

ATTORNEY CHOICE OF FORUM IN CLASS ACTION LITIGATION: WHAT DIFFERENCE DOES IT MAKE?

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ABSTRACT

Legislation designed to change class action litigation practices has centered on attorney choice of forum. The Class Action Fairness Act of 2005 (CAFA) rests on two related assumptions: that plaintiff attorneys choose state forums to achieve better outcomes for the proposed class they seek to represent and that, in the view of CAFA supporters, federal courts present a superior venue for resolving multistate class actions. The first assumption appears to be based exclusively on anecdotal information suggesting that state courts favor plaintiffs and federal courts favor defendants.

On behalf of the Federal Judicial Center and the Advisory Committee on Civil Rules, we collected and analyzed survey responses from attorneys for both sides in closed class action cases. This Article presents empirical data concerning attorney choice of federal or state forums and compares legal rulings and outcomes in a sample of cases filed originally in state court and removed to federal court and resolved either in federal court or in state court after remand. These data shed light on the limitations of the above assumptions. The Article also presents and analyzes data about the outcomes, monetary recoveries, settlements, and attorney fees in the above cases as well as in a sample of cases filed as original actions in federal

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courts.

Our data support the conventional wisdom that attorney choice of forum is influenced by attorneys' perceptions of how state and federal forums are likely to rule on class certification, motions on the merits, and settlement approval. Our data, however, lend little support to the view that state and federal courts differ greatly in how they resolve class actions. For example, state and federal courts were equally unlikely to certify cases as class actions (which occurred in 22% of the remanded cases and 20% of the cases retained in federal courts). Along similar lines, we found no statistically significant differences in state and federal court rulings on dispositive motions or in motions to approve a class-wide settlement.

Attorney perception of the predisposition of judges to rule in favor of their clients' interests was a major factor affecting plaintiff attorneys' choice of forum. Other factors also strongly influenced on those choices, including the source of law (state or federal), and the linkage of class members and their claims to the state. Favorable substantive law and discovery rules also played a role. Likewise, defendants who removed cases to federal court perceived a predisposition on the part of federal judges to rule favorably toward interests like those of their clients, for example, by applying class certification rules strictly. Those attorneys also perceived and that federal substantive law, discovery rules, and expert evidence rules would favor their side.

In examining the actual rulings and outcomes in particular cases we found little indication that attorney perceptions of perceived judicial predispositions were even accurate. Indeed, the percentage of class actions certified, the percentage dismissed, and the percentage of settlements approved were indistinguishable in state and federal courts without regard to whether an attorney perceived a predisposition in that court or not. In the end, one is left to wonder about the source of the attorneys' perceptions and the extent to which attorneys themselves may have been influenced to accept without question or empirical data a general set of preconceptions about state and federal courts and judges.