs sued 583 insurance companies, more than 80 separate corporate groups
- Claims based on use of computer software (“Colossus”) to estimate pain and suffering component of bodily injury claims – achieve more consistent, fair results among adjusters

Hensley class action

- Bad faith, conspiracy claims that software under-estimated pain and suffering, resulting in underpayment of claims
- Nationwide class of millions, majority of U.S. insurance industry
- Most defendants did not have a plaintiff who was an insured – tied to case using rarely recognized “juridical link” doctrine

Hensley Class Action

- Under Arkansas law, any argument that touches on merits of claim must be disregarded before class certification - motions to dismiss never decided after 4 years of litigation
- Many defendants had no contacts with Arkansas - personal jurisdiction motions left undecided
- Arkansas supreme court decisions favorable to class actions

Hensley Class Action

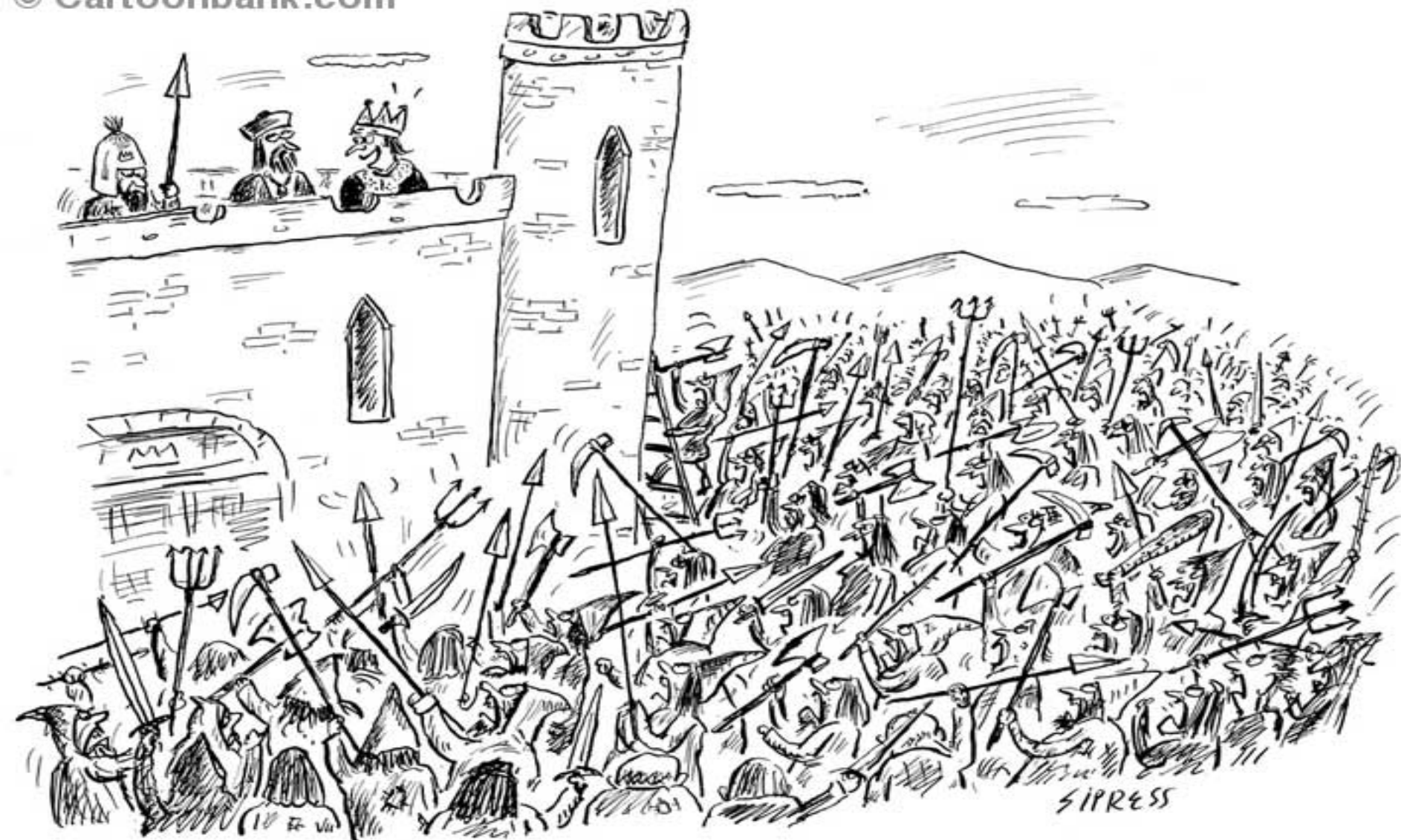
- Court initially ordered 22 page document retention notice and 121 page complaint sent by every defendant to every employee and agent across country, regardless of connection to case
- Massive discovery enforced by court, including millions of first party claim files
- Depositions of corporate reps ordered held in Texarkana

Miller County, Arkansas Population: 43,226
State of Arkansas Population: 2,855,390 (2008)



Hensley Class Action

- Costs of discovery, unfriendly forum, court's refusal to consider motions to dismiss or personal jurisdiction, and unlikely appellate recourse led to settlements
- Claims-made settlements, required notarized claim forms, resulting in take rate of 10% or less
- Over \$130M in fees paid to Plaintiffs' counsel, never having to try their claims or even go to contested class certification
- Settlements required injunction against use of particular software for estimating pain and suffering



"I know—what if I promise them change?"

Where we are now: Class Action Fairness Act

- Enacted in 2005, CAFA extended diversity jurisdiction over class actions with more than \$5M in controversy
- Requirements: (a) class action or mass action; (b) 100 or more class members; (c) minimal diversity with any member of class; (d) \$5M in controversy of class¹
- Not just nationwide class actions, but any with minimal diversity²

Class Action Fairness Act

- Also applies to mass actions – monetary claims of 100 or more proposed to be tried jointly¹
- Unlike traditional diversity, any defendant can remove without consent of others²
- Removable when elements of jurisdiction arise – class action alleged, amount in controversy – regardless of when
- One year time limit on removal does not apply under CAFA³

Class Action Fairness Act

- Exceptions: court *must* decline jurisdiction if more than $\frac{2}{3}$ of class members are citizens of forum state and:
 - at least one defendant from whom significant relief is sought is citizen of forum state and conduct forms significant basis for claims; and principal injuries incurred in forum state (local controversy exception)
 - or, all primary defendants are citizens of forum state (home state exception)

Class Action Fairness Act

- Discretionary jurisdiction: court *may* decline jurisdiction if between $\frac{1}{3}$ and $\frac{2}{3}$ of class members and primary defendants are citizens of forum state, based on 6 statutory considerations¹
- State actor exception: no jurisdiction if primary defendants are governmental entities²
- CAFA also does not apply to claims relating to securities or corporate governance³
- Burden on plaintiff to prove exceptions⁴

Amount in Controversy

- Battleground has been amount in controversy
- Total damages sought by entire class in determining whether \$5M in controversy - including compensatory, punitives, and attorneys' fees
- Circuits split on proof required by defendant that damages may exceed \$5M¹
- Based on allegations of the complaint, not post removal representations by plaintiffs²

Amount in Controversy

- Savvy plaintiffs limit class relief to less than \$5M, but division over standard of proof when relief limited in complaint
 - 11th Cir. – complaint alone must show CAFA's jurisdictional requirements met
 - 6th Circuit has rejected splitting claims into separate lawsuits as means to stay under \$5M
- May depend on whether ultimate relief limited to prayer for relief under state law
- Consider also value of compliance with equitable relief, depending on circuit

Defending remand motions

- Burden on defendant to present evidence of federal jurisdiction¹
- Defendant put in unusual position of showing what class damages could be²
- Even if unstated in complaint, most courts require evidence from removing defendant to establish amount in controversy
- Best practice is to file detailed evidence of amount in controversy with notice of removal

Defending remand motions

- What happens after remand if relief limited?
- Assuming complaint not amended to expand relief, depends on state law
- Plaintiff may be judicially estopped from recovering more on remand¹

Appeal of Remand Orders

- Limited review of remand orders –appeal filed in “not less than” 7 days¹
- Most circuits have read as “not more than” 7 days²
- Acceptance of appeal discretionary, and must be decided within 60 days
- Time for decision can be extended by agreement or good cause, not to exceed 10 days

What happens to federal jurisdiction if class cert is denied?

- *St. Paul* doctrine holds that jurisdiction is fixed based on allegations at removal, unaffected by later events¹
- District courts split – some have remanded if revival of class allegations unlikely²
- Aversion to small individual claim remaining in federal court
- Circuit courts have yet to address

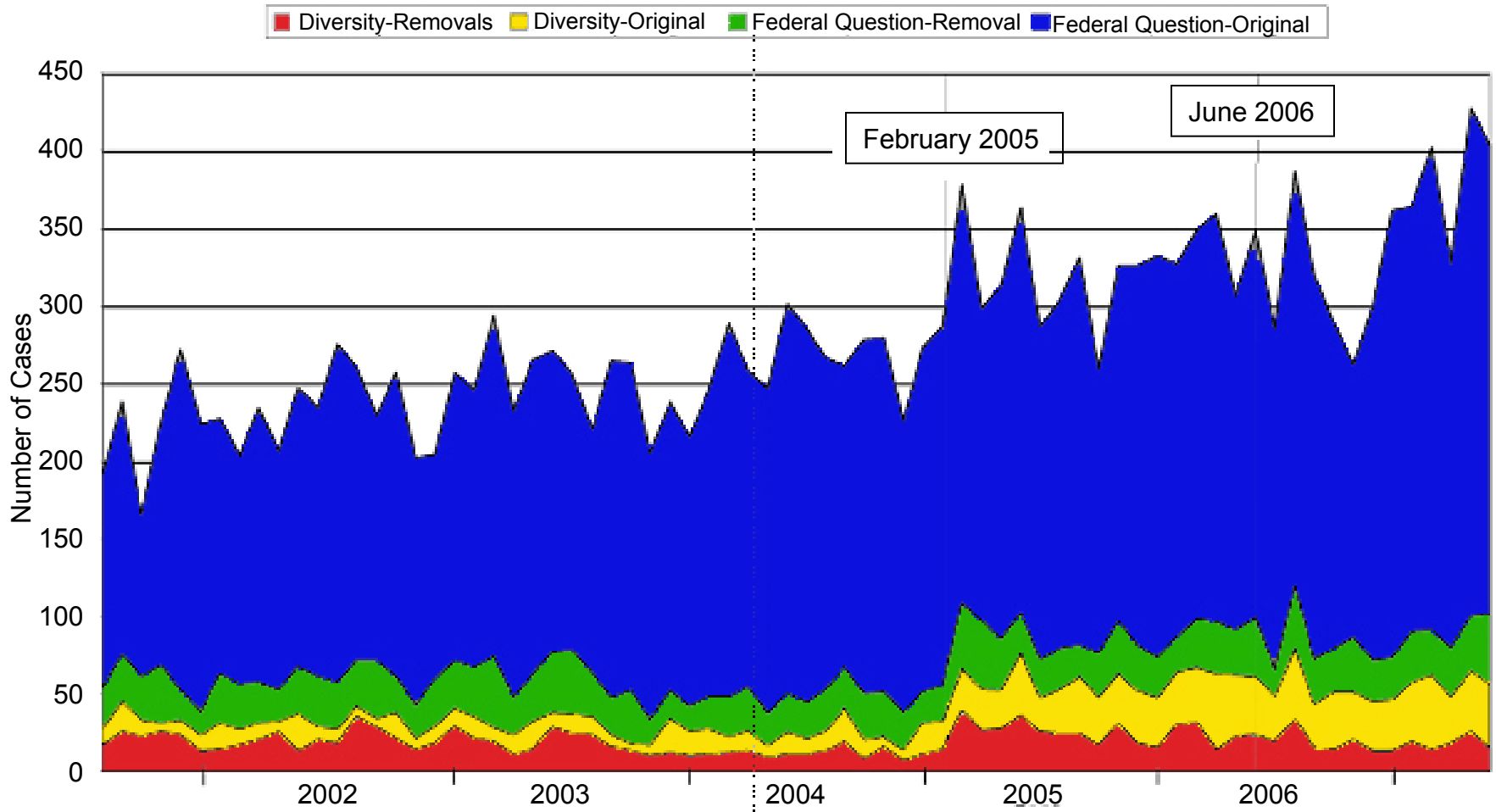
Impact of federal jurisdiction over class actions

- Supreme Court agreed to review whether state statutory claim prohibiting filing as class action conflicts with federal procedural device - Rule 23
- Question of whether state law is substantive or procedural rule under *Erie*
- Plaintiff asserting federal jurisdiction under CAFA, to overcome prohibition of class actions for claims provided by state statute

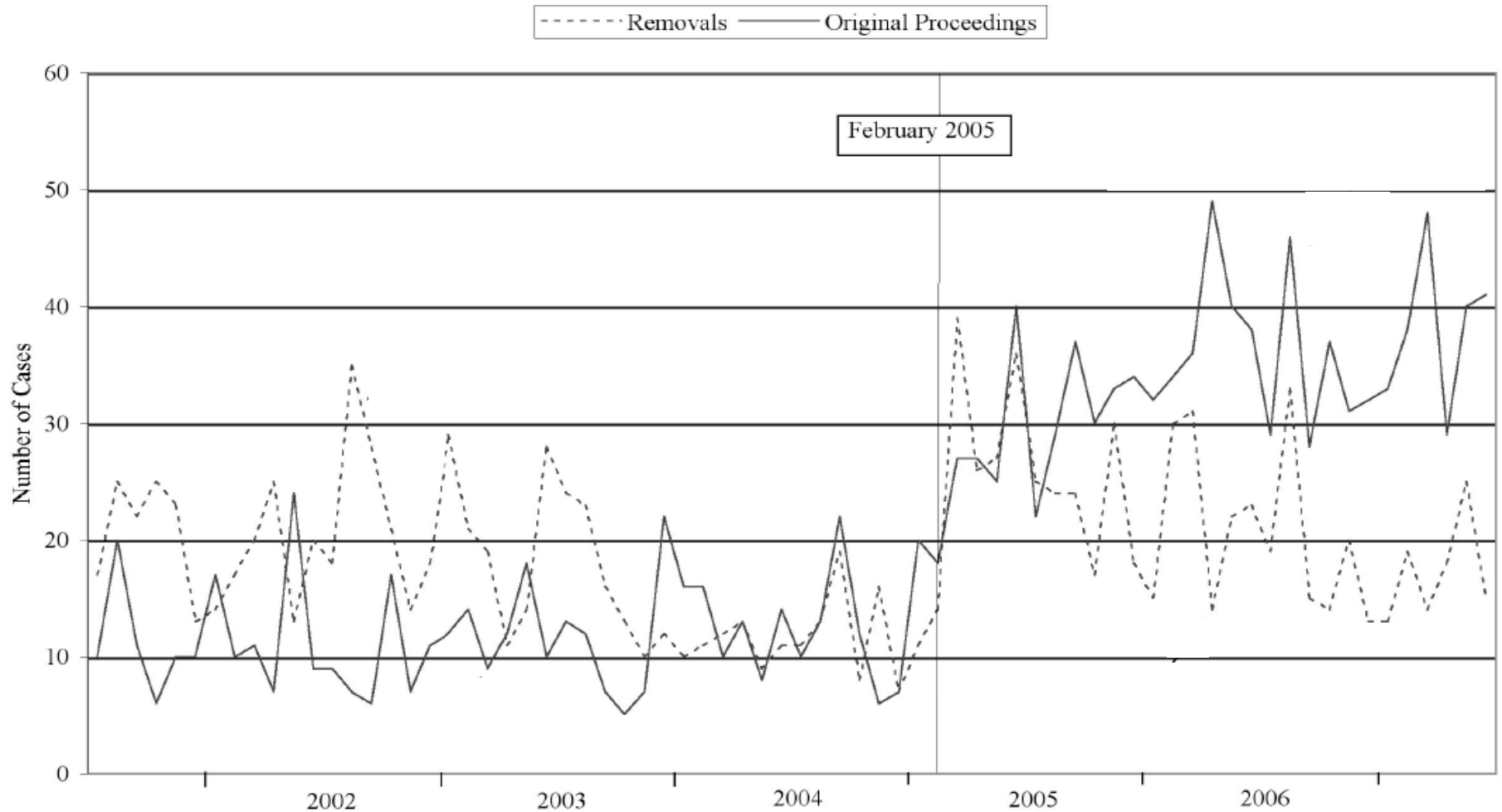
Where we are going: More class actions in federal courts

- Federal Judicial Center Study of April, 2008
- Spike in diversity removals after CAFA, but leveled off
- Increase in original diversity filings
- More state court class actions?

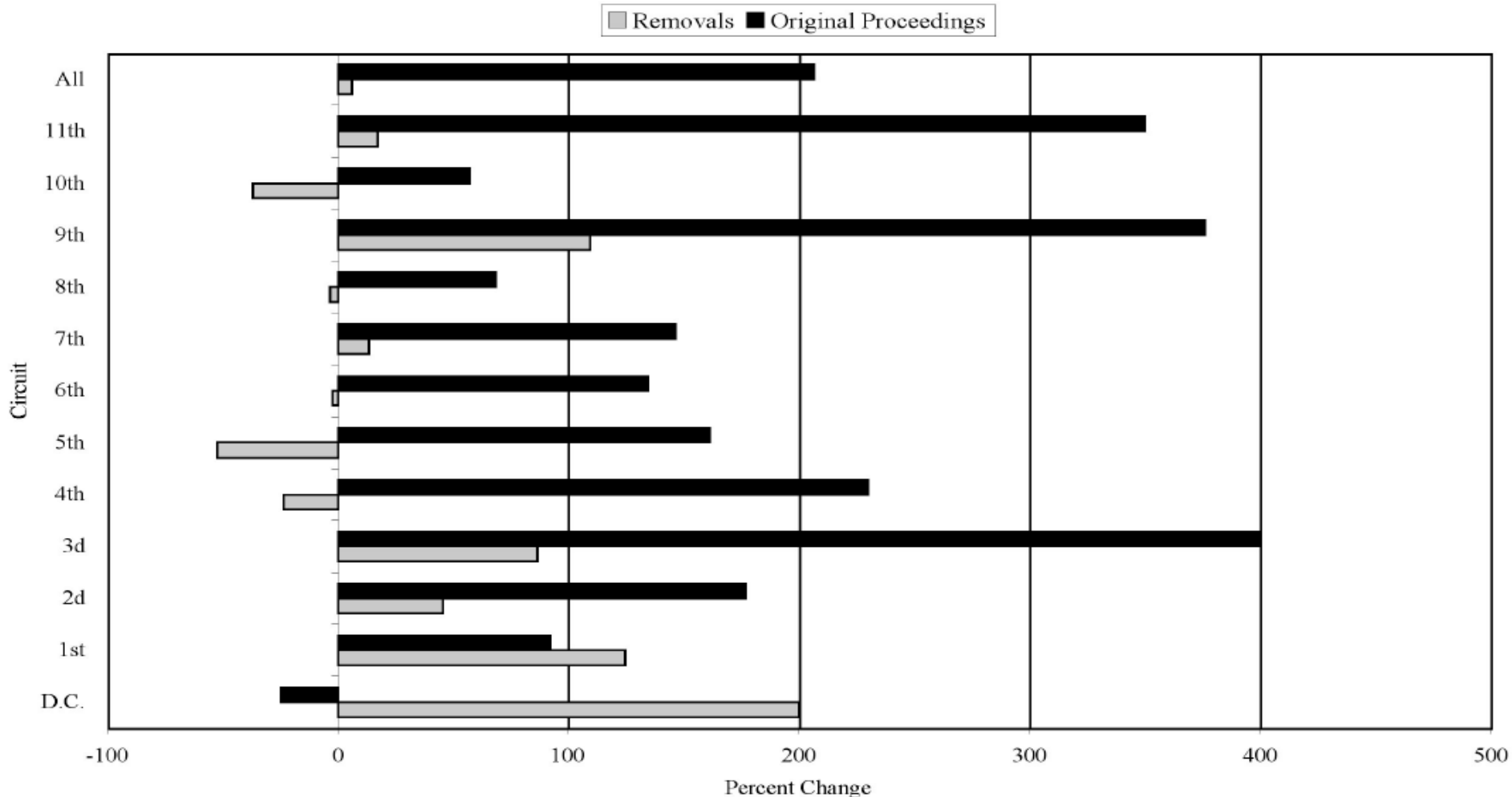
Monthly Class Action Filings and Removals, 7/01 – 6/07



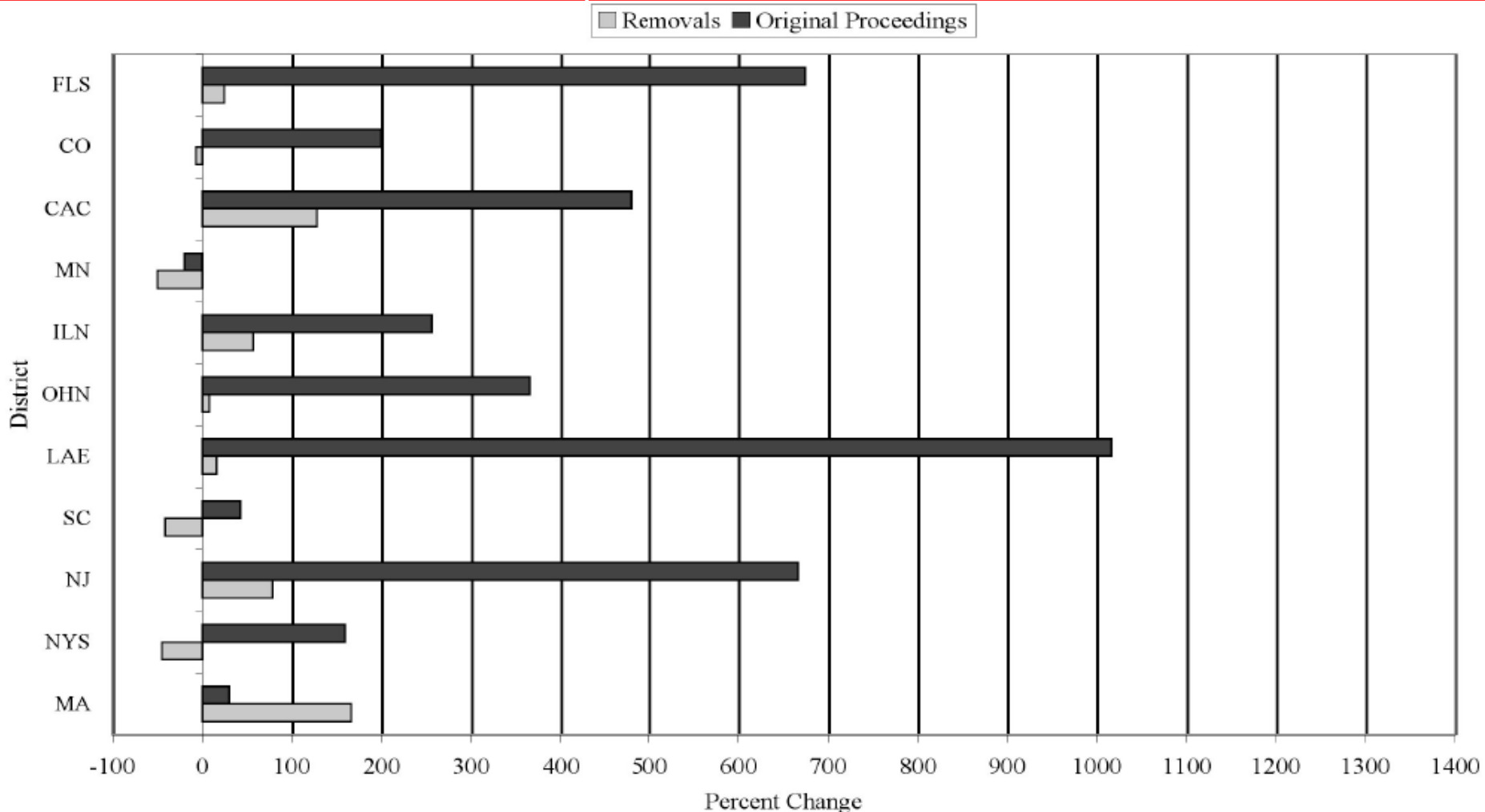
Monthly Class Action Filings and Removals, Diversity Only, 7/01-6/07



Change in Diversity Class Action Filings and Removals By Circuit , 2002-03 to 7/05-6/07



Change in Diversity Class Action Filings and Removals in Largest Diversity District In Each Circuit, 2002-03 to 7/05-6/07



Response of Plaintiff's Bar

- Trend away from common law fraud claim with individual issues of reliance (presumed reliance under *Basic* for securities claims), and creative use of contract claims
- Increased use of statutory claims that don't require proof of individual causation
- Foregoing relief by class, splitting claims by fact issues, or limiting time period of class to enhance certification¹

Creative Use of Injunctive Relief

- Typical class actions seek damages, must prove that common issues predominate – Rule 23(b)(3)
- Class seeking injunctive relief certified under (b)(2), no predominance requirement, although varying level of cohesiveness requirement¹
- Plaintiffs alleging more creative injunctive relief claims to avoid the difficulty of certifying class under b3, but which ultimately seeks damages (disguised as injunctive relief)²

International Class Actions

- Jurisdiction over “foreign cubed” class actions – disputes between foreign plaintiffs and defendants¹
- Conduct and effects test to analyze impact of claims on U.S.
- Canadian class actions are increasing – common issues not required and more liberal judicial acceptance²

Standard of Review of Class Certification Motions

- Eisen rule long cited to preclude examination of merits when ruling on class cert – that plaintiff loses on claim should not control whether to certify class¹
- Many courts have overly extended rule to forbid looking at how class claims can be proven, or even considering dispositive issues before class cert
- Many courts accept allegations of complaint as true, or presume that class should be certified

Heightened review of class certification – a positive trend

- Class should not be certified based upon only allegations in the complaint – Plaintiffs must produce evidence
- Trend towards requiring resolution of conflicting legal and factual issues when deciding class cert
- Not 12(b)(6) standard, issues decided for class cert not binding on trier of fact
- Trend toward requiring plaintiff to prove Rule 23 requirements by preponderance of evidence, even if overlaps merits issues

Taking the Fight to Plaintiffs

- Historically defendants allow plaintiffs to dictate time of the class certification battle
- Traditional sequence is motion to dismiss/answer, discovery, then file class certification opposition brief in response to motion
- This approach often costly, time-consuming, and allows plaintiffs to set the tone
- Alternatively, consider active options to “prepare” the class certification battlefield

Early Use of Dispositive Motions

- Strategic advantages to attacking claims early through motions to dismiss, for judgment on the pleadings, or for summary judgment
- Early focus of court on inadequacies of merits or as a class action
- Can force plaintiffs to take positions to avoid dispositive ruling that will undermine ability to obtain class certification

Motions to Strike or Dismiss Class Allegations

- Brings certification problems to the forefront *before* extensive and expensive discovery
- Keeps plaintiffs from finding and using bad facts from discovery in future litigation
- Appropriate when legal, not factual issue, precludes certification; cuts off argument that time for discovery is needed
- Caution: gauge receptivity of forum – implied waiver of argument later in class cert brief, or conditions court to find against you

Discovery

- Know what's been produced by you in other cases
 - Searchable database of documents, affidavits, deposition testimony
- Assume plaintiff's counsel in similar cases are in communication with one another
- Coordination and communication among retained counsel in class actions
- Think carefully about whether you want bifurcated discovery

Strategies in Multi-Defendant Class Actions

- Advantages of defense group participation
 - Easier sharing of strategy, research, and work among defense group
 - Better coordination among counsel (minimize risk of negative impact from position by one defendant)
 - Avoid duplicative arguments and experts, saving costs and focusing arguments
- Multiple defendants retaining same counsel
 - All advantages of a defense group, plus sharing costs of common work to reduce fees

Rising Claims in Class Actions

- Security of privacy data of consumers, employees
- Healthcare benefits
- Fair Debt Collection Practices Act claims
- Truth in Lending Act/Real Estate Settlement Procedures Act claims
- Fair Labor Standards Act claims
- Statutory consumer or employee-based claims providing for minimum damages without proof of causation or individual injury

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