

Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules

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Introduction

Federal Rule of Civil Procedure 23, an outgrowth of an equity rule, was promulgated in 1938 as part of the first Federal Rules of Civil Procedure.¹ The current version of the rule creates a procedure designed to permit representative parties and their counsel to prosecute or defend civil actions on behalf of a class or putative class consisting of numerous parties. Rule 23 was last amended in 1966. The Judicial Conference Advisory Committee on Civil Rules is currently considering proposals to amend Rule 23.

The Rule 23 Debate in Historical Perspective

Creating a workable procedural standard for class actions has challenged rule makers since the first draft was published in 1937.² The 1966 amendments to Rule 23 sparked a “holy war”³ over the rule’s creation of opt-out classes. Opinions became polarized, with class action proponents seeing the rule as “a panacea for a myriad of social ills” and opponents seeing the rule as “a form of ‘legalized blackmail’ or a ‘Frankenstein Monster.’”⁴

Apparently anticipating debate about the 1966 amendments to Rule 23, Professor Benjamin Kaplan, then reporter to the advisory committee that drafted those amendments, was quoted as saying that “it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23.”⁵ Respect for Professor Kaplan’s caution may have dampened any advisory committee interest in revisiting Rule 23.⁶ Now, a generation has passed and the current advisory committee has returned its attention to the hotly debated policy issues under-

1. Fed. R. Civ. P. 23, Advisory Committee Note to 1937 adoption (West ed. 1994). The U.S. Supreme Court adopted the Federal Rules of Civil Procedure on December 20, 1937, and ordered them to be reported to Congress at the beginning of the January 1938 session. Fed. R. Civ. P. at 8 (West ed. 1994).

2. See James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L.J. 551, 571 (1937) (“It is difficult, however, to appraise the various problems involved and state a technically sound and thoroughly workable rule” for class actions.).

3. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 Harv. L. Rev. 664 (1979).

4. *Id.* at 665.

5. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1967) (paraphrasing Professor Kaplan).

6. See, e.g., Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process 1 (Apr. 21, 1995) (unpublished draft paper presented at NYU Research Conference on Class Actions and Related Issues in Complex Litigation, on file at the Research Division, Federal Judicial Center) (an unspoken barrier shielded Rule 23 from Advisory Committee scrutiny for many years). A later version of Professor Cooper’s paper has been circulated and is expected to be published in a spring 1996 symposium on class actions in the NYU Law Review.

lying the procedural framework of Rule 23. This report to the advisory committee addresses many of the empirical questions underlying those policy issues.

After the 1966 amendments, the emergence of mass torts as potential class actions has added fuel to the debate because of the high stakes inherent in that type of litigation. But the issues remain similar.⁷ Broadly stated, three central issues permeate the debate. First, does the aggregation of numerous individual claims into a class coerce settlement by raising the stakes of the litigation beyond the resources of the defendant?⁸ Second, does the class action device produce benefits for individual class members and the public—and not just to the lawyers who file them? And, finally, do those benefits outweigh the burdens imposed on the courts and on those litigants who oppose the class?⁹

In 1985 a Special Committee on Class Action Improvements of the American Bar Association's Section of Litigation articulated a list of recommended revisions of Rule 23 and called it to the attention of the advisory committee.¹⁰ The ABA special committee found that "the class action is a valuable procedural tool" and recommended changes so that such actions would not "be thwarted by unwieldy or unnecessarily expensive procedural requirements."¹¹ Recommended changes included collapsing the three categories of class actions into one, expanding judicial discretion to modify the notice requirements, authorizing precertification rulings on motions to dismiss and motions for summary judgment, and permitting discretionary interlocutory appellate review of rulings on class certification.¹²

In March 1991, the Judicial Conference of the United States acted on a report of its Ad Hoc Committee on Asbestos Litigation. The Judicial Conference requested "the Standing Committee on Rules of Practice and Procedure to direct its Advisory Committee on Civil Rules to study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation."¹³ Given these developments, the advisory committee drafted a proposed revision of Rule 23, based primarily on the ABA special committee's 1985 recommendations. Professor Edward H. Cooper, reporter to the advisory committee, circulated this draft to "civil procedure buffs," including academics, lawyers, interest groups, and bar organizations.¹⁴ Many of the responses questioned the need for change and suggested that changes might upset settled practices and make matters worse.¹⁵

7. See, e.g., Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 (raising issues of fairness to litigants and coercion of settlements in mass torts).

8. See, e.g., Staff of the Subcomm. on Securities, Senate Comm. on Banking, Housing and Urban Affairs, 103d Cong., 2d Sess., *Private Securities Litigation* 7–8 (May 17, 1994) [hereinafter *Senate Staff Report*].

9. *Id.*; see also Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) (regardless of the merits of the claims on which they are based, settlements in securities class actions produce returns of only about 25% of the potential loss).

10. American Bar Association Section of Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986) [hereinafter *ABA Special Committee Report*]. The House of Delegates of the ABA authorized the Section of Litigation to transmit the report to the Advisory Committee but neither approved nor disapproved its recommendations. *Id.* at 196.

11. *Id.* at 198.

12. *Id.* at 199–200.

13. Judicial Conference of the United States, *Ad Hoc Asbestos Committee Report* 2 (March 1991).

14. Memorandum from Professor Edward H. Cooper to "Civil Procedure Buffs" (Jan. 21, 1993) (on file at the Research Division, Federal Judicial Center). A copy of the 1993 version of the Advisory Committee's proposed Rule

Legislative proposals to modify Rule 23 have paralleled the rule-making policy debates over the past twenty years.¹⁶ As a recent example, in December 1995, Congress overrode a presidential veto and adopted legislation designed to alter substantive and procedural aspects of securities class actions.¹⁷ This legislation had bipartisan support and was an outgrowth of hearings and an extensive staff report in 1994.¹⁸ Among other provisions, the statute tightens pleading requirements for securities class actions and directs district judges to stay discovery and all other proceedings until there is a judicial ruling on any pending motion to dismiss for failure to satisfy those heightened pleading requirements.¹⁹ The statute also modifies the notice requirements applicable to the filing and settlement of securities class actions²⁰ and limits attorneys' fees to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."²¹

The 1995 FJC Study

The Federal Judicial Center conducted the present study in 1994–1995 at the request of the advisory committee. In general, the committee asked the Center to provide systematic, empirical information about how Rule 23 operates. The study was designed to address a host of questions about the day-to-day administration of Rule 23 in the types of class actions that are ordinarily filed in the federal courts. The research design focused on terminated cases and did not encompass the study of mass tort class actions, which appear to occur relatively infrequently and remain pending for long periods of time.

This report describes the results of the study and addresses many of the issues in the continuing debate about class actions, including those raised by the ABA special committee's recommendations. The principal issues are:

- What portion of class action litigation addresses the type of class to be certified?
- Are judges reluctant to rule on the merits of claims before ruling on class certification?
- Does filing of a case as a class action or certifying a class coerce settlement without regard to the merits of the claims?
- How well does the notice process work and who bears its costs?
- In what ways do class representatives and individual class members participate in the litigation?

23 is attached as Appendix A. A copy of the November 1995 draft of proposed Rule 23 is included as Appendix B.

¹⁵ Cooper, *supra* note 6, at 1.

¹⁶ For example, the 95th and 96th Congresses considered proposals to amend Rule 23 at the behest of the U.S. Department of Justice, Office for Improvements in the Administration of Justice. *See* S. 3475, 95th Cong., 2d Sess. (1978), and H.R. 5103, 96th Cong., 1st Sess., Tit. I (1979). For further discussion of this proposal, see Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299 (1980) (evaluating H.R. 5103 to determine whether it satisfies the goals of improving the efficiency of small damage claim actions while protecting the interests of defendants and absent parties).

¹⁷ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

¹⁸ See Senate Staff Report, *supra* note 8, for a discussion of the issues raised at the hearings.

¹⁹ Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77Z-1(b) (West Supp. 1996).

²⁰ *Id.* § 77Z-1(a)(3), (a)(7).

²¹ *Id.* § 77Z-1(a)(6).

- In cases that settle, how do the benefits to the class compare to the benefits to the class attorneys? How extensive is the class action plaintiffs' bar?
- How well does the appellate process work and how might discretionary interlocutory appeals of rulings on class certification affect the fairness of the process?

Such questions—and more—are incorporated in Professor Edward Cooper's April 1995 report to the advisory committee and conferees at New York University Law School's Research Conference on Class Actions.²² Our report parallels Professor Cooper's report in that we have presented study data and analyses to correspond with his questions as closely as possible.²³ Where relevant, we present general background on the state of the law, often focusing on recent decisions in the circuits where study cases were filed.

Study Design and Methods

We selected for analysis as class actions closed cases in which the plaintiff alleged a class action in the complaint or in which plaintiff, defendant, or the court initiated class action activity, such as a motion or order to certify a class. This report presents empirical data on all class actions terminated between July 1, 1992, and June 30, 1994, in four federal district courts: the Eastern District of Pennsylvania (E.D. Pa., headquartered in Philadelphia), the Southern District of Florida (S.D. Fla., headquartered in Miami), the Northern District of Illinois (N.D. Ill., headquartered in Chicago), and the Northern District of California (N.D. Cal., headquartered in San Francisco).²⁴

We identified class actions meeting these selection criteria by a multistep screening process that included reviewing electronic court docket records, statistical records maintained by the Administrative Office of the U.S. Courts, and published opinions. We then reviewed all cases that were candidates for inclusion in the study.²⁵ For each case meeting study criteria, we examined court records and systematically entered appropriate case information into a computerized database. These data were then analyzed by the same attorney researchers who collected the data. In addition, we reviewed data about class actions from the Federal Judicial Center's 1987–1990 district court time study;²⁶ those data are summarized at relevant parts of this report.²⁷

²² Cooper, *supra* note 6.

²³ Our headings and subheadings generally follow the structure of Professor Cooper's paper, but occasionally we have adapted the titles or rearranged the parts to present the data more clearly.

²⁴ Cases in the study represent a termination cohort, i.e., a group of cases that were selected because they were concluded within the same time period. Termination cohorts sometimes present problems of biased data if recent filing trends show fluctuations. Because of the limitations of class action filing data we have not been able to test filing trends as thoroughly as we would like. On the other hand, we have no reason to believe that the use of a termination cohort presents serious problems for these data. *See* Appendix D, Methods.

²⁵ *See* Appendix D for details about the identification of class actions.

²⁶ *See* Thomas E. Willging, et al., Preliminary Report on Time Study Class Action Cases (Feb. 9, 1995) (unpublished report on file with the Information Services Office of the Federal Judicial Center). The time study report includes national data derived from judges' records of the time they spent on the 51 class actions in the study. *See infra* § 2(d) and Table 19. *See* Appendix D for details about the time study.

²⁷ The current report supplements Willging et al., *supra* note 26, and supersedes our preliminary presentation of data to the advisory committee concerning the first two districts studied. *See* Thomas E. Willging et al., Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of

We generally used the median (midpoint) to describe the central tendency of the data. We used this statistic because the mean (average) in many instances was inflated by a few extraordinarily large or small values (“outliers”).

Nature of the Data

Several perspectives regarding—and limitations of—the data deserve special mention at the outset. The four districts were not selected to be a scientific sampling of class actions nationwide. Rather, we selected the four districts because available statistical reports on the frequency of class action activity in those districts indicated that we would have the opportunity to examine a relatively large number of cases in those districts. This high volume would allow us to observe a variety of approaches to class actions. Similarly, the selection of districts from four separate geographic regions would enable us to observe any regional differences in approaches and the selection of districts from four circuits would enable us to observe variations in case law. Because this study did not employ random sampling or control or comparison groups, our results cannot and should not be viewed as representative of all federal district courts nor should causal inferences be drawn from the data. On the other hand, we have no reason or data that would lead us to believe that these districts are unusual or that they present a picture that is radically different from what one would expect to find in other large metropolitan districts.

Each district should be viewed as a separate entity and the data from the four districts should be viewed as descriptive—four separate snapshots of recent class action activity. Generally, data from the four districts should not be aggregated. Occasionally, when the number of cases on a given subject is quite small, we discuss combined data from the four districts for descriptive purposes only, but no inference should be drawn that these data are necessarily representative of all courts.²⁸

cited in *Lambert v. NutraSweet Corp.*, 2017 WL 4112117 (D. Kan. Sept. 12, 2017)
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California in Cases Closed Between July 1, 1992, and June 30, 1994 (rev. Apr. 13, 1995) (unpublished preliminary report on file with the Information Services Office of the Federal Judicial Center).

²⁸ For example, when discussing subject matter (nature-of-suit) categories of cases in relation to infrequent events, we present the data in figures with a caution that no overall conclusions can be drawn from them.

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Summary of Findings

Overall, we identified 407 class actions in the four districts. Of those, 152 were certified as class actions, 59 of which were certified for settlement purposes only.

1. Individual Actions and Aggregation. Across the four districts, the median level of individual recoveries ranged from \$315 to \$528 and the maximum awards ranged from \$1,505 to \$5,331 per class member. Without an aggregative procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied.

Occasionally, other aggregative procedures were used in conjunction with a class action. District court consolidation of related cases occurred more frequently than multidistrict litigation (MDL) consolidation.

2. Routine Class Actions. Securities (b)(3) cases in the four districts exhibited a number of standard characteristics that suggest routineness in the way in which they are litigated and adjudicated. Such cases did not necessarily last longer than nonsecurities class actions, were about as likely to be subject to some form of objection to certification, and did not necessarily yield more dollars to individual class members. Securities cases were, however, more likely to be certified, to be subject to representativeness objections, to involve larger class sizes than nonsecurities cases, and to contain boilerplate allegations. Finally, numerosity objections were unlikely to occur in securities cases, but more likely to occur in other cases.

We did not find the above pattern of routine litigation practices in nonsecurities cases in which only a Rule 23(b)(2) class was sought. Nor did we find such a pattern in (b)(2) civil rights cases, a subset of the nonsecurities cases. Accordingly, we concluded that we cannot generalize about whether these types of (b)(2) cases represented routine applications of Rule 23.

Comparing class and nonclass settlement and trial rates as possible indicators of routineness, the settlement rate for other nonprisoner class actions was comparable to the settlement rate for nonprisoner civil actions, but no consistent pattern was detected across the four districts. The settlement rate for securities class actions was higher than for nonclass securities actions in three of the four districts. Trial rates (jury and bench), however, were generally about the same for all nonprisoner civil cases whether or not they were filed as class actions.

Despite similarities with nonclass cases in settlement and trial rates and despite some standardization of arguments and certification decisions in securities cases, class actions as a group do not appear to be routine cases according to two other measures. In three districts, class actions took two to three times the median time from filing to disposition (15–16 months compared to 5–6 months). In a national time study, certified and noncertified class actions on average consumed almost five times more judicial time than the typical civil case. Both these meas-

ures suggest that class actions are not routine in their longevity or in their demands on the courts.

The most frequently certified class was the Rule 23(b)(3) or “opt-out class,” which occurred in roughly 50% to 85% of the certified classes in the four districts. The second most frequently certified class was the Rule 23(b)(2) or “injunctive class,” which occurred in 17% to 44% of the certified classes. Rule 23(b)(1) “mandatory” classes were certified in a total of fourteen cases in three districts.

A securities case was the most likely case type to be certified as a (b)(3) class, while civil rights cases of various types were most likely to be certified as (b)(2) classes. Certification under more than one 23(b) subsection occurred in about 10% of the certified classes. The most frequent multiple certification combination was (b)(2) and (b)(3).

3. Race to File. Multiple filings of related class actions might indicate a race by counsel to the courthouse, perhaps to gain appointment as lead counsel. We found the following multiple filings: intradistrict consolidations, MDL consolidations, and related but unconsolidated cases. At least one form of multiple filing occurred in 20% to 39% of the class actions in the four districts.

On a related issue, it did not appear that many class action complaints were filed quickly for the ostensible purpose of preserving discoverable information.

4. Class Representatives. We did not find any evidence of professional class action plaintiffs. Very few persons functioned as a class representative in more than one case and none served in that capacity in more than two cases in the study. There were, however, changes in class representatives in 8% to 33% of certified class actions. Many of the changes appeared to signify a significant shift in the litigation or the removal of a person in response to arguments of opposing parties or objections of non-representative parties. A substantial minority (26% to 46%) of all certified class actions in which the court approved a settlement included separately designated awards to the named class representatives. The median award per representative was under \$3,000 in three courts and \$7,560 in the fourth.

5. Time of Certification. Counsel filed motions to certify—or courts issued show cause orders for sua sponte certification—in the four districts within median times of 3.1 months to 4.3 months after the filing of the complaint. Judges ruled on motions to certify within median times of 2.8 months to 8.5 months after the date of the motion.

Parties often filed motions to dismiss or for summary judgment and judges generally ruled on those motions in a timely fashion, often dismissing a case in whole or in part. These rulings on the merits often preceded rulings on class certification, with the rate of precertification rulings on motions to dismiss being higher than the rate for summary judgment motions (although there were some precertification rulings on summary judgment motions in all four districts).

Overall, approximately two out of three cases in each of the four districts had a ruling on either a motion to dismiss, a motion for summary judgment, or a sua sponte dismissal order. Approximately three of ten cases in each district were terminated as the direct result of a ruling on a motion to dismiss or for summary judgment.

As to the timing of such rulings, defendants generally had an opportunity to test the merits of the litigation and obtained prompt judicial rulings on motions to dismiss. Not surprisingly, testing the factual sufficiency of claims via summary judgment took longer—sometimes more than a year—than obtaining rulings on motions to dismiss.

6. Certification Disputes. Across the four districts, 152 (37%) of the 407 cases filed as class actions were certified as such. Fifty-nine (39%) of the certified cases were certified for settlement purposes only. About 40% of the latter cases were settlement classes, that is, cases in which the parties submitted a proposed settlement to the court before or simultaneously with the first motion to certify a class.

In three of the four courts, opposition to certification was indicated in over half of the cases in which class certification was raised. Most arguments centered on traditional issues relating to the typicality, commonality, and named plaintiffs' representativeness. Opposition infrequently addressed the subtype of Rule 23(b) class to be certified; approximately 15% of judicial rulings granting class certification addressed the type of class certified. (See also sections 2 and 9 of this Summary.)

7. Plaintiff Classes. Defendants almost never sought certification of a plaintiff class and were successful in having a plaintiff class certified in only one instance. In half of the 152 certified cases, defendants acquiesced in a plaintiff class either by failing to oppose a motion to certify or by stipulating to certification.

8. Defendant Classes. Across the four districts, there were a total of four motions requesting certification of a defendant class, three filed by plaintiffs and one filed by defendants. One defendant class was certified, at plaintiffs' request, in a civil rights case.

9. Issues Classes and Subclasses. There were no issues classes in any of the four districts. Subclasses were infrequent, appearing in ten cases, five of which were securities cases.

The ability of the named plaintiff to represent the class was frequently disputed because of a potential conflict of interest with other class members. But disputes regarding the typicality of class representatives' claims were less frequent.

10. Notice. Notice of class certification or notice of settlement or voluntary dismissal was sent to class members in at least three-quarters or more of the certified class actions. Notice was delayed in a substantial number of cases. While the reason for the delays could not be determined, one consequence of the delays was to postpone notice expenses until the case had been resolved and such expenses could be shifted to the defendant. In a dozen cases, half of which were settlement classes, neither notice to the class nor hearing on settlement approval appeared to have taken place.

Parties and judges provided individual notice in almost all certified (b)(3) actions in which notice was issued. In at least two-thirds of the cases in each district, individual notices were supplemented by publication in a newspaper or other print medium.

The median number of recipients of notice of certification or settlement (or both) was substantial, ranging from approximately 3,000 individuals in one district to over 15,000 in another. In many cases plaintiffs and defendants shared the cost of notices. Across the four districts, the median cost of notice in the limited number of cases with data available exceeded \$36,000 for notice of certification or settlement or both. Litigation related to notice issues occurred in less than one-quarter of the certified cases in which notice was communicated to the class.

Settlement notices generally did not provide either the net amount of the settlement or the estimated size of the class. A class member typically did not have the information with which to estimate his or her individual recovery. Also missing from most notices was information about the amount of attorneys' fees, costs of administration, and other expenses. Usually, however, notices included sufficient information about plans to distribute settlement funds, procedures

for filing claims, opt-out procedures, and the timetable for filing objections and participating in hearings.

11. Opt Outs. At the settlement stage, the percentage of cases with at least one member opting out was considerably higher than at the certification stage. The occurrence of at least one member opting out of a settlement ranged from 36% to 58% of the cases compared to 9% to 21% with at least one member opting out of a certification before settlement.

Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class; 75% of the opt-out cases had 1.2% or fewer of class members opt out. Settlements with small average individual recoveries had a higher number of cases with one or more opt outs than cases with larger average individual recoveries.

12. Opt Ins. None of the certified class actions required that class members file a claim as a precondition to class membership. Many cases in the study used a claims procedure to distribute any settlement fund to class members. Claims procedures were used routinely in securities class actions. The effect of combining a claims procedure with an opt-out class appeared to be that a class member who did not opt out or file a claim was nonetheless precluded from litigating class issues in the future.

13. Individual Member and Nonmember Participation. Attempts to intervene in cases filed as class actions occurred relatively infrequently. Following rulings rejecting an attempt to intervene, three prospective intervenors filed appeals challenging that decision, but none was successful. Prospective intervenors also filed three appeals addressing other issues—again without success. In addition, objecting class members filed appeals of settlements in two major consumer class actions.

Overall, about half of the settlements that were the subject of a hearing generated at least one objection. Nonrepresentative parties participated by filing written objections to the settlement far more frequently than by attending the settlement hearing. Courts approved approximately 90% or more of the proposed settlements without changes in each district. In a small percentage of cases, the court conditioned settlement approval on the inclusion of specified changes.

14. Settlement. In each district, a substantial majority of certified class actions were terminated by class-wide settlements. Certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified. Certified class actions were less likely than noncertified cases to be terminated by traditional rulings on motions or trials. The vast majority of cases that were certified as class actions had also been the subject of rulings on motions to dismiss or for summary judgment, most of which did not result in dismissal or judgment. But noncertified cases were not simply abandoned; in each district, they were at least twice as likely as certified class actions to be disposed of by motion or trial (mostly by motion). Overall, about half of the noncertified cases were disposed of by motion or trial.

As to the relationship between class certification and settlement, many cases settled before the court ruled on certification. At the other end of the spectrum, a sizable number—a majority in three of the districts—settled more than a year after certification.

Special masters were never used to evaluate settlements and in only one case was a master used to facilitate settlement. Magistrate judges were used occasionally to evaluate a settlement and more frequently to facilitate settlement.

15. Trials. The number of trials in study cases was small; a trial began in only 18 (4%) of the 407 cases in the four districts combined. Plaintiff classes and individual plaintiffs did not fare well at trial. Except for one default judgment that led to a class settlement, no trial resulted in a final judgment for a plaintiff class. Of the three trials that found for individual plaintiffs, one judgment was vacated and remanded for dismissal, one judgment was vacated with a resulting \$1 damage award for the plaintiff on remand, and one defendant's appeal was dismissed. Five of the 18 trials led to settlement during or after trial, including the default judgment case mentioned above, two certified cases that settled after partial judgments for the class, and two non-certified cases.

16. Fee-Recovery Ratios. Net monetary distributions to the class regularly exceeded attorneys' fees by substantial margins. In cases where benefits to the class can readily be quantified, the "fee-recovery rate" (fee awards as a percentage of the gross settlement amount) infrequently exceeded the traditional 33.3% contingency fee rate.

When a settlement created a fund for distribution to the class, three of the four districts calculated fees using the percentage of recovery method far more often than the lodestar method. Not surprisingly, courts generally used the lodestar method in cases where the class settlement produced nonquantifiable benefits. Judges appeared to attach special importance to actual benefits won for the class when calculating fees, either by using the percentage of the recovery method, considering fee objections, or adjusting the lodestar calculation.

Four or fewer appeals per district involved attorneys' fees issues. All fee-related appeals related to plaintiffs' counsel fees, including challenges to the amount of the award, denial of the fee request, or reduction of the fee request. For the four districts combined, only one of the fee-related appeals resulted in vacating a fee award. The other appeals ended in fee-award affirmation (two cases), appeal dismissal (two cases), reversal of denial of fees (one case), vacating the trial court's reduction of fees (one case), and remanding for reconsideration (one case).

17. Trivial Remedies; Other Remedies. We did not find any patterns of situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees. Nor did we find any (b)(2) cases that appeared to result in clearly trivial injunctive relief accompanied by high fees. The fee-recovery rate, as described above, exceeded 40% in 11% or fewer of settled cases, half of which included nonquantifiable benefits such as a permanent injunction. In the balance of cases with high fee-recovery rates, the settlement produced relatively small payments to the class as well as to attorneys for the class.

In five cases in two districts, a portion of the settlement funds was distributed to a charitable or other nonprofit organization.

18. Duplicate or Overlapping Classes. We found five duplicative or overlapping classes in related cases that were not consolidated with similar litigation pending in federal and state courts. Our review of the files indicated that those cases generated few difficulties for the court.

19. Res Judicata. No data were available.

20. Appeals. The rate of filing at least one appeal ranged from 15% to 34%. Noncertified cases were more likely to have one or more appeals than certified cases. Cases with trials showed even a higher rate of appeal. Few appeals led to altering the decision of the trial judge at the appellate level or on remand. Class certification before appeal, however, may have been one of the factors that led to settlement in cases that settled on remand.

Plaintiffs filed 75% to 85% of the appeals and were rarely successful in reversing or vacating trial court decisions. On the other hand, defendants rarely filed appeals; their appeals also did not lead to a high rate of reversal or vacation. Among appeals resulting in full or partial reversal on appeal, most reversals significantly changed the direction of the case. For appeals in cases that had been previously certified, reversal and remand generally resulted in a class settlement, although there were only seven such reversals in the study. On the other hand, reversal and remand in thirteen cases not previously certified generally did not lead to a successful outcome for the plaintiffs.

Parties rarely sought appellate review of district court decisions that dealt with the mechanics of the class action process, such as certification or class settlement. Litigants appealed certification decisions in seven study cases. Two cases involved certified classes. In one, the certification of a class was affirmed and, in the other, class certification was vacated. In the other five cases, putative class representatives appealed the denial of class certification. Three of these five appeals were unsuccessful. The fourth resulted in reversal and remand that led to class certification and the fifth resulted in dismissal with no class certified.

21. Class Action Attorneys. In 156 cases, 160 different law firms served as lead, co-lead, or liaison counsel, with more than 1 firm appointed in most cases. Twelve of these law firms served as lead or co-lead counsel in 4 or more cases. In total, these 12 firms appeared 95 cases, 63% of the certified cases in the study.

cited in *Lambert v. Nutraceutical Corp.*
No. 15-56423 archived on September 12, 2017

Findings

(1) Individual Actions and Aggregation²⁹

(a) Average recovery per class member

Background. In this opening section, we report data on one alternative to class actions, namely, the filing and consolidation of individual cases. The ultimate question in this subsection is: How many members of certified classes would have maintained individual actions absent the class action? We cannot answer that question in exactly those terms, but even the highest level of recovery per individual class member that we found appears unlikely to support separate individual actions.

Data. Across the districts, the median level of the average recovery per class member³⁰ ranged from \$315 to \$528; 75% of the awards ranged from \$645 to \$3,341; and the maximum awards ranged from \$1,505 to \$5,331 (see Figure 1). Even assuming that an individual member might recover a higher award in a separate trial, the multiplier would have to be ten or more for an individual to meet the minimum jurisdictional amount for a diversity case. Cases seeking injunctive relief and cases brought under federal statutory authority could be brought as individual actions. However, without a substantial multiplier of individual damage awards, none of the awards would likely induce a private attorney to bring the case on a contingent fee basis or an individual to advance sufficient personal funds to retain an attorney to file the action. Nor is it clear how many, if any, individual actions would be supported by the hope for a statutory fee award (*see infra* § 16(b)).

The median net settlement per class member in the relatively few securities cases ranged from \$337 to \$447 (see Figure 2). The comparable medians for nonsecurities classes ranged from \$275 to \$1,472 (see Figure 3). Given the small numbers of cases with monetary settlements in each district, no firm conclusions can be drawn about the differences between securities cases and all other cases. It does appear, however, that neither level of recovery would have been likely to support individual actions.

²⁹. See generally Judith Resnik, *From "Cases" to "Litigation,"* Law & Contemp. Probs., Summer 1991, at 5 (describing a trend toward aggregation).

³⁰. We calculated the average recovery per class member by starting with the gross settlement amount, deducting expenses, attorneys' fees, and any separate awards to the named class representatives, and dividing that net settlement amount by the number of notices sent to class members.

Discussion at the advisory committee's November 1995 meeting raised a question about the incidence of the "two-dollar" individual recovery.³¹ To address that question, we examined all class actions in the four districts that were certified solely under (b)(3) and that produced an average distribution per class member of less than \$100 (see Table 1). There were nine such cases in the four courts. These data did not include any two-dollar cases, but they do tend to bridge the gap between the anecdotal evidence and our quantitative evidence. The absence of such nominal recoveries in the four districts suggests that the anecdotal cases on which the discussion was based, which presumably arose in other districts, may represent outlier cases at the bottom of the range of class action recoveries.

For these nine cases with monetary awards below \$100 per member, the average award to the class was \$2.63 million and the median award was \$2.55 million (see Table 1). For those same cases, fee awards were generally based on a percentage of the gross recovery. Those percentages clustered around 30% and five of the nine awards were exactly 30% of the total recovery. The average size of the class was 45,055 and the median size was 45,920 members. Eight of the nine cases were securities cases. (*See also infra* § 17(a) for a discussion of (b)(3) cases in which the relief was relatively trivial in relation to attorneys' fees and for a discussion of non-monetary relief in such cases.)

(b) Consolidation and related cases

Background. In the previous section, we concluded that individuals would be unlikely to file individual cases to recover damages. In this subsection, we look at the extent to which separate cases were filed in relation to the same transactions. An important distinction, however, is that the separate cases discussed in this subsection generally were filed as class actions and not simply as individual claims. Here, we look for "relationships . . . between aggregation and numbers of individual actions arising out of the same transactional setting."³² We also address how often "individual actions proceed in the same court, or in different courts, without any attempt at aggregation."³³ We found what appears to be a modest amount of interdistrict and intradistrict consolidation and also found a smaller number of cases that the court declined, or was without authority, to consolidate.

On occasion, a court may find that "[c]laims identical or similar to those made in a class action may be the subject of other litigation, either in the same court or in other federal or state courts."³⁴ Individuals who have no interest in being class members may file their own separate suits either before or after certification. Under Rule 23(b)(3)(B), the court must consider the pendency of other litigation concerning the controversy, in both state and federal courts, by or against members of the class.³⁵ Further, under Rule 23(c)(A)(4) common issues of fact or law may be carved out for class certification³⁶ on both an intradistrict³⁷ and on a nation-wide³⁸ ba-

31. Advisory Committee on Civil Rules, Minutes at 22-23, Nov. 9-10, 1995.

32. Cooper, *supra* note 6, at 25.

33. *Id.*

34. Manual for Complex Litigation, Third, § 30.3, at 234 (Federal Judicial Center 1995) [hereinafter MCL 3d].

35. *Id.* § 30.15, at 219 & n.691 (citing *Califano v. Yamasaki*, 442 U.S. 682 (1979) (need to consider whether proposed nation-wide class would improperly interfere with similar pending litigation in other courts)).

36. *Id.* § 33.262, at 324 & n.1067 (citing *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410 (N.D. Ill. 1994) (negligence liability for infected blood), *mandamus granted, class certification denied, In re Rhone-Poulenc Rorer*,

sis. Federal courts use Federal Rule of Civil Procedure 42(a)³⁹ for intradistrict transfers and the MDL statute for interdistrict transfers.⁴⁰ There is no clear authority for a federal court to consolidate cases filed in state court with actions filed in federal court.

Data on consolidations. In all four districts, interdistrict consolidation of cases in which there was class action activity was relatively infrequent. The Judicial Panel on Multidistrict Litigation consolidated between 3% and 6% of cases with cases from other districts. The median time from filing the complaint in a case to MDL consolidation ranged from approximately four months in three districts to approximately six months in the other district (see Figure 4). Due to the small number of cases for different nature-of-suit categories, we are unable to observe any distinct patterns or draw any reliable inferences about, say, antitrust, securities, or civil rights cases. In this small subset of cases, the most common nature-of-suit categories were antitrust cases followed by securities cases (see Table 2).

District courts consolidated similar cases within their own districts more often (14% to 20%) than the judicial panel consolidated cases across district lines. The median number of cases within each consolidation ranged from two to four (see Figure 5). Among intradistrict consolidations, the most frequent nature of suit was securities (see Table 3).

Data on nonconsolidations. We also looked at how often courts do not consolidate cases even though they are related to other litigation pending in federal and state courts. On the federal level, nonconsolidation of related cases occurred in 5% to 23% of the cases in the four districts (see Figure 6). Securities was the most common nature of suit among the nonconsolidated cases (see Table 4).

Inc., 51 F.3d 1293 (7th Cir. 1995) (district judge ordered to decertify the plaintiff class), *cert. denied*, 116 S. Ct. 184 (1995); *In re Copley Pharmaceutical, Inc.*, “Albuteral” Prods. Liab. Litig., No. MDL 1013, 158 F.R.D. 485 (D. Wyo. 1994) (negligence, breach of warranty claims for contamination of bronchodilator), *defendant’s motion to decertify plaintiff class denied*, *In re Copley Pharmaceutical*, 161 F.R.D. 456 (D. Wyo. 1995)).

37. *See, e.g.*, *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (opt-out class of water contamination victims in vicinity of a landfill); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986) (district-wide class of asbestos-injury claimants to resolve specific issues).

38. *See, e.g.*, *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir.) (nation-wide 23(b)(3) class of schools seeking compensatory damages associated with the presence of asbestos-containing building materials), *cert. denied*, 479 U.S. 852 (1986).

39. Fed. R. Civ. P. 42(a) states:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42(a) permits partial or complete consolidation of related actions pending in the same district for both pretrial and trial purposes. *See* *Lloyd v. Industrial Bio-Test Labs, Inc.*, 454 F. Supp. 807 (S.D.N.Y. 1978) (securities case where the court granted the defendant’s cross motion for consolidation); *Wellman v. Dickinson*, 79 F.R.D. 341, 348 (S.D.N.Y. 1978).

40. Pursuant to 28 U.S.C. § 1407(a) (1988), the Judicial Panel on Multidistrict Litigation is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings upon its determination that transfer “will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”

On the state level, we identified nonconsolidation with pending state litigation infrequently, ranging from 1% to 3% of the study cases (see Figure 6). Among this small group, securities and other civil rights cases were the most common nature of suit (see Table 5).

Nonconsolidation of related cases can present difficulties for courts, especially during discovery. Other problems arise when multiple actions result in conflicting or overlapping classes that may produce, among other things, inconsistent adjudications. For details about the types of difficulties we found in eight cases that were not consolidated with related litigation pending in federal and state courts, see Tables 6 and 7. While the nonconsolidations presented difficulties for the court, they did not appear to be insurmountable. Of the eight cases, half were eventually disposed of via a class settlement approved by the court. Three of the remaining cases were terminated via a judicial ruling on a motion to dismiss, a stipulated voluntary dismissal, and a judicial ruling on a motion for summary judgment.

(2) Routine Class Actions

(a) What was the relationship, if any, between the “easy applications” of Rule 23 and the substantive subjects of dispute?

Background. Some have maintained that class actions in certain nature-of-suit categories are often “easy applications” of Rule 23. These cases are considered easy or routine because they frequently involve complaints with boilerplate allegations, similar class certification arguments, and standard settlements. In particular, some have viewed securities class actions as fitting into such standard molds.⁴¹ To test these premises, we compared study cases in different nature-of-suit categories. Since the number of filings in most categories was small, we limited our analysis, where appropriate, to securities cases, nonsecurities cases, and civil rights cases (a subset of nonsecurities cases).

Data on Rule (b)(3) cases. First, we compared indicators of routineness in cases filed as Rule 23(b)(3) class actions,⁴² starting with duration of the case from complaint to closing. Despite the perceived complexity of securities cases, they did not take much longer to settle and close than nonsecurities class actions. Study data for the four districts showed the median time period from filing the complaint to closing ranged from twenty-four to twenty-eight months for settled securities class actions. In comparison, median time periods for settled nonsecurities class actions were shorter in two districts (with medians of eleven and thirteen months) and longer in two others (with medians of thirty-six and fifty months) (see Table 8).⁴³ In particular, the me-

41. *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989) (“all too familiar path of large securities cases,” including “lugubrious” pleading contests and “massive” discovery). A recent report found courts reacting to what some view as boilerplate shareholder allegations of officer/director fraud: “The increased [judicial] application of Rule 9(b) may stem from the courts’ thinning patience with nearly identical ‘boiler-plate’ securities fraud complaints.” Edward M. Posner & Karl L. Prior, *Motions to Dismiss Shareholders’ Suits Against Officers and Directors* (ALI-ABA Course of Study: The Prosecution and Defense of Shareholder Litigation against Directors and Officers, Washington, D.C.), May 28–29, 1992, at 91, 109.

42. These include cases filed under Rule 23 (b)(3) alone or in combination with one or more other subdivisions of 23(b).

43. In addition, Figure 10, discussed *infra*, presents median duration periods for settled and nonsettled securities cases combined and compares class actions to nonclass civil actions.

dian case lengths for (b)(3) civil rights actions were about the same as, or longer than, for settled securities cases in the three districts where civil rights cases settled.

Do these results indicate that securities cases are “routine”? To respond to that question, we looked at the rate at which (b)(3) classes were certified, finding somewhat distinctive results for securities and civil rights cases. A (b)(3) class was certified in 94% to 100% of the securities cases where a motion or sua sponte order on certification was filed. In contrast, for nonsecurities actions, the certification rates were 64% to 93% in the three districts with sufficient numbers of cases for meaningful comparison (see Table 9). Interestingly, the certification rate for (b)(3) civil rights cases was 100% in each of the three districts with (b)(3) civil rights class actions, but these constituted only two or three cases per district. Although these data are not sufficient to support broad conclusions, high rates of certification within the securities and civil rights categories could indicate that these are easy applications of Rule 23, at least with respect to the certification decision.

We next examined the bases for opposition to class certification and again found some distinctive patterns among securities cases. In two districts, disputes over certification in securities cases were about as frequent as for the other major nature-of-suit categories in those districts. In the other two courts, objections to certification were filed about 1.5 times as often in nonsecurities cases⁴⁴ as in securities cases.⁴⁵ Of special note is that objections on the basis of numerosity were absent from all (b)(3) securities cases in three districts and were present in only 25% of the certification disputes in the fourth district. In nonsecurities cases, however, numerosity generally was raised more frequently. In two districts, it was at issue in 33% and 56% of the certification disputes; the other two districts had only two or three such cases. These limited results could be viewed as indicating relatively “easy” sailing toward satisfying the numerosity requirement in securities cases.

However, another observed difference was in arguments concerning the representativeness of the principal plaintiffs. In all or nearly all securities cases in the four districts, defendants disputed the ability of named plaintiffs to represent the class, often basing their arguments on alleged conflicts or purportedly unique facts applicable to the representatives (*see infra* § 6(b)). Generally, these objections occurred less frequently in nonsecurities (b)(3) cases (see Table 10). Representativeness disputes were often harder fought battles than numerosity disputes and frequently involved complex issues and facts. The relatively high rates of certifying securities classes, however, indicates that these challenges were quite often overcome; for example, the class representative in some cases was replaced by one who was more “representative” (*see infra* § 4(b)).

We also compared the amounts distributed from settlement funds in certified b(3) cases where the court approved a settlement. As might be expected, securities cases had median net monetary distributions to the class (\$1.7 million to \$3.0 million) far greater than in nonsecurities cases (\$1.1 million or less). Comparing median attorneys’ fee awards for securities and other class actions showed similar disparities in all but one district. These figures are misleading, though, unless viewed in light of class size because securities classes are generally large. We considered class size by computing the net settlement per class member—dividing the total net

44. Certification objections were filed in 58% and 59% of nonsecurities class actions in these two districts.

45. Certification objections were filed in 35% and 40% of securities class actions in these two districts.

monetary settlement amount by the number of notices sent to class members (*see supra* § 1(a)). The median net settlement per class member for securities cases exceeded that in nonsecurities cases in only one of the three districts with sufficient case counts to allow for comparison (see Table 11).

Discussion. In sum, the following general characteristics were found in many securities (b)(3) cases in the four districts: They did not necessarily last longer than most nonsecurities class actions; were about as likely, or somewhat less likely, to be subject to some form of objection to certification; and did not necessarily yield more dollars to individual class members. In addition, securities cases were more likely to be certified and subject to representativeness objections. Finally, numerosity objections were a rarity in securities cases, but a relatively frequent occurrence in other cases. Large class sizes in securities cases often made them distinctive when compared with most nonsecurities classes.

In addition, and somewhat understandably, the securities complaints contained more frequent use of boilerplate allegations when compared with the wide variety of other types of (b)(3) class actions. This appeared to be a factor of the governing law, the subject matter of the complaints, and the frequency with which securities cases were filed. Securities claims generally followed a recognizable pattern based on federal securities statutes and case precedent, whereas claims not dealing with securities often covered ground not as frequently traveled or charted new territory.

Data on Rule (b)(2) cases. We also compared similar indicators in nonsecurities cases in which only a Rule 23(b)(2) class was sought. In those cases that settled, the median time from complaint to closing ranged from fifteen to sixty months, not notably different from (b)(3) cases given the relatively small number of cases involved (see Table 12 compared to Table 8). The rate of (b)(2) certification ranged from 50% to 95% (see Table 13). In three of the districts, the (b)(2) certification rate was lower than for nonsecurities (b)(3) cases; in the fourth district it was higher (see Table 13 compared to Table 9). Looking just at the subset of (b)(2) civil rights cases showed a range of certification rates of 67% to 100%, with no notable patterns observed (see Table 13). We also found no recognizable patterns in the frequency of defendant opposition to motions to certify a (b)(2) class (see Table 14). We did, however, observe that the median fee award was considerably smaller for (b)(2) class counsel when compared to fees in nonsecurities (b)(3) cases (see Table 15 compared to Table 11). Given the disparate nature of these data, it is not possible to generalize about whether (b)(2) cases are easy or routine applications of Rule 23.

(b) How did class actions compare to other types of cases in terms of the type of outcome and the stage of the case at which the outcome occurred?

Background. In this subsection, we look at the routineness of class actions from a different angle, namely, how do class actions compare to other types of civil cases. Two related assertions are commonly made about class actions: that such cases generally settle and that they are rarely tried.⁴⁶ The underlying assumptions—sometimes explicitly stated⁴⁷—are that the settlement

46. *See, e.g.,* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2098 (1995) (“Defendants’ and plaintiffs’ attorneys agree to settle virtually all class actions that survive motions to dismiss and motions for summary judgment.”). *Cf.* Joel Seligman, *Commentary, The Merits Do Matter: A Comment On Professor Grundfest’s “Disimplying Private Rights Of Action Under The Federal Securities Laws: The Commission’s Authority,”* 108 Harv. L. Rev. 438,

rate for class actions is higher than that for other types of civil cases, and the trial rate is lower. In this section we will address that assumption by comparing the settlement and trial rates in the class actions we studied with such rates in nonclass action civil cases. The comparison group consists of all nonclass civil cases that were terminated in the four study districts during the same time period.

Data. Differences in data collection make it difficult to compare settlement rates in class actions and nonclass civil cases.⁴⁸ Allowing for such differences, it appears that the settlement rates for nonprisoner class actions were within approximately $\pm 16\%$ of the settlement rates for nonprisoner nonclass actions (see Figure 7). It also appears that settlement rates were higher for securities class actions than for all nonclass securities cases in all but one district (see Figure 8).

The rate of trial (jury and bench) was about the same for class actions and nonclass civil cases in one district and the class action rate was slightly higher in two districts. In the fourth district, the trial rate for class actions was 5.5% and the rate for nonclass civil cases was 3.2% (see Table 16). In securities cases, there were too few cases to treat as other than anecdotal information. Because of the Judicial Conference Advisory Committee on Civil Rules's interest in the subject, we include the information for descriptive purposes only (see Table 17).

In comparison with nonclass civil cases, class actions are not routine in terms of their longevity. Overall, the median time from filing to disposition for class actions was two to three times that of other civil cases in three of the four districts, and in the fourth (S.D. Fla.), class actions took about four and a half months longer at the median (see Figure 9). The patterns were similar for securities cases, but the gaps between class and nonclass securities cases were generally not as long as the corresponding gaps in nonsecurities cases (see Figure 10).

Discussion. Examining trial and settlement rates might lead one to conclude that class actions are routine, not very different from other cases terminated in the same courts during the same time span. But the length of time from filing to termination and, as we will see in *infra* § 2(d), the amount of judicial time required by class actions distinguish them from other cases.

(c) What was the frequency and rate of certification of (b)(1), (b)(2), and (b)(3) classes and how did these rates correspond with substantive areas?

In this subsection, we examine the frequency and rate of certification of (b)(1), (b)(2), and (b)(3) classes (and combinations thereof) and address how the rates correspond with different nature-of-suit categories.

Background. Under Federal Rule of Civil Procedure 23 a case may be certified pursuant to

⁴⁴8 (1994) ("A substantial portion of securities class actions have been resolved by judicial dismissal on the basis of a defendant's motion.").

⁴⁷. Alexander, *supra* note 9, at 524 ("Though empirical data are hard to come by, it seems clear that securities class actions are resolved by adjudication significantly less often than are other civil cases.").

⁴⁸. As noted in Figures 7 and 8, the settlement rate for class actions was based on our observations, derived from the case files. Settlement rates for nonclass cases were derived from data provided by each court to the Administrative Office of the U.S. Courts upon termination of a case. We used the categories "dismissed: settled," "dismissed: voluntarily," and "judgment on consent." The differences between Administrative Office data and our data for the same set of class actions suggest that differences between class and nonclass cases may simply reflect the differences in data collection methods.

subdivisions (b)(1)(A), (b)(1)(B), (b)(2), or (b)(3).⁴⁹ Determining which subdivision under Rule 23 to use is not always clear.⁵⁰ There may also be instances where a class action may qualify under Rule 23(b)(3) as well as under (b)(1) or (b)(2).

If a (b)(3) class is sought and approved, class counsel is required to provide notice to all class members and an opportunity to opt out. The (b)(1) and (b)(2) subdivisions do not require notice of class certification and do not ordinarily allow opting out. "Because of the notice requirement and the frequent necessity of having to deal with individual damage claims, greater precision is required in (b)(3) actions than in those brought under (b)(1) or (b)(2)."⁵¹

If a proposed class action qualifies or fits the criteria of more than one of the (b) subdivisions, do parties or judges indicate a preference for class certification pursuant to Rule 23(b)(1) or (b)(2) over Rule 23(b)(3)?⁵² Some believe that the increased burden of mandatory notice and

49. Fed. R. Civ. P. 23(b) states in relevant part:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision

(a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
 - (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
 - (D) the difficulties likely to be encountered in the management of the class action.

50. "The problem is that all class litigation, even litigation for damages, has the potential to affect a defendant's standard of conduct. For instance, a suit for nuisance damages may be won by some claimants and lost by others, thereby creating 'incompatible standards of conduct' for the defendant. Hence, damage actions, which are normally construed as (b)(3) actions, may also fall within the language of (b)(1)(A), and the court may deny notice, giving opportunity to appear or to opt out. The confusion from such amorphous language has resulted in inconsistent case law on what exactly constitutes a (b)(1)(A) class action and games in which the category is manipulated to avoid the time and expense of giving notice." Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 673 (1994) (footnotes omitted).

51. MCL 3d, *supra* note 34, § 30.14, at 217 & n.681 (citing *Rice v. Philadelphia*, 66 F.R.D. 17 (E.D. Pa. 1974)).

52. *See, e.g.*, *Patrykus v. Gomilla*, 121 F.R.D. 357 (N.D. Ill. 1988) (civil rights case certified under Rule 23 (b)(2) and (b)(3)); *National Treasury Employees Union v. Reagan*, 509 F. Supp. 1337 (D.D.C. 1981) (civil rights case certified conditionally under Rule 23(b)(1)(A) or (b)(2)); *Bertozzi v. King Louie Int'l, Inc.*, 420 F. Supp. 1166 (D.R.I. 1976) (securities case certified pursuant to Rule 23 (b)(1) and (b)(2)); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269 (N.D. Cal.), *modified*, 73 F.R.D. 289 (N.D. Cal. 1976) (employment discrimination case certified under Rule 23(b)(2) and (b)(3)), *aff'd sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

other requirements⁵³ deter parties from seeking (b)(3) certification. Similarly, some courts have expressed reluctance to certify a (b)(3) class when an action also met the requirements of either a (b)(1)⁵⁴ or (b)(2) class.⁵⁵ One commentator recommends that “[i]f the court determines that both provisions [(b)(2) and (b)(3)] apply, then it should treat the suit as having been brought under Rule 23(b)(2) so that all class members will be bound”⁵⁶ because “[t]o hold otherwise would allow the members to utilize the opting out provision in subdivision (c)(2), which in some cases would thwart the objectives of representative suits under Rule 23(b)(2).”⁵⁷

Data. Of the 138 certified classes for which information was available, 84 (61%) were (b)(3) classes, 40 (29%) were (b)(2) classes, and the remaining 14 (10%) reflected an equal number of (b)(1)(A) and (b)(1)(B) classes (see Figure 11). Below, we look at the frequency and rate of certification of (b)(1), (b)(2), and (b)(3) classes among the different natures-of-suit categories. We present nature-of-suit information in response to the question raised, but with the caveat that the numbers are often so small that no general conclusion can be drawn from them.

Rule 23(b)(1)(A) and (b)(1)(B). Two of the four districts (E.D. Pa. and N.D. Ill.) certified a total of seven (b)(1)(A) classes.⁵⁸ Similarly, two districts (N.D. Ill. and N.D. Cal.) certified a total of seven (b)(1)(B) classes.⁵⁹

Rule 23(b)(2). The four districts had a total of forty cases with certified (b)(2) classes. One district accounted for just over half of these cases. Civil rights cases of various types accounted for 50% of the (b)(2) classes. This is consistent with the advisory committee’s note that describes various actions in the civil rights field as prototypes of a (b)(2) class,⁶⁰ without suggesting that subdivision (b)(2) is limited to civil rights cases. The second largest nature-of-suit category was ERISA, accounting for five of the forty cases (12.5%).

⁵³ Additional requirements include (1) notice must be individual to all members who can be identified through reasonable effort; (2) absent class members have the right to exclude themselves from the class and from the binding effect of the judgment; and (3) absent class members have the right to enter their appearance through counsel. Rule 23(c)(2).

⁵⁴ See, e.g., *Robertson v. National Basketball Ass’n*, 556 F.2d 682 (2d Cir. 1977) (antitrust case where the court found a Rule 23(b)(1) preferable to a (b)(3) class so that opt-out privileges would be unavailable).

⁵⁵ See, e.g., *Hummel v. Brennan*, 83 F.R.D. 141 (E.D. Pa. 1979) (a labor action where the court certified a Rule 23(b)(2) class rather than a Rule 23(b)(3) class to insure that one litigation would dispose of the issue; court also indicated that procedural safeguards are unnecessary when a class is homogeneous, and that any unfairness caused by members’ inability to opt out was outweighed by the preventing of repetitious suits). See also *Herbert Newberg & Alba Conte, Newberg on Class Actions* § 4.20, at 4-74 n.232 (3d ed. 1992).

⁵⁶ 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1775, at 491 & n.64 (2d ed. 1986 & Supp. 1995) (citing *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973) (“Although [the] suit could have been brought as a (b)(3) action, (b)(2) actions generally are preferred for their wider res judicata effects.”); *McGlothlin v. Connors*, 142 F.R.D. 626, 640 (W.D. Va. 1992); *Tustin v. Heckler*, 591 F. Supp. 1049, 1068 (D.N.J. 1984)).

⁵⁷ Wright et al., *supra* note 56 at 491–92 (footnotes omitted).

⁵⁸ The nature-of-suit categories were other personal property damage (1), civil rights (1), and Employment Retirement Income Security Act (ERISA) (1) in one district and securities (1), civil rights (1), ERISA (1), and other statutory actions (1) in the other.

⁵⁹ N.D. Ill. certified five cases with the following nature-of-suit categories: ERISA (3), securities (1), and constitutionality of a state statute (1). N.D. Cal. certified the remaining two cases, which were securities actions.

⁶⁰ Fed. R. Civ. P. 23 advisory committee’s note (citing *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963), as some examples).

Rule 23(b)(3). The largest number of certified classes—eighty-four (61%)—were in the (b)(3) category. N.D. Ill. had the most, twenty-six (31%), followed by E.D. Pa. twenty-four (28%), N.D. Cal. twenty-three (27%), and S.D. Fla. eleven (13%). In the four districts combined, 64% of the certified (b)(3) classes were in securities cases (over 80% of certified (b)(3) classes in S.D. Fla., 74% in N.D. Cal., 62.5% in E.D. Pa., and 50% in N.D. Ill.).

Multiple Certifications. Multiple certifications were found in sixteen cases.⁶¹ Three courts each had five cases and one court had one case (see Table 18). The most frequent combination was (b)(2) and (b)(3), occurring in five cases, including two ERISA actions, two civil rights actions, and one other statutory action. The second most frequent combination was (b)(1)(A) and (b)(2), occurring in three cases, one each of other statutory action, civil rights, and other personal property damage cases. The remaining eight cases contained a variety of certification combinations and involved securities, civil rights, ERISA, and constitutionality of state statute actions.

(d) How much judicial time did class actions take and how did that compare to other civil actions?

Background. Yet another measure of the relative routineness of class actions is the amount of judicial time required. Using data from a sample of cases in the Federal Judicial Center's most recent District Court Time Study,⁶² we compared the judicial time expended on class actions with that of civil cases (including class actions) filed within the time study sample period.

Data. Based on case weights derived from time study data, the average class action demands considerably more judge time than the average civil case. We found this when we looked at the data for all subject matter (nature-of-suit) categories combined and when we looked at the data by nature-of-suit category. Case weights are scaled in relation to the weight of an average case, which is rated as a 1. Note that the case weights are based on data from all cases (including class action cases) in the entire time study sample. Case weights are based on average judicial time expenditures and take into account a wide range of cases and judicial activity, from summary dismissals to extended trials.

If class actions were treated as a separate category for case weighting purposes (which they are not), the hours demanded for the class action cases in the district court time study would justify a case weight of 4.71,⁶³ higher than any civil case type except death penalty habeas corpus (6.15). Racketeer Influenced and Corrupt Organizations (RICO) (3.02) is the next closest

⁶¹. Includes three cases with combinations that included at least one (b) subdivision and an unspecified class type.

⁶². In the Federal Judicial Center district court time study (Willging et al., *supra* note 26), district and magistrate judges maintained records of the time they spent on a random sample of 8,320 civil cases filed in 86 U.S. district courts between November 1987 and January 1990. Fifty-one of those cases (0.61%, an incidence of 6.1 class actions for every 1,000 cases filed) contained class action allegations. For a more complete description of the time study methods and a listing of case weights for all nature-of-suit categories, see Memorandum from John Shapard to Subcommittee on Judicial Statistics of the Committee on Judicial Resources 1 (July 20, 1993) (on file with the Research Division, Federal Judicial Center) [hereinafter Shapard Memorandum].

⁶³. Shapard Memorandum, *supra* note 62, at 6-7. The 4.71 case weight for class actions was derived by aggregating the time required for all class action cases in the sample and comparing that time to the time required for the average case. See Memorandum from John Shapard to Mark Shapiro, Rules Support Office, Administrative Office of the U.S. Courts (February 8, 1994) (on file with the Research Division, Federal Judicial Center).

civil case type. As compared to criminal cases, an average class action case would require about as much judge time as an average case dealing with extortion, racketeering, and threats (4.62) and would require less time than the average criminal prosecution for bankruptcy or securities fraud (5.30). Note that these are averages that take into account all judicial activity in the sample cases, including trials and sentencing when applicable.

The case weights for the three nature-of-suit categories that were most prevalent in the class action study are: securities, commodities, and exchange, 1.96; other civil rights (filed originally in federal court), 1.61; and prisoner civil rights (not U.S. defendant), 0.26.⁶⁴

The average amount of time required for the average class action of each of the above three types is more than three times the average amount required for the average civil case of the same type. Securities class actions required 3.2 times the judicial time spent on all securities cases; other civil rights cases, 3.3 times as long; and prisoner civil rights cases, 5.03 times.

Certified class action cases consumed considerably more judge time than cases filed as class actions but never certified. Still, noncertified cases required more judicial time than the average civil case. In the eleven certified class actions in the time study, judges spent, on the average, eleven times more hours than they did in the average civil action. In the noncertified cases, judges spent twice the number of hours they spent on the average civil case (see Table 19).⁶⁵

The above data indicate that class actions, on the average, are far from routine. However, some types of cases filed as class actions but not certified appear to be fairly routine. For example, other civil rights cases that were filed but not certified as class actions consumed less than one-third of the judge time consumed by all other civil rights cases. Likewise, securities cases that were filed but not certified as class actions consumed less than two-fifths of the judge time consumed by all securities cases. The low time demands of some of these noncertified cases may be accounted for by their consolidation into other cases that were not part of the time study.⁶⁶ In addition, the civil rights cases may have included some filings with frivolous class action allegations (e.g., by a pro se litigant who is not authorized to represent a class) combined with frivolous claims, leading to a prompt dismissal.

(3) Race to File

Background. Critics of the use of the class action rule, especially in the securities field, claim that lawsuits frequently are filed without an adequate investigation, immediately after a triggering event, such as a precipitous decline in a stock's value.⁶⁷ Reportedly, the purpose of such practices is to gain an advantage in the competition to be appointed lead counsel for the class. Some commentators wonder whether the claims of speedy filings of class actions might be explained by less venal considerations, such as an effort to preserve evidence, especially in tort cases.⁶⁸

64. Shapard Memorandum, *supra* note 62.

65. The calculation of the above hypothetical 4.71 case weight for class actions included both certified and uncertified cases. The average number of judge hours per case was approximately eleven for all class actions, but the amount of judge time for certified class actions was approximately three times that.

66. If a non-time study case became the lead case, judges were instructed not to count the time spent on the consolidated cases.

67. See Senate Staff Report, *supra* note 8, at 16–29; see also, e.g., Greenfield v. U.S. Healthcare, 146 F.R.D. 118 (E.D. Pa. 1993), *aff'd sub nom.* Garr v. U.S. Healthcare, 22 F.3d 1274 (3d Cir. 1994).

68. Cooper, *supra* note 6, at 28.

We can supply only a modest amount of information relevant to the ultimate issue. We looked for multiple filings of class action claims and for information about efforts to preserve evidence, as indicated by a motion to expedite discovery or to preserve evidence.

Data on multiple filings. A race to the courthouse might be inferred from multiple filings of related claims. If so, the frequency and size of intradistrict consolidations (see Figure 12), the frequency and size of multidistrict litigation consolidations (see *supra* § 1(b) and Table 2), and the frequency with which we found related cases (see *infra* § 18 and Figure 13) represent potential races to the courthouse. The cumulative number of such cases is considerable: 32%, 22%, 20%, and 39% of the cases in the four districts had one or more of these three forms of multiple litigation (see Figure 14). Looking only at cases that led to either multidistrict or intradistrict consolidation indicates that from 13% to 22% of the cases involved multiple filings of cases that a district judge or the Judicial Panel on Multidistrict Litigation found to have common questions of law or fact.⁶⁹

Data on expedited discovery. We also gathered information about whether class action complaints were filed for the ostensible purpose of expediting discovery or preserving discoverable information. Generally they were not, at least as measured by the frequency of requests for expedited discovery or preserving information in class litigation.

In seven cases in the four districts, plaintiffs moved for expedited discovery,⁷⁰ typically for the purpose of gathering evidence to support a motion for a preliminary injunction. Courts granted all but two of those seven requests. Otherwise, we found no evidence to support the claim that any early filings of class actions were for the purpose of expediting discovery or preserving information.

(4) Class Representatives

Call for research. In this section we address issues related to the selection and supervision of class representatives. Examining the full range of questions raised concerning class representatives would call for interviewing lawyers and class representatives about their relationships and, perhaps, going back to case files or other records to examine depositions and other discovery information concerning named representatives. Most of that research is beyond the scope of this study. We urge other researchers to pursue the issues raised and we stand ready to provide information to support such an effort.

Background. To assure that a class is adequately represented, the court has wide discretion in selecting the named representative and class counsel.⁷¹ While the selection of the representative may be less critical than the appointment of counsel, the class representatives should be free of conflicts of interest with the class⁷² and should present claims and raise defenses that are typical of the class claims and defenses.⁷³

69. Fed. R. Civ. P. 42(a); 28 U.S.C. § 1407 (1988).

70. Plaintiffs so moved in three (3%) of 117 cases in E.D. Pa., three (3%) of 102 cases in N.D. Cal., and one (1%) of seventy-two cases in S.D. Fla. In N.D. Ill., there were no such cases.

71. MCL 3d, *supra* note 34, § 30.16.

72. *Id.* See generally Downs, *supra* note 50, at 651–58.

73. Fed. R. Civ. P. 23(a)(3). See also *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982); Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 Ohio St. L.J. 607 (1993).

(a) How many “repeat players”?

Background. One of the questions asked was if there are “professional” representatives who appear repeatedly, at least in particular subject areas.

Data. We found few multiple appearances of named plaintiffs in the four districts. Pooling all the names of class representatives into one file with 353 names of class representatives from 141 cases, we identified duplicate appearances by four individuals and one corporation. In each instance, the representative appeared in two separate class actions. None of the class representatives appeared in more than two cases in the study. In no instance did the same name arise in two districts.⁷⁴

One of the five sets of duplicate appearances involved two securities actions, two sets involved one securities action and another statutory action (ERISA, RICO, and “other”), one set involved an antitrust action and a civil rights action, and the fifth set involved an ERISA action and an “other statutory action.”

(b) Did judges add or substitute representatives?

Background. The court has a continuing duty to insure that class representatives “remain free of conflicts and . . . ‘vigorously pursue’ the litigation in the interests of the class, including subjecting themselves to discovery.”⁷⁵ The court may have to replace a class representative if “the representative’s individual claim has been mooted or otherwise significantly affected by intervening events, such as decertification, or where the representative has engaged in conduct prejudicial to the interests of the class or is no longer interested in pursuing the litigation.”⁷⁶ We examined the frequency with which representatives were changed in certified class actions.

Data. Changes in class representatives occurred in a considerable percentage of certified class actions in the four districts—21%, 8%, 23%, and 33%, representing ten, one, ten, and eleven cases, respectively (see Figure 35). These differences in the rate of changes did not seem to have any direct relationship with the frequency of objections to certification based on the representativeness of the named plaintiffs in (b)(3) or (b)(2) cases (see Tables 10 and 14). Nor did the differences appear to have any direct relationship with the longevity of cases in those districts. The three districts with rates from 21% to 33% had approximately the same median times from filing to disposition (see Figure 9). Perhaps some unexamined feature of the local legal culture among the bar or bench in N.D. Cal. might help to explain the higher frequency of changes in that district.

For almost half of the changes, no reasons were evident in the case file. In three cases, the changes were to replace a deceased class representative. The remaining cases—also, almost half of the changes—were instances in which the change in representative appeared to reflect a significant change in the litigation. Seven changes involved explicit recognition that the representatives’ claims were atypical of the class claims; five changes responded to situations affecting the ability of the class representative to continue to represent the class (e.g., conflict of interest; a redefined class did not include the representative); and three involved voluntary withdrawal

⁷⁴ But note that our data only include class actions that were terminated in four districts during a two-year span.

⁷⁵ MCL 3d, *supra* note 34, § 30.16, at 221 (footnote omitted).

⁷⁶ *Id.* at 221–22.

from or opting out of the class. One change added representatives of a subclass of stock option holders.

(c) Did named representatives attend the approval hearing?

Background. Class representatives' "views may be important in shaping the [settlement] agreement and will usually be presented at the fairness hearing." ⁷⁷ While representatives' views may be entitled to "special weight," they do not have veto power over a proposed settlement. ⁷⁸

Data. Attendance of representative parties at the settlement approval hearing was uneven across the four districts. In E.D. Pa. (where records of the settlement hearing were most complete) one or more class representatives attended the settlement approval hearing in 46% of the certified, settled class actions (*see* discussion at *infra* § 13(b) and Figure 53). The rates in the other districts varied from 11% to 28%.

(d) What was in it for the class representatives?

Background. "The propriety of 'incentive' awards to named plaintiffs has been rigorously debated. While a number of courts have approved such awards on the basis that class representatives take on risks and perform services, others have denied preferential allocation on the grounds that the named plaintiff may be tempted to settle an action to the detriment of the class or come to expect a 'bounty' for bringing suit." ⁷⁹ A notice of proposed settlement should "disclose any special benefits provided to the class representatives." ⁸⁰

Data. A substantial minority of all certified, settled class actions in which the court approved a settlement included designated awards to the named class representatives. ⁸¹ In the four districts the percentages that included such awards were 26%, 35%, 40%, and 37% (see Figure 16). The median amounts of all awards to class representatives in the four districts were \$7,500 in two districts, \$12,000 in the third, and \$17,000 in the fourth (see Figure 17). In many cases, there was more than one representative. The median award per representative in three courts was under \$3,000 and in the fourth was \$7,560 (see Figure 18). The median percentage of the total settlement that was awarded to class representatives was less than or equal to eleven thousandths of one percent (0.011%) in all four districts.

(5) Time of Certification

Introductory Data. Across the four districts we found a total of 286 cases with either a motion for or against class certification or a sua sponte show cause order regarding certification in the four districts. Of these cases, 93 (33%) were unconditionally certified, 59 (21%) were certified for settlement purposes only, 76 (27%) were denied certification, 6 (2%) were deferred, and 52

⁷⁷ *Id.* § 30.44, at 242.

⁷⁸ *Id.*

⁷⁹ 2 Newberg & Conte, *supra* note 55, § 11.38, at 11-80 to 11-82 and cases cited at nn. 209-11. *See also* Downs, *supra* note 50, at 692 ("Cases in the late 1970s and early 1980s abhorred such preferences, but recent cases permit such practices more freely." (footnote omitted)).

⁸⁰ MCL 3d, *supra* note 34, § 30.212, at 228.

⁸¹ The data, of course, include only information that was available in the court file, the settlement, the notice to the class, or the motion for approval of the settlement and does not include any undisclosed preferences to class representatives. *See* Downs, *supra* note 50, at 692-93 (reporting that often the preferences are not disclosed to the class in the notice of settlement; also, finding that 37% of the cases studied in N.D. Cal. contained such preferences).

(18%) had no action indicated. In the following sections we discuss the process whereby decisions about certification were made.

(a) Timing of motions and certification decisions

Background. In this subsection, we examine the point at which motions to certify are filed and the length of time that elapses before the court rules to see if there is “any pattern to the point at which the first certification decision is made.” We also examine (*see infra* § 5(b)) “the effect of local rules requiring that a motion to certify be made within a stated period.”⁸² Federal Rule of Civil Procedure 23(c)(1) directs the court to determine “as soon as practicable” after the commencement of a case whether an action is to be maintained as a class action.

Data. How soon do counsel file motions to certify—or courts issue sua sponte orders regarding certification? Median times in the four districts ranged from 3.1 months to 4.3 months after the filing of the complaint.⁸³ Seventy-five percent (75th percentile) of the motions or orders were filed within a range of 6.5 months at one end to 16.3 months at the other (see Figure 19).

How soon do courts rule on motions to certify after they have been filed?⁸⁴ Three districts’ median times ranged from 2.8 months to 4.1 months. The other district had a median time of 8.5 months. In 75% of the cases, courts ruled on class certification within 7.6, 15.8, 10.2, and 8.4 months after the filing of a motion to certify (see Figure 20).

(b) Local rules on the timing of certification motions

Background. As noted above, Federal Rule of Civil Procedure 23(c)(1) directs the court to determine class status “as soon as practicable,” but the rule provides little specific guidance. To fill that gap and encourage early resolution or settlement, three of the four districts specify, by local rule, a definite time within which the plaintiff must file its motion for certification unless good cause is shown to extend the time. E.D. Pa. and S.D. Fla. require the filing of a motion to certify within 90 days,⁸⁵ and N.D. Cal. requires the filing of such a motion within 180 days.⁸⁶ N.D. Ill. has no local rule addressing the timing of motions to certify.

⁸² Cooper, *supra* note 6, at 30.

⁸³ In the time study, 64% of the motions or orders in fifty-one class action cases were filed within 100 days of the filing of the complaint. Preliminary Time Study, *supra* note 26, at 8–9.

⁸⁴ For one standard of promptness, see 28 U.S.C. § 476 (motions pending for more than six months need to be included in a district court’s semiannual report under the Civil Justice Reform Act). Note that the data reflect only those cases that contained both the certification motion filing date and the date of the court’s ruling.

⁸⁵ U.S. District Court for the Eastern District of Pennsylvania, Local Rule 27(c) (Aug. 1, 1980) states, in relevant part:

Within ninety (90) days after the filing of the complaint in a class action, unless this period is extended on motion of good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Fed. R. Civ. P., as to whether the case is to be maintained as a class action.

U.S. District Court for the Southern District of Florida, Local Rule 23.1(A)(3) (Feb. 15, 1993) states:

Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion of good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Fed. R. Civ. P., as to whether the case is to be maintained as a class action.

⁸⁶ U.S. District Court for the Northern District of California, Local Rule 200-6(c) (rev. Nov. 1, 1988) states:

Data. In the previous section, we saw that in 75% of the cases the time from the filing of the complaint to the filing of a motion to certify ranged from more than 6.5 to more than 16.3 months in the four districts. In E.D. Pa., the median time for filing a motion to certify was slightly longer than called for by the local rule, and in S.D. Fla., the median time was more than a month longer (see Figure 19). In N.D. Cal., the median time was in compliance with the 180-day limit, but the time for filing a motion to certify was longer than 180 days in at least 25% of the cases. N.D. Ill., which has no rule addressing how soon after the complaint a motion for certification must be filed, had the third shortest time span (8.2 months) between the two filings for 75% of the cases (see Figure 19). At the other extreme, N.D. Cal., with a 180-day filing requirement, had the longest time span between the filing date of the complaint and the filing date of the motion to certify (see Figure 19).

We found no relationship between the local rule and the time within which judges rule on motions to certify once filed. For example, judges took more time to issue 75% of their rulings (between seven and fifteen months) in the two districts with rules requiring early filing of motions to certify than in the district with a rule requiring filing within 180 days (see Figure 20).

Further, the time to settlement of the case did not appear to have any relationship to the local rules or the absence of a local rule. Our data revealed that neither the length of time from the court's ruling on certification to settlement of the case nor the length of time from filing of the case to settlement appeared to be influenced by the presence, absence, or provisions of a local rule. For example, in one district with a 90-day rule, 75% of the cases took approximately three-and-one-half years from the filing of the complaint to settlement, a figure higher than that of N.D. Ill., which has no rule. Cases in N.D. Cal. (180-day rule) were disposed of more quickly than cases in one jurisdiction with the 90-day rule (see Figure 21). On the other hand, E.D. Pa. (90-day rule) disposed of 75% of its cases approximately one year faster than the other three courts.

The time from ruling on certification to settlement followed similar paths. However, it must be noted that there was a substantial amount of missing data regarding settlements in two districts, and our conclusions are based solely on the limited available data. Overall, courts settled 75% of their cases in a range of fourteen to thirty-eight months after certification (see Figure 22; *see also infra* § 5(c)). Again, early filing practices did not correspond with quicker resolution of cases. It took over three years for one district with an early filing rule to dispose of its cases. But E.D. Pa. again settled its cases more quickly after certification than the other three courts.

Data on the time from filing to termination in two districts with the ninety-day certification rule showed termination of 75% of the courts' cases in just over two years. Termination rates were the same for the other district with the early certification rule and the district with no rule. Data showed that 75% of those cases were terminated in 34.1 months (see Figure 23).

Discussion. There has not been substantial compliance with the presumptive time limits of the local rules. However, it should be noted that each local rule has a clause "unless extended for good cause." Moreover, delays in judicial rulings on motions to certify can thwart the apparent intent of the local rules. Finally, prompt settlement of the case appears to be affected by

The party seeking to maintain an action as a class action shall file a motion for determination whether it may be so maintained pursuant to Rule 23(c)(1) within six months of the filing of that party's first pleading, or at such later time as the assigned judge may order or permit.

many factors other than a rule regarding the starting point of the class certification process. In all three of these areas one might reasonably expect other factors, such as the workload of the court or the number of judicial vacancies, to affect the court's output. Lack of compliance with the rules in the first instance suggests that in many cases judges and litigants do not see such rules as necessary to the management of the litigation before them.

(c) Decisions on merits in relation to certification

Summary. In this rather lengthy subsection we present data on the frequency and type of rulings on motions to dismiss and motions for summary judgment. We also address the key issue of the timing of such rulings in relation to rulings on class certification. Many assume that class action litigation proceeds directly from certification of a class to settlement without judicial examination of the merits of the claims. The data presented in this section indicate otherwise. Parties often filed motions to dismiss or for summary judgment and judges generally ruled on those motions in a timely fashion, often dismissing a case in whole or in part. These rulings on the merits often preceded rulings on class certification.

Background. As noted above, Federal Rule of Civil Procedure 23(c)(1) directs the court to determine "[a]s soon as practicable" whether an action is to be maintained on behalf of or against a class. The rule is silent on the timing of rulings on class certification in relation to rulings on motions to dismiss or for summary judgment. The proposed amendment to Rule 23 that the advisory committee on civil rules circulated in January 1993 contained a new provision in 23(d)(1)(B) authorizing a court to "decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay."⁸⁷

Some argue that it would be more economical for a court to rule on the merits of a putative class action before committing resources to certifying and managing the case as a class action and before imposing an obligation to notify the class.⁸⁸ For the same or similar reasons, the advisory committee is currently considering a procedure that would require a preliminary assessment of the merits as part of a (b)(3) certification decision (see Appendix B, § 23(b)(3)(E)). As the data below show, many judges in the four districts have not seen themselves as lacking authority to rule on a motion to dismiss or to issue a sua sponte dismissal order before ruling on class certification. Nor, apparently, did judges in a prior empirical study of (b)(3) class actions show any reluctance to rule on the merits before ruling on certification.⁸⁹ Having explicit authority to so rule, however, might influence any judge who has felt constrained to avoid ruling on such motions prior to class certification.

Federal courts of appeals have taken divergent views on whether a ruling on a motion to dismiss or motion for summary judgment may precede a ruling on class certification. Some

87. Appendix A, § 23(d)(1)(B); see also Appendix B, § 23(d)(1).

88. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo. L.J. 1123, 1145 (1974) ("A judge concerned with the most efficient use of court time may be reluctant to consider certification and notice without some belief that the case is strong on the merits.") [hereinafter *Georgetown Empirical Study*].

89. *Id.* at 1144 ("In the preliminary stages of litigation, the court showed no reluctance to dismiss or grant summary judgment to defendants on the merits without consideration of the class issues."). The study examined all Rule 23(b)(3) class actions filed in the U.S. District Court for the District of Columbia between July 1, 1966, and Dec. 31, 1972.

courts have interpreted the U.S. Supreme Court's ruling in *Eisen v. Carlisle & Jacqueline*⁹⁰ to mandate that the determination of class status is to be made before the decision on the merits.⁹¹ The reasoning of such courts is that Rule 23(c)(1) requires that a class action seeking damages be certified before a determination on the merits in order to prevent one-way intervention or opting out by class members, who would know the outcome of the ruling on the merits.⁹² Other courts have approved precertification rulings on the merits, reasoning that a party filing a pre-trial motion to dismiss or for summary judgment may explicitly or implicitly waive the protection.⁹³ As noted above, of the courts of appeals for the four district courts involved in this study, the courts of appeals in the Third and Ninth Circuits have approved the practice of issuing precertification decisions on the merits, the Seventh Circuit has generally disapproved the practice,⁹⁴ and the Eleventh Circuit has no published ruling on this point. Based on the rulings in each circuit we would expect that there would be few, if any, precertification⁹⁵ rulings on the merits in N.D. Ill. and that E.D. Pa. and N.D. Cal. would have more such rulings.

Data. In three districts in the current study—putting aside N.D. Ill., which we will discuss separately below—the rate of precertification⁹⁵ rulings on motions to dismiss exceeded 70%. In cases in which there were rulings on both motions to dismiss and motions to certify, approximately 80% of the motions to dismiss were decided before the motions to certify (see Figure 24).⁹⁶ In all four districts, the rate of precertification ruling on motions for summary judgment was lower than the rate of precertification rulings on motions to dismiss (see Figure 25), but this may be a function of the differences between motions to dismiss and motions for summary judgment. One would expect, for example, that the need for discovery would delay the filing of summary judgment motions. In all courts, more than 20% of the rulings on summary judgment preceded the class certification ruling, and in N.D. Cal., 67% (ten of fifteen) of the summary judgment rulings preceded the class certification ruling (see Figure 25).

The data partially support the expectation that N.D. Ill. would have fewer precertification rulings because of case law in its court of appeals disapproving that practice. In fact, N.D. Ill. had the lowest rate of precertification rulings on motions to dismiss (twenty-eight of forty-six, or 61%; see Figure 24) of the four districts but the second highest rate of precertification rulings on motions for summary judgment (eleven of twenty-seven, or 41%; see Figure 25). Nevertheless,

90. 417 U.S. 156 (1974).

91. *Id.* at 177–78. *See, e.g.*, *Nance v. Union Carbide Corp.*, 540 F.2d 718, 724 n.9 (4th Cir. 1976) (quoting *Peritz v. Liberty Loan Corp.*, 523 F.2d 349 (7th Cir. 1975)), *vacated*, 431 U.S. 952 (1977).

92. *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1317 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991). *See also* *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353–54 (7th Cir. 1975).

93. *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (en banc) (explicit waiver; use of “test case” procedure before certification ruling), *cert. denied*, 419 U.S. 885 (1974); *Wright v. Schock*, 742 F.2d 541 (9th Cir. 1984) (implicit waiver where defendant “assumes the risk” of a limited effect of its summary judgment motion).

94. *See* cases cited *supra* notes 92 & 93. *But see* *Roberts v. American Airlines, Inc.*, 526 F.2d 757, 762 (7th Cir. 1975) (dictum that defendants by filing a motion for summary judgment before a ruling on class certification “assumed the risk that a judgment in their favor would not protect them from subsequent suits by other potential class members”), *cert. denied*, 425 U.S. 951 (1976).

95. We use the term “precertification” to mean before a *ruling* on certification, whether or not the ruling is to grant or deny certification.

96. These data do not include rulings on motions to dismiss that terminated the case without the need for a ruling on class certification.

N.D. Ill. judges issued a substantial number of precertification rulings on both types of motions, which suggests that the law of the circuit regarding precertification rulings has not been the only factor affecting the district judge's decision about when to rule on motions to dismiss or for summary judgment.⁹⁷

As discussed in the last subsection, three of the districts have local rules regarding the timing of motions to certify a class; E.D. Pa. and S.D. Fla. require filing a motion to certify a class within 90 days and N.D. Cal. requires filing within 180 days.⁹⁸ Still, in E.D. Pa., the percentage of precertification rulings was substantial for motions to dismiss (thirty-one of forty, or 78%; see Figure 24), though not for motions for summary judgment (eight of twenty-six, or 31%; see Figure 25). In N.D. Cal., the percentage of precertification rulings was higher for both motions to dismiss (twenty-six of thirty-two, or 81%; see Figure 24) and for motions for summary judgment (ten of fifteen, or 67%; see Figure 25).

Again, as discussed in the last subsection, compliance with the rules did not appear to have been strict. Whether the local rules had an effect seemed doubtful. Assuming that there is any effect of the local rules, one might expect that requiring a prompt motion to certify would have more impact on the generally slower and more deliberate summary judgment process than on motions to dismiss. As one might expect, under the 180-day deadline for filing of motions to certify in N.D. Cal., rulings on summary judgment more often preceded rulings on certification than under the 90-day deadline in E.D. Pa. But the timing may say more about the nature of summary judgment than about the effects of the two local rules.

Whether a motion to dismiss was ruled on before or after a motion to certify did not appear to be related to the grounds cited in the ruling on dismissal. At both stages, such motions generally referred to Federal Rule of Civil Procedure 12(b)(6) or 12(b)(1) (see Table 20), which were the most frequently cited grounds in motions to dismiss generally (see Table 21). Note, however, that, in all districts but N.D. Ill., a motion to dismiss for failure to state a claim (Rule 12(b)(6)) was far more likely to be ruled on before certification. In N.D. Ill., such a motion was almost equally likely to be ruled on before or after certification. Perhaps the law of the circuit has some influence.

In our preliminary report to the advisory committee,⁹⁹ we discussed the greater likelihood of a motion being denied before rather than after a ruling on certification. We observed what appeared to be a pattern of denying precertification motions to dismiss more frequently in E.D. Pa. and in the time study sample of cases. This phenomenon also occurred to a minor extent in N.D. Ill., but not in N.D. Cal. or S.D. Fla. (see Table 22). If there is any relationship between the timing of certification and the denial of motions to dismiss, it might be subject to local variations. Note also that the disproportionate denial of precertification motions compared to

97. Note that Fed. R. Civ. P. 56(a) allows the filing of a motion for summary judgment "at any time after the expiration of 20 days from the commencement of the action . . ." and Fed. R. Civ. P. 12(b) calls for the filing of a motion "before pleading." Neither rule sets a standard for when such motions should be decided.

Note also that case law in at least two other circuits has concluded that the parties may waive their right to a ruling on certification or may assume the risk that a precertification ruling on the merits may not have class-wide effect. See discussion at *supra* notes 93 & 94.

98. See *supra* notes 85 & 86.

99. See Willging et al, Preliminary Report, *supra* note 27, at 31-33.

postcertification motions also extended to summary judgment rulings in E.D. Pa., but not in the other courts (see Table 23).

(i) Outcomes of rulings on dismissal and summary judgment and impact on the litigation

Background. In this subsection we present data about the outcomes of motions to dismiss and motions for summary judgment and in the following subsection we will present data as to the timing of the filings and rulings on such motions. Critics of the class action device, especially critics of shareholders' securities class actions, frequently referred to such cases as "strike suits."¹⁰⁰ While it is difficult to find a definition of a strike suit that crisply distinguishes it from most other types of litigation,¹⁰¹ two essential ingredients seem to be the frivolity of the allegations and the difficulty of obtaining a ruling on the merits. The ultimate test of the strike element seems to be whether settlements are seen as being coerced because the defendants do not have a cost-effective opportunity to litigate the merits (see *infra* § 14(a)).¹⁰²

The timing and outcome of rulings on motions to dismiss and motions for summary judgment are relevant to the question of whether the class action device is used as a strike suit. Examining such rulings should illuminate whether and when litigants in class actions have an opportunity to address the merits or frivolity of a claim. Motions to dismiss generally test the sufficiency of the underlying legal theory of the case as applied to the facts alleged in the complaint, regardless of whether or not those facts can be proved. Motions for summary judgment generally test the sufficiency of the factual basis for each element of the claim for relief, as shown through affidavits, depositions, and other documentary materials. In general, if a claim for relief survives a motion to dismiss, its legal claims are probably not frivolous. Likewise, if a claim survives a motion for summary judgment, its material factual allegations are probably not frivolous.

The timing of rulings on such motions is relevant to the cost of obtaining a ruling on the merits. If rulings can be obtained promptly, whether before or after class certification, parties opposing the class have an opportunity to resolve the claims on their merits without being forced to settle.

Data on outcomes. Overall, approximately two out of three cases in each of the four districts had rulings on either a motion to dismiss, a motion for summary judgment, or a sua sponte dismissal order (see Table 24). In three of the four districts, more than one out of six cases included both rulings on dismissal and summary judgment, and in the fourth approximately one case in nine had both types of rulings (see Table 24).¹⁰³

100. See, e.g., Senate Staff Report, *supra* note 8, at 18 ("Each of the corporate executives described what they characterized as 'strike suits' that were filed against their companies, generally following an adverse earnings announcement and resulting stock price drop.")

101. See, e.g., Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 Dick. L. Rev. 355, 357 n.1 (1994) ("The term 'strike suit,' coined in the 1930s, refers to a derivative action whose nuisance value gives it a settlement value independent of its merits."); Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits, in Derivative Litigation: The ALI Drops the Ball*, 77 Minn. L. Rev. 1339, 1341 n.5 (1993) ("Strike suits' are 'those based on reckless charges and brought for personal gain.'") (quoting Robert C. Clark, *Corporate Law* § 15.2 (1986)).

102. *Georgetown Empirical Study*, *supra* note 88, at 1136 (evidence that defendants gained dismissal or summary judgment indicates that they did not feel "forced to settle even if the plaintiff's claim is weak"). We discuss the issue of whether class actions lead to coerced settlements *infra* § 14(a).

103. An unknown number of those cases had multiple rulings on motions to dismiss and on motions for summary

Of the cases in which a motion to dismiss was filed, rulings were issued in from 73% to 81% of the cases depending on the district. That rate of ruling approximates the rates found in three studies of motions to dismiss in general litigation.¹⁰⁴ Rulings in which all or part of the complaint was dismissed amounted to 47%, 49%, 76%, and 77% of the rulings in E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal., respectively (see Table 25). Overall, about half of the cases in each district included rulings dismissing all or part of the complaint.

The vast majority of motions for summary judgment were, as is typical,¹⁰⁵ filed by defendants (see Figure 26 and Table 26). In two districts, rulings on such motions were issued approximately 85% of the time and in the other two districts about 60% of the time (see Figure 27), data that are comparable to and, overall, somewhat higher than the rate of rulings in a study of general civil litigation.¹⁰⁶ Such motions were granted in whole or in part in more than half of the rulings (54%–68%) in three of the four districts studied. In the fourth, such motions were granted in whole or in part 39% of the time (see Table 26).

Combining all dismissals and summary judgment rulings for all cases in the four districts, we find that approximately two of five cases were dismissed in whole or in part or had summary judgment granted in whole or in part in two districts and that approximately three out of five cases were so treated in the other two districts (see Figure 28). But note that granting dismissal or summary judgment does not necessarily end the litigation because an amended complaint may be filed or the summary judgment may be partial or may not apply to all parties.

What effect do these rulings have on the litigation as a whole? In examining each class action file we identified the event or events that resulted in terminating the litigation. The effects of motions in each of the districts were strikingly similar: Approximately three out of ten cases in each district were terminated as the direct result of a ruling on a motion to dismiss or for summary judgment (see Table 27; see also Table 39).

(ii) Timing of rulings on dismissal and summary judgment

Data on timing. One general standard of promptness is that motions should be decided within six months or a reason given for the delay.¹⁰⁷ Looking at the time from the filing of the first motion to dismiss to the first ruling on dismissal, the median time for rulings on motions to dismiss ranged from 2.6 months to 7.4 months. Three of the four courts had a median response time of less than four months (see Table 28). Because the median time is a measure of the central tendency (i.e., the middle of the data) and we wish to discuss a wider range of the data, we also calculated the time by which 75% of the motions had been decided and found that they were resolved in 4.7, 13.7, 8.6, and 5.4 months (see Table 28).

judgment filed on behalf of various defendants. To keep the demands of the study manageable we limited our motions study to identifying the filing of the first motion of a given type and examining the outcome of the first ruling on each type of motion.

¹⁰⁴ Thomas E. Willging, *Use of Rule 12(b)(6) in Two Federal District Courts 6–8* (Federal Judicial Center 1989) (finding a rate of 83% and reporting rates of 77% and 56% from two other studies).

¹⁰⁵ See Joe S. Cecil & C. R. Douglas, *Summary Judgment Practice in Three District Courts 5* (Federal Judicial Center 1987) (defendants filed 59%, 71%, and 80% of the motions for summary judgment in the three district courts studied).

¹⁰⁶ *Id.* (finding that about two-thirds of the motions for summary judgment produced rulings).

¹⁰⁷ 28 U.S.C. § 476 (1990) (motions pending for more than six months need to be included in a semiannual report under the Civil Justice Reform Act).

The timing of rulings on summary judgment follow a similar pattern, but involve generally longer time spans than the rulings on motions to dismiss. The median time from the filing of the first motion for summary judgment to the first summary judgment ruling was less than four months in two courts and more than seven months in the other two courts (see Table 29). Seventy-five percent of all motions for summary judgment were resolved in 7.9, 15.4, 16.8, and 5.2 months in the four courts (see Table 29). The two slower courts were also slower in ruling on motions to dismiss.

Discussion. In analyzing the issue of whether large numbers of class actions are strike suits, our data yield mixed results. On the one hand, motions to dismiss are filed and granted more frequently in class action litigation than in ordinary civil litigation.¹⁰⁸ Such data indicate that a relatively large number of cases are found to be without legal or factual merit, or both. Comparison with data from a 1974 study of (b)(3) class actions indicates, however, that the rate of dismissal and summary judgment is lower in the current study than it was during 1966–1972 in one federal district court.¹⁰⁹

On the other hand, defendants generally appear to have had an opportunity to test the merits of the litigation and obtain a judicial ruling in a reasonably timely manner, particularly for motions to dismiss. Testing the factual sufficiency of claims via summary judgment, however, may take more than a year for some rulings in some courts.

For at least one-third of the cases in our study, judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise. The settlement value of other cases was undoubtedly influenced by rulings granting motions for partial dismissal, or partial summary judgment and by rulings denying such motions. Such merits-related influences on settlement value, however, seem not to fall within the broadest definition of a strike suit.

(d) Simultaneous motions to certify and approve settlement

Background. The question is how frequently do courts approve settlements which include the initial certification of a class? As a general principle, settlement negotiations in class actions are deferred until the court has ruled on class certification. However, on occasion, parties will enter into settlement agreements before a class is certified. Because of their advantages courts have

¹⁰⁸. In an empirical study of the use of Fed. R. Civ. P. 12(b)(6) in two federal district courts, that rule was found to account for the disposition of 2% to 4% of all cases in the sample. Willging, *supra* note 104, at 7–9. Motions were filed in 13% of the cases in the sample and approximately 23% of the rulings resulted in a total disposition of the case. *Id.* An earlier study by the Center found higher rates of filing (40%) and disposition (65% compared to 52% in the later study), as well as a higher rate of granting of motions (40%) in a sample of cases in six federal district courts. *Id.* at 5–6 (citing Paul Connolly & Patricia Lombard, *Judicial Controls and the Civil Litigative Process: Motions* (Federal Judicial Center 1980)).

¹⁰⁹. *Georgetown Empirical Study*, *supra* note 88, at 1136 (showing that 55% [44 of 81] of class actions were disposed of favorably to defendants by dismissal or summary judgment). Excluding four voluntary dismissals which we would not have counted as rulings on dismissal, the rate is 49% (40 of 81), compared to our rate of approximately 33%.

sometimes approved settlement classes.¹¹⁰ But settlement classes generally warrant closer judicial scrutiny than settlements where the class certification has been litigated.¹¹¹

Data. Across the four districts, a total of 152 cases were certified in some form or fashion. Of this total 93 cases (61%) were certified unconditionally and 59 cases (39%) were certified for settlement purposes only. Of those 59 cases, 28 (47%)—approximately 18% of all certified class actions—contained information or docket entries indicating that a proposed settlement was submitted to the court before or simultaneously with the first motion to certify.

The twenty-eight cases with simultaneous motions to certify and approve settlement were filed in three districts. One district had fourteen cases or 50% of all cases, eight of which were securities cases. The next district had seven cases (25%), four of which were other statutory actions. The third district also had seven cases (25%), four of which were civil rights actions (see Table 30). In twenty-four of the twenty-eight cases (86%), the court approved the settlement without changes. In the remaining cases, the court approved the settlement but with some changes. (*See also infra* § 14(b).)

Are there differences in the two types of classes certified for settlement purposes, that is, cases certified with or without a simultaneous settlement? Our data were especially limited in this area because information was missing for numerous cases, and as a result no reliable conclusions can be drawn from them. We found that the (b)(3) class was the most frequently certified class in both types of scenarios. The (b)(2) class was the second most frequently certified class (see Table 31). These results parallel our finding that the (b)(3) class is the most frequent type of class sought and certified. (*See supra* § 2(c).)

(e) Changes in certification rulings

Background. In this subsection we look at the frequency with which courts change the definition of the class or the direction of their certification rulings. The *Manual for Complex Litigation, Third*, indicates that “[w]hether a class is certified and how its membership is defined can often have a decisive effect not only on the outcome of the litigation but also on its management. It determines the stakes, the structure of trial and methods of proof, the scope and timing of discovery and motion practice, and the length and cost of the litigation.”¹¹² The *Manual* also warns that “[u]ndesirable consequences may follow when an expansive class, formed on insufficient information, is later decertified or redefined.”¹¹³

Data. Of 152 certified cases, counsel in 23 (15%) cases filed either a motion to reconsider the court’s decision or a motion to decertify the class. The courts’ responses to these motions varied.¹¹⁴ In 9 (39%) of the 23 cases the court affirmed its certification ruling. In 5 (21%) of the 23 cases the court denied reconsideration of the matter altogether (see Table 32).

110. *See, e.g.*, *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979). *Cf.* *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982); *In re Franklin Bank Sec. Litig.*, 574 F.2d 662 (2d Cir. 1978).

111. MCL 3d, *supra* note 34, § 30.45.

112. *Id.* § 30.1, at 212.

113. *Id.* § 30.11, at 215.

114. Outcomes included: denying reconsideration, affirming certification, reversing certification, modifying certification deferring reconsideration, taking no action, and lastly, taking some other form of action.

Of the districts' *noncertified* cases, in only 4% did counsel file a motion to reconsider the court's decision. The court denied the reconsideration motion in 72% of those cases. In the remaining 28% of the cases, the court either took some other action or did not rule on the request.

(6) Certification Disputes

In this section we first address the questions: How much time is spent contesting certification? Are there correlations between the subjects of litigation and certification disputes? Is much effort devoted to contesting the choice between (b)(1), (b)(2), and (b)(3) classes, and does this correlate to the subject of the litigation?¹¹⁵

(a) How many certification contests were there and how much time did counsel spend opposing certification?

Background. Pursuant to Federal Rule of Civil Procedure 23, class certification is left to the sound discretion of the district court.¹¹⁶ Because judicial discretion is not immutable, disputes inevitably arise. At this stage, the court does not have the responsibility of adjudicating the merits of the class or individual claims (*see supra* § 5(c)).

Data. In three of the four study courts, defendants opposed certification in slightly over 50%¹¹⁷ of the cases with a motion or sua sponte order regarding class certification. Defendants opposed 40% of the motions or orders in the other district (see Figure 29).

We have no reliable measure to estimate the time counsel spend contesting certification. Some have suggested that the length of the brief is an adequate indicator, but it is far from clear that more pages equates to more time, especially when the subject matter has become routinized (*see supra* § 2(a)). Notwithstanding this, because of the expressed interest in time spent on certification contests, we looked at brief lengths and at whether there appeared to be a relationship between the length of the opposition brief and the outcome of the certification dispute, that is, whether the case was certified.

We found that in at least 70% of cases where opposition to certification was indicated counsel in the four districts submitted opposition memoranda (see Figure 30). Further, in cases for which information was available, 75% of the opposition brief lengths ranged from twenty-seven pages or less in one district to sixty-one pages or less in another, with median lengths ranging from twelve pages to twenty-six pages. Briefs supporting certification in disputed cases were somewhat longer; 75% ranged from thirty-five pages or less in one district to seventy-six pages or less in another, with median lengths ranging from eighteen to forty pages (see Figure 31).

A relationship, although modest, appeared to exist between opposition brief lengths and whether a case was eventually certified. In 75% of the cases in three districts, opposition brief lengths were longer in certified cases (with differences of three pages in one district, 9.5 in the second, and thirty-one in the third).

How does the length of judicial opinions in contested cases that were ultimately certified (certified dispute cases) compare to contested cases that were not certified (noncertified dispute

¹¹⁵ Cooper, *supra* note 6, at 30.

¹¹⁶ Zeidman v. Ray McDermott & Co., 651 F.2d 1030, 1038–39 (5th Cir. 1981); 7B Wright et al., *supra* note 56, § 1785.

¹¹⁷ This percentage is lower than the time study figure, which was 60%. *See* Willging et al., *supra* note 26, at 10.

cases)? Should we expect to find lengthier opinions in certified cases? The length of opinions in certified dispute cases were somewhat lengthier than those in noncertified cases, but not dramatically so. We found that in 75% of the certified dispute cases, opinion lengths ranged from thirteen to twenty-four pages as compared to three to nineteen pages for noncertified cases (see Figure 32).¹¹⁸

Opposition to certification was indicated in twenty-seven different nature-of-suit categories in the four districts. In twelve of these different case types, opposition to certification appeared only once. Not surprisingly, because of the amount in controversy in many securities cases and because of their overall prevalence in the four districts, in two of the four districts opposition was most prevalent in these cases. In the third district, the number of securities and prisoner civil rights cases were the same and in the fourth district most opposition arose in other civil rights cases (see Table 33). When we combined civil rights cases—other civil rights, jobs, accommodations and welfare—they accounted for the most opposition in two districts (see Table 34). In another district, opposition was found equally in prisoner civil rights, securities, and other civil rights cases.

(b) Was there a relationship between disputes over certification and the nature of suit?

Data. Most of the contested cases included arguments about three of the four traditional Federal Rule of Civil Procedure 23(a) issues: typicality, representativeness, and commonality. Disputes addressing representativeness and typicality occurred with almost equal frequency. Arguments about the other traditional issue, the size of the class (numerosity), occurred less frequently (see Figure 33). Most disputes, except numerosity, arose in securities, civil rights, and labor cases. Numerosity disputes arose most frequently in civil rights and labor cases. Looking at each type of dispute separately, we found:

Representativeness disputes. Disputes regarding the ability of the representatives to adequately represent the class occurred most often, appearing in 89 of the 141 cases (63%) in which there was opposition to certification. Most of these disputes arose in securities (27 cases, or 30.3%), civil rights (23 cases, or 25.8%), and labor (15 cases, or 16.8%) cases.

Typicality disputes. Disputes addressing the typicality of the class representatives' claims arose in eighty-seven cases (61%) and similarly appeared most often in securities (twenty-six cases, or 29.8%), civil rights (twenty-four cases, or 27.5%), and labor (thirteen cases, or 14.9%) cases.

Commonality disputes. Disputes about the presence of common issues of law and fact appeared in seventy-four cases (52%) and again were generally found in securities (twenty-one cases, or 28.3%), civil rights (nineteen cases, or 25.6%), and labor (twelve cases, or 16.2%) cases.

Numerosity disputes. Numerosity disputes arose less frequently than the other types of disputes, occurring in forty-nine cases (34%). Such disputes generally appeared in civil rights (twenty-one cases, or 42.8%) and labor (six cases, or 12.2%) cases.

¹¹⁸ Time study data revealed that the average amount of judicial time spent on certification rulings was about five hours. The average ruling was approximately seven pages. The median length was one page but some were as long as twenty-five to thirty-five pages. Willging et al., *supra* note 26, at 13.

(c) How much effort was devoted to the choice between (b)(1), (b)(2), and (b)(3) classes and did the effort vary by nature of suit?

Background. One of the assumptions set forth in the September 1985 report of the American Bar Association's Section of Litigation Special Committee on Class Action Improvements is that disputes over the type of class to be certified are frequent and problematic.¹¹⁹ As a result of these disputes, the committee indicated that "[t]he trifurcation created by present subdivision (b) places a premium on pleading distinctions with important procedural consequences flowing to the victor."¹²⁰ Further, the committee recommended eliminating the three subsections of subdivision (b) "in favor of a unified rule permitting any action meeting the prerequisites of Rule 23(a) to be maintained as a class action if the court finds 'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'"¹²¹

A central feature of the preliminary draft proposal of Rule 23 circulated by the Advisory Committee on Civil Rules in January 1993 was the merger of current subdivisions (b)(1), (2), and (3) into a unitary standard.¹²² This standard would have applied a single set of certification factors to all cases and allowed trial judges discretion in designing class actions suited to the needs of particular cases, including "the power to certify different class actions for different parts of the same case," less stringent forms of notice for (b)(3) classes, some form of notice in a (b)(1) or (b)(2) class action, and an opt-out right in (b)(1) or (b)(2) class actions.¹²³ "This new power over opt-out should make it easier for trial judges to experiment with novel opt-out structures. For example, a judge might certify a mandatory class for liability and an opt-out class for damages on the theory that the damage phase triggers a weightier litigant-autonomy interest than liability or on the theory that [permitting an] opt-out for damages is necessary to protect high stakes plaintiffs from exploitation."¹²⁴

Not everyone agrees that there should be a collapsing of categories as set forth in the 1993 draft proposal. Some argue that the elimination of the Rule 23(b) categories would (1) have ramifications both for the opt-out provisions and the notice requirements of the existing rule and (2) impact the legitimacy lent by the traditions established by (b)(1) classes and the moral tones established by the civil rights cases' uses of (b)(2) classes. Additionally, others believe that

119. ABA Special Committee Report, *supra* note 10, at 203 ("With such procedural consequences at stake, it is no surprise that enormous amounts of energy and money are often devoted to the characterization battle, and difficult questions command the attention of the courts as the parties struggle at the outset of a case to decide whether the presence of an 'individual issue' defeats a claim to (b)(1) status . . ."). *See also* Tober v. Charnita, Inc., 58 F.R.D. 74 (M.D. Pa. 1973); Contract Buyers League v. F & F Inv., 48 F.R.D. 7 (N.D. Ill. 1969).

120. ABA Special Committee Report, *supra* note 10, at 204.

121. *Id.* The Committee Note of Proposed Rule 23 (see Appendix A) suggests that the rationale behind the collapsing of categories or proposing a unified rule was simplification:

This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on whether and how the case should proceed as a class action.

122. Cooper, *supra* note 14.

123. Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 Rev. Litig. 79, 83 (1994).

124. *Id.* at 84 n.15 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 925-30 (1987) (analyzing various conditions on opt out)).

the current subdivisions have historical roots that enable the courts to draw upon the jurisprudence developed from those cases. A change in the rule could very well lead to unpredictable results.

If the language of the 1993 draft proposal were adopted, courts would be able to allow class members to opt out of (b)(1) and (b)(2) classes, and might deny members the opportunity to opt out of a (b)(3) class, thereby preventing individuals from pursuing individual litigation. Additionally, “[e]liminating the three categories is likely to create greater procedural complexity because the court must then determine in every case whether notice and opt out requirements should apply, and if so, under what conditions.”¹²⁵ “This subjective standard . . . would invite protracted procedural battles about what the parties consider to be ‘superior,’ ‘fair’ and ‘efficient.’ The standard’s inherent subjectivity would also practically assure that different judges applying their own views of superiority, fairness and efficiency would render decisions that litigants would inevitably find to be inconsistent and confusing.”¹²⁶

Some courts have experimented with their application of Rule 23 and have employed judicial discretion in applying the subsections of Rule 23(b) more flexibly.¹²⁷

Data. We examined the extent to which the parties and the courts address the class-type issue and found that in all four districts the parties infrequently address the issue. In the 122 cases for which information was available, the parties’ arguments in 95 cases (78%) did not address whether one type or another should be certified. In 20 cases (16%) the portion of the briefs devoted to such arguments was less than 25% of the size of the briefs. In the remaining 7 cases arguments regarding class type were less than 75% of the size of the briefs in 6 cases and between 75% to 99% in the remaining case.

Courts address the type of class to be certified less frequently than the parties.¹²⁸ In the 140 cases for which information was available, in approximately 85% of the cases the court did not address the class-type issue at all. However, in the 27 cases where counsel did raise the class-type issue, the courts in 21 of those cases (77%) addressed the issue. Of those 21 rulings, 20 devoted less than 25% of the opinion to the class-type issue and 1 devoted 50% to 74%.

Discussion. Data collected from the four districts do not support the American Bar Association’s earlier stated assumption that disputes over the type of class to be certified are frequent. We cannot tell from these data whether the disputes over the type of class in this minority of cases might be problematic. Whether or not having disputes over the type of class in 22% of the opposition briefs and in about 15% of the judicial opinions supports a proposed rule change is clearly a question for the special committee.

¹²⁵ Lawyers for Civil Justice et al., Comments on Federal Rule of Civil Procedure 23, at 1, 2 (Apr. 22, 1993) (unpublished report) (on file with the Research Division, Federal Judicial Center).

¹²⁶ *Id.* at 7.

¹²⁷ *See, e.g.*, Bell v. American Title Ins. Co., 277 Cal. Rptr. 583 (Cal. Ct. App. 1991); Boggs v. Divested Atomic Corp., 141 F.R.D. 58 (S.D. Ohio 1991).

¹²⁸ *Cf. Georgetown Empirical Study, supra* note 88, at 1143 (“Orders granting certification seldom specif[y] which category of rule 23 (b) . . . [is] involved.”).

(7) Plaintiff Classes

(a) Did defendants ever seek and win certification of a plaintiff class?

Data. Defendants almost never sought certification of a plaintiff class. In less than 1% of the motions filed was the defendant seeking such certification. Our data uncovered one such motion in a tort (personal property-other fraud) case which was subsequently certified. In approximately 79% of the cases with certification motions, plaintiffs were seeking to certify a plaintiffs class. In over 12% of the remaining cases (see Figure 34, other category), the parties generally stipulated to a plaintiff class or settlement class.

(b) How frequently did defendants acquiesce in certification of a plaintiff class by failing to oppose or by stipulating to class certification?

Data. In half of the 152 certified cases, defendants acquiesced in certification of a plaintiff class by either failing to oppose the motion or sua sponte order for certification or by stipulating to class certification. Our data did not reveal defendants' basis or rationale for acquiescing.

(8) Defendant classes¹²⁹

Background. The core questions are: How common are defendant classes? Are there identifiable but narrow settings in which they are most likely?¹³⁰ Case law and commentary give us more information than the empirical data in the study, which simply confirms that use of defendant classes is rare. Defendant class actions have been long recognized as a valid procedural device "whereby an entire class of defendants can be bound to a judgment although some individual members did not participate in the litigation but were represented by named class representatives."¹³¹ It appears on its face that Rule 23 allows for the certification of both defendant and plaintiff classes.¹³² However, certification of defendant classes is presumed to be uncommon.¹³³

Though perhaps uncommon, case law and commentary show that defendant classes have been used in various types of cases. The most common use is reported to be "in suits against local or state enforcement officials challenging the constitutionality of state law or practice."¹³⁴ Defendant classes have also been employed "in patent infringement cases in which a common

¹²⁹ Note, *Defendant Class Actions*, 91 Harv L. Rev. 630, 637 (1978):

The traditional defendant class action is limited to the resolution of issues that are perfectly common to all the class members. As such, it is essentially a device that permits the offensive assertion of collateral estoppel on the common issues against non-parties, rather than a method of conducting a unitary proceeding that determines the rights and liabilities of each class member represented in the suit.

¹³⁰ Cooper, *supra* note 6, at 30-31. Professor Cooper also asks a number of questions about how defendant classes work. Given the paucity of data on the subject, we are unable to respond meaningfully to those questions.

¹³¹ Robert E. Holo, *Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution*, 38 U.C.L.A. L. Rev. 223, 223 (1990).

¹³² Fed. R. Civ. P. 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties. . . ."

¹³³ See *DeAllaume v. Perales*, 110 F.R.D. 299, 303 (S.D.N.Y. 1986) ("Although Rule 23 provides for defendant as well as plaintiff classes, certification of a defendant class is rare.").

¹³⁴ 1 Newberg & Conte, *supra* note 55, § 4.50, at 4-196.

question of patent validity is litigated against a defendant class of alleged infringers.”¹³⁵ Case law also reveals that defendant classes have been upheld in civil rights,¹³⁶ criminal justice,¹³⁷ mental health,¹³⁸ and securities cases.¹³⁹

Data. Our data support the earlier assertion that defendant classes are not common. In the four districts, there were a total of four motions requesting certification of a defendant class, three filed by plaintiffs and one filed by defendants. Of the 152 certified cases in the four districts, N.D. Ill. was the only one with a certified defendant class. Certification had been sought by the plaintiffs in a civil rights case. After reviewing that case file we were unable to determine whether the defendant was a willing representative for the class, nor could we ascertain the extent of compensation for such an undertaking.

(g) Issues Classes and Subclasses

In this section we address the questions: How frequently, and in what settings, are issues classes [i.e., cases in which some but not all of the issues are certified for class treatment] used? Subclasses? How diligent and sophisticated is the inquiry into possible conflicts of interest within a class . . . ?¹⁴⁰ We found no issues classes and few subclasses. We also found that the ability of the representative to represent the class was frequently disputed on the ground that the named plaintiffs had a potential conflict of interest with other class members.

Background on issues classes and subclasses. Rule 23(c)(4) authorizes the court (1) to allow a class action to be maintained with respect to particular issues, or (2) to divide the class into appropriate subclasses.¹⁴¹ Subdivision (c)(4) is helpful in assisting the courts with the ability to restructure complex cases in order to meet the other requirements for maintaining a class action, such as the superiority and manageability requirements.¹⁴²

All four of the districts, E.D. Pa.,¹⁴³ S.D. Fla.,¹⁴⁴ N.D. Ill.,¹⁴⁵ and N.D. Cal.,¹⁴⁶ have case law reflecting the courts' willingness to certify an issues class if the other Rule 23 requirements are fulfilled.

¹³⁵ *Id.* at 4-197 (citing *Dale Elecs., Inc. v. RCL, Inc.*, 53 F.R.D. 531 (D.N.H. 1971); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 (N.D. Ill. 1969); *Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc.*, 285 F. Supp. 714 (N.D. Ill. 1968)).

¹³⁶ *See, e.g.*, *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972); *Doss v. Long*, 93 F.R.D. 112 (N.D. Ga. 1981); *Florida Businessmen for Free Enter. v. Florida*, 499 F. Supp. 346 (N.D. Fla. 1980), *aff'd sub nom.* *Florida Businessmen for Free Enter. v. Hollywood*, 673 F.2d 1213 (11th Cir. 1982).

¹³⁷ *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Marcera v. Chinlund*, 91 F.R.D. 579 (W.D. N.Y. 1981).

¹³⁸ *See, e.g.*, *Institutionalized Juveniles v. Secretary of Public Welfare*, 78 F.R.D. 413 (E.D. Pa.), *rev'd on other grounds*, 442 U.S. 902 (1978); *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975).

¹³⁹ *See, e.g.*, *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 528 (S.D. Fla. 1986). The plaintiff successfully sought certification of a defendant class in an action charging violation of federal securities and RICO laws; court indicated that the “certification of defendant classes has gained considerable acceptance in securities fraud litigation.” *Id.* at 533. *See also In re Intel Sec. Litig.*, 89 F.R.D. 104 (N.D. Cal. 1981) (court indicated that the existence of a plaintiff class often enhances the likelihood of certification of a defendant class).

¹⁴⁰ Cooper, *supra* note 6, at 31. On this topic, Professor Cooper also raised a series of questions about how issues classes work. Given the absence of issues classes in our study, we cannot address those questions.

¹⁴¹ *See* 7B Wright et al., *supra* note 56, § 1790, at 268.

¹⁴² *Id.*

¹⁴³ *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 109 (3d Cir. 1979) (finding certification of the

Additionally, case law also reveals that subclasses have been used in E.D. Pa.,¹⁴⁷ S.D. Fla.,¹⁴⁸ N.D. Ill.,¹⁴⁹ N.D. Cal.¹⁵⁰ and in a variety of substantive case types.

class for purposes of determining liability entirely proper in an action seeking injunctive relief against the continued maintenance of state school and hospital facility catering to persons suffering from mental retardation); *Samuel v. University of Pittsburgh*, 538 F.2d 991, 995 (3d Cir. 1976) (finding decertification of a class action in a case attacking a state-wide residency rule to be in error when the court could have used Rule 23(c)(4)(A) and (B) to better manage the class); *McQuilken v. A&R Dev. Corp.*, 576 F. Supp. 1023, 1028, 1032 (E.D. Pa. 1983) (utilizing Rule 23(c)(4)(A) to limit the issues in a class action to recover damages to class members' property by construction activity); *Griffen v. Harris*, 83 F.R.D. 72, 74 (E.D. Pa. 1979) (holding that in light of Rule 23(c)(4)(A) the district court should reconsider its prior ruling on class certification, in an action challenging the Department of Housing and Urban Development administration of rent supplement program, as it pertains to damages); *Swarb v. Lennox*, 314 F. Supp. 1091, 1099 (E.D. Pa. 1970) (ordering class certification for a limited class with limited issues in a case involving the legality of the Pennsylvania judgment by confession practice), *aff'd*, 439 U.S. 1012 (1979).

144. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (reversing the district court's decision to deny class certification in a suit brought for the denial of Medicaid benefits; court should have considered Rule 23(c)(4)); *In re Nissan Antitrust Litig.*, 577 F.2d 910, 913 (5th Cir. 1978) (affirming district court's decision to separate out certain issues for class treatment in an antitrust action), *cert. denied*, 429 U.S. 1017 (1979).

145. *Denberg v. United States*, 696 F.2d 1193, 1207 (7th Cir. 1983) (finding that although the district court did not have jurisdiction over the action challenging decision of the Railroad Retirement Board to deny benefits to husbands of retired railroad workers, it was appropriate for the district court to utilize Rule 23(c)(4)(A) in order to separate out particular issues for class treatment), *cert. denied*, 466 U.S. 926 (1984); *Barkman v. Wabash, Inc.*, No. 85-C-611, 1988 U.S. Dist. LEXIS 421, at *2, 8 (N.D. Ill. Jan. 19, 1988) (finding the use of Rule 23(c)(4)(A) appropriate in a securities action); *Skelton v. GMC*, 1985-2 Trade Cas. (CCH) ¶66, 683 (N.D. Ill. 1985) (finding that the common issue appropriate for class-wide treatment in a warranty case is the issue of whether a design or manufacturing defect breached the implied warranty of merchantability). *But see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (reversing district court's decision to certify a class action as to the issue of negligence only in a product liability/negligence suit because district judge "exceed[ed] the permissible bounds of discretion in the management of federal litigation"), *cert. denied*, No. 95-147, 1995 U.S. LEXIS 6153 (Oct. 2, 1995).

146. *Valentine v. Carter-Wallace, Inc.*, No. C94-2867, 1995 U.S. Dist. LEXIS 9938, at *1-2 (N.D. Cal. Mar. 15, 1995) (certifying pursuant to Rule 23(c)(4)(A) specific common issues for class treatment in a product liability/negligence suit); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 453 (N.D. Cal. 1994) (excluding plaintiff's deterrence claims for class certification in a case under the Americans with Disabilities Act); *In re Activision Securities Litig.*, 621 F. Supp. 415, 439 (N.D. Cal. 1985) (certifying defendant underwriter class with respect to particular issues); *In re Gap Store Sec. Litig.*, 79 F.R.D. 283, 308 (N.D. Cal. 1978) (certifying defendant class of underwriters as to particular issues); *I.M.A.G.E. v. Bailar*, 78 F.R.D. 549, 559 (N.D. Cal. 1978) (bifurcating issues in a civil rights action pursuant to Rule (c)(4)(A)). *But see In re Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982) (holding that "the few issues that might be tried on a class basis in this case balanced against issues that must be tried individually, indicate that the time saved by a class action may be relatively insignificant"), *cert. denied*, 459 U.S. 1171 (1983).

147. *Samuel v. University of Pittsburgh*, 538 F.2d 991, 996 (3d Cir. 1976) (holding that the district court abused its discretion by not investigating into the possible usefulness of subclasses before decertification was ordered); *Williams v. Philadelphia Hous. Auth.*, No. 92-7072, 1993 U.S. Dist. LEXIS 8826, at *29 (E.D. Pa. June 30, 1993) (certifying a subclass in a case against the Housing Assistance Program); *Troutman v. Cohen*, 661 F. Supp. 802, 813 (E.D. Pa. 1987) (certifying subclasses for class action involving challenges to the Medical Assistance Skilled Care Regulations); *Pennsylvania v. Int'l Union of Operating Eng'rs*, 469 F. Supp. 329, 391 (E.D. Pa. 1978) (certifying subclasses for a discrimination class action); *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 629 (E.D. Pa. 1976) (certifying subclasses in a civil action class action); *Dawes v. Philadelphia Gas Comm'n*, 421 F. Supp. 806, 826 (E.D. Pa. 1976) (certifying subclasses in an action challenging certain policies and practices of the Philadelphia Gas Works); *Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 66 F.R.D. 581 (E.D. Pa. 1975) (certifying subclasses in a Sherman antitrust class action); *Dorfman v. First Boston Corp.*, 62 F.R.D. 466, 476 (E.D. Pa. 1973) (certifying two

Data on issues classes and subclasses. Our results uncovered no issues classes in the four districts. The cases that were certified appeared to encompass all the issues in question. We had, for example, no mass tort cases where issues of fault and general causation might be suitable for class treatment, leaving other issues, for example, proximate cause or damages, to be determined on a case-by-case analysis. Finding no issues classes is not surprising from a judicial economy standpoint because issues classes can create additional litigation and courts are likely to use issues classes only when the advantages outweigh the disadvantages of promoting additional litigation.¹⁵¹

Our data revealed a total of ten subclasses in the four districts. Each district except for one certified three subclasses. Securities cases had the largest number of subclasses—five. Four of the remaining five subclasses were found in civil rights cases (see Figure 35). In these cases subclasses were often used to separate out different class members who either purchased stock under different circumstances than the rest of the class or were discriminated against by a defendant during a different time than the class period.

Our data showed that judges have used subclasses but not issues classes. It appears that courts, or at least the ones in the four districts, were more comfortable in certifying subclasses in cases where members held divergent or antagonistic interests. Allowing such subclasses in effect brings to closure all issues in a class, thereby terminating the entire litigation.

Background on conflicts of interest. As a general principle, class representatives' interests should not conflict with the interests of the class.¹⁵² Pursuant to Federal Rule of Civil Procedure 23(a)(3) "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the

subclasses in a securities class action)

148. *Appleyard v. Wallace*, 754 F.2d 955 (11th Cir. 1985) (vacating district court's decision to deny class certification and suggesting that the court should have considered using Rule 23(c)(4)). *But see Mathews v. Diaz*, 426 U.S. 67, 71 (1976) (finding that the district court in the Southern District of Florida lacked jurisdiction over the class action involving the Social Security Act and the class and subclass as certified were too broadly defined).

149. *Williams v. State Bd. of Elections*, 696 F. Supp. 1559, 1560 (N.D. Ill. 1988) (certifying subclasses in a civil rights class action); *Technograph Printed Circuits, Ltd. v. Method Elec., Inc.*, 285 F. Supp. 714, 725 (N.D. Ill. 1968) (certifying subclasses in a patent class action).

150. *American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 786 n.5 (9th Cir. 1982) (finding subclassification appropriate in a usury class action suit); *Valentino v. Carter-Wallace, Inc.*, No. C 94-2867, 1995 U.S. Dist. LEXIS 9938, at *1 (N.D. Cal. March 15, 1995) (certifying subclass in product liability/negligence class action); *Sullivan v. Chase Inv. Serv., Inc.*, 79 F.R.D. 246 (N.D. Cal. 1978) (certifying subclasses in class action against brokerage houses). *But see Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) (finding that the district court had no authority to create a subclass in a Section 1983 class action violation); *Mendoza v. United States*, 623 F.2d 1338, 1349-50 (9th Cir. 1980) (affirming district court's decision to deny plaintiffs' subclass motion), *cert. denied*, 450 U.S. 912 (1981); *Wilkinson v. FBI*, 99 F.R.D. 148 (N.D. Cal. 1983) (denying subclass in constitutional class action challenge for failure to satisfy the numerosity requirement).

151. For a discussion of the advantages and disadvantages of issues classes, see 7B Wright et al., *supra* note 56, § 1790, at 271.

152. *But see Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 407 (D.N.J. 1990) (the court found that the "[f]act that the named plaintiff in a securities fraud action purchased her stock through a broker who was her stepfather and who resided in the same household with her did not produce a conflict of interest between her and other members of the class nor show that she had access to inside information not available to the general public, and did not preclude finding that her claims were typical of those of members of the class.")

claims or defenses of the class” In some instances a party’s claim of representative status will only be defeated if the conflict goes to the very subject matter of the litigation.¹⁵³

Data on conflicts of interest. In the majority of cases where typicality of the class was disputed, defendants generally contended that plaintiffs’ claims were distinct from those of the class they sought to represent, or were subject to a defense unique to the representative. Arguments addressing actual conflicts of interest between the representative and class members occurred infrequently. Such arguments were raised in general terms and usually addressed the possibility of conflicts between class representatives and absent class members or alleged conflicts in plaintiffs’ proposed class definition.

Under Rule 23(a)(4), a representative party is expected to fairly and adequately protect the interest of the class. In some instances, defendants might allege that a representative cannot satisfy the requirements of Rule 23(a)(4) if a potential conflict of interest exists with the other class members. The ability of the representative to represent the class was often disputed on the ground that the named plaintiffs had a potential conflict of interest with other class members. The general types of conflicts found in our study included but were not limited to:

1. Cases generally alleging inadequacy of representation due to antagonistic interests of the class representatives to class members whose rights and interests they purport to represent (e.g., named plaintiffs wanted to withdraw their pension contributions whereas other members wanted to wait for monthly retirement benefits).
2. Cases where the conflict centered around some class members not being entitled to the same relief.
3. A case where the dispute centered around the competition between lead counsel and another plaintiff’s lawyer to represent the class. Lead counsel for the class submitted a proposal to continue to serve as lead counsel that included a \$325,000 cap on costs and expenses to be reimbursed from the fund. Plaintiff’s counsel argued that the cap committed counsel to seek an early settlement and represented a powerful incentive to settle the case and that lead counsel had bought an interest in the litigation and that interest conflicted with the class.
4. A case where counsel sought to act simultaneously as the class representative and as class counsel. A potential conflict of interest existed between her duty as representative to the class and her economic interest in attorneys’ fees.

Courts addressed these conflicts in a variety of ways, sometimes substituting class representatives (*see supra* § 4(b)), sometimes denying class certification, and sometimes overruling the objection.

¹⁵³ 7A Wright et al., *supra* note 56, § 1768, at 327 & Supp. 1995 (citing *Michaels v. Ambassador Group, Inc.*, 110 F.R.D. 84 (E.D.N.Y. 1986) (“any conflict of interest arising between members of proposed class in an action for alleged violations of Securities Exchange Act section 10(b), from different times of purchase and sale, was minimal when compared to substantial questions common to all members of class, and any conflicts were too peripheral to mandate denial of class certification motion”); *United States v. Rhode Island Dep’t of Employment Sec.*, 619 F. Supp. 509, 513 (D.R.I. 1985) (“[T]he fact that the class representative may be entitled to back pay in an amount different from that owed other class members does not automatically destroy the adequacy of her representation, nor create any conflict among class members going to the ‘very subject matter of the litigation.’”).

(10) Notice

(a) What types of notice, in what time frame, have been required in (b)(1), (b)(2), and (b)(3) actions?

Background. Two different situations may call for notice: class certification and settlement. Regarding notice of certification, Federal Rule of Civil Procedure 23(c)(2) mandates that, “[i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” In (b)(1) and (b)(2) actions, district judges have discretion to provide notices whenever they deem it necessary “for the protection of the members of the class or otherwise for the fair conduct of the actions.”¹⁵⁴ The *Manual for Complex Litigation, Third* indicates that notice of certification “may at times be advisable for (b)(1) and (b)(2) classes.”¹⁵⁵

Regarding notice of settlement, Rule 23(e) provides, without exception, that “notice of the proposed dismissal or compromise shall be given to all members of the class” Courts and commentators have concluded that “notice of [voluntary] dismissal or compromise is mandatory in all cases under Rule 23.”¹⁵⁶

Rule 23 does not specify a time within which notice must be sent, but the *Manual for Complex Litigation, Third* suggests that “notice should ordinarily be given promptly after the certification order is issued.”¹⁵⁷ In some instances, class members or their representatives and, perhaps, defendants may have found it to be in their interests to delay notice, for example, when a settlement¹⁵⁸ or disposition of the liability issues is imminent. If the class prevails on liability, the ruling might have the effect of shifting the burden of paying the cost of notifying the class.¹⁵⁹ If the case settles, the parties can use the settlement agreement to specify their allocation of notice costs. If the class does not prevail on liability, however, the ruling will not bind class members who did not have notice of class certification.¹⁶⁰

In its 1985 study, the ABA Section of Litigation’s Special Committee on Class Action Improvements observed that Rule 23 imposes notice requirements exceeding those demanded by the Constitution and that Rule 23(c)(2) “frequently obliges a court to require the class representative to advance huge sums of money as a precondition to further prosecution of the action.”¹⁶¹ The proposed amendment to Rule 23 that the advisory committee circulated in 1993 would give the district judge discretion to require “appropriate notice” (see Appendix A, Pro-

¹⁵⁴ Fed. R. Civ. P. 23(d)(2). See 7B Wright et al., *supra* note 56, § 1786, at 196.

¹⁵⁵ MCL 3d, *supra* note 34, § 30.211, at 224. The purpose of the notice is to “help bring to light conflicting interests or antagonistic positions within the class . . . and dissatisfaction with the fairness and adequacy of representation.” *Id.* Similarly, Newberg and Conte assert that notice in such cases is “frequently advisable.” 2 Newberg & Conte, *supra* note 55, § 8.05, at 8-18.

¹⁵⁶ 7B Wright et al., *supra* note 56, § 1797, at 365 & n.48.

¹⁵⁷ MCL 3d, *supra* note 34, § 30.211, at 224.

¹⁵⁸ *Id.* at 224-25.

¹⁵⁹ 2 Newberg & Conte, *supra* note 55, § 8.09, at 8-33.

¹⁶⁰ Failure to give adequate notice may mean that members of the class will not be bound by the judgment. 7B Wright et al., *supra* note 56, § 1789.

¹⁶¹ ABA Special Committee Report, *supra* note 10, at 208 (citing Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974)).

posed Rule (1993) 23 (c)(2)). In making that decision, the judge would be directed to take into account a host of factors, including “the expense and difficulties of providing actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice.”¹⁶² In this subsection we will present data on the current practices in the four districts, relate those practices to the current rules, and discuss the relevance of the data to proposed reforms.

Data. Notice of class certification or of the settlement or voluntary dismissal of a class action was sent to class members in at least 76% of the certified class actions in each of the four districts (see Figure 36). Although notice of certification before settlement is not required in (b)(1) and (b)(2) actions, the majority of such cases included some notice (see Table 35). Generally the notice in those cases was notice of settlement, but a sizable minority included personal notice of class certification.¹⁶³ As noted above, Rule 23(e) calls for notice of settlement in all certified class actions. In six settled (b)(2) class actions, however, no notice to the class or hearing regarding the settlement was indicated on the record.¹⁶⁴

In the (b)(3) certified class actions, notice of certification or settlement was sent in all but six of the cases in the study.¹⁶⁵ As we discuss below in this subsection, notice appeared to have been delayed in sixteen certified (b)(3) actions in which the first notice was a notice of settlement. Our data do not reveal reasons for the lack of notice, but there are any number of possibilities, ranging from concerns about the cost of notice to the parties' inadvertence or neglect. In five of the six cases, the failure to notify the class of the certification appears to have deprived class members of an opportunity to participate in the action before a settlement or a ruling on the merits¹⁶⁶ and may as well have deprived the defendants of a final judgment of class-wide effect.¹⁶⁷ For further discussion of notice in settlement classes, see *infra* § 14(a).

Discussion. Failure to provide notice to the class in these cases seems to violate Rule 23(c)(2)'s mandate that notice be provided promptly in all cases. The omission may be the result of a conscious litigation strategy. In the words of one commentator, postponing notice may represent “litigation strategy and ingenuity,” designed to obtain a ruling on the merits before providing notice.¹⁶⁸ In this way, class representatives might avoid the burden of paying the cost

¹⁶² Cooper, *supra* note 14.

¹⁶³ In all four districts notice was issued in 37 cases certified in whole or in part under (b)(1) and (b)(2). Data was available regarding the event associated with notices in 31 cases. Of those, 23 were notices of settlement and eight were notices of certification. Only two of the eight cases with notices of certification had been certified in part under (b)(3). All eight cases included personal notice and four of those also included notice by publication. See also discussion of (b)(1) and (b)(2) classes *infra* § 11(b).

¹⁶⁴ In four of the cases injunctive relief was included in the final order and in one of those cases a \$10,000 payment to the named plaintiff was part of the settlement. In one of the other two cases, the court simply noted that the parties “settled out of court.” The other case was dismissed “for statistical purposes” while the parties worked out the details of their settlement, with the parties to report to the court if there was any difficulty reaching settlement.

¹⁶⁵ One of the six cases was terminated by remand to the state court. One was dismissed by stipulation without any damages or other remedy indicated and without any indication of court approval. The other four cases, one of which was certified as both a (b)(2) and a (b)(3) class, had been terminated by dismissal or summary judgment.

¹⁶⁶ One of the purposes of the notice is to give the absent class member an opportunity to “enter an appearance through counsel.” Fed. R. Civ. P. 23(c)(2).

¹⁶⁷ See *supra* note 160.

¹⁶⁸ 2 Newberg & Conte, *supra* note 55, § 8.09, at 8-33.

of notice¹⁶⁹ and both parties might avoid the expense and inconvenience of providing two sets of notices to the class. Delays in notice could also, of course, be the result of any number of other factors, such as the need to gather information about the class, inadvertence, neglect, the press of business, or any of the myriad reasons for delays in litigation.

Data. To examine the extent of delays in notice, we looked at the length of time between class certification and the first notice to the class (other than a notice of settlement). We found some variation. In the fastest of the four districts on this point, the median time span was 2.2 months between certification and notice, but 25% of the cases in that district took more than 16.3 months (see Figure 37). In the other districts, the median times were 3.3, 3.8, and 8.3 months (see Figure 37). In all four districts at least 25% of the certification notices were issued more than six months after the class was certified. We have no direct data on the reasons for those delays.

The time from ruling to notice of settlement may shed additional light on the extent to which settlement avoids the need for the class representatives or their attorneys to advance the costs of notice. In 27 (38%) class actions that were certified and later settled (i.e., excluding settlement classes), the first notice sent to the class was a notice of the settlement. Overall, 16 (59%) of those 27 cases had been certified as (b)(3) classes. The median elapsed time between certification and notice was almost three years in one district, more than a year in two other districts, and about three months in the fourth. The number of cases in which such time gaps occur is a relatively small proportion—less than 13%—of all certified and settled class actions. Nevertheless, the numbers are sufficient to show that the practice occurs and that the time gap between certification and notice of settlement can be quite wide.

Discussion. The combined effect of finding no notice at all in six certified (b)(3) actions and finding delayed notices in sixteen certified (b)(3) cases that eventually settled suggests that the lack of a precise timetable guideline in Rule 23(c)(2) has in some cases allowed the parties to postpone or avoid notice. Such omissions thwart the intent of the advisory committee that class members be notified promptly of the class certification so that they can effectively exercise their rights to participate or opt out of the action.¹⁷⁰ Omitting notice also has the effect of avoiding the preclusive effect of a judgment for a defendant against a class.

These practices may be an effort to achieve informally, without a rule change, the result that the ABA Section of Litigation's special committee also sought, namely, recognition of notice costs as potential barriers to access to the courts and flexible allocation of the cost of providing notice. Addressing the merits of a case before certification might provide a mechanism for allocating the costs of notice.

(b) In what form was the notice issued, who paid the cost, and does the cost of notice discourage legitimate actions?

Background. Rule 23(c)(2) requires individual notice in (b)(3) actions for class members “who can be identified with reasonable effort.” Others are to be given “the best notice practicable un-

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g.*, Frankel, *supra* note 5, at 41 (“But it seems obvious that if notice is to be effective—if class members are to have a meaningful opportunity to request exclusion, appear in the action, object to the representation, etc.—the invitation must go out as promptly as the circumstances will permit.”); ² Newberg & Conte, *supra* note 55, § 8.09, at 8-32 to 8-33.

der the circumstances.” The *Manual for Complex Litigation, Third* states that “[p]ublication in newspapers or journals may be advisable as a supplement.”¹⁷¹ As discussed (*see supra* text accompanying note 161), *Eisen v. Carlisle & Jacqueline*¹⁷² requires that class representatives be responsible for the cost. The *Manual for Complex Litigation, Third* points out that “[t]he manner of giving notice can encourage or discourage the assertion of certain claims, or can be so costly and burdensome as to frustrate plaintiffs’ ability to maintain the action.”¹⁷³ Commentators have asserted that the effect of *Eisen* “is to make the initiation of class actions more burdensome, particularly when they are brought under Rule 23(b)(3) and thus require individual notice to all identifiable class members.”¹⁷⁴

Data. The data indicate that the parties and judges follow the dictates of the *Eisen* line of cases by providing individual notice in almost all certified (b)(3) actions in which any notice was provided (see Table 36).¹⁷⁵ In at least two-thirds of the cases in each of the districts, the individual notices were supplemented by publication in a newspaper or other print medium. Other forms of notice, such as broadcasting or use of electronic media, were rarely or never used. A number of cases involved posting of notices at government offices, a form of notice that was particularly prevalent in (b)(2) actions.

The median number of recipients of notice of certification or settlement or both was substantial, ranging from a median of approximately 3,000 individuals in one district to a median of over 15,000 in another (see Figure 38). In all districts the number of notices sent to individuals equaled or exceeded the estimated number of class members. Generally, parties estimated the size of the class during the certification process, before notices were sent.

Data on the costs of implementing notices were difficult to obtain. Whether the data are representative of all cases in the four districts is doubtful. In three of the four districts we were unable to obtain cost data for half or more of the cases. Across the districts, in the cases for which data were available, the median costs of distributing notices exceeded \$36,000 per case and in two of the districts the median costs were reported to be \$75,000 and \$100,000 per case.¹⁷⁶ In at least 25% of the cases in each district, the cost of notice exceeded \$50,000 per case and in two of the districts, such costs exceeded \$100,000 per case. These data are best viewed as a collection of anecdotes and estimates.

Who paid the costs? The short answer is that both plaintiffs and defendants paid. The practices varied in the four courts, but overall defendants paid more than plaintiffs in two courts, slightly less than plaintiffs in one, and considerably less in the fourth. Defendants paid all or part of the costs in 62%, 27%, 58%, and 46% of the cases in E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal., respectively. The data are consistent with the data on the timing of notice (discussed

171. MCL 3d, *supra* note 34, § 30.211, at 225.

172. 417 U.S. 156 (1974).

173. MCL 3d, *supra* note 34, § 30.211, at 226.

174. 7B Wright et al., *supra* note 56, § 1788, at 234.

175. In only one case was it clear that notice other than individual notice was used. In that case, notice was communicated to an estimated 1 million Sears Auto Center repair customers by newspaper publication and by posting notices at all Sears repair centers. In another case, the file was incomplete, but there was no record of notice other than by publication.

176. These costs refer to notice of certification or settlement or both, depending on what type or types of notice were issued in each case.

supra in § 10(a)). Delays in issuing notice apparently led to shifting the cost of notice from plaintiff to defendant. Our data cannot tell us whether the delays reflected a desire to avoid notice costs or some other motivation.

Do these requirements discourage the pursuit of class actions as the editors of the *Manual for Complex Litigation, Third* and Professors Wright, Miller, and Kane assert? The available data on costs suggest that the costs in some cases are high enough to deter litigants or law firms from pursuing class actions, especially where a number of small claims are spread among a large number of class members. Costs of notice may also induce plaintiffs to define a class more narrowly than if costs were not a factor. The larger the class, the costlier the notice. The data on lack of notice in some cases and delays in others suggest that the impact of the cost is sufficient to give parties an incentive to avoid notice, but we do not have direct data showing that the cost of notice is the source of that problem.

(c) How much litigation of notice issues occurred?

Data. In each of the four districts, litigation of notice issues occurred in less than one-quarter of the cases in which notice of certification or settlement was communicated to a certified class (see Figure 39). Overall, twenty-one objections were filed in 18 cases, fourteen by class members, two by class representatives, three by defendants, and two by others.

The most frequent type of objection, occurring eleven times, was to the content of the notices, that is, the failure to include information about an item the objector deemed important. Three of those eleven objectors complained specifically about the lack of information concerning attorneys' fees. Others had more general complaints that the information in the notice was inadequate to inform class members. Six objections complained that the notice had not been received in a timely manner, sometimes arising after an opt-out period had expired or the hearing on settlement approval had been held. Two objectors complained about the exclusion or inferior treatment of a subgroup. (Objections to the substance of the settlement that were presented at the settlement approval hearing will be addressed in § 14(c), *infra*.)

Courts responded to all but six of the twenty-one objections. Seven were heard and rejected, six were heard and accepted in whole or in part, one was withdrawn, and one was handled through correspondence from the plaintiffs' attorney.

Discussion. Overall, the number of objections as well as their tenor and force was not great. Whether that is a sign that the process is working or not is hard to judge. Objections to notice do not appear to represent a significant mechanism for addressing or correcting the types of errors and omissions discussed *supra* in § 10(b) or *infra* in § 10(d).

(d) Did the notices of proposed settlements contain sufficient detail to permit intelligent analysis of the benefits of settlement?

Background. The *Manual for Complex Litigation, Third* recommends that a notice of proposed settlement include a description of the essential terms of the settlement, information about attorneys' fees, disclosure of any special benefits for class representatives, specification of the time and place of the hearing, and an explanation of the procedure for allocating and distributing the settlement.¹⁷⁷ A combined notice of certification and settlement, as the first notice to the class, should include information about opt-out rights and deadlines as well as sufficient information

¹⁷⁷ MCL 3d, *supra* note 34, § 30.212, at 228. Cf. 2 Newberg & Conte, *supra* note 55, § 8.32, at 8-105.

to allow the recipient to make an intelligent choice about opting out. A notice of settlement that is the second notice—that is where the class has already been given notice of certification and the opportunity to opt out—should communicate sufficient information to support an intelligent appraisal of whether to accept or oppose the settlement and whether to file a claim.

In either of the above instances, the putative or actual class member would need sufficient information to assess the impact of the settlement on the member's personal situation. The ultimate question in a rational, economic analysis would be: What can I expect to recover? The class member needs to know this to compare actual losses and determine whether to participate in the settlement or oppose it. To estimate a personal recovery, one needs to know at least the net dollar amount of the settlement and the estimated size of the class with which one can expect to share the net settlement.¹⁷⁸ Newberg and Conte state that it is “unnecessary for the settlement distribution formula to specify precisely the amount that each individual class member may expect to recover.”¹⁷⁹ Courts have not demanded precision but have called for estimates of monetary benefits, fees and expenses, and individual recoveries.¹⁸⁰

Language in a notice should be clear and direct.¹⁸¹

Data. We examined the settlement notices in all of the certified settled cases to determine whether they communicated the type of information described above. Settlement notices in the cases did not generally provide either the net amount of the settlement or the estimated size of the class. Rarely would a class member have the information from which to estimate his or her individual recovery. In only five cases, all of which were in two districts, did the notice include information about the size of the class. As to the net amount of the settlement, in one district a third of the notices included such information, in two districts, a fifth did, and in the fourth district, a tenth. Notices included information about the gross amount of the settlement in 64% to 90% of the cases (see Figure 40).

Missing from most disclosures was information about the dollar amount of attorneys' fees, costs of administration, and other expenses. In only one district did more than half of the notices include the dollar amount of attorneys' fees; at the other end of the range, in one district only 10% of the notices included such information (see Figure 41). In all four districts, however, more than two-thirds of the notices included information about either the percentage or the amount of attorneys' fees (see Figure 41). If the fees are calculated as a percentage of the gross settlement and not as a percentage of the net amount (practices differ), then information about the fee percentage and the gross amount of the settlement would suffice because a class member could calculate the fees by multiplying the gross settlement by the percentage to be allocated to

¹⁷⁸. An estimate of the individual shares in the settlement or the percentage of damages to be compensated would, of course, serve the same purpose.

¹⁷⁹. 2 Newberg & Conte, *supra* note 55, § 8.32, at 8-107.

¹⁸⁰. Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir.) (“the notice may consist of a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses”), *cert. denied*, 423 U.S. 864 (1975); Boggess v. Hogan, 410 F. Supp. 433, 442 (N.D. Ill. 1975) (“the notice should . . . include the best available information concerning fees and expenses together with an estimated range of unitary recovery”).

¹⁸¹. *See, e.g.*, Avery v. Heckler, 762 F.2d 158, 165 (1st Cir. 1985) (affirming “a judicial decision that favors plain and direct English” in a proposed notice). *See generally* 2 Newberg & Conte, *supra* note 55, § 8.39 (discussing the language and content of notice, emphasizing the need for clear, objective language).

fees. Information about the costs of administration and other expenses, including the attorneys' legal expenses for discovery and other pretrial activity, are infrequently included in the notice of settlement (see Figure 42).¹⁸²

Notices generally included sufficient information on the nonmonetary aspects of the settlement. In each district, more than 75% of the notices presented information on a plan of distribution for the proceeds and also included information and forms for submitting a claim. When equitable relief was included in the settlement, it was generally summarized in the notice. Opt-out rights, where applicable, were stated in the vast majority of notices and all notices in all four districts specified the date and time for a hearing on approval of the settlement.

Discussion and call for research. Notices did not appear to include sufficient information for an individual class member to appraise the net value of a settlement to the class or to calculate an expected personal share in the settlement. Is it reasonable to expect that additional information could be provided? It appears that much of the needed information was available at other stages of the litigation and might have been calculated or estimated in the notice of settlement. For example, the exact size of the class might not have been determined until after notices had been sent, yet the parties frequently offered estimates of class size in seeking certification. The Rule 23(a)(1) requirement that "the class be so numerous that joinder of all members is impracticable" demands that the parties and the court consider the size of the class. Moreover, in cases where notice of certification had been sent before a settlement, information about actual class size was available based on the number of notices sent and opt outs received.

What about attorneys' fees? The parties might argue that information about attorneys' fees was not available until after the settlement has been approved and the court entered an order awarding fees. This is technically true. An estimate, with caveats, may have been the most that could have been presented. But courts generally awarded attorneys' fees in the amount requested by the plaintiffs¹⁸³ and those requests were generally submitted to the court before the settlement approval hearing. Including the amount of the fee request in the notice might call for earlier calculation of the estimated fees. Where the fees are a percentage of the settlement, the actual calculation—or a clear statement of the formula—would avoid any problems a class member might have in applying the formula.

Notices generally included the technical information about distribution plans, claims procedures, opt-out rights, hearings, and objections. Counsel in these cases often followed routine formats for developing notices and presenting settlement approval information to the court.¹⁸⁴ Because the practice appears to be routinized, one would expect that counsel would follow any explicit guidelines established through the rule-making process.

Having read the notices in these cases presses us to make an additional observation. Many, perhaps most, of the notices present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader. A content analysis of the samples could test this impression. For any researchers who wish to take up this call for further research,

¹⁸² The median percentage of the gross settlement devoted to administrative costs was 2% across the four districts.

¹⁸³ See discussion and data at *infra* § 16(d).

¹⁸⁴ 2 Newberg & Conte, *supra* note 55, § 8.32, at 8-105 ("[R]ule 23(e) notices are becoming standardized in format . . ."). For sample forms, see *id.* at Appendix 8-2. See also MCL 3d, *supra* note 34, § 41.4.

we can make available a file of most or all of the notices we encountered in the four districts. Courts and commentators have agreed that notices should communicate the essential information in “plain English.”¹⁸⁵

(11) Opt Outs

(a) Number of opt outs and relationships with subject areas and size of claims

Background. The questions in this section are: How frequently do members opt out of (b)(3) classes? Is opting out related to specific subject areas or size of typical individual claims? The background question, which our data cannot answer directly, is: Why do class members opt out?

The choice of opting out may arise in two distinct contexts: after certification but before settlement or after a settlement has been proposed. As the discussion of notice indicates (*see supra* § 10), notice of certification was often deferred until after a settlement had been reached. We examined the rates of opting out at each stage separately and in combination and noted some characteristics of cases with large numbers of settlement opt outs.

Data. At the *certification stage*, the percentage of certified (b)(3) class actions with one or more class members opting out was 21%, 11%, 19%, and 9% in the four districts (see Figure 43). The number of cases in any single nature-of-suit category was too small for meaningful analysis. Because the advisory committee has asked for data on nature of suit, we present the information (see Figure 44), but with the caveat that differences among the categories cannot support any generalizations.

At the *settlement stage*, the percentage of cases with one or more opt-out members was considerably higher than at the certification stage. Those percentages ranged from 36% in two districts to 43% in the third and 38% in the fourth (see Figure 45). Again, the number of cases in each nature-of-suit category does not support detailed analysis of differences (see Figure 46).

Combining the opt outs at the certification and settlement stages yields percentages of certified (b)(3) class actions with one or more opt outs ranging from 42% to 50% in the four districts (see Figure 47). These percentages are somewhat lower than the percentage of opt outs observed in the Georgetown study.¹⁸⁶

How many class members opted out in these cases? In all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class and 75% of the opt-out cases had 1.2% or fewer class members opt out. Again in all four districts, 75% or more of the cases with opt outs had fewer than 100 total opt outs. This left seven cases in the study with more than 100 opt outs.¹⁸⁷ Two cases had 2,500 and 5,203 members, respectively, who opted out. In both of these cases, objectors who were represented by attorneys ap-

¹⁸⁵ *See supra* note 181.

¹⁸⁶ *Georgetown Empirical Study, supra* note 88, at 1161 (58% of cases in national study had one or more opt outs).

¹⁸⁷ In five of those seven cases, objectors or class members other than the official representatives appeared at the settlement approval hearing. Objections filed in the seven cases included objections to the attorneys' fees (five), insufficiency of the settlement amount to compensate for losses (three), insufficient deterrence (two), disfavoring particular groups in the class (two), and a host of miscellaneous objections, including a single allegation of collusion among the parties.

peared at the settlement hearings, a sign that they might be planning further litigation.¹⁸⁸ Overall, three of the seven cases with more than 100 class members who opted out were securities class actions.¹⁸⁹

Data regarding opt outs at the settlement stage suggest that there may be a relationship between the average net amount of the settlement and the presence of one or more opt outs (see Figure 48). The number of cases is too small to yield definitive results and other factors certainly may have affected the decision to opt out, but the direction and magnitude of the relationship in all four districts was similar. The data suggest the possibility that the smaller the average individual portion of the settlement the larger the number of cases in which one or more parties opt out.

Discussion. Intuitively, one might expect one of two relationships between the net monetary award and the decision to opt out. For very large awards, say in a products liability case involving serious personal injuries, one would expect the opt-out rate to increase as the size of the expected award increases because individuals with more serious than average injuries would be able to obtain representation and pursue a larger individual award. None of the cases in the study, however, had median awards of that magnitude (*see supra* § 1(a)). The largest average net individual award was \$5,331 and the great majority of the awards were below \$1,000 (*see supra* § 1(a)).

For the type of awards in this study—none of which seem high enough to support individual lawsuits on a contingent fee basis (*see supra* § 1(a))—one might expect that class members would have more incentive in the larger cases to remain in the class and recover an award in the thousands of dollars. As the size of the net average settlement decreases, members have less incentive to file a claim. If totally dissatisfied with the amount of the recovery, some members may choose to protest by opting out. Without additional research, we cannot know whether this happened in our study, but the data in Figure 48 are compatible with such a scenario.

Comparison of the opt-out rates in this study with those in the Georgetown study, published more than twenty years ago, showed no increase in the rate of opting out.¹⁹⁰ The levels of opt-

188. The case with 5,203 opt outs was the *General Motors Pick-Up Truck Litigation*. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995). In that case many of the objectors were represented by a public interest organization, the Center for Auto Safety, or by government attorneys; the settlement approval was reversed on appeal. In the other large case, 2,500 (16%) of 15,818 class members opted out of a securities class action settlement of \$4,119,000 after objecting, through an attorney, that the amount of the settlement was insufficient. *Hooker v. Arvida/JMB*, No. 92-7148 (N.D. Ill. filed Oct. 27, 1992). No appeal was filed in that case and there was no indication in the case file of further litigation, but the presence of the attorneys and the large number of opt outs indicate the possibility of further litigation by the opt-out members.

189. One of those cases was described in the previous note. In another, *In re* Oracle Sec. Litig., No. 90-931 (N.D. Cal. filed March 29, 1990), 115 members (0.0007%) of a class estimated at 164,000 opted out. The only objections filed in that case were to the amount of attorneys' fees. The other securities case, *Mogul v. Nikken, Inc.*, No. 92-946 (N.D. Cal. filed March 4, 1992), involved a class of independent distributors of a networking marketing program, not a public securities offering; 360 (0.01%) members of a class of 28,533 opted out. In that case no objections were presented at the hearing and there is no indication of an independent action by the opt-out members. The settlement included a mandatory (b)(1)(B) class for refunds for products and an opt-out (b)(3) class for claims based on economic loss arising from the marketing program.

190. *See* discussion of *Georgetown Empirical Study*, *supra* note 88. This portion of the Georgetown study was based on a national study of selected class actions, more than half of which were securities and antitrust cases. *Id.* at

ing out reported in the Georgetown study, in fact, indicate that opting out may have declined considerably.¹⁹¹

(b) Opt outs in (b)(1) or (b)(2) classes

Data. As a practical matter, putative class members do not opt out in (b)(1) or (b)(2) classes, with one minor exception.¹⁹² In addition, there were four settled class actions with opt outs that were certified under either (b)(1)(B) (one case) or (b)(2) (three cases) as well as (b)(3). At least in those cases, the certification of a class on mandatory grounds was not used as a way to evade the opt-out requirements of Rules 23 (b)(3) and 23 (c)(2).

We also looked for cases that had not been certified under (b)(3) yet appeared to be damage actions. In four cases, classes were certified under (b)(1) or (b)(2), but not (b)(3), and damages were awarded on a class-wide basis. None of the cases, however, appeared to represent distortions of the mandatory class categories to evade (b)(3) opt-out requirements.¹⁹³

(12) Opt Ins

(a) Opt-in classes

Background and Data. The question raised is whether devices are employed to create what are essentially opt-in classes, by such means as defining the class to include only those members who file claims. The Georgetown study found that judges in three cases required an opt-in procedure and found that it reduced the class size by 39%, 61%, and 73%.¹⁹⁴ In that study the opt-out procedure generally reduced class size by 10% or less. Plaintiffs' attorneys raised concerns that the opt-in procedure excluded unsophisticated consumer class members.¹⁹⁵ Along similar lines, Newberg and Conte report a small number of opt-in cases that were approved under state court rules.¹⁹⁶

1157-59.

^{191.} In the national portion of their study, the Georgetown authors reported that in 31 of the 36 cases for which information was available, 10% or less of the class opted out. *Id.* at 1161. In the instant study more than 75% of the class actions in each district had fewer than 1.2% of the class opt out. Only two cases in the entire study had opt-out rates above 10%.

^{192.} In one case certified as a (b)(1)(B) class for settlement purposes only, the case file included three letters from class members indicating their desire to opt out of the settlement. That settlement consisted of an agreement from a corporate entity to provide supplemental funding if needed to satisfy the terms of a loan to an employee stock ownership plan and did not include a monetary distribution. One objection to the settlement was to the scope of the language in the release given to defendants. There is no indication that the opt-out letters from these class members had any effect, because the class was defined as a mandatory class and because there was no monetary settlement. The effectiveness of the notice of opting out would be tested if the opt-out members filed suit against the defendant, but there was no evidence that this occurred.

^{193.} In all four cases, notice of settlement was provided to the class, but opt-out rights were not provided in the notice. Three of these cases were ERISA cases involving relatively small retirement funds, each of which appeared to qualify as a limited fund. The fourth case involved a class of claimants who had filed complaints with a state fair employment commission and whose complaints had not been processed. The relief consisted of an order that the commission process the complaints for all who wished and that they pay \$350 to those who chose that remedy. Thus, one might conclude that the injunctive relief was the primary remedy.

^{194.} *Georgetown Empirical Study*, *supra* note 88, at 1148-51.

^{195.} *Id.* at 1149-50.

^{196.} 3 Newberg & Conte, *supra* note 55, § 13.22.

None of the certified class actions in this study defined the class as requiring the filing of a claim as a precondition to becoming a member of the class, but many used a claims procedure that, as a practical matter, limited the number who shared in the common fund (*see infra* § 12(b)).¹⁹⁷ Combining an opt-out class with a claims procedure appears to have the effect of precluding further litigation by class members who do not opt out or file claims.

(b) Claims procedures

Background and data. A large number of cases in the study used a claims procedure to distribute the proceeds of a settlement fund to class members. Only those class members who filed claims shared in the benefits of the settlement, but all class members—as defined in the class certification order—who did not affirmatively opt out were bound by the judgment. Unfortunately, the parties generally did not report the number of claims received; thus, our data on claims received are too incomplete to present.

Claims procedures were used in 80% of certified, settled class actions in one district; 77% in another; 45% in the third; and 42% in the fourth (see Figure 49). Claims procedures were a standard *modus operandi* in securities class actions, being used in between 80% and 100% of these cases in the four districts (see Figure 50). Other types of cases that typically generate monetary awards also used claims procedures. For example, all three antitrust settlements in the study did so, as did three of the five employment discrimination cases. On the other hand, only four of twelve ERISA cases and one of eleven “other civil rights” cases established such procedures. An advantage of using a claims fund is that once the total number of claims is known, the entire fund can be distributed on a pro rata basis.¹⁹⁸

(13) Individual Member Participation

(a) Participation before settlement

(i) Attempts by class members to intervene

Background. The question is how frequently do nonrepresentative class members seek to intervene before the settlement stage? Intervention by putative class members can proceed under either Federal Rule of Civil Procedure 24(a) (intervention of right when granted by statute or when necessary to protect an interest of the prospective intervenor), Federal Rule of Civil Procedure 24(b) (permissive intervention when a statute provides for conditional intervention or there are common questions of law or fact), or Federal Rule of Civil Procedure 23(d)(2) (court may require that notice be given to class members to allow them “to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or oth-

¹⁹⁷ We encountered a few cases filed as statutory opt-in class actions under 29 U.S.C. § 216(b) (1988) of the Fair Labor Standards Act (FLSA) and under 29 U.S.C. § 626(b) (1988) of the Age Discrimination in Employment Act (ADEA), both of which employ an opt-in procedure. Notice of filing a complaint is sent to all potential class members at the outset and they are given an opportunity to file a written consent to join the class. We did not include these cases in the study because they did not invoke Rule 23 and their structure did not match well with our study design. A separate study of FLSA and ADEA cases might provide data that would be useful for assessing the viability of a Rule 23 opt-in procedure.

¹⁹⁸ For an illustration of a formula for allocating the fund according to the proportion of each claimant’s damages, *see* 3 Newberg & Conte, *supra* note 55, § 12.35, at 12-85 to 12-86.

erwise to come into the action"). The main purposes of allowing intervention in class actions are to assure "that the class is adequately represented" and "to enable those class members on the outside of the litigation to function as effective watchdogs."¹⁹⁹

Data. Attempts to intervene in cases filed as class actions occurred relatively infrequently in the study, in 11%, 0%, 9%, and 5% of the cases in the four districts (see Figure 51). Overall, judges granted about half of the requests (see Figure 51). The most frequently cited basis for intervention was Rule 24(b) (permissive intervention) (see Figure 52). Rule 23(d)(2) was cited in only three cases. The authority cited for intervention did not appear to make a difference in the outcome of the application (see Figure 52).

Data on intervention activity was spread among a wide assortment of nature-of-suit categories and no meaningful conclusions can be drawn about differences among the categories (see Table 37).

(ii) Attempts by nonmembers to intervene

Data. In all four districts, a total of six nonmembers of an alleged class attempted to intervene in the class actions. Aside from representing special interests, there was no pattern to their applications.²⁰⁰ Courts granted two of the six applications. All four of those that were denied intervenor status participated in the case at a later stage. In each case the would-be intervenors objected to the settlement and in three cases they filed an appeal, each of which was unsuccessful.²⁰¹ In addition to appeals from the denial of an application to intervene, three proposed intervenor-plaintiffs filed appeals on the plaintiffs' side from a denial of an injunction, a denial of class certification, and a summary judgment for the defendant. All three decisions were affirmed on appeal.

(b) Class member participation in settlement by filing objections and attending settlement hearings

The question raised is: How frequently do nonrepresentative class members appear to contest settlement, and with what effect?²⁰² Objections may be presented by any class member who has not opted out of the litigation, any settling defendant, or any shareholder of a settling corpora-

¹⁹⁹ 7B Wright et al., *supra* note 56, § 1799, at 438–39.

²⁰⁰ Two involved local labor unions, one of which successfully intervened on behalf of its members in a Title VII action (*Stender v. Lucky Stores*, No. 88-1467 (N.D. Cal. filed April 22, 1988)) and the other of which was denied intervention on the side of a class of abused and neglected children who were served by union members. The other successful intervenor was permitted to intervene in a securities class action for the limited purpose of maintaining an interpleader action. *Sullivan & Long, Inc. v. Scattered Corp.*, No. 93-4069 (N.D. Ill. filed July 7, 1993). Two other unsuccessful attempts are described in the next footnote.

²⁰¹ In one case, a bankruptcy trustee for a corporate defendant sought to insure that the corporation did not waive its claims against accountants and other professionals. The trustee later filed objections to the attorneys' fee request and filed an appeal from the fee award, serving as the nominee of several class members. That appeal was pending at the time of our data collection. *Weiner v. Southeast Banking Co.*, No. 90-760 (S.D. Fla. filed March 22, 1990). In another case, a pro-life coalition sought to intervene as a defendant in an abortion rights case against a defendants' class of state attorneys general. The court denied the application and the denial was affirmed on appeal, *Keith v. Daley*, 764 F.2d 1265 (7th Cir.), *cert. denied*, 474 U.S. 980 (1985). See also discussion of appeals *infra* at §§ 13(c) & 20(a).

²⁰² Cooper, *supra* note 6, at 33.

tion.²⁰³ Generally, a written objection must be filed before the hearing, and an objector need not appear at the hearing to have an objection considered by the court.²⁰⁴

Data. Our data permit us to document the objections raised by class members and other objectors and, within limits, to document their attendance at settlement approval hearings. Except in E.D. Pa., however, we were generally unable to obtain transcripts of the settlement approval hearings, so our report of attendance in the other three districts is based on clerical entries that seem likely to undercount the participation of class members and objectors.²⁰⁵ With this caveat, court files indicate that nonrepresentative parties were recorded as attending the settlement hearing infrequently, with 14% in E.D. Pa. being the high mark and the other three districts showing 7% to 11% rates of participation (see Figure 53). Attendance of representative parties was also mixed. Again, E.D. Pa. had the highest rate, 46%, and the other districts varied from 11% to 28% (see Figure 53; *see also supra* § 4 (c)).

Participation by filing written objections to the settlement was far more frequent than participation by appearing at the settlement hearing. Generally, objectors filed their objections in writing before the hearing. Typically, the parties addressed the objections in the final motion for approval of the settlement. Overall, about half of the settlements that were the subject of a hearing generated at least one objection. The percentage of cases in which there was no objection ranged from 42% to 64% in the four districts (see Table 38).

The most frequent type of objection was to the amount of attorneys' fees as being disproportionate to the amount of the settlement; in 14% to 22% of the cases in the four districts, objectors raised this point (see Table 38). The next most frequent objection related to the insufficiency of the award to compensate class members for their losses. Next in line were objections that the settlement disfavored certain subgroups. A wide variety of objections were grouped in a miscellaneous category. Many of the miscellaneous objections raised serious concerns that were difficult to categorize.²⁰⁶

²⁰³ 2 Newberg & Conte, *supra* note 55, § 11.55, at 11-132 to 11-133.

²⁰⁴ *Id.* § 11.56, at 11-137.

²⁰⁵ But, in a recent article, the author asserted that an empirical study of terminated class actions in N.D. Cal. from 1985 to 1993 showed that "class representatives did not participate in 100% of the cases." Downs, *supra* note 50, at 691. Our study, however, found that one or more class representatives attended nine of 32 settlement approval hearings in N.D. Cal. and that the nine hearings were held between June 18, 1992, and December 17, 1993. The difference appears to be that we counted as an appearance any notation on the clerk's minute entry that one or more class representatives were present. Professor Downs did not count such entries as indicating presence because, in his experience, clerks place in the minute entry what the lawyers say in court. Thus, the minute entries may simply represent instances where a lawyer for the class announced an appearance "on behalf of [a class representative]" who was not present. Telephone conversation with Professor Downs (Jan. 2, 1996). Whatever view one takes of the N.D. Cal. data, the data derived from transcripts in E.D. Pa. appear to be the most reliable data available.

²⁰⁶ For example, in *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied*, No. 94-2137, 1995 U.S. LEXIS 5538 (Oct. 2, 1995), an extensive number of complaints were filed and heard at the settlement hearing, including complaints that the settlement did not properly address safety concerns. In two ERISA cases, pensioners raised questions about the effect of the settlement on their retirement benefits. In one case, shareholders raised a claim that the recovery was excessive and would diminish the value of their stock. *Schlansky v. EAC Indus.*, No. 90-854 (N.D. Ill. filed Feb. 13, 1990). At least three miscellaneous objections raised questions about the scope of the release and at least four raised questions about the substantive terms of the proposed settlement.

How did the courts respond to the objections? Approximately 90% or more of the proposed settlements were approved without changes in each of the four districts. In a small percentage of cases, the court approved the settlement conditioned on the inclusion of specified changes. Overall in the four districts, judges made changes in nine settlements before approving them. In seven of these cases, objections had been raised and the changes may have been responsive to those objections, but our data do not permit us to examine that relationship systematically.²⁰⁷

Similar results were obtained for specific objection to the amount of fees requested. Overall, in twenty-one cases, objections to the amount of attorneys' fees were filed. In nineteen of those twenty-one cases the court awarded 100% of the request and in the other two the court awarded less than the full fee request.²⁰⁸ (For a comprehensive discussion of the courts' treatment of attorneys' fees in the study cases, *see infra* § 16.)

Our study was not designed to trace the responses to each objection, but our general impression is that the parties summarized and discussed most objections in a motion for settlement approval. The parties generally filed such a motion after the deadline for filing objections had passed, shortly before the settlement approval hearing. Many of the settlement approval orders, which were typically prepared by the parties for the judge's signature, specifically addressed objections.

Discussion. Objections represent an outside source of information about the substance of the settlement and its impact on class members. The settling parties at this stage have little or no incentive to present negative information about the settlement, so objections from class members and others may be a crucial source of information about defects in the settlement.

In approximately half of the settlements, there was some level of participation by nonrepresentative class members and others. The process channels participation into written filings that the parties review, filter, and present to the court. The objections, in the form received, are generally appended to the parties' filings for the court to read.

Appearances at hearings are infrequent and changes in the settlement as a result of objections are even less frequent. But, there are no data from other studies to suggest what one should expect.²⁰⁹

²⁰⁷ In one case the connection between the objection and the changes in the settlement was clear. Objectors complained that certification of a mandatory class was inappropriate and that parties should be given an opportunity to opt out. The court's approval of the settlement included an opportunity to opt out. *McKenna v. Sears Roebuck*, No. 92-2227 (N.D. Cal. filed June 12, 1992). In another instance, the change consisted of lowering the percentage of attorneys' fees awarded and changing the formula for calculation of fees and expenses, but it was unclear whether the change was responsive to a specific objection. *Nathanson, IRA v. Tenera*, No. 91-3454 (N.D. Cal. filed Oct. 2, 1991). In another case, the court's action in initially rejecting a settlement appeared to arise *sua sponte*. The court determined that a settlement of the derivative action had not been properly approved by disinterested members of the corporate board and, for that reason, the court disapproved that settlement. Because settlement of the class action was contingent on court approval of the derivative settlement, the class action settlement was disapproved until the parties reached a proper settlement of the derivative action. *In re Oracle Sec.*, No. 90-931 (N.D. Cal. filed March 29, 1990).

²⁰⁸ In E.D. Pa., 58% of the fee request was awarded in one case and 100% in the other five cases in which objections to fees were filed. In N.D. Ill., 94% was awarded in one case and 100% in the other four cases with objections. In the other two districts 100% of the requested fees were awarded in all cases with objections to fees.

²⁰⁹ The Georgetown study did not examine participation or objections. *Georgetown Empirical Study, supra* note 88. *See also supra* note 205.

(c) Nonrepresentative class member participation by filing appeals

Data. As noted in *supra* section 13(a)(2), three prospective intervenors filed appeals from the denial of their application to intervene. Prospective intervenors, together with one or more named plaintiffs, also filed appeals addressing other issues in three cases, one involving the denial of an injunction, another the denial of class certification, and the third, the granting of summary judgment for the defendant. In all three instances the trial court's judgment was affirmed.

In addition, objecting class members filed appeals in two major consumer class actions. One of those appeals, the *General Motors Pick-Up Truck Litigation*, resulted in a decision that vacated the order certifying a settlement class and remanded the case to the district court for further proceedings. In the other case, a class member filed an appeal from the district court's approval of a \$3 million attorney fee award in a case in which the class remedy was to provide \$50 coupons toward the purchase of specified automotive equipment to replace prior purchases of similar equipment.²¹⁰ That appeal is pending.

(14) Settlement

(a) Did certification coerce settlement of frivolous or nearly frivolous claims?

Background. Earlier (*see supra* § 5(c)(i)), we observed that one indicator of a "strike suit" is the power of the *filing* of a case to coerce a settlement without regard to the case's merit or lack thereof.²¹¹ In this section we carry that discussion further by examining the relationship between class certification and the settlement of cases. The central question is: Does the act of *certifying* a class coerce settlement of frivolous or nearly frivolous claims? We cannot address this question directly with our data because we have no way of knowing, from the written court file, what factors influenced the parties to settle and whether class certification played so dominant a role as to be considered coercive. Such questions might be addressed by other methods, such as interviews.

One indirect, limited approach is to compare the outcomes of certified class actions (other than those certified for settlement purposes only) to cases in which certification was denied or not ruled on. If it is the class action device that coerces settlement, one would expect that certified cases would achieve settlements more frequently than cases that are not certified as class actions. Viewed from another angle, certified class actions would be less likely to be disposed of by noncoercive means, such as rulings on the merits via motions or trials. Such merits-related dispositions are the traditional ways for litigants to avoid being coerced to settle. These two tests overlap because cases that settle have by definition not been disposed of by rulings on the merits.

(i) Outcomes of certified classes compared with outcomes for noncertified cases

Data. Table 39 compares the various motion, trial, and settlement outcomes of all certified and noncertified class actions. Cases certified for settlement purposes only were not included in the above analysis because generally the settlement in those cases was reached before the court

²¹⁰ *McKenna v. Sears Roebuck Co.*, No. 92-2227 (N.D. Cal. filed June 12, 1992).

²¹¹ *See* discussion *supra* § 5(c).

ruled on certification. Thus, the settlement could not be said to be a product of a certification ruling.

Across the four districts, a substantial majority of certified class actions were terminated by class-wide settlements. In the four districts, the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals)²¹² for cases not certified ranged from 20% to 30% (see Table 40). Certified class actions were more than two times more likely to settle than cases that contained class allegations but were never certified (see Table 40).

The converse proposition—that certified class actions are less likely to be terminated by traditional rulings on motions or trials—is also true. For the most part, this finding follows directly from having a high percentage of settlements that terminated the litigation. Combining the motion and trial categories in Table 39 yields a range of nonsettlement dispositions from 13% to 37% for certified class actions compared to a range of 45% to 62% for cases filed as class actions but never certified as such (see Table 41). In each of the four districts, noncertified cases were at least twice as likely as certified class actions to be disposed of by motion or trial. These data confirm empirical data from an earlier study of class action activity in N.D. Cal.²¹³

What do those data tell us about whether settlement was coerced? Without examining the options available to the parties, whether those options were pursued successfully or unsuccessfully, one should not rush to conclude that the cases settled simply because they were certified. For example, if a case settled after a ruling on summary judgment or in the face of a trial date, that settlement might be seen as primarily the product of the ruling or the setting of the trial date. In the following section we will look at the data on these alternatives.

(ii) Frequency of rulings on motions to dismiss, motions for summary judgment, trial dates scheduled, and trials held in certified class actions

Data. The vast majority of cases that were certified as class actions were also the subject of rulings on motions to dismiss, motions for summary judgment, or the setting of a trial date. Approximately a third of those cases in one district, 50% in two districts, and more than 80% in the fourth were the subject of rulings on at least one motion to dismiss (see Figure 54). The percentage of cases with rulings on motions for summary judgment ranged from 30% to 67%, with the middle two districts showing 43% and 44% (see Figure 55). Finally, trial dates were set in percentages ranging from 17% to 56% in the four districts (see Figure 56).

Overall, from 72% to 94% of the cases certified as class actions received either a ruling on a motion to dismiss, a ruling on a motion for summary judgment, or the setting of a trial date (see Figure 57). Looked at from the other side, at most 6% to 28% of the certified class actions in the four districts could possibly have settled without a ruling on the merits or the setting of a trial date.

²¹² Stipulated dismissals were not included as class settlements because a stipulation of dismissal does not satisfy the Rule 23(e) requirement of obtaining court approval for a class settlement. On the other hand, a stipulation of dismissal is an acceptable way of indicating a nonclass settlement.

²¹³ Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 Ind. L.J. 497, 501 (1987). Garth and his colleagues found a 78% settlement rate for certified class actions compared to a 15% settlement rate for cases filed as class actions but not certified. Seventy percent of the uncertified cases were disposed of by motion to dismiss or by summary judgment.

Of the three factors discussed, the effect of setting of a trial date seems somewhat ambiguous and difficult to interpret because we have no way of measuring whether the date was firm or realistic enough to have an impact on settlement. Local practices may have clerks enter the settings in a semiautomatic fashion. But even eliminating the setting of a trial date as a factor does not change the data very much. More than two-thirds of the certified class actions in the four districts had rulings on either a motion to dismiss, a motion for summary judgment, or both (see Figure 58).

Discussion. The data indicate that certified class actions receive considerable attention from judges or their staff in the form of ruling on motions and setting trial dates. Data from the time study²¹⁴ reinforce this finding. Judges spent about eleven times more time on class actions than on the average civil case in the time study (*see supra* § 2(d)). Judicial rulings and active case management, including the setting of trial dates and holding pretrial conferences (see Table 19), cannot be said to eliminate the possibility of coerced settlements, but their prevalence in this study of class actions greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency. The data show that a district judge examined the merits of the great majority of cases and that the parties pursued some, if not all, of the litigation alternatives available to them. One might reasonably conclude that rulings on motions and the case management practices limited the ability of a party to coerce a settlement without regard to the merits of the case.

Another perspective on the relationship between certification and settlement is to view certification as a “settlement event,” that is, an event that would “affect substantially the potential value of a settlement,” “clarify uncertainty about the value of the case,” and “let lawyers gauge the approach of the judge.”²¹⁵ From this angle, the certification decision can be expected to have a direct impact on settlement, just as a ruling on summary judgment or an arbitration award might have. The impact, though, seems to arise from implicit judicial recognition of the plausibility of the claims and the multiplication of those claims by the size of the class. In other words, the impetus to discuss settlement may flow from an assessment of the total liability the litigation might impose.

(iii) Timing of settlements in relation to class certification

Background. Another indicator of the relationship between certification and settlement is the timing of the two events. If settlement occurs before or simultaneously with certification or long after certification, the possibility of any connection between the two seems remote. Unless settlement follows reasonably promptly after certification, the settlement would not seem to be directly related to the certification. While simultaneous settlement and certification might be seen as anticipating the probability of certification if no settlement was reached, there is no judicial ruling that can be said to coerce settlement. (For discussion of the effect of the filing of the complaint on settlement, *see supra* § 5(c).)

Data. The time from certification to settlement varied widely (see Table 42). The median times in the four districts ranged from 9.2 to 18.9 months. The majority of the cases in one district settled before certification and in the other three districts, 15%–37% of the cases settled be-

²¹⁴ Willging et al., *supra* note 26.

²¹⁵ Garth, *supra* note 213, at 504.

fore certification. In three districts, at least a quarter of the certified class actions settled within two months after certification. A large number of these cases were settlement classes which were certified simultaneously with the preliminary approval of a proposed settlement. At the other end of the scale, at least a quarter of the cases in all four districts took more than a year after certification to settle. In three districts, this quarter of the cases took approximately two to three and one-half years or more.

Discussion. The data on timing of settlements did not support any inference of a relationship between certification and settlement. Many cases settled before the court ruled on certification and a sizable number, a majority in three of the districts, settled more than a year after certification.

(b) Notice

Background. When certification is first sought at the settlement stage, the question raised is: How effective is the attempt to ensure compliance with notice and certification requirements? As noted in section 10(a), *supra*, Rule 23(e) requires notice of settlement or compromise in all class actions, regardless of the type. Thus, all cases certified for settlement purposes would be expected to have a notice of the certification combined with a notice of the settlement and communicated to the class.²¹⁶ In section 10(a), however, we found that six settled (b)(2) classes received no notice of settlement. Our analysis in this section overlaps with that analysis. We also found in section 10(a) that five certified (b)(3) classes received no notice of certification before being disposed of on the merits (four) or by stipulation (one). We also found a tendency to delay notice after certification until a settlement was reached, perhaps to shift the costs of notifying the class to the defendant or a settlement fund or perhaps for other reasons, such as to gather information about the class.

Settlement classes are difficult for the court to evaluate because of the lack of an adversarial proceeding on class certification.²¹⁷ Complicated issues, such as conflicts between class counsel and counsel for individual plaintiffs or the need to protect future claimants, may challenge the court.²¹⁸ The approval process generally involves two steps: a preliminary evaluation of fairness and a later review, after notice, at a fairness hearing.²¹⁹

Data. In two districts, notice of settlement was disseminated to the class in all class actions certified for settlement purposes. In the other two districts 13 of 16 (81%) and 12 of 15 (80%) settlement classes included notice to the class (see Figure 59). Overall six cases in the latter two districts did not include notice of the approval of a settlement class. In all of those cases, the court explicitly approved the proposed class settlement without requiring any changes. In none of the six cases did the file indicate that the classes were (b)(3) classes or that class damages were included in the settlement. All involved some form of injunctive relief. Nevertheless, Rule 23(e) requires notice to the class prior to the settlement of these cases so that class members have an opportunity to review the proposed settlement and participate in the review process.

²¹⁶ When a settlement is presented to a court that has not ruled on certification, generally the court's order preliminarily approving the settlement includes a ruling on class certification.

²¹⁷ MCL 3d, *supra* note 34, § 30.45, at 243-44.

²¹⁸ *Id.* at 244.

²¹⁹ *Id.* § 30.41, at 236-38.

In those same settlement class actions, the court issued a preliminary approval of the settlement in more than 80% of the cases in three districts and in 50% of the cases in the remaining district (see Figure 60). Overall there were twelve settlement classes, eight in one district, that did not appear to include a preliminary approval ruling (see Figure 60). Three of these cases involved class damages and all three of those cases had a subsequent fairness hearing. Seven settlement classes had neither evidence of preliminary approval nor of a later fairness hearing (see Figures 60 & 61). None of those seven cases was certified as a (b)(3) class and none involved money damages.

Discussion. A handful of cases in the study had no notice to the class of a class-wide settlement, generally for injunctive relief. Most of these same cases did not have either the preliminary approval of the judge or a hearing to examine the fairness of the settlement. All had the final approval of a judge. Rule 23(e) and the guidance of the *Manual for Complex Litigation, Third* make it clear that more is expected for a settlement class. Without notice to the class and the reaction of class members to the settlement, the judge might not have sufficient information to assess whether the settlement is fair and reasonably responsive to the interests of the class.

Nor does the fact that the cases involved injunctive relief and not money damages diminish the need for notice and a hearing. Injunctive relief sometimes weighs more heavily in the lives of class members than a modest share in a pecuniary settlement. For example, one of the settlements was on behalf of a class of persons who use wheelchairs, crutches, or similar aids and wish to attend sporting events at a specific facility. The injunctive relief provided that defendants would better accommodate such persons and stop denying floor level seating to the class. One assumes that some class members have a serious interest in the shaping and implementation of this relief and that notice to the class would assist the court in affirming or rejecting the rather vague proposed remedies. Notice and a hearing might generate information about whether the proposed remedy addressed all the barriers faced by class members.

Another example from this set of cases involved injunctive relief on behalf of a class of mentally retarded individuals who were misplaced in facilities for the mentally ill. The settlement provided for identifying all misplaced individuals and for funding 100 appropriate placements in community settings across the state. Class members, their family members, attorneys, or caseworkers would presumably be able to contribute information about whether the settlement would be likely to meet their needs.

In proposing a settlement class, the parties usually intend to bar future claims. Ironically, the lack of notice and a hearing leaves the settlement open to collateral attack by class members who were not notified of its provisions.²²⁰

Why might a court and the parties bypass notice and a hearing in this context? While there may be darker motives, a plausible reason may have been to save time and money, either for the parties or the court, or both. Individual notice to a huge class might forestall a worthwhile settlement because neither side can afford the notice costs. And, of course, the economy could be false if class members later successfully challenge the settlement.

That some courts and parties evaded the clear mandate of Rule 23(e) in this handful of cases raises the question of whether bypassing notice and a hearing might in some cases be meeting a need of class representatives or the court or both. If so, a rule allowing truncated notice (e.g., to

²²⁰. 2 Newberg & Conte, *supra* note 55, § 11.23, at 11-32.

a sample of class members or by posting at offices or locations where the problems arose) on explicit findings of financial hardship and high cost–benefit ratios might warrant the advisory committee’s consideration.

(c) Attendance of nonrepresentative parties at settlement approval hearings

This topic was discussed in *supra* section 13(b).

(d) Provisions favoring named representatives

This topic was discussed in *supra* section 4(d).

(e) How often did magistrate judges or special masters evaluate settlements?

Background. The proposed revision to Rule 23(e) “clarifies that the strictures of [Federal Rule of Civil Procedure] 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement.”²²¹ Rule 53(b) provides that a special master is to be appointed only in jury trials involving complicated issues, in nonjury trials upon a showing of some exceptional condition, or, if a magistrate judge is to be appointed, upon the consent of the parties.²²²

The proposed revision to Rule 23(e) also authorizes referring settlement or dismissal proposals to magistrate judges for evaluation. Currently, in civil litigation generally, district judges assign a variety of duties to magistrate judges.²²³ These judicial officers perform duties that range from resolving discovery disputes to presiding, with the consent of the parties, over civil trials.

The principal reason for these proposed rule changes is to clarify that the court has the authority to appoint an independent master to investigate the fairness of dismissal or settlement proposals in any certified class action. The advisory committee cited some examples of when an independent evaluation might be necessary: when the named parties and their counsel have ceased to be adversaries with respect to the proposed dismissal or settlement, when the parties are required to disclose weaknesses in their own positions in the course of the evaluation of the proposal, when the parties are required to provide information to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with fiduciary obligations owed to members of the class, or when other conflict-of-interest issues must be resolved.²²⁴

Data on Special Masters. Of 126 proposed settlements in certified cases, a settlement was assigned to a special master (other than a magistrate judge) in only 2 cases.²²⁵ One assignment was for the purpose of facilitating settlement and the other was to review a consent decree that incorporated a settlement. Neither assignment involved reporting to the judge on the merits of

²²¹. Cooper, *supra* note 14, at 23.

²²². Fed. R. Civ. P. 53(b). *See also* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394, 395–98 (1986) (discussing historical use and purpose of special masters); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 57–58, 58 n.173 (1991) (discussing courts’ justifications for appointing special masters).

²²³. 28 U.S.C. § 636(b)(3) (1976).

²²⁴. Cooper, *supra* note 14, at 22.

²²⁵. There were no referrals to review dismissal.

settlement. Moreover, courts appointed masters in only 3 cases in the study as a whole, counting all appointments for whatever purpose.²²⁶

Data on Magistrate Judges. The study found that referrals to magistrate judges for settlement purposes²²⁷ were somewhat more frequent. By far, the greatest rate of magistrate referrals occurred in N.D. Cal. (47% of certified cases with proposed settlement; 14 of 30 cases).²²⁸ In the other three courts, the comparable rates were 5%, 23%, and 20%.²²⁹ Typically, the magistrate judge's role was to facilitate settlement, not to report and recommend to the district judge on the merits of a proposed settlement, although this occurred in some cases.

Discussion. The premise underlying the proposed rule change is that some judges are uncertain about their authority to appoint masters, especially for run-of-the-mill class action settlements or dismissals.²³⁰ The rarity of appointment may indicate that district judges are reluctant to spark Rule 53(b) disputes within the litigation. The data may also indicate district judge confidence and pleasure with the effectiveness of referrals to magistrate judges. The differences in magistrate judge referral rates among the four districts may indicate variations in district referral practice generally, rather than propensity or reluctance to refer class action settlements.²³¹

Another view is that the data reflect a general reluctance to assign matters to nonjudicial officers, who might be perceived as having the potential to create more problems than they solve. For example, the large numbers of parties in a class action make conflict of interest checks difficult for the master, possibly exacerbating the problems of potential and actual conflicts of interest that, it is argued, inherently exist in the class action setting. Others argue, however, that these "inherent" conflicts are themselves one reason to appoint a master, one who can, to some extent, serve as an additional guardian against abusive settlements or other alleged abuses.

The study's finding of generally low referral rates might suggest a need for the proposed rule change. Since class actions often involve time-consuming and complex issues, clear authorization for the use of masters and magistrate judges could potentially conserve district judge time and help expedite settlement and dismissal decisions.

²²⁶. In the third case, a master reviewed requests for attorneys' fees.

²²⁷. There were no referrals to review dismissal.

²²⁸. Although the proposed rule change would not affect cases until after certification, it is interesting to note that the rate of referral was lower for noncertified cases (37% or 7 of 19 cases). District judges eventually approved settlement in 20 of the 21 cases referred to magistrate judges.

²²⁹. The numbers of cases referred were small (2 of 43, 3 of 13, and 8 of 40, respectively). Rates of referral were similar for noncertified cases.

²³⁰. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (construing narrowly exceptional circumstances required to enlist services of special master).

²³¹. For example, looking at other phases of class actions, the magistrate referral rate in N.D. Cal. was also significantly higher than the average rates in the other three districts with respect to the following phases of litigation: discovery management, resolution of class issues, claims resolution, fund administration, and counsel-fee application review; however, the district's rate of referral for pretrial case management was comparatively low and its rate of referring class certification issues was about average compared to the other three districts.

(15) Trials

(a) How often were trials held and with what results in what types of cases?

Background. The Judicial Conference Advisory Committee on Civil Rules asked us to determine how often class actions were actually tried on the merits and what results came from those trials. To this end, we identified the frequency and outcomes of trials by nature-of-suit code and by other case characteristics, such as certification status and Rule 23(b) subdivision.

Data overview. A trial began in only eighteen cases in the four districts combined. The trial rate in class actions in each of the four districts was not notably different from the 3% to 6% trial rate for nonprisoner nonclass civil actions (see Table 16). A little less than half of the eighteen trial cases were certified as class actions.²³² Given the small number of trials, we did not attempt to stratify trial outcome data by district.²³³ Instead, we aggregated data for the four districts (see Tables 43 and 44); however, inferences about the universe of trials in class actions nation-wide cannot be made from these aggregated results.

Plaintiff classes and individual plaintiffs did not fare well at trial. Except for one default judgment that led to a class settlement,²³⁴ no trial resulted in a final judgment for a plaintiff class. Of the three trials that found for individual plaintiffs, one judgment was vacated and remanded for dismissal, one judgment was vacated with a resulting \$1 damage award for the plaintiff on remand, and one defendant's appeal was dismissed. Five of the eighteen trials led to settlement during or after trial, including the default judgment case mentioned above that was settled during an appeal, two certified cases after partial judgments for the class, and two non-certified cases.

Some have theorized that trials are more common in (b)(2) actions, because they often pursue still developing legal theories, and less common in (b)(3) actions where large sums are often at stake.²³⁵ This did not appear to be the case in the small number of trials we studied. Four of the eighteen trials were in cases filed as (b)(2) class actions without any (b)(3) claims. Three were certified; one was not. An additional three noncertified civil rights actions did not specify a 23(b) type, but they also could have been of the pure (b)(2) variety. Thus, as many as seven of the eighteen trials involved (b)(2) issues with no (b)(3) issues. The same number of other trials involved classes seeking large dollar recoveries: five (b)(3) securities classes²³⁶ and two (b)(2)/(b)(3) Title VII classes.²³⁷

²³² The percentage of certified class actions in which a trial began ranged from 0% to 14% in the four districts (see Figure 56).

²³³ We did, however, gather data on the percentage of class action cases in which a trial date was entered on the docket (see Figure 62), the percentage of certified cases in which a trial date was entered on the docket (see Figure 56), the timing of the first entry of the trial date (see Figures 63 and 64), and the timing of the scheduled trial date (see Figures 65 and 66). The four study districts entered a trial date within two years of the filing of the complaint in over 40% of the cases for which trial dates were entered (see Figure 64). One district set a trial date in all of its cases within the first two years of the case. See *supra* § 14(a)(ii) for a discussion of the effect of setting a trial date on settlement.

²³⁴ In one certified case, the plaintiff class won a default judgment after the defendant failed to appear on the first day of the jury trial.

²³⁵ Cooper, *supra* note 6, at 33.

²³⁶ These five were jury trials, generally involving fraud issues, with all but one of the classes certified.

²³⁷ Both were combination jury/bench trial cases, one certified and the other not.

The remaining four trials concerned a certified class's (b)(3) contract claim, an uncertified (b)(3) ERISA claim, and (b)(2)/(b)(3) tort claims in cases in which the case file did not indicate that large dollars were at stake. No prisoner cases went to trial. More specific information on the eighteen trials is presented below.

Data on Jury Trials. Ten of the eighteen trials were before a jury (see Table 43). All but one resulted in decisions for the defendant or in settlement by the parties. The verdicts generally survived appeals, except for one reversal in part of a directed verdict.

Among the eighteen trials, cases involving (b)(3) claims had a higher rate of trial by jury than cases without (b)(3) claims. Seventy percent of the trial cases with (b)(3) claims went to jury trial, compared to 25% of the cases filed under (b)(2) alone.²³⁸

(i) Certified cases with jury trials

Six of the ten jury trials involved class issues in certified cases. The class was not successful in four of these cases, including three securities cases and one contracts case. These four verdicts for defendants survived appeal. The fifth of the six jury trials in certified cases was a jury/bench combination in a protracted Title VII case that eventually settled, but only after nonfinal judgments for one large subclass on the issue of defendant's liability and for the defendant on its liability to a second subclass. In the sixth certified case, the plaintiff class won a default judgment; the court of appeals dismissed the appeal of that ruling after the parties settled.

(ii) Noncertified cases with jury trials

Four of the ten jury trials were in cases not certified as class actions. In one securities case, the parties settled during the trial. In two civil rights cases, individual plaintiffs lost at trial; the resulting appeal in one case was dismissed and in the other case the court of appeals reversed in part and affirmed in part the trial court's directed verdict. In the fourth noncertified case, a jury/bench trial combination resulted in injunctive relief and damages for the individual plaintiff on Title VII claims and partial summary judgment for the defendant on an ADEA claim; resulting cross-appeals were dismissed.

Data on Bench Trials. Eight of the eighteen were bench trials (see Table 44). Defendants were found not liable in four of these cases. Three were not certified and involved individual claims concerning civil rights, personal injury, and ERISA issues, with no resulting appeals in two cases and an affirmance in the third. In the one certified case, the court found defendants not liable for civil rights violations, both with respect to the class and with respect to individual plaintiffs. No one appealed.

Courts found for individual plaintiffs in two bench trials²³⁹ but the court of appeals vacated those judgments. Finally, two cases settled during, or immediately after, the bench trial: one a certified civil rights action and the other a noncertified contracts case.

²³⁸ Seven out of the ten trials in cases with (b)(3) claims (alone or in combination with (b)(1) or (b)(2) claims) were jury trials, compared to one jury trial out of four trials in cases with (b)(2) claims and no (b)(3) claims.

²³⁹ In one case involving personal property damage claims, the trial court awarded \$75,000 to the individual plaintiffs with no award to the certified class. In the other, a civil rights case, no class was certified.

(b) How did class action trial rates compare with trial rates for all other civil cases within the district?

As discussed *supra*, in section 2(b), the rate of trial (jury and bench) for class actions and other civil cases was in the 3% to 6% range in the four districts (see Table 16).

(16) Fee/Recovery Rates

Overview. An overarching question concerning attorneys' fees is whether, in addition to conferring benefits on attorneys, class action outcomes confer substantial benefits on class members. The major questions posed in this section are: What were the ratios of attorneys' fees to recoveries? What methods other than lodestar have courts used to regulate fees? To what extent have methods of fee regulation taken into account the benefit to the class?

(a) What were the ratios of attorneys' fees to recoveries?

Background. Professor Cooper has referred to the "cynical belief" that "many class actions serve only to confer benefits on class counsel."²⁴⁰ To address this issue, we computed a "fee-recovery rate" (attorneys' fee awards²⁴¹ divided by gross monetary settlement²⁴²) for certified class actions where the court approved a settlement.²⁴³ This rate is meaningful only in "distribution cases," cases where some form of monetary benefit was available for distribution to class members after payment of attorneys' fees and expenses, notice costs, and other administrative expenses. Interestingly, in two districts 82% of certified cases that settled were distribution cases, but the comparable figure in the other two courts was 53%.²⁴⁴

Data and Discussion. There were no fee awards to, and few fee requests by, counsel other than plaintiffs' counsel.²⁴⁵ In most cases, net monetary distributions to the class exceeded at-

²⁴⁰ Cooper, *supra* note 6, at 34. Some argue that class counsel at times receive large fees from settlements that provide nominal benefits or only speculative benefits to the class. See MCL 3d, *supra* note 34, § 30.42, at 239-40. See also Senate Staff Report, *supra* note 8, at 73-74.

²⁴¹ Fee awards exclude sanctions and out-of-pocket expenses.

²⁴² Gross monetary settlement includes any cash payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses awarded by the court, and administrative costs of the settlement.

²⁴³ No case that went to trial and did not settle resulted in a final judgment or verdict in favor of a class. See *supra* § 15(a).

²⁴⁴ In the balance of certified and settled cases, the class received some form of equitable relief, coupons, price reductions, or other benefits that the court could not quantify, that the parties did not quantify, or that led to unresolved disputes concerning value in the litigation or on appeal. We refer to these as "no distribution cases." In the *General Motors Pick-Up Truck Litigation*, the principal settlement (vacated on appeal) consisted of distribution of \$1,000 coupon certificates to an estimated 5-6 million class members. Objecting class members placed economic value on the coupon distribution that differed significantly from defendant's estimates. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 807 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995). The fee award, vacated on appeal, was \$9.5 million. *Id.* at 822.

Sometimes litigants settled on liability issues but left each class member's claim to be determined individually, such that the total amount to be distributed to the class was not known at the time of the fee award. For example, under the claims resolution procedure in one settled case, class members who filed valid claims could receive 100% of the medical insurance benefits due to them for certain medical services. The settlement did not place a dollar limit on claim recoveries. Fee awards totaled \$3.7 million.

²⁴⁵ Defendants' counsel unsuccessfully requested fees in one case each in three districts; case files did not con-

torneys' fees by substantial margins. The fee-recovery rate infrequently exceeded the traditional 33.3% contingency fee rate. Median rates ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement (see Figures 67 and 68).²⁴⁶

Some distribution cases also included other class relief that the court did not quantify.²⁴⁷ This occurred about a third of the time in two districts and about 17% and 25% of the time in the other two courts. To the extent that monetary value can be associated with that relief, the data presented in this subsection understate the value of gross settlement and thus possibly overstate fee-recovery rates.

The fee-recovery rate calculations discussed in this subsection do not include cases with no net monetary distribution to class members (no distribution cases), because those settlements contained only equitable or other nonquantifiable relief. Fees and costs comprised all or a large percentage of the settlement funds in those cases.²⁴⁸

(b) How were fees calculated?

Background. In most study cases—as in most class actions generally—the court awarded attorneys' fees under the century-old common fund doctrine.²⁴⁹ Traditionally, in determining fees in common fund cases, courts included the size of the fund as a principal factor and frequently

tain the amounts sought. Parties other than plaintiffs or defendants requested fees in 10 cases in only one district. The first was a \$300,000 fee application by nonlead counsel relating to legal services performed before the court appointed lead counsel pursuant to a competitive bidding process. Although the court declined to award the requested fees from the settlement fund, the order stated that nonlead counsel might be entitled to fees on the basis of *quantum meruit*. In the other case, counsel for an objecting class member unsuccessfully requested \$131,000 in fees.

²⁴⁶ In one district, N.D. Cal., the median fee award to class counsel was \$1.5 million, with an average fee award of approximately \$2.5 million. In the other three districts, the median and average fee awards were smaller—with medians ranging between \$0.6 million and approximately \$1 million and averages from just under \$0.75 million to approximately \$1.1 million (see Figure 69). However, the N.D. Cal. average fee award was within the range of the other three districts if one excludes the district's largest fee award (\$13.9 million).

N.D. Cal. also had the highest median (\$5.1 million) and average (\$10 million) gross monetary settlement. In comparison, the other three districts' median settlement amounts were between just under \$2 million and approximately \$3 million, with average amounts between \$3.2 and \$4.7 million (see Figure 70). For N.D. Cal., even if the largest settlement (\$73.6 million) is excluded, the district still had a comparatively large mean settlement amount (\$7.2 million). However, some perspective is offered by looking at the district's average gross monetary settlement per notice sent, which was only slightly above the comparable average for the other three districts combined.

²⁴⁷ For example, in one case, class counsel valued the settlement's "noncash" benefits at \$8.3 million in addition to the \$9.9 million monetary distribution. In another case, the defendant supplemented the \$487,000 monetary distribution by agreeing to implement practices designed to increase the representation of women and African-Americans in its workforce.

²⁴⁸ See *supra* note 244. Typically, the only payments defendants made in these cases were to attorneys, class representatives, and noticing companies. We will refer to these payments collectively as "settlement costs." Fee awards as a percentage of these settlement costs were 96%, 91%, 88%, and 80% on the average for the four districts (see Table 45). The median percentage of gross settlement amounts attributable to costs of administering the settlement (primarily notice) was 2% across the four districts in the 29 cases for which data were available. In these cases, the median amount of such expenses was \$100,000.

²⁴⁹ The principle governing the doctrine is that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478–79 (1980). See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970). See generally Alan Hirsch & Diane Sheehy, *Awarding Attorneys' Fees and Managing Fee Litigation* 5-48 & 75-88 (Federal Judicial Center 1994).

based awards on what the court considered to be a reasonable percentage of the fund.²⁵⁰ In the early 1970s, courts began moving away from this approach toward the lodestar method, under which the fee award is calculated by multiplying the hours reasonably expended times the reasonable hourly rates.²⁵¹ In the 1980s, however, the pendulum swung again and courts began to reconsider the lodestar method.²⁵²

In federal courts today, a threshold question in determining fees in common fund cases is “whether the jurisdiction requires use of the lodestar method or whether it requires, permits, or has yet to rule upon the propriety of a percentage fee award.”²⁵³ In recent years, the trend has been toward the percentage of recovery method.²⁵⁴ For example, the Court of Appeals for the Eleventh Circuit has required the percentage method in common fund class actions.²⁵⁵ The Third,²⁵⁶ Seventh,²⁵⁷ and Ninth²⁵⁸ Circuits authorize either the lodestar or the percentage method.

²⁵⁰. A basic premise of the percentage of recovery method is that a common fund is “itself the measure of success . . . [and] represents the benchmark from which a reasonable fee will be awarded.” 3 Newberg & Conte, *supra* note 55, § 14.03, at 14-4. *See also* Camden I Condominium Ass’n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991).

²⁵¹. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973). The Supreme Court never formally adopted the lodestar method in a common fund case. MCL 3d, *supra* note 34, § 24.121, at 189.

²⁵². The latest swing away from lodestar received momentum from a footnote in a 1981 Supreme Court decision that distinguished between calculation of fees under fee-shifting statutes (where a reasonable fee reflects the amount of attorney time reasonably expended) and under the common fund doctrine (“where a reasonable fee is based on a percentage of the fund bestowed on the class”). Blum v. Stenson, 451 U.S. 886, 900 n.16 (1984).

Additional momentum came in 1982 when a Third Circuit task force, formed to examine court-awarded attorneys’ fees, recommended the percentage of recovery method for common fund cases. Court Awarded Attorneys’ Fees, Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255-56 (1985) [hereinafter Task Force Report]. The Task Force Report discussed criticism by courts, commentators, and members of the bar. Criticism included that lodestar has proven to be difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. *Id.* at 246-53.

²⁵³. MCL 3d, *supra* note 34, § 24.121, at 188 (footnotes omitted).

²⁵⁴. *Id.* at 189.

²⁵⁵. *See* Camden I Condominium Ass’n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (“Henceforth in this circuit, attorneys’ fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.”).

²⁵⁶. For example, in evaluating which method the district court could use, the Third Circuit stated recently that “the court may select the lodestar method in some non-statutory fee cases where it can calculate the relevant parameters (hours expended and hourly rate) more easily than it can determine a suitable percentage to award.” *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

²⁵⁷. *See, e.g., In re* Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992) (fee award simulating “what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character” would be appropriate); Florin v. NationsBank of Georgia, 34 F.3d 560, 565 (7th Cir. 1994); Harmon v. Lymphomed, 945 F.2d 969, 975 (7th Cir. 1991). Although permitting either method, the Seventh Circuit has expressed a preference for the percentage method. *In re Continental Illinois*, 962 F.2d at 572-73.

²⁵⁸. Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (allowing use of either percentage or lodestar calculation method in common fund case). *See also In re* Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1295 (9th Cir. 1994). In Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989), the Ninth Circuit held that the percentage method is particularly suited for cases with multiple claims where it would be difficult to identify what fees directly relate to the claims that created the fund.

Proponents of the percentage method believe that it encourages early settlements and provides benefits to efficient counsel who under a lodestar approach might be penalized, rather than rewarded, for their efficiency.²⁵⁹ The percentage method also saves the court from the cumbersome task of closely scrutinizing lodestar fee petitions to determine whether the hours claimed were reasonably spent for the benefit of the class.²⁶⁰

At the same time, the percentage method has been criticized because, when strictly applied, it can result in windfalls to class counsel in cases with very large settlements. Conversely, class attorneys can be penalized if they take on challenging cases that yield small monetary recoveries.²⁶¹ The method has also been criticized because it encourages early settlement and, thus, might deny the class a potentially more generous recovery that further litigation could bring.²⁶²

In a relatively small number of study cases, the court awarded fees pursuant to fee-shifting statutes, such as the one governing civil rights claims,²⁶³ rather than under the common fund doctrine. Although over the past decade the percentage method has gained favor in common fund cases, lodestar remains the accepted method in fee-shifting cases.²⁶⁴ Given that the common fund doctrine applies in most class actions, we will concentrate our discussion on that doctrine.

Data and Discussion. For all certified and settled cases in the study, lodestar was used more frequently than the percentage method in only one district, E.D. Pa. (see Figure 71). Even in that district, however, the percentage method was used nearly as much as lodestar. By contrast, N.D. Cal. determined fees by percentage of recovery 6:1 over lodestar and N.D. Ill. nearly 2:1

²⁵⁹ “Objections to the lodestar method were based on the . . . premise that attorneys pad their hours and otherwise engage in unethical activities to enhance their fees, and that key decisions pertaining to settlement are affected by counsel fees.” Downs, *supra* note 50, at 667. See also Newberg & Conte, *supra* note 55, § 14.03, at 14-3 to 14-7 and cases in nn. 17–20; Kirehoff v. Flynn, 738 F.2d 320, 324 (7th Cir. 1986) (lodestar creates an incentive to run up hours in relation to the stakes of the case); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 693–97 (N.D. Cal. 1990) (same). For additional problems identified with the lodestar method, see Monique Lapointe, Note, *Attorneys’ Fees in Common Fund Actions*, 59 Fordham L. Rev. 843, 847–61 (1991).

²⁶⁰ See *Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989).

²⁶¹ Cooper, *supra* note 6, at 34.

²⁶² Some critics maintain that settlement sometimes occurs when class counsel determines that the case has reached its point of diminishing returns from the fees perspective, with class counsel viewing the additional attorney time necessary to obtain a larger class recovery as not cost beneficial. See generally John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, Law & Contemp. Probs., Summer 1985, at 5, 41–44 [hereinafter Coffee, *Unfaithful Champion*]. See also John C. Coffee, Jr., *The “New Learning” on Securities Litigation*, N.Y.L.J., Mar. 25, 1993, at 5 [hereinafter Coffee, *New Learning*]. For a discussion of conflicts of interest that these situations create between class counsel and the class, see generally MCL 3d, *supra* note 34, § 30.16.

²⁶³ See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 1988 (1988) (public accommodation and employment discrimination cases). Such statutes specifically authorize recovery of attorneys’ fees by the prevailing party. Whether the award is mandatory or permissive depends on the terms of the particular statute and applicable case law. MCL 3d, *supra* note 34, § 24.11. The availability of statutory fees is driven by public policy, encouraging private enforcement of substantive rights under the law. Statutory fee cases often produce only nominal damages or declaratory judgments—the kind of results that usually cannot be quantified. See generally Lapointe, *supra* note 259, at 865–67 (discussion of the differences between statutory fee and common fund cases).

²⁶⁴ *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (indicating that lodestar approach is the centerpiece of attorneys’ fee awards in a statutory fee case (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984)). See generally Hirsch & Sheehy, *supra* note 249, at 19–44.

over lodestar. It appeared that the percentage method was the exclusive method in S.D. Fla. (see Figure 71).

Interestingly, S.D. Fla., which did not use lodestar, had the lowest average rate (24%) while E.D. Pa., which used lodestar the most, had the highest average fee-recovery rate (30%) (see Figure 68). The differences were not as pronounced for median fee-recovery rates, which ranged from 27% (S.D. Fla.) to 30% (N.D. Ill.) (see Figure 68).²⁶⁵ Factors other than selection of fee-calculation method, of course, may have contributed to these results. Moreover, similar differences in mean and median fee-recovery rates were found when we looked only at cases using the percentage of recovery method (see Figure 72).

The four courts differed in their approaches to fee calculation depending on whether or not the settlement created a fund for distribution to the class. In certified cases with net monetary distributions to class members (distribution cases), the percentage method was far more prevalent than lodestar (see Figure 73). As one would expect, in settlements where the only benefits to the certified class were those that could not be easily quantified (no distribution cases), courts generally used lodestar or relied on consensual fee determinations (see Figure 74).

We will first discuss distribution cases. In the three districts where the appellate courts have authorized either fee-calculation method, lodestar was used in less than 10% of the distribution cases in two districts but in a third of the cases in E.D. Pa.²⁶⁶ (see Figure 73). In all four districts, judges determined fees using the percentage method in 45% or more of the distribution cases. Percentage of recovery appeared to be the sole method used in S.D. Fla.²⁶⁷ In N.D. Cal., judges used it in 78%²⁶⁸ of the distribution cases, compared to about 60%²⁶⁹ in N.D. Ill. and 45%²⁷⁰ in E.D. Pa.²⁷¹ (see Figure 73).

In no distribution cases, lodestar was the dominant method in two districts (see Figure 74). In the other two districts, findings were less informative because, in all but a few cases, the parties consented on fees or the method used was not apparent from case files. In all four districts, nine cases were determined by lodestar and three by percentage of recovery (see Figure 74).²⁷² It appears that in many cases the court opted for lodestar when it could not quantify the value of class benefits, making a percentage of recovery calculation problematic.

²⁶⁵ Generally, the study could not measure the degree to which higher fee-recovery rates reflected high quality work done, efforts to pursue challenging but deserving claims, or other factors. See discussion of fee adjustments and multipliers *infra* § 16 (c).

²⁶⁶ The mean and median fee-recovery rates in E.D. Pa. distribution cases using lodestar were 30% and 28%, respectively, compared to 28% and 27% using the percentage method.

²⁶⁷ In S.D. Fla., all percentage method cases involved securities claims.

²⁶⁸ In N.D. Cal., over 80% of the percentage method cases involved securities issues. None involved civil rights claims.

²⁶⁹ In N.D. Ill., 60% were securities cases; 10% involved civil rights.

²⁷⁰ In E.D. Pa., nearly 90% were securities cases; no cases involved civil rights.

²⁷¹ In one case each in two districts, the court applied both the lodestar and percentage of recovery methods (see Figure 73). These cases are included in the percentages cited above. In addition, we could not determine the method the court used in about 20% of the distribution cases where generally the parties stipulated to a fee award and the court approved all or most of the stipulated amount.

²⁷² In 50% or more of the cases, parties stipulated to fees or the fee method was otherwise unknown.

Civil rights claims were generally more prevalent in no distribution cases.²⁷³ In part, this explains the higher lodestar usage in no distribution cases; lodestar is the appropriate method when the court applies a fee-shifting statute.²⁷⁴

The Percentage Method. Median fee-recovery rates for distribution cases ranged from 27% to 30% when the percentage method was used, consistent with precedents in the four districts' respective courts of appeals (see Figure 72). For example, recently the Third Circuit cited an E.D. Pa. decision that noted that fee awards have ranged from 19% to 45% of the common fund.²⁷⁵ In recent decisions, the Seventh²⁷⁶ and Eleventh²⁷⁷ Circuits have discussed benchmarks or ranges of 20% to 30%. In addition, the Eleventh Circuit has instructed district courts to apply the twelve *Johnson* factors²⁷⁸ and other pertinent factors²⁷⁹ in determining the fee percentage. The Ninth Circuit has indicated that 25% should be the "benchmark"²⁸⁰ for such awards, subject to adjustment upward or downward to account for any unusual circumstances involved in a case.²⁸¹ When federal district courts across the country use the percentage of recovery method for common fund cases, most select a percentage in a range from 25% to 30% of the fund.²⁸²

Other Methods. To prevent a windfall to plaintiffs' counsel in cases where the settlement fund is unusually large, some courts have used the lodestar method²⁸³ or a sliding scale percentage

²⁷³ Civil rights cases represented 44%, 0%, 19%, and 40% of cases with no net monetary distribution to the class, compared to 6%, 11%, 11%, and 9% of cases where the class received net monetary distributions.

²⁷⁴ See *supra* note 264.

²⁷⁵ *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (citing *In re* SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 533 (E.D. Pa. 1990)).

²⁷⁶ See *Florin v. NationsBank of Georgia*, 60 F.3d 1245, 1248 (7th Cir. 1995) (quoting *In re* Unisys Corp. Retiree Medical Benefits ERISA Litig., MDL No. 969, 1995 WL 130679, at *12 (E.D. Pa. Mar. 22, 1995) ("the benchmark in common fund cases is 20%-30%").

²⁷⁷ *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991) (noting that percentage method is "better reasoned" for common fund cases and that the "majority of common fund fee awards fall between 20% and 30% of the fund"). In addition, the Eleventh Circuit stated, as a general rule, that 50% may be established as an upper limit. *Id.*

²⁷⁸ *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

²⁷⁹ The other factors include "the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by settlement, and the economics involved in prosecuting a class action." *Camden I*, 946 F.2d at 775. See discussion of fee enhancements *infra* § 16(c).

²⁸⁰ "A benchmark is a single percentage figure used over and over again, regardless of the type of litigation or the size of the recovery." Lapointe, *supra* note 259, at 867, n.165.

²⁸¹ See *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (25% of \$850,000 in damages: a percentage award "should be adjusted or replaced . . . when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). See also *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989) (25% of a \$4,736,000 recovery); *In re* Pacific Enterprises Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (an award of 33% was justified because of the complexity of the issues and the risks). See discussion of fee enhancements *infra* § 16 (c).

²⁸² MCL 3d, *supra* note 34, § 24.121, at 189 (25%-30% range). See also *Hirsch & Sheehy*, *supra* note 249, at 68 (20%-30% range).

²⁸³ *In re* Washington Public Power Supply Sys. Litig., 19 F.3d 1291, 1297 (9th Cir. 1994) ("the 25% 'benchmark' is of little assistance" in a case where the settlement fund was large (\$687 million)).

method with the percentage to be awarded decreasing as the size of the fund increases (sliding scale percentage method).²⁸⁴ Only one case in the study had a gross monetary settlement amount greater than \$50 million.²⁸⁵ The fee-recovery rate in that N.D. Cal. case was 19%, below the Ninth Circuit benchmark of 25%.²⁸⁶

In another case, as part of a bidding process for lead class counsel, the court selected a fee structure that included the sliding scale percentage method. In addition, the fee percentage under this structure would be discounted by 20% if the case settled within the first year of litigation (an early settlement discount). That is, in addition to the sliding scale based on settlement amount, the class would also receive a discount on fees if the case settled early.²⁸⁷ Such discounts generally are intended to keep class counsel from settling prematurely, under the theory that early settlement is likely to be advantageous to class counsel but detrimental to the class.²⁸⁸ Some ascribe to this theory in particular with respect to cases with large potential recoveries where, as described above,²⁸⁹ the sliding scale percentage method would decrease the fee percentage as the size of the fund increases. To offset any incentives for attorneys to settle early and obtain fees at a higher percentage of a smaller settlement, the early settlement discount has been introduced as a disincentive to premature settlement.

(c) How was benefit to the class taken into account?

Overview. In determining fee awards, the courts often included consideration of the extent to which the class benefited from the settlement. We looked for the following as indicators: (1) use of the percentage of recovery method, (2) any adjustments to the lodestar amount based on results achieved, and (3) whether the court considered any fee objections.

Using this somewhat limited data-gathering technique, it was apparent that the court took class benefits into account in at least 80% of the distribution cases in two districts and at least 68% and 51% of the time in the other two districts (see Figure 73).²⁹⁰ In the balance of the dis-

^{284.} See Task Force Report, *supra* note 252, at 256. See also Florin v. NationsBank of Georgia, 60 F.3d 1245 (7th Cir. 1995) (“fee awards usually fall in the 13 percent–20 percent range for funds of \$51–\$75 million, and in the 6 percent–10 percent range for funds of \$75–\$200 million”). See also Coffee, *New Learning*, *supra* note 262, at 7 n.13 and accompanying text. But, it has been noted:

A percentage is a relative concept and one court’s award of twenty-five percent of a \$19.3 million recovery does not mean that the percentage continues to be reasonable when applied to a \$4.7 million recovery. Thus, the notion that a percentage falling within a certain range is reasonable is inherently misleading.

Lapointe, *supra* note 259, at 868 & n.170.

^{285.} Stender v. Lucky Stores, Case No. 88-1467 (N.D. Cal. filed April 22, 1988).

^{286.} The parties stipulated to attorneys’ fees and the court awarded the full amount of the fee request.

^{287.} *In re* Oracle Sec. Litig., 132 F.R.D. 538, 541 (N.D. Cal. 1990). The selected fee structure was as follows:

Recovery (in millions)	Time for Resolution	
	0–12 months	13 or more months
Up to \$1	24%	30%
\$1–\$5	20%	25%
\$5–\$15	16%	20%
\$15 or more	12%	15%

^{288.} See *supra* note 262 and accompanying text.

^{289.} See *supra* note 283.

^{290.} This is in contrast to Professor Downs’ findings that “class attorneys received substantial awards . . . with

tribution cases, case files did not provide sufficient information on fee-award rationale, often because awards were based on consent of the parties or unadjusted lodestar calculations. Given this, we generally could not determine whether or not the courts considered class benefits in their fee decisions for these cases. To the extent that they did, the percentages cited above are understated.

Background on fee adjustments and multipliers. One method courts have used to take class benefits and other considerations into account has been to apply enhancements or reductions to fee awards.²⁹¹ In common fund cases, the trend had been that fee enhancements, where not otherwise prohibited, should be reserved for the rare case in which the standard fee-calculation method will not adequately compensate the professional.

One method used to enhance fees has been to apply a multiplier to the lodestar amount.²⁹² In the past, the Seventh Circuit suggested limiting multipliers to a 200% increase in the lodestar.²⁹³ The majority of courts, however, had not imposed such limits.²⁹⁴

Data and discussion on fee adjustments and multipliers. In two cases, the lodestar was enhanced by a multiplier. In each case, the multiplier was approximately 2.5 times the lodestar amount, resulting in a \$765,000 (34%) fee award on a \$2.2 million gross settlement in one case

little or no judicial scrutiny.” Downs, *supra* note 50, app. at 710–11 (Chart D).

²⁹¹ When counsel request fee enhancements, arguments generally are that the case was especially difficult, that the ultimate results produced exceptional benefits for the class, or that performance was otherwise superior. Counsel also sometimes asks for adjustments to reflect the novelty of the issues presented, risk of nonpayment, and delay in payment (loss of use of money). See Hirsch & Steehy, *supra* note 249, at 69–70; 3 Newberg & Conte, *supra* note 55, § 14.03. See also Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974) (twelve factors to be used in determining attorney fees); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1975); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 562–66 (1986) (Delaware Valley I) (in the context of fee-shifting statutes, *Johnson* factors are subsumed within the lodestar amount absent extraordinary circumstances).

²⁹² In a decision that might have affected the use of multipliers in study cases, on June 24, 1992, the Supreme Court barred risk multipliers (fee enhancers that account for counsel's risk of nonpayment) in statutory fee-shifting cases. City of Burlington v. Dague, 505 U.S. 557 (1992). The decision, however, did not address specifically whether risk multipliers remain available in common fund cases. The effect of *Dague* on study cases (i.e., cases terminated in the four districts between July 1, 1992, and June 30, 1994) is unclear; the relevant appellate courts did not begin to interpret the decision in the class action context until March 1994.

The Seventh and Ninth Circuits concluded that *Dague* does not extend to common fund cases. See Florin v. NationsBank of Georgia, 34 F.3d 560, 564–65 (7th Cir. 1994) (op. dated Sept. 8, 1994); *In re* Washington Public Power Supply System Sec. Litig., 19 F.3d 1291, 1300 (9th Cir. 1994) (holding that district court erred by refusing to award risk multiplier to lodestar calculation) (op. dated Mar. 23, 1994). On the other hand, a recent Third Circuit opinion, interrupting *Dague*, could be read to prohibit the use of multipliers for lodestar enhancement in common fund class actions. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

²⁹³ Skelton v. General Motors Corp., 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). *But see In re* Superior Beverage/Glass Container Consol. Pretrial, 133 F.R.D. 119, 132 (N.D. Ill. 1990) (awarding multipliers ranging from 1.5 to 2.5, depending on each attorney's contribution). See also *In re* Continental III. Sec. Litig., 750 F. Supp. 868, 896 (N.D. Ill. 1990) (no multiplier allowed), *rev'd*, 962 F.2d 566, 569 (7th Cir. 1992). These three cases were not in the study.

²⁹⁴ See Richard B. Schmitt, *Shareholders Suits Pay Attorneys Less*, Wall St. J., Feb. 1, 1991, at B1, col. 4.

and a \$9.5 million fee award in the *General Motors Pick-Up Truck* settlement recently vacated on appeal.²⁹⁵

The dearth of enhancers or other adjustments in study cases might be related to the frequent use of the percentage method where the selected percentage itself can incorporate the factors that previously resulted in fee adjustments. Similarly, there is a trend, and in fee-shifting cases a mandate, to incorporate those factors into the lodestar components. Also, it is possible that, prior to 1994 appellate decisions affecting two of the study courts, *Dague* had a chilling effect on enhancements in common fund cases.²⁹⁶

(d) What percentage of the fee amounts requested were awarded and how often were objections and appeals filed concerning fees?

Data and Discussion. We looked at how frequently the court awarded fee amounts less than counsel requested. Again, we found differences depending on the calculation method used. In the three districts that used the lodestar, courts granted lodestar amounts less than requested in 22%, 17%, and 33% of the cases. By contrast, when these same three courts used the percentage method, they reduced fee requests in 43%, 9%, and 16% of certified case settlements, respectively. The fourth district did not use lodestar and apparently did not reduce percentage method requests. Regardless of the method, the vast majority of awards were 90% to 100% of the request.

Class members, or other interested parties, did not object to fees very often; objections were filed with respect to five out of thirty-four (15%) fee awards in one court, three of eleven (27%) in another, five of thirty-four (15%) in the third, and seven of twenty-eight (25%) in the fourth district. An objection was filed in only one lodestar case (representing 11% of lodestar cases in that district and 6% of lodestar cases in the four districts combined). In contrast, rates of fee objection were higher in cases using the percentage method²⁹⁷ (see Figure 75). Since objections were filed in percentage method cases 4.5 times as often as under lodestar, these results could be read to indicate that objections are more likely under the percentage method. However, one must also consider that notices of proposed settlement identified fee-related amounts²⁹⁸ in 33% of the lodestar cases compared to 78% of percentage method cases. That is, for all four districts combined, class members in percentage cases were given information about fee amounts 2.4 times as often as in lodestar cases. Even considering this, however, there appeared to be less propensity to object under lodestar for some reason. Note, however, that one cannot extrapolate these data on a small number of cases to all class actions nationwide; factors other than those discussed here may have caused these results.

Appeals were filed in 15% to 34% of study cases (*see infra* § 20). For three of the four districts, 3% to 7% of these appeals (four or fewer per district) involved attorneys' fees issues,²⁹⁹

²⁹⁵ *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

²⁹⁶ *See supra* note 292.

²⁹⁷ The rate reflects the number of percentage method cases with at least one fee objection divided by the number of percentage method cases.

²⁹⁸ These notices described the proposed settlements and either stated the amount or range of fees or the percentage of the settlement fund to be allocated to fees, subject to court approval.

²⁹⁹ Not including appeals on sanctions.

often accompanying appeals on other issues. In the fourth district, three fee-related appeals constituted 25% of the court's class action appeals. All fee-related appeals were challenges to the award, denial, or reduction of plaintiffs' counsel fees. In total, for the four districts, there were ten such appeals. One of these cases, the *General Motors Pick-Up Truck Litigation*, resulted in vacating a "settlement class" settlement that included \$9.6 million in fee awards. The other appeals ended in fee-award affirmance (two cases), appeal dismissal (two cases), reversal of denial of fees (one case), vacating the trial court's reduction of fees (one case), and remanding for reconsideration (one case). The other two appeals were pending (see Tables 51 to 54).

(17) Trivial Remedies; Other Remedies

(a) How frequently did certified (b)(3) classes lead to relief that is relatively trivial in comparison to attorneys' fees?

Study results did not show recurring situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees. (See also *supra* § 1(a) for a discussion of the average recovery per individual class member and of cases in which the average individual recovery was less than \$100.) We gauged this by determining, for each certified case with (b)(3) recovery, what percentage of the gross monetary settlement was paid to class counsel. This fee-recovery rate exceeded 40% in 11% of settled cases in two districts and in less than 5% of settled cases in the other two courts (see Figure 67).³⁰⁰ In half of these cases, case files provided information that helped explain the "high" rates. For example, in some cases, monetary relief was accompanied by nonquantifiable (b)(2) benefits, such as a permanent injunction for the benefit of the class. In other cases, the settlement produced relatively small payments to the class as well as to attorneys for the class.³⁰¹ (For a more detailed discussion of fee-recovery rates, see *supra* § 16(a).)

In the four districts, in twelve cases that were certified *solely* under Rule 23(b)(3), attorneys' fees were awarded but no objectively quantifiable monetary relief was awarded to the class. Table 46 summarizes the relief and the attorneys' fee awards in those cases. Assessing whether the relief is trivial in relation to the fees calls for subjective judgments that we leave to the readers. The fee awards in these cases were generally the product of a stipulation (eight of nine cases for which information was available). In one case, the *General Motors Pick-up Truck Litigation*, the

³⁰⁰. The "fee-recovery rate" exceeded 40% in the following numbers of cases: two of eighteen certified settled cases with net monetary distribution in each of two districts, one of twenty-three cases in the third district, and zero of nine cases in the fourth.

³⁰¹. In the case with the highest fee-recovery rate (71%), a \$34,000 monetary class recovery and \$83,000 fee award were accompanied by a prothonotary's agreement to place future interpleaded funds in separate interest-bearing accounts. The second highest rate (63%) involved a \$3.6 million fee award, \$300,000 in notice costs and a \$1.8 million net cash distribution to a certified class of approximately 2,000 stockholders that incurred stock losses. The third highest rate (around 47%) was related to a \$82,000 net monetary distribution to a class of terminated members of a health plan, with attorneys' fees of \$76,000. The fourth largest rate (45%) was based on a \$21,000 net monetary distribution and \$17,500 in fees related to bank customers that received improper forms. Two other cases had high rates (just over 40% in each). One was a securities case, where the court used the percentage of recovery method but did not place a value on other nonclass benefits valued by class and settlement counsel at \$8.3 million. The other was a lodestar case with a net monetary settlement of \$200,000 where no noneconomic benefits were apparent in the case file. There also may have been other factors, not apparent in case files, that affected the rates at which fees were awarded.

court of appeals cast doubt on the justification for the stipulated fees when it vacated the settlement. Judges reduced substantially two of the four fee requests that were not stipulated by the parties.

(b) How frequently did certified (b)(2) classes lead to injunctive relief that is relatively trivial in comparison to attorneys' fees?

We looked at the percentage of certified (b)(2) cases that resulted in injunctive relief without any substantive monetary distribution. We found variation among the districts, with the percentage ranging from 0% (zero of three cases) in one district to 71% (five of seven cases) in another.³⁰² In just over half of these cases, attorneys' fee awards were around \$50,000 or less, with injunctive relief ranging in scope from a nationwide nondiscrimination policy in a federal agency (\$53,000 in fees) to a local housing authority's rewiring of dwelling units (\$6,600 in fees). It appears that many would agree that the breadth of the results obtained was not trivial in comparison to the size of the fee award in these cases.

Cases with fee awards greater than \$150,000 resulted in the following relief:

- improving treatment and placement opportunities for developmentally disabled Medicaid recipients (\$682,681);
- entering into a consent decree concerning abortion and family planning services (\$224,810 in fees); and
- readjudicating claims for survivor and disability benefits (\$167,500).

The comparatively high level of fees makes it more difficult to assess their appropriateness after the fact. Given the breadth and complexity of these cases, however, many would consider the relief to be nontrivial (see Table 47).

(c) How often were recoveries distributed to charities or the like?

Nine percent or less of approved settlements included distribution of settlement funds to a charitable or other nonprofit organization.³⁰³ This occurred in a total of five cases in two districts (see Table 48). One example is a settlement fund that donated \$150,000 to the Chicago Bar Foundation for specific programs on domestic abuse, juvenile justice, and mentoring.

(18) Duplicative or Overlapping Classes

Background. The core questions are: How common are duplicate or overlapping classes? What difficulties were posed by such classes? Case law and commentary provide us with more information than the empirical data in the study. It is clear that multiple actions that are similar or identical and brought in different forums can be problematic. Such problems include the de facto surrender of jurisdiction by a court's yielding priority to another action and intercourt and intersystem consolidation.³⁰⁴ These multiple actions can result in conflicting or overlapping

³⁰² The percentages of certified (b)(2) settlements that resulted in injunctive relief without any substantive monetary distribution were as follows: 71% (five of seven settled certified (b)(2) cases) in one court, 44% (seven of sixteen cases) in another district, 20% (one of five cases) in the third court, and 0% (zero of three cases) in the fourth.

³⁰³ The number of approved settlements with charitable distributions were as follows: three of thirty-four court-approved settlements in one district, two of twenty-seven settlements in another, zero of thirty-four in the third, and zero of eleven in the fourth.

³⁰⁴ See, e.g., *Garcia-Mir v. Civiletti*, 32 Fed. R. Serv. 2d (Callaghan) 509 (D. Kan. 1981) (court denied certification because of the danger of overlapping classes and of wasted judicial effort; the court found that there were cases

classes that may produce inconsistent adjudications, duplication of effort, and confusion for class members, litigants, and judges.³⁰⁵ “When such an overlap occurs, the individual’s claims become subject to an ‘irrational resolution by a race to judgment,’”³⁰⁶ and “[e]ven if absent class members are permitted to opt out of any or all of the parallel lawsuits, no guarantee exists that the actions of many individual class members choosing to opt out will resolve the conflict or eliminate the overlap.”³⁰⁷ Problems arising from competing classes may benefit by consolidation of the actions in one court.³⁰⁸

Data. We found that overlapping classes generally arose in related cases that were not consolidated with similar litigation pending in federal and state courts (*see supra* § 1(b)). Our data uncovered five cases with what appeared to be duplicative or overlapping classes. The data showed that those cases generated few difficulties, if any, for the court. In several instances, the federal court avoided parallel proceedings by issuing a stay pending the completion of trial in related state litigation. Aside from our search for file references to related and consolidated cases, we did not inquire into the existence of competing class actions.

(19) Res Judicata

Call for Research. There are no data from the field study on this topic. It would be interesting to pursue the extent to which opt-out plaintiffs or objecting class members filed an action on the same issues that were addressed in the class action. Our data would permit identification of counsel in those cases and a follow-up questionnaire or interview might well uncover interesting and useful data.

pending in another district involving the same class members and issues; the case was eventually transferred to the other district).

³⁰⁵ George T. Conway III, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1101 & n.11 (1987) (quoting Kennedy, *Class Actions: The Right to Opt Out*, 25 Ariz. L. Rev. 3, 81 (1983): “Among the hypothetical parade of horrors which can be projected is the scenario in which fifty competing, national, multistate opt out class actions are brought on the same claims and all members remain silent in response to the fifty notices.”).

³⁰⁶ *Id.* at 1121 & n.12 (citing Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 70 (1986): “Professors Miller and Crump observe that a race to judgment among competing class actions would encourage litigants to engage in unseemly tactical behavior. ‘For example, defendants could forum shop by delaying or accelerating particular actions. Plaintiffs could collude with similarly aligned parties in stalking horse litigation, diverting their opponents’ attention or seeking collateral advantages such as the cumulative benefits of inconsistent discovery rulings.’” *Id.* at 1101 n.12 (quoting Miller & Crump, *supra*, at 24 (footnotes omitted))).

³⁰⁷ *Id.* at 1101.

³⁰⁸ Subclasses will often be necessary when independent actions are brought on behalf of classes that overlap or conflict with classes represented in other actions. For example, in the settling *Antibiotics* cases, well over 100 actions were filed, including several brought on behalf of nationwide classes. To avoid obvious conflicts, and to ease administrative chores, the consumer classes were redefined on a geographical basis, with states named as representatives of statewide consumer classes. 2 Newberg & Conte, *supra* note 55, § 7.31, at 7-93 to 7-94 (citing *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971)). “Similarly, nonsettling *Antibiotics* actions were upheld as statewide classes after being transferred for coordinated pretrial proceedings.” *Id.* at 7-94 (citing *In re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971), *nonsettling actions transferred*, 320 F. Supp. 586 (J.P.M.L. 1970)).

(20) Appeals

Background: Proposed Revision to Rule 23. Under the final judgment rule,³⁰⁹ orders granting or denying class certification are interlocutory and generally not appealable until the entry of a final judgment;³¹⁰ however, in certain cases courts have allowed interlocutory appeal under the limited exceptions of 28 U.S.C. §§ 1292(a) and (b).³¹¹ Generally,

[c]lass action certification rulings involve some factual analysis and thus do not qualify as “a controlling question of law as to which there is substantial ground for difference of opinion” [28 U.S.C. § 1292(b).] In short, there is little likelihood of immediate review of class action rulings even though such rulings may be crucial and controlling in the future conduct of the case.³¹²

Pendent appellate jurisdiction over an otherwise unappealable order is available only to the extent necessary to ensure meaningful review of an appealable order.³¹³ Granting a petition for writ of mandamus for certification review is rare.³¹⁴

The proposed revision to Rule 23 would add a provision that authorizes immediate appellate review of class certification rulings by leave of the court of appeals. As described in the draft committee note, this provision is intended to afford an opportunity for prompt correction of error before the parties incur significant litigation or settlement costs.³¹⁵ The underlying theory is that class certification rulings very often have make-or-break significance for the litigation,

³⁰⁹ Federal “courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts.” 28 U.S.C. § 1291 (1988).

³¹⁰ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978) (order decertifying a class is not appealable under 28 U.S.C. § 1291); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) (not appealable under 28 U.S.C. § 1292(a)(1)). *But see* *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990) (class representative’s failure to prosecute its individual claims created a final judgment; denial of class certification merged into that judgment), *cert. denied*, 498 U.S. 1025 (1991).

³¹¹ *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993) (interlocutory appeal reversed denial of class certification); *Gay v. Waiters & Dairy Lunchmen’s Union*, 549 F.2d 1330 (9th Cir. 1977) (ruling on class certification that is integral to a preliminary injunction ruling, also appealed, may be reviewed pursuant to 1292(a)). *See also* *Castano v. American Tobacco Co.*, No. 95-30725, 1996 WL 273523, at *1 (5th Cir. May 23, 1996) (certifying class certification ruling for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b)). *But see* *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 208–09 (3d Cir. 1990) (class certification not reviewable under pendent appellate jurisdiction because preliminary injunction was vacated).

³¹² *Downs*, *supra* note 50, at 701.

³¹³ *Georgine v. Amchem Products, Inc.*, No. 94-1925, 1996 WL 242442, at *9 (3d Cir. May 10, 1996) (holding that “[t]o give full effect to the appellants’ right to review of the injunction, we must reach class certification”). *Hoxworth*, 903 F.2d at 209.

³¹⁴ *In re Catawba Indian Tribe of S.C.*, 973 F.2d 1133 (4th Cir. 1992) (writ of mandamus will not issue unless denying certification amounted to a usurpation of judicial power); *Interpace Corp. v. Philadelphia*, 438 F.2d 401 (3d Cir. 1971) (writ of mandamus power is rarely exercised in class action context). *But see In re American Medical Systems, Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996) (ruling that writ of mandamus to decertify nationwide plaintiff class was justified because of trial court’s “total disregard of the requirements of Rule 23” in medical device products liability case); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir.) (mandamus justified; district court certification of class was in error and delaying review would cause irreparable harm), *cert. denied*, 116 S. Ct. 184 (1995).

³¹⁵ Appellate review would be “available only by leave of the court of appeals promptly sought, and proceedings in the district court . . . are not stayed . . . unless the district judge or court of appeals so orders.” *Cooper*, *supra* note 14, Committee Note.

with denial of certification sometimes leading to quick dismissal of the case and with granting of certification at times seen as forcing defendants to settle. (*See supra* § 14(a).) The draft committee note anticipates that orders permitting immediate appellate review will be “rare.” Others speculate about whether losing parties will seek interlocutory appellate review of nearly every decision on certification.

In 1986, the Special Committee on Class Action Improvements of the ABA Section of Litigation recommended a code change that would be similar in effect to the proposed rule amendment.³¹⁶ The ABA special committee proposed amending the jurisdictional provisions of 28 U.S.C. § 1292 to permit appellate review of a certification ruling by permission of the court of appeals “with accompanying safeguards designed to deter vexatious or delaying resort to interlocutory review.”³¹⁷ The ABA special committee also anticipated that orders permitting such interlocutory review would be rare.³¹⁸

Providing for discretionary interlocutory appeal of certification rulings might dovetail with another proposed change: making some level of probable success on the merits an additional element or factor for the court to consider in deciding whether to certify a class. (*See supra* § 5(c).) Some argue that both proposed changes would affect the impact of the certification ruling on parties’ bargaining power during settlement negotiations. Some maintain that allowing interlocutory appeal on certification would be even more important if Rule 23 provided for consideration of probable success on the merits, because the certification ruling would make an even stronger statement on the potential outcome of a case than under the current rule.

(a) How often were appeals filed?

Data. In the four districts, the rate of filing at least one appeal in class action cases ranged from 15% to 34% (see Figure 76).³¹⁹ For this purpose, rate of appeal is defined as the number of cases in which at least one appeal was filed divided by the number of cases in the study.³²⁰ It is important to recognize, however, that the pool of cases from which parties generally might appeal is far less than all class actions in the study, because study cases exhibited a high rate of settlement and settlement judgments are infrequently appealed (see Table 39 and discussion at *supra* § 14(a)). The overall rate of appeal (see Figure 76) might have been even higher had it not been for the high rate of class settlement. Significant differences in appeal rates for settled cases

³¹⁶ The ABA special committee made this recommendation prior to the enactment of 28 U.S.C. § 1292(e) (Supp. 1993) which provides the statutory authority for using the rule-making process to permit an appeal of interlocutory orders.

³¹⁷ ABA Special Committee Report, *supra* note 10, at 200. The report cited 28 U.S.C. § 1927 (1988), Fed. R. Civ. P. 7, Fed. R. App. P. 38, and inherent judicial power as “ample deterrents against abusive resort to interlocutory review.” *Id.* at 211.

³¹⁸ *Id.* at 211.

³¹⁹ In the time study, 14% of the class actions included one or more appeals. Willging et al., *supra* note 26, at 28. For discussion and statistics on appeal rates in federal civil cases, see generally Carol Krafska et al., *Stalking the Increase in the Rate of Federal Civil Appeals 6–7*, n.13 (Federal Judicial Center 1995); Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States 29–30* (Federal Judicial Center 1993); Richard A. Posner, *The Federal Courts: Crisis and Reform 89–91* (1985).

³²⁰ There are other ways to estimate appeal rates for these and other purposes. *See, e.g.*, Krafska et al., *supra* note 319, at 4–6, 21–22; McKenna, *supra* note 319, at 29 & n.57.

(appeal rates ranging from 9% to 21%) and nonsettled cases (ranging from 33% to 43%) were observed in three districts. In the fourth court, the rate of appeal was the same (15%) for both settled and nonsettled cases.

In three districts, noncertified cases were more likely to have one or more appeals than certified cases (see Figure 76). These findings may reflect the higher rate of settlement found in certified cases (see Table 39 and discussion at *supra* § 14(a)(i)). In the fourth district, there was no difference in appeal rates for certified and noncertified cases.

Because of the elevated stakes in trial cases, one might expect that the percentage of cases that resulted in appeal would be higher for cases that go to trial compared to those that do not. This expectation was borne out for the four districts in the aggregate. Cases in the study resulted in eighteen trials and twelve of those trials led to appeals on trial-related issues (see Tables 43 and 44),³²¹ a 67% rate of appeal.³²² Looking only at fully completed trials, that is, excluding four cases that settled during trial (three of which resulted in no appeal), the rate of appeal was higher (79%). Given that these rates are for a small number of trials in cases terminated in a two-year period in four districts combined, they cannot be used to predict the rates for class actions nationally. It is interesting to note, however, that these appeal rates are much higher than past findings of the nation-wide appeal rate for all civil cases that terminated by trial. For example, a 1981 study found a 24% rate of appeal after full trials in 18,500 cases terminating between 1977 and the first half of 1978.³²³

There were twelve, thirty-four, thirty-six, and fifty-six appeals in the four districts. All but two of the appeals were from a final judgment or order. Most cases with appellate review included only one appeal. Two districts experienced multiple appeals in about a third of the cases with appeals; the comparable rate for the other two districts was around 10% (see Figure 77).

(b) How often did appeals alter the prior decision of the trial judge?

Data: Overview of Results on Appeal. Few of the appeals resulted in altering the prior decision of the trial judge (see Figure 78).³²⁴ The appellate courts reversed, vacated, or remanded in full in about 15% of the appeals from three districts and 6% from the fourth.³²⁵ Appellate decisions affirmed in full with much greater frequency—in about 50% of decided appeals in three districts and in 33% in the fourth court. The other frequent disposition was dismissal of the appeal, ei-

³²¹ Eight of 12 appeals of trial results led to an appellate ruling and the other four appeals were dismissed (see Tables 43 and 44).

³²² In computing rate of appeal, for this purpose, the numerator was the number of post-trial appeals in cases where trial commenced; the denominator was the number of study cases where a trial commenced.

³²³ Gordon Bermant et al., *Protracted Civil Trials: Views from the Bench and the Bar*, Table 6, at 41 (Federal Judicial Center 1981). *See also* J. Woodford Howard, Jr., *Court of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits*, Table 2.5, at 35 (1981).

³²⁴ The disposition data shown in Figure 78 is broken down further by appeals filed by plaintiffs (see Figure 79) and defendants (see Figure 80). Figures 78–80 show the number of decided appeals, rather than the number of cases with appeals; some cases had more than one appeal.

³²⁵ These percentages were obtained by dividing the number of appellate reversals, vacations, or remands for each district by the total number of appeals filed in study cases in that district, with the denominator excluding appeals where the court of appeals had not yet issued a decision. These five excluded appeals, shown in the legend for Figure 78, amount to about 3.6% of appeals filed in study cases in the four districts combined.

ther by the court of appeals or by stipulation of the parties. This occurred at rates in the four districts ranging from 28% to 36% of decided appeals (see Figure 78).³²⁶

Plaintiffs were appellants more often than defendants were. Plaintiffs filed about 75% of the appeals in three districts and 85% in the fourth.³²⁷ The preliminary time study found that plaintiffs filed 71% of the appeals in that sample of fifty-one class actions nation-wide.³²⁸

In the instant study, between 13% and 26% of plaintiffs' appeals were successful, in whole or in part, in reversing or vacating trial court decisions in three courts.³²⁹ The fourth court did not have a sufficient number of appeals for this stratification (see Figure 79). Few defendants' appeals resulted in reversal or vacation (see Figure 80).

Data: Reversals. Generally in study cases, after appellate reversal and remand of a dispositive order, case resolution in favor of the class appeared more likely if a class had been certified prior to the appeal than if no class had been certified. While other explanations may be possible for these observations, our study data establish a plausible hypothesis that may warrant further testing.

Reversals in Cases with Certified Classes. Viewing the four districts as an aggregate, appellate reversals in whole or in part occurred in seven cases where the district court had certified a class prior to the appeal (see Table 49). In four of the seven cases, after the appellate court reversed a final judgment, the district court on remand approved a class settlement. The judgments appealed from in three of these four cases had been dispositive in favor of the defendants.³³⁰ The fourth case settled despite the court of appeals reversal of summary judgment for the plaintiff class on liability. In the other three of these seven cases, the court of appeals vacated a settlement (the *General Motors Pick-Up Truck Litigation* now pending in the district court), affirmed nearly all of a summary judgment for defendants in another case (also pending), and in the third case vacated a decision in favor of defendants with instructions to dismiss the case for lack of jurisdiction.

Reversals in Cases with No Class Previously Certified. Thirteen reversals occurred in cases where a class was not certified before appeal, again looking at the four districts as an aggregate.

³²⁶ These calculations exclude appeals where no appellate disposition information was available. See *supra* note 325.

³²⁷ This is not surprising given (1) the frequency and outcome of defendant motions to dismiss some or all of plaintiff claims, (2) the frequency and outcome of plaintiff motions for class certification, and (3) the outcome of trials in study cases. For example, motions to dismiss were granted in full or in part in about 75% of the rulings on motions to dismiss in two districts and in about 48% of such rulings in the other two districts (see Table 25). The district court denied certification of a plaintiff class in about one-third of the rulings on class certification in three districts and in half of the rulings in the fourth district (see *supra* § 5). For all four districts combined, plaintiffs were unsuccessful in about 70% of the trials that commenced, not counting trials that settled before completion (see Tables 43 and 44).

³²⁸ Willging et al., *supra* note 26, at 28.

³²⁹ See *supra* note 326.

³³⁰ In the first of these three cases, an appellate panel vacated summary judgment for the defendants. In the second case, the court of appeals reversed the district court's dismissal of the case for failure to state a claim; the district court had certified a plaintiff class on the same date that it dismissed the case. In the third settled case, the court of appeals twice reversed and remanded summary judgments for the defendants, once before and once after class certification.

The aftermath of reversals in these cases did not appear as favorable to the class as where a class had been certified before the filing of the appeal (see Table 50 compared to Table 49).

All but one of the thirteen were plaintiff appeals of claim dismissal or summary judgment for the defendants.³³¹ Despite appellate reversal of these judgments,³³² remand led to dismissal or no substantive success on plaintiffs' original claims in all but five of the twelve cases with plaintiff appeals; three of those five remanded cases are pending in district court. Another one of the five resulted in class certification and class settlement after remand. In the one additional case, a class was certified after reversal of the first summary judgment ruling for defendants; the case eventually settled after appellate reversal of a second summary judgment ruling for defendants.³³³

Data: Issues on Appeal. We categorized the principal issues and related outcomes on appeal in Tables 51 through 54.

Implications for Proposed Amendments to Rule 23. Study data on appeals can be interpreted in several ways but they should not be viewed as predictors of the universe of class action cases nation-wide. Because study data reflect a small number of appeals in a limited time period in only four districts, we cannot make broad-based conclusions.

Current supporters of the rule change have maintained that an appellate reversal of the class certification decision could change the life of a case in ways far beyond the class certification itself. Some might read the study's reversal and remand findings to suggest that certifying a class before a plaintiffs' appeal of dismissal or summary judgment had a significant impact on the eventual outcome of the case. Not surprisingly, cases certified before such appeal had a higher likelihood of class settlement after remand than those cases with no class certification before the appeal, suggesting the potential importance to a plaintiff class of a favorable and timely ruling on certification.³³⁴ Some also might read the data to suggest that the absence of class certification before appeal of a dispositive order may decrease the likelihood of settlement upon remand, even if the appellate ruling on the dispositive motion is fully favorable to the plaintiff.

These readings of the data parallel the general observation that certified cases settled at a higher rate than noncertified cases (*see supra* § 14(a)). These outcomes may indicate a higher

³³¹. In the defendants' appeal in one case, the appellate panel vacated the district court's injunction and award of nominal damages to individual plaintiffs, resulting in nominal damages on remand.

³³². For example, in one case, the court of appeals vacated partial summary judgment for the defendants with instructions to dismiss plaintiffs' claims. In another case, plaintiffs and intervenors successfully challenged the district court's dismissal of the case but were unsuccessful in getting a reversal of the denial of class certification. In a third case, the court of appeals reversed in part the grant of defendant's motion for summary judgment.

³³³. Interestingly, there was no district court ruling on certification prior to the initial appeal in these two settled cases, whereas in over half of the other reversal cases the trial court ruled on, but denied, class certification before the filing of the appeal.

³³⁴. Some may argue that our results illustrate that rulings on dispositive motions, before giving plaintiffs the opportunity to have their class certified, could be viewed as a detriment to plaintiffs (see Table 50). If this phenomenon is widespread beyond the four districts, plaintiffs' lawyers might conclude after considering other factors that they prefer the issuance of a certification ruling before any ruling on dispositive motions, rather than run the risk of waiting and possibly precluding any future ruling on certification. *See supra* § 14(a)(i). Some plaintiffs' counsel might see this as a reason to oppose the proposed amendment to Rule 23 that would authorize, and thus possibly promote, district court rulings on dispositive motions prior to rulings on class certification, putting aside the cost of notice problem for purposes of this discussion. *See supra* § 5(c).

level of merit in certified cases than in noncertified cases. Although one cannot conclude from our data that class certification causes settlement, class certification before appeal could be viewed as one of the factors that led to eventual settlement. But, defendants and their counsel may view these cases as illustrations to support their arguments that certification exerts pro-plaintiff pressure on defendants.

(c) To what extent did appellate review serve to correct errors in procedural decisions relating to the class action mechanism, such as class certification?

Data: Appeals Involving Certification. Study results suggest that litigants infrequently seek appellate review of district court decisions involving class action mechanics, such as certification or class settlement. For example, in the four districts combined, seven cases included appeals on class certification issues (see Table 55).

Putative class representatives appealed the denial of class certification in a total of five cases; two of the denials were reversed and remanded, two were affirmed, and one appeal was dismissed. After these appellate rulings, three of the cases were dismissed without class certification and two are pending in the district court. A class was certified in one of the pending cases; nonclass claims are pending in the other case.

Parties other than class representatives filed certification appeals in two cases. In the *General Motors Pick-Up Truck Litigation*, objecting class members successfully challenged a class settlement judgment and the standards used to certify the class. And, in another case, defendants twice appealed certification of a plaintiffs' class. The appellate court deemed the first district court certification decision as interlocutory and not reviewable.³³⁵ When the certification decision later came up for appellate review with a final order, the court of appeals affirmed class certification.

Discussion. There could be several explanations for the small number of appeals involving class certification. For example, most class action appeals, given that they were nearly always filed after a final judgment, may have excluded certification issues because other issues, such as the merits of the claims, may have superseded the need or feasibility of revisiting the certification issue. Also, there was no apparent opposition to certification with respect to 50% to 60% of certification orders in the study. (See *supra* § 6(a); see also *supra* § 2(a).) In about 18% of the study's certified class actions, the parties submitted a proposed settlement before or simultaneously with the first motion to certify. (See *supra* § 5(d).)

When certification is granted, some defendants might settle rather than incur the costs of litigating to final judgment and appeal.³³⁶ Likewise, when certification is denied, individual plaintiffs might be unwilling to incur expenses disproportionate to their individual recoveries to litigate further to secure appellate review on certification.³³⁷ These projections of the impact on

³³⁵ *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 209 (3d Cir. 1990).

³³⁶ See Cooper, *supra* note 14, Committee Note.

³³⁷ As described *supra* in § 20(c), the court of appeals reversed the denial of certification in two of the seven cases with appeals on certification issues. Such reversals have been cited as one of the reasons for authorizing interlocutory appeals concerning certification. Under the current rule, if the denial of class certification is reversed on appeal after the entry of a final judgment in the case, putative class members can delay their decision to opt in until remand with full knowledge of the nature of the final judgment. Some have argued that this scenario gives putative class members the advantage of "one way intervention." See Cooper, *supra* note 14, Committee Note. The infre-

plaintiffs and defendants can be viewed as consistent with the reasoning offered in the ABA special committee's commentary to its 1986 recommendation on interlocutory appeal.³³⁸

Regardless of the reasons, the dearth of certification appeals in the study does not necessarily mean that the revised rule would not have generated more appeals in these cases had it been in effect during the study period. Some believe that, since certification is a settlement-significant event, if parties can seek appeal they will, especially defendants challenging the grant of certification. (*See supra* § 14(a)(i).) The discretionary nature of the proposed rule, however, is designed to be a guard against abuse of the appellate process.

Estimating Appeals of Certification Rulings Under the Proposed Amendment. Our data may be useful as a description of the number of certification appeals currently taken. One might reasonably expect at least that many interlocutory appeals under the proposed amendment. Our data cannot predict, however, how many parties will seek such appellate review and how these interlocutory appeals will affect settlement prospects.

Even though few appeals in study cases involved the certification ruling itself, an analysis of all appeals in cases with certification rulings may provide some insight into how many additional appeals the amended rule might bring. In two districts nearly two-thirds of class actions included at least one ruling on certification, nearly half did in the third district, but only 36% did in the fourth (see Figure 81). Most (84% to 100%) of the appeals in these cases occurred after the ruling on certification (see Figure 82). Appeals, of any kind, in cases with rulings on certification occurred at about the same rate (19% to 34%) as in cases without any ruling on certification (see Figure 83 compared to Figure 76).

Many believe that the appellate courts will not grant appeals of routine certification decisions. The finding that only 19% to 34% of cases with rulings on certification resulted in any appeal on any issue (see Figure 83) could support the draft committee note's statement that the number of orders granting appeal under the proposed amendment would be rare. However, as discussed above, there are strongly held views that parties will seek review of certification rulings as freely as possible and that the proposed revision adding consideration of probable success would increase the significance of the certification ruling.

Data: Appeals on Other Class Action Issues. In addition to the certification appeals described above, only a small number of other appeals could be identified as characteristic of class actions. Most of these were fee-award appeals (four or fewer in each district). Arguably, these are not uniquely characteristic of class actions, particularly where a fee-shifting statute applied. (*See supra* § 16(d) for a discussion of the results on these appeals.)

quency of these types of cases in the study does not necessarily mean that they occur as infrequently in other cases or in other districts.

³³⁸ The ABA committee commentary stated:

If [class certification] is denied, the individual plaintiff must abandon his efforts to represent the alleged class or incur expenses wholly disproportionate to his individual recovery in order to secure appellate review of the certification ruling. If, as often happens, the individual plaintiff is unwilling to incur such an expense, the case is dismissed and the certification ruling is never reviewed. . . . Conversely, if class certification is erroneously granted, a defendant faces potentially ruinous liability and may be forced to settle a case rather than run the economic risk of trial in order to secure review of the certification ruling.

ABA Special Committee Report, *supra* note 10, at 210–11.

In addition, prospective intervenors appealed the denial of intervention in one case in one district and in two cases in another. None of the intervenors was successful on appeal.

Objecting class members sought appellate review of the fairness and reasonableness of a class settlement in only one case, the *General Motors Pick-Up Truck Litigation*. That settlement was vacated. In two other appeals, a third-party defendant challenged the district court's approval of a settlement; however, those appeals were dismissed. Finally, in one case, the trial court's disqualification of plaintiffs' counsel was affirmed as part of an appeal of the district court's decision on class certification.

In section 10(c) *supra*, we saw that the certified class actions included twenty-one objections to some aspect of the notice process. But, no appeal involved any issue related to notice to the class.

(21) Class Action Attorneys

(a) How extensive was the class action bar across the four districts?

Data and Discussion. Some have expressed concerns about the prevalence of "class action firms" that appear with great frequency in class actions across the country.³³⁹ Related to these concerns are questions concerning conflicts of interest that arise in class actions and even allegations of collusion between class counsel, defense counsel, and representative parties in certain cases.³⁴⁰

Using court files,³⁴¹ we identified lead, co-lead, and liaison counsel³⁴² in 150 of the 152 certified cases in the study³⁴³ and in 4 noncertified cases.³⁴⁴ These attorneys were from 160 different law firms from across the country. In most cases, more than one firm served as class counsel and at least one of the lead attorneys was from within the district where the case was being heard.

Two-thirds of the 60 firms had offices within the district where their respective cases were pending. As one might expect given the districts studied, most of these firms had offices in the Philadelphia, Miami, Chicago, or San Francisco metropolitan areas and they appeared more often within their respective districts than in the other study districts. However, certain Philadelphia firms had offices in California or Florida and appeared frequently outside E.D. Pa.

³³⁹. See generally Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 521-22, 545-48 (1991).

³⁴⁰. See generally Coffee, *Unfaithful Champion*, *supra* note 262, at 37-38; Senate Staff Report, *supra* note 8, at 61-62, 73-76.

³⁴¹. Court files, of course, would not identify behind-the-scenes participation by lawyers who did not enter an appearance or identify themselves in a settlement or other document.

³⁴². For definition and discussion of lead counsel and liaison counsel, see MCL 3d, *supra* note 34, § 20.22.

³⁴³. The court docket indicated that plaintiffs in the other two certified cases appeared *pro se*.

³⁴⁴. In 107 certified cases and 4 noncertified cases in the study, we identified counsel from court orders appointing class counsel or from notices to the class that included the name of class counsel. These 111 cases were as follows: 31 in E.D. Pa., 12 in S.D. Fla., 36 in N.D. Ill., and 32 in N.D. Cal. In 8 of the 111 cases, liaison counsel were appointed in addition to lead or co-lead counsel; in 1 case lead counsel was appointed for a certified defendants' class.

For 43 additional certified cases where court orders or class notices did not identify lead or co-lead counsel, we assumed that plaintiffs' attorneys listed on the docket sheets were lead or co-lead counsel. There were 24 such cases in E.D. Pa., none in S.D. Fla., 15 in N.D. Ill., and 4 in N.D. Cal.

A third of the 160 firms were from outside the study districts and generally appeared as co-lead counsel. Most of these firms were from New York City (18 firms), Los Angeles (5 firms), or Washington, D.C. (5 firms). Other firms hailed from various states, including Ohio (4 firms), Minnesota (3 firms), Massachusetts (2 firms), and Michigan (2 firms).

(b) How often did the same attorneys appear as counsel for the class in different cases and in different courts?

Data. As an indication of how often the same attorneys appeared as class counsel in different cases in different courts, we looked at the firms that were lead or co-lead counsel in four or more cases.³⁴⁵ For the four districts combined, there were twelve such firms in ninety-five cases. All but two were certified cases. This means that these twelve firms were lead or co-lead counsel in 63% of the certified cases in the study.

One firm was lead or co-lead in seventeen cases and liaison counsel in two cases. These nineteen cases were spread more or less evenly among three districts, with no cases in N.D. III. Two other firms were each lead or co-lead counsel in about fifteen cases in three districts, again with no cases in N.D. III. One Washington, D.C., firm was in four cases in three districts. The other eight firms appeared almost exclusively in cases in their own districts. Interestingly, among these eight firms, the three Chicago firms did not appear outside N.D. III. (see Table 56).

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³⁴⁵ Each consolidation of cases is counted as one case.

Conclusion

In this section, we summarize some of the more intriguing findings, discuss implications for policy makers, and suggest areas for future research.

Summary of significant findings. Based on assumptions in the ABA committee report, we expected to find considerable litigation over the appropriate Rule 23 category,³⁴⁶ judicial reluctance to examine the merits of cases before ruling on class certification,³⁴⁷ and limited opportunities for appeal of certification rulings before final judgment.

We found little litigation about which Rule 23 category was appropriate. This finding across four districts suggests that the need for collapsing Rule 23's three categories is not as critical as some have suggested, but the question of whether the amount of litigation we found would justify a rule change is a policy question. Further, collapsing categories could create unintended consequences, such as clouding existing case precedent on noticing, opting out and similar matters. Our finding raises questions about the need for a rule change but could not address whether there would be any harmful effect of changing the rule.

We also found, contrary to a premise underlying the ABA special committee's recommendation, that judges frequently ruled on motions to dismiss and motions for summary judgment prior to ruling on class certification. Among judges who did not so rule, however, we cannot rule out the possibility that some may have considered the absence of express permission for precertification merits rulings to be a factor that restrained them from so ruling. Again, our data do not suggest that the proposed change would have harmful effects. An unintended, but not necessarily harmful, consequence of the proposed change might be, for example, a dramatic shift in allocating the costs of notice. Our data suggest that the parties often appear to avoid imposing the full cost of notice on the proponent of the class despite the clear ruling in *Eisen v. Carlisle & Jacqueline*.³⁴⁸ Explicitly permitting precertification rulings on the merits would remove one of *Eisen's* major premises and make the rule consistent with the general practice that we found.

Concerning interlocutory appeals,³⁴⁹ study data confirmed the assumption in the ABA committee report that there are limited opportunities for appellate review, interlocutory or not, of decisions on certification. We also found limited success by appellants in altering district

³⁴⁶ ABA Special Committee Report, *supra* note 10, at 3-4 ("this problem arises frequently").

³⁴⁷ *Id.* at 10 ("Clarification [is needed] to eliminate confusion concerning proper treatment of pre-certification motions . . . and to authorize consideration of such motions prior to certification of the class. . . .").

³⁴⁸ 417 U.S. 156 (1974).

³⁴⁹ ABA Special Committee Report, *supra* note 10, at 10 (recommending discretionary interlocutory appellate review of rulings on certification).

court decisions generally and few appeals of certification decisions. Whether the paucity of successful appeals of certification decisions is attributable to the lack of opportunity for earlier appeals of certification decisions or to the lack of appealable issues that survive final judgment cannot be answered with our data for various reasons. For example, because parties often settled certified class actions, only dissenting class members or intervenors would have retained a right to appeal. Thus, the number of appeals we found is not necessarily a measure of the number of issues that might have been candidates for interlocutory appeal immediately after the certification decision.

Based on anecdotal evidence, we expected to find a high level of abuse in the form of attorneys' fees that were disproportionate to the class recoveries.³⁵⁰ Instead we found that attorneys' fees were generally in the traditional range of approximately one-third of the total settlement. While attorneys clearly derived substantial benefits from settlements, the recoveries to the class in most cases were not trivial in comparison to the fees. But, recoveries by individual class members were in amounts that could not be expected to support individual actions. This finding confirms that many cases satisfy an underlying purpose of Rule 23, which is to provide a mechanism for the collective litigation of relatively small claims that would not otherwise support cost-effective litigation. Our findings, however, do not address the monetary value or sufficiency of plaintiffs' recoveries in relation to any monetary losses they may have incurred.

Anecdotal evidence also led us to expect to find substantial evidence of "strike suits" where filing a class action or certifying a class coerced settlement without regard to the merits of claims.³⁵¹ Instead we found that although certified cases in the study settled at a higher rate than cases not certified as class actions, there were no objective indications that settlement was coerced by class certification. Rather, we found that settlements often appeared to be the combined product of a case surviving a motion to dismiss and/or a motion for summary judgment as well as being certified as a class action. Whether the size of the potential liability affected settlement was beyond the scope of the current study.

On the other hand, we found a sizable number of cases that might be characterized as unsuccessful strike suits, that is, cases that were filed as class actions and never certified as such. Such cases were often found to be without merit and were terminated by rulings on motions to dismiss or motions for summary judgment, not by settlements, coerced or otherwise. These data suggest that judges generally rule promptly on the merits of claims and that these rulings frequently dispose of unmeritorious claims.

One of the more surprising findings was that settlement and trial rates for cases filed as class actions were not much different from settlement and trial rates for civil cases generally.³⁵² The findings on settlement and trial rates are consistent with a general trend toward fewer trials and more settlements in civil litigation in federal district courts.³⁵³

³⁵⁰. See, e.g., Senate Staff Report, *supra* note 8, at 7 ("settlements yield large fees for plaintiffs' lawyers but compensate investors for only a fraction of their actual losses"); see also Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77z-1(a)(6) (West Supp. 1996) (attorneys' fees in securities class actions shall be limited to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

³⁵¹. See text accompanying *supra* notes 100 to 109 (§ 5(c)) and notes 211 to 215 (§ 14(a)).

³⁵². See text accompanying *supra* notes 46 to 49 (§ 2(b)).

³⁵³. See Donna Stienstra & Thomas E. Willging, Alternatives to Litigation: Do They Have a Place in the Federal District Courts 33-36, 68 (Federal Judicial Center 1995) (federal civil trial rate diminished from more than 7% to less

Addressing one of the advisory committee's fundamental questions, we found that there are significant numbers of "routine" class actions that represent relatively standard or "easy" applications of Rule 23, especially in the securities and civil rights contexts. This finding suggests that there are well-established applications of Rule 23 that might be affected by a major restructuring of class action procedures.

Calls for research. In many respects, this study report represents a threshold empirical look at contemporary class actions. Because of time and budget constraints, we were unable to address certain issues that the advisory committee identified and, in the course of our research, we came across additional issues that warrant further study. We noted those issues in the various sections of the report and summarize them here primarily with the hope that we might stimulate other researchers to pursue them.

There is a basic need for research to determine the incidence or volume of class actions throughout the ninety-four districts of the federal system. Nation-wide statistics on class actions are reported to and by the Administrative Office of the U.S. Courts, but that reporting is not complete. For the four courts in this study we identified the majority of cases selected for the study by using electronic searches of dockets and databases of published opinions; the majority of the study cases could not be found in the statistics reported to the Administrative Office.³⁵⁴ Similar searches for a scientifically selected sample of the other ninety districts would be required to get a clear picture of the national incidence of class action activity.

The advisory committee sought information about class representatives that we were unable to provide given the limits of our time and resources. Interviews of lawyers and class representatives would be necessary, for example, to develop a clearer picture of how representatives and attorneys come to be involved in class actions. Along similar lines, interviews of nonrepresentative class members, especially those who participate in the process by filing objections, claims, or opt-out notices would provide an opportunity to examine in-depth any "grass roots" dissatisfaction with particular class action settlements.

Some researchers have attempted to assess the percentage of individual loss that class action settlements redress.³⁵⁵ Surveying class members might provide a better source of information about individual damages and the percentage of those damages recovered through the class actions process. Further, an expanded analysis of the content of notices sent to class members could provide more complete information about the clarity and effectiveness of notices in communicating relevant information about settlements.³⁵⁶

Also, study of the relationship among multiple filings of class actions seems in order. We encountered related cases in state and federal courts and noted their presence.³⁵⁷ A more in-depth look at such overlapping cases might provide insights into ways to improve federal-state coordination and federal management of multidistrict and intradistrict consolidations.

than 4% between 1970 and 1993).

³⁵⁴ See the section "Identification and Definition of Class Actions" in Appendix D, *infra*, and Table 57.

³⁵⁵ See Senate Staff Report, *supra* note 8, at 151-61 (summarizing studies of whether the merits matter in securities class actions).

³⁵⁶ See text accompanying *supra* notes 177 to 185 (§ 10(d)).

³⁵⁷ See text accompanying *supra* notes 32 to 41 (§2(b)).

Studying the res judicata effects of class settlements or adjudication would also be another worthy candidate for further research. In a similar vein, studying the frequency and nature of satellite or subsequent litigation by class members who opt out could generate data comparing class and individual recoveries and could thereby facilitate examining the sufficiency of class action settlements.

These calls for research suggest that there is much to be done before systematic data are available to put into perspective the anecdotes and generalizations that long have been driving the debate about class actions.

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Appendix A

PROPOSED RULE 23—1993

Rule 23. Class Actions.

(a) Prerequisites. One or more members of a class may sue or be sued as representatives on behalf of all if—with respect to the claims, defenses, or issues certified for class action treatment—

- (1) the members are so numerous that the joinder of all is impracticable;
- (2) legal or factual questions are common to the class;
- (3) the representative parties' positions typify those of the class;
- (4) the representative parties and their attorneys are willing and able to fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty; and
- (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) Whether a Class Action Is Superior. The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

- (1) the extent to which separate actions by or against individual members might result in
 - (A) inconsistent or conflicting adjudications that would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications that, as a practical matter, would dispose of the nonparty members' interests or reduce their ability to protect their interests;
- (2) the extent to which the relief may take the form of an injunction or declaratory judgment respecting the class as a whole;
- (3) the extent to which common questions of law or fact predominate over any questions affecting only individual members;
- (4) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (5) the extent and nature of any related litigation already begun by or against members of the class;
- (6) the desirability or undesirability of concentrating the litigation in the particular forum; and
- (7) the likely difficulties in managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) Determinations by Order Whether Class Action To Be Certified; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

- (1) As soon as practicable after persons sue or are sued as representatives of a class, the court must determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.

- (A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:
- (i) the nature of the controversy and the relief sought;
 - (ii) the extent and nature of the members' injuries or liability;
 - (iii) potential conflicts of interest among members;
 - (iv) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and
 - (v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, a putative member's election to be excluded may be conditioned upon a prohibition against maintaining a separate action on some or all of the matters in controversy in the class action or a prohibition against its relying in a separate action upon any judgment rendered or factual finding in favor of the class, and a putative member's election to be included in a class may be conditioned upon its bearing a fair share of litigation expenses incurred by the representative parties.

- (B) An order under this subdivision may be conditional, and may be altered or amended before final judgment.
- (2) When ordering that an action be certified as a class action under this rule, the court must direct that appropriate notice be given to the class under subdivision (d)(1)(C). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice.
- (3) The judgment in an action certified as a class action, whether or not favorable to the class, must specify or describe those who are members of the class or have elected to be excluded on conditions affecting any separate actions.
- (4) When appropriate, an action may be certified as a class action with respect to particular claims, defenses, or issues, by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1).

(d) Orders in Conduct of Class Actions.

- (1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:
- (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;
 - (B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;
 - (C) require notice to some or all of the class members or putative members of:
 - (i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class;
 - (ii) the proposed extent of the judgment; or
 - (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
 - (D) impose conditions on the representative parties, class members, or intervenors;

(E) require the pleadings be amended to eliminate allegations about representation of absent persons, and that the action proceed accordingly; or

(F) deal with similar procedural matters.

(2) An order under Rule 23 (d)(1) may be combined with an order under Rule 16, and may be altered or amended.

(e) Dismissal or Compromise. An action in which persons sue or are sued as representatives of a class must not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for certification as a class action, or be compromised without approval of the court. An action certified as a class action must not be dismissed or compromised without approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

Purpose of revision. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on whether and how the case should proceed as a class action.

In the revision, the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined to treat as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which is added as subdivision (a) as a prerequisite for any class action. The issue of superiority of class action resolution is made a critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions—and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

The revision emphasizes the need for the court, parties, and counsel to focus on the particular claims, defenses, or issues that are appropriate for adjudication in a class action. Too often, classes have been certified without recognition that separate controversies may exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion. Also, the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries—at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not, however, an unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts. The rule does not attempt to authorize or establish a system for “fluid recovery” of damages, nor does it attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions will be certified under this rule, and most that were not certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility [given] notice and membership in the class.

Various non-substantive stylistic changes are made to conform to style and conventions adopted by the Committee to simplify the present rules.

Subdivision (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities of the class.

Paragraph (5)—the superiority requirement—is taken from subdivision (b)(3) and becomes a critical element for all class actions.

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words “claims, defenses, or issues” are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

Subdivision (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class

members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such “opt-outs”—or, in some cases, even require that a putative member “opt-in” in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class actions remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion—the fact pattern described in subdivision (b)(1)(A)—a person might nevertheless be allowed to be excluded from the class upon the condition that the person will not maintain any separate action and hence, as a practical matter, be bound by the outcome of the class action. The opportunity to elect exclusion from a class may also be useful, for example, in some employment discrimination action in which certain employees otherwise part of the class may, because of their own positions, wish to align themselves with the employer’s side of the litigation either to assist in the defense of the case or to oppose the relief sought for the class.

Ordinarily, putative class members electing to be excluded from a plaintiff class will be free to bring their own individual actions, unhampered by factual findings adverse to the class, while potentially able, under the doctrine of issue preclusion, to benefit from factual findings favorable to the class. The revised rule permits the court, as a means to avoid this inequity, to impose a condition on “opting out” that will preclude an excluded member from relying in a separate action upon findings favorable to the class.

Rarely should a court impose an “opt-in” requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid the potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give meaningful notice of the class action to all putative members of the class. With defendant classes it may be appropriate to impose a condition that requires the “opting-in” defendant class members to share in the litigation expenses of the representative party. Such a condition would be rarely needed with plaintiff classes since typically the claims on behalf of the class, if successful, would result in common fund or benefit from which litigation expenses of the representative can be charged.

Under the revision, some notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members’ individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the “numerosity” requirement.

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the

rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations, it might be appropriate to certify some issues relating to the defendants' culpability and—if the relevant scientific knowledge is sufficiently well developed—general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

Subdivision (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision if this will promote the fair and efficient adjudication of the controversy. See *Manual for Complex Litigation, Second*, § 30.11.

Inclusion in the former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Subdivision (c)(2) requires that notice be given if a class is certified, though under subdivision (d)(1)(C) the particular form of notice is committed to the sound discretion of the court, keeping in mind the requirements of due process. Subdivision (d)(1)(C) contemplates that some form of notice may be desirable with respect to many other important rulings. Subdivision (d)(1)(C)(i), for example, calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

Subdivision (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members, e.g., *Shelton v. Fargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of the fairness of these proposals conducted by an independent master can be of great benefit to the court, particularly since the named parties and their counsel have ceased to be

adversaries with respect to the proposed dismissal or settlement. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

Subdivision (f). The certification ruling is often the crucial ruling in a case filed as a class action. The plaintiff, in order to obtain appellate review of a ruling denying certification, will have to proceed with the case to final judgment and may have to incur litigation expenses wholly disproportionate to any individual recovery; and, if the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of “one way intervention.” Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potentially ruinous liability of a class-wide judgment in order to secure review of the certification decision. The consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains the provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. The appellate procedure would be the same as for appeals under 28 U.S.C. § 1292(c). The statutory authority for using the rule-making process to permit an appeal of interlocutory orders is contained in 28 U.S.C. § 1292(e), as amended in 1992.

It is anticipated that orders permitting immediate appellate review should be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of errors.

cited in Lambert v. Nutraceutical Corp.
No. 15-56423 archived on September 12, 2017

Appendix B

PROPOSED RULE 23—1995

Rule 23. Class Actions (November 1995 draft).

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all if with respect to the claims, defenses, or issues certified for class action treatment—

- (1) the members are so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the representative parties' positions typify those of the class; and
- (4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty.

(b) When Class Actions May Be Certified. An action may be certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) final injunctive or declaratory relief may be appropriate with respect to the class as a whole; or
- (3) the court finds (i) that the questions of law or fact common to the certified class predominate over individual questions included in the class action, (ii) that {the class claims, issues, or defenses are not insubstantial on the merits,} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}, and (iii) that a class action is superior to other available methods and necessary for the fair and efficient disposition of the controversy. The matters pertinent to these findings include:
 - (A) the practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;
 - (B) the extent and nature of any related litigation involving class members;
 - (C) the desirability of concentrating the litigation in the particular forum;
 - (D) the likely difficulties in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;
 - (E) the probable success on the merits of the class claims, issues, or defenses;
 - (F) whether the public interest in—and the private benefits of—the probable relief to individual class members justify the burdens of the litigation; and

- (G) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or
- (4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:
 - (A) the nature of the controversy and the relief sought;
 - (B) the extent and nature of the members' injuries or liability;
 - (C) potential conflicts of interest among members;
 - (D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and
 - (E) the inefficiency or impracticality of separate actions to resolve the controversy; or
- (5) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be Certified; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

- (1) When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.
 - (A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how putative members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions putative members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.
 - (B) An order under this subdivision is conditional, and may be altered or amended before final judgment.
- (2)(A) When ordering that an action be certified as a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [A defendant may be ordered to advance the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the plaintiff class will win on the merits.]
 - (i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.
 - (ii) In any class action certified under subdivision (b)(3), the court shall direct to members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort [, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims]. The notice shall advise each member that any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

- (iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.
- (3) Whether or not favorable to the class,
 - (A) The judgment in an action certified as a class action under subdivision (b)(1) or (2) shall include and describe those whom the court finds to be members of the class;
 - (B) The judgment in an action certified as a class action under subdivision (b)(3) shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class; and
 - (C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.
- (4) An action may be certified as a class action—
 - (A) with respect to particular claims, defenses, or issues; or
 - (B) by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions.

- (1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.
- (2) As a class action progresses, the court may make orders that:
 - (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
 - (B) require, to protect the members of the class or otherwise for the fair conduct of the action, notice to some or all members of:
 - (i) refusal to certify a class;
 - (ii) any step in the action;
 - (iii) the proposed extent of the judgment; or
 - (iv) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, to otherwise come into the action, or to be excluded from or included in the class;
 - (C) impose conditions on the representative parties, class members, or intervenors;
 - (D) require that the pleadings be amended to eliminate allegations about representation of absent persons, and that the action proceed accordingly;
 - (E) deal with similar procedural matters.
- (3) An order under subdivision (d)(2) may be combined with an order under Rule 16, and may be altered or amended

(e) Dismissal and Compromise.

- (1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.
- (2) An action certified as a class action shall not be dismissed or compromised without the approval of the court, and notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
- (3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to

the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

PARTIAL DRAFT ADVISORY COMMITTEE NOTE

December 12, 1995

Subdivision (b). Subdivision (b) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking. When Rule 23 was substantially revised in 1966, the Advisory Committee Note stated: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Although it is clear that developing experience has superseded that suggestion, the lessons of experience are not yet so clear as to support detailed mass tort provisions either in Rule 23 or a new but related rule.

The probability that a claim would support individual litigation depends both on the probability of any recovery and the probable size of such recovery as might be won. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median recovery figures reported by the Federal Judicial Center study all were far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases frequently sweep into a class many members whose individual claims would easily support individual litigation, controlled by the class member. Individual class members may be seriously harmed by the loss of control. Class certification may be desired by defendants more than most plaintiff class members in such cases, and denial of certification or careful definition of the class may be essential to protect many plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims.

In another direction, class certification may be sought as to individual claims that would not support individual litigation because of a dim prospect of prevailing on the merits. Certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in part from the expense of defending class litigation. More important, settlement pressure reflects the fact that often there is at least a small risk of losing against a very weak claim. A claim that might prevail in one of every ten or twenty individual actions gathers compelling force—a substantial settlement value—when the small probability of defeat is multiplied by the amount of liability to the entire class.

Individual litigation may play quite a different role with respect to class certification. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual

actions. The need to wait until a class of claims has become “mature” seems to apply peculiarly to claims that at least involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity [of] class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

Item (ii) has been added to the findings required for class certification, and is supplemented by the addition of new factor (E) to the list of factors considered in making the findings required for certification. It addresses the concern that class certification may create an artificial and coercive settlement value by aggregating weak claims. It also recognizes the prospect that certification is likely to increase the stakes substantially, and thereby increase the costs of the litigation.

{ *Version 1* } Taken to its full extent, this concern might lead to a requirement that the court balance the probable outcome on the merits against the cost and burdens of class litigation, including the prospect that settlement may be forced by the small risk of a large class recovery. A balancing test was rejected, however, because of its ancillary consequences. It would be difficult to resist demands for discovery to assist in demonstrating the probable outcome. The certification hearing and determination, already events of major significance, could easily become overpowering events in the course of the litigation. Findings as to probable outcome would affect settlement terms, and could easily affect the strategic posture of the case for purposes of summary judgment and even trial. Probable success findings could have collateral effects as well, affecting a party's standing in the financial community or inflicting other harms. And a probable success balancing approach must inevitably add considerable delay to the certification process.

The “first look” approach adopted by item (ii) is calculated to avoid the costs associated with balancing the probable outcome and costs of class litigation. The court is required only to find that the class claims, issues, or defenses “are not insubstantial on the merits.” This phrase is chosen in the belief that there is a wide—although curious—gap between the higher possible requirement that the claims be substantial and the chosen requirement that they be not insubstantial. The finding is addressed to the strength of the claims “on the merits,” not to the dollar amount that may be involved. The purpose is to weed out claims that can be shown to be weak by a curtailed procedure that does not require lengthy discovery or other prolonged proceedings. Often this determination will be supported by precertification motions to dismiss or for summary judgment. Even when it is not possible to resolve the class claims, issues, or defenses on motion, it may be possible to conclude that the claims, issues, or defenses are too weak to justify the costs of certification.

{ *Version 2* } These risks can be justified only by a preliminary finding that the prospect of class success is sufficient to justify them. The prospect of success need not be a probability greater than 0.50. What is required is that the probability be sufficient in relation to the predictable costs and burdens, including settlement pressures, entailed by certification. The finding is not an actual determination of the merits, and pains must be taken to control the procedures used to support the finding. Some measure of controlled discovery may be permitted, but the procedure should be as expeditious and inexpensive as possible. At times it may be wise to integrate the certification procedure with proceedings on precertification motions to dismiss or for summary judgment. A realistic view must be taken of the burdens of certification—bloated abstract assertions about the crippling costs of class litigation or the coercive settlement effects of certification deserve little weight. At the end of the process, a balance must be struck between the apparent strength of the class position on the merits and the adverse consequences of class certification. This balance will always be case-specific, and must depend in large measure on the discretion of the district judge.

The prospect-of-success finding is readily made if certification is sought only for purposes of pursuing settlement, not litigation. If certification of a settlement class is appropriate under the standards discussed [with factor (G) and subdivision (e)] below, the prospect of success relates to the likelihood of reaching a settlement that will be approved by the court, and the burdens of certification are merely the burdens of negotiations that all parties are willing to pursue.

Care must be taken to ensure that subsequent proceedings are not distorted by the preliminary finding on the prospect of success. If a sufficient prospect is found to justify certification, subsequent pretrial and trial proceedings should be resolved without reference to the initial finding. The same caution must be observed in subsequent proceedings on individual claims if certification is denied.

One court's refusal to certify for want of a sufficient prospect of class success is not binding by way of res judicata if another would-be representative appears to seek class certification in the same court or some other court. The refusal to recognize a class defeats preclusion through the theories that bind class members. Even participation of the same lawyers ordinarily is not sufficient to extend preclusion to a new party. The first determination is nonetheless entitled to substantial respect, and a significantly stronger showing may properly be required to escape the precedential effect of the initial refusal to certify.

Item (iii) in the findings required for class certification has been amended by adding the requirement that a (b)(3) class be necessary for the fair and efficient [adjudication] of the controversy. The requirement that a class be superior to other available methods is retained, and the superiority finding—made under the familiar factors developed by current law, as well as the new factors (E), (F), and (G)—will be the first step in making the finding that a class action is necessary. It is no longer sufficient, however, to find that a class action is in some sense superior to other methods of [adjudicating] “the controversy.” It also must be found that class certification is necessary. Necessity is meant to be a practical concept. In adding the necessity requirement, it also is intended to encourage careful reconsideration of the superiority finding without running the drafting risks entailed in finding some new word to substitute for “superior.” Both necessity and superiority are together intended to force careful reappraisal of the fairness of class adjudication as well as efficiency concerns. Certification ordinarily should not be used to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not necessary for them, even if it would be superior in the sense that it consumes fewer litigating resources and more fair in the sense that it achieves more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, despite individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be “necessary” if there is to be any [adjudication] of the claims, but it is neither superior nor necessary to the fair and efficient [adjudication] of the claims. Class certification, on the other hand, is both superior and necessary for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount.

Superiority and necessity take on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. Bankruptcy proceedings may prove a superior alternative, but the certification decision must make a conscious choice about the best method of addressing the apparent problem.

Yet another problem, presented by some recent class-action settlements, arises from efforts to resolve future claims that have not yet matured to the point that would permit present individual enforcement. A toxic agent, for example, may have touched a broad universe of persons. Some have developed present injuries, most never will develop any injury, and many will develop injuries at some indefinite time in the future. Class action settlements, much more than adjudications, can be structured in ways that provide for processing individual claims as actual injuries develop in the future. Class disposition may be the only

possible means of resolving these “futures” claims. Although “necessary” in this sense, class certification—if it is ever appropriate—must be carefully guarded to protect the rights of class members who do not even have a realistic way to determine whether they may some day experience actual injury. The needs to effect meaningful notice and to protect the opportunity to opt out of the class require that any class be limited to terms that permit an individual claimant to opt out of the class and pursue individual litigation within a reasonable time after knowing both of the individual injury and the existence of the class litigation.

Factor (E) has been added to subdivision (b)(3) to complement the addition of new item (ii) and the addition of the necessity element to item (iii). The role of the probable success of the class claims, issues, or defenses is discussed with those items.

Factor (F) has been added to subdivision (b)(3) to effect a modest retrenchment in the use of class actions to aggregate trivial individual claims. It bears on the item (iii) requirement that a class action be superior to other available methods and necessary for the fair and efficient [adjudication] of the controversy. It permits the court to deny class certification if the public interest in—and the private benefits of—probable class relief do not justify the burdens of class litigation. This factor is distinct from the evaluation of the probable outcome on the merits called for by item (ii) and factor (E). At the extreme, it would permit denial of certification even on the assumption that the class position would certainly prevail on the merits.

Administration of factor (F) requires great sensitivity. Subdivision (b)(3) class actions have become an important private means for supplementing public enforcement of the law. Legislation often provides explicit incentives for enforcement by private attorneys-general, including qui tam provisions, attorney-fee recovery, minimum statutory penalties, and treble damages. Class actions that aggregate many small individual claims and award “common-fund” attorney fees serve the same function. Class recoveries serve the important functions of depriving wrongdoers of the fruits of their wrongs and deterring other potential wrongdoers. There is little reason to believe that the Committee that proposed the 1966 amendments anticipated anything like the enforcement role that Rule 23 has assumed, but there is equally little reason to be concerned about that belief. What counts is the value of the enforcement device that courts, aided by active class-action lawyers, have forged out of Rule 23(b)(3). In most settings, the value of this device is clear.

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public interest. Adoption of a provision for “fluid” or “cy pres” class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class members and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the res judicata effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is so slight as to be essentially trivial or meaningless, however, the core justification of class enforcement fails. Only public values can justify class certification. Public values do not always provide sufficient justification. An assessment of public values can properly include reconsideration of the probable outcome on the merits made for purposes of item (ii) and factor (E). If the prospect of success on the merits is slight and the value of any individual recovery is insignificant, certification can be denied with little difficulty. But even a strong prospect of success on the merits may not be sufficient to justify certification. It is no disrespect to the vital social policies embodied in much modern regulatory legislation to recognize that the effort to control highly complex private behavior can outlaw much behavior that involves merely trivial or technical violations. Some “wrongdoing” represents nothing worse than a wrong guess about the uncertain requirements of ambiguous law, yielding “gains” that could have been won by slightly different conduct of no greater social value. Disgorgement and deterrence in such circumstances may be unfair, and indeed may thwart important public interests by discouraging desirable behavior in areas of legal indeterminacy.

Factor (G) is added to resolve some, but by no means all, of the questions that have grown up around the use of “settlement classes.” Factor (G) bears only on (b)(3) classes. Among the many questions that it does not touch is the question whether it is appropriate to rely on subdivision (b)(1) to certify a mandatory non-opt-out class when present and prospective tort claims are likely to exceed the “limited fund” of a defendant’s assets and insurance coverage. This possible use of subdivision (b)(1) presents difficult issues that cannot yet be resolved by a new rule provision. Subdivisions (c)(1)(A)(3) and (e) also bear on settlement classes.

A settlement class may be described as any class that is certified only for purposes of settling the claims of class members on a class-wide basis, not for litigation of their claims. The certification may be made before settlement efforts have even begun, as settlement efforts proceed, or after a proposed settlement has been reached.

Factor (G) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and litigation. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important and even vitally important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court’s Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, particularly if the action appears to have been shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Subdivision (c)(1)(A)(ii) requires that if the class was certified only for settlement, class members be allowed to opt out of any settlement after the terms of the settlement are approved by the court. Parties who fear the impact of such opt-outs on a settlement intended to achieve total peace may respond by refusing to settle, or by crafting the settlement so that one or more parties may withdraw from the settlement after the opt-out period. The opportunity to opt out of the settlement creates special problems when the class includes “futures” claimants who do not yet know of the injuries that will one day bring them into the class. As to such claimants, the right to opt out created by subdivision (c)(1)(A)(ii) must be held open until the injury has matured and for a reasonable period after actual notice of the class settlement.

The right to opt out of a settlement class is meaningless unless there is actual notice. Actual notice in turn means more than exposure to some official pronouncement, even if it is directly addressed to an individual class member by name. The notice must be actually received and also must be cast in a form that conveys meaningful information to a person of ordinary understanding. A class member is bound by the judgment in a settlement-class action only after receiving actual notice and a reasonable opportunity to opt out of the judgment.

Although notice and the right to opt out provide the central means of protecting settlement class members, the court must take particular care in applying some of Rule 23’s requirements. Definition of the class must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

When a settlement class seems premature, the same goals may be served in part by forming an opt-in class under subdivision (b)(4). An opt-in class will bind only those whose actual participation guarantees actual notice and voluntary choice. The major difference, indeed, is that the opt-in class provides clear assurance of the same goals sought by requiring actual notice and a right to opt out of a settlement-class judgment. Other virtues of opt-in classes are discussed separately with subdivision (b)(4).

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b) should apply to a request for permission to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order “involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

Only a modest expansion of the opportunity for permissive interlocutory appeal is intended. Permission to appeal should be granted with great restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify some expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the mer-

its of an individual claim that, standing alone, is far smaller than the costs of litigation. [The prior draft added that if a plaintiff class is certified after judgment for the representative plaintiffs, the result may be “one-way” intervention. That does not seem much of a concern to me—if indeed there is a valid claim on the merits, why should we be concerned that the late-certified class members have not had to take a sporting chance on losing their valid claims?] An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is indeed modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

cited in *Lambert v. Nutraceutical Corp.*, 2017
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Appendix C

Figures and Tables

The following figures and tables are generally derived from data collected in the field study described in Appendix D. One exception is Table 19, which is based on data derived from the Federal Judicial Center's district court time study and a review of relevant pleadings in class actions in the time study. *See* discussion *infra* Appendix D.

Another exception relates to the data supporting Figures 7–10 and Tables 16–17. The data for the class action cases in those figures and tables come from the class action field study that is the subject of this report. The comparison data for nonclass cases come from the Federal Judicial Center's Integrated Data Base (IDB), which is a compilation of records and case status reports routinely sent by clerks of court to the Administrative Office of the United States Courts. The Center makes the IDB available to the public through the Center-University Consortium for Political and Social Research, which is located at the University of Michigan, Ann Arbor, Michigan 48109-1248. The IDB number is ICPSR # 8440.

As discussed in the Introduction and in Appendix D, we present these figures and data to describe the class action activity in four district courts in cases terminated within the study period. We present the data and figures as a systematic examination of class action activity in those four courts in cases terminated between July 1, 1992, and June 30, 1994. We caution the reader not to read too much into the data and especially not to draw inferences and conclusions about the universe of class activity. Data on subsets of the data elements, such as nature-of-suit categories or types of class actions, are particularly susceptible to misinterpretation because of their small numbers. For example, differences among districts in such cases may simply represent chance fluctuations or little more than that.

Figure 1: Median Net Settlement Per Class Member in Settled, Certified Class Actions

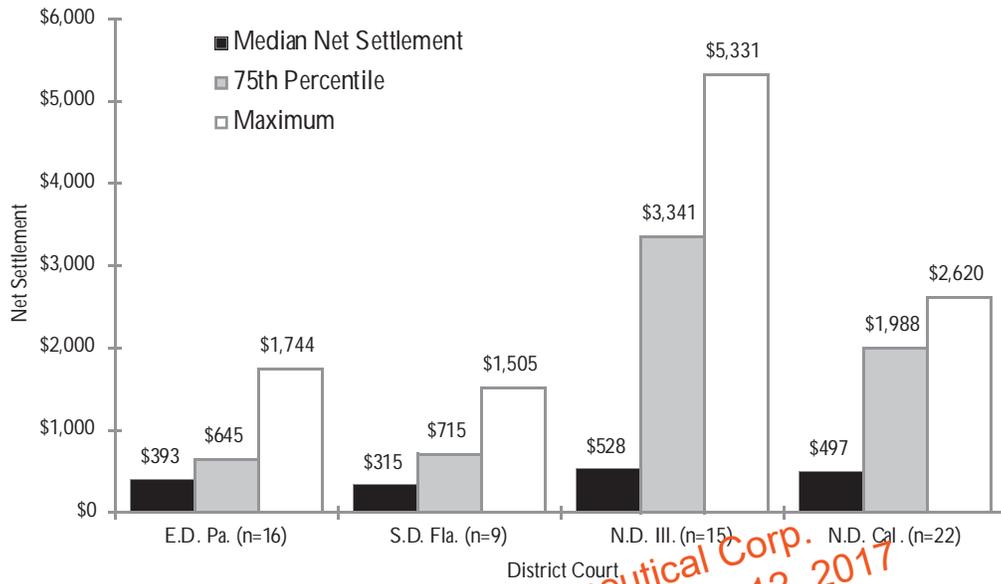
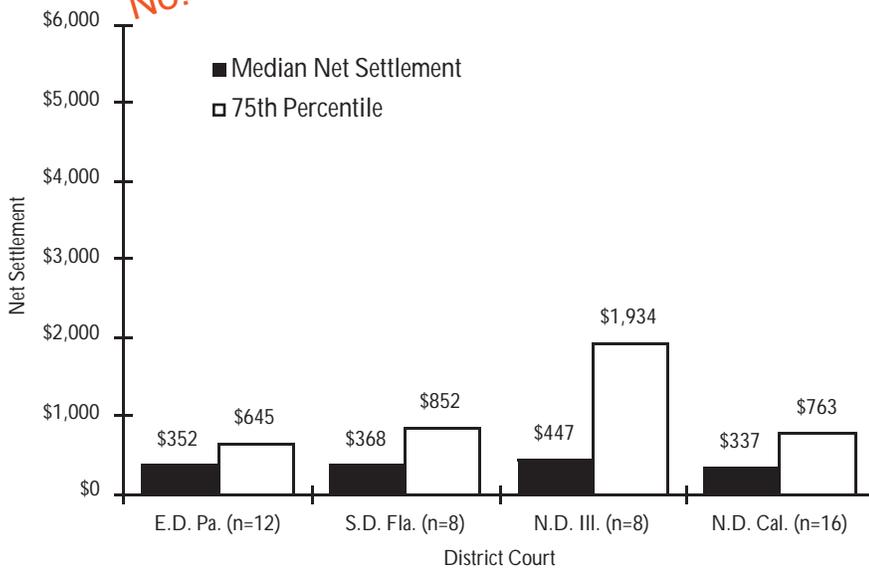


Figure 2: Median Net Settlement Per Class Member in Settled, Certified Securities Class Actions



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Figure 3: Median Net Settlement Per Class Member in Settled, Certified Nonsecurities Class Actions

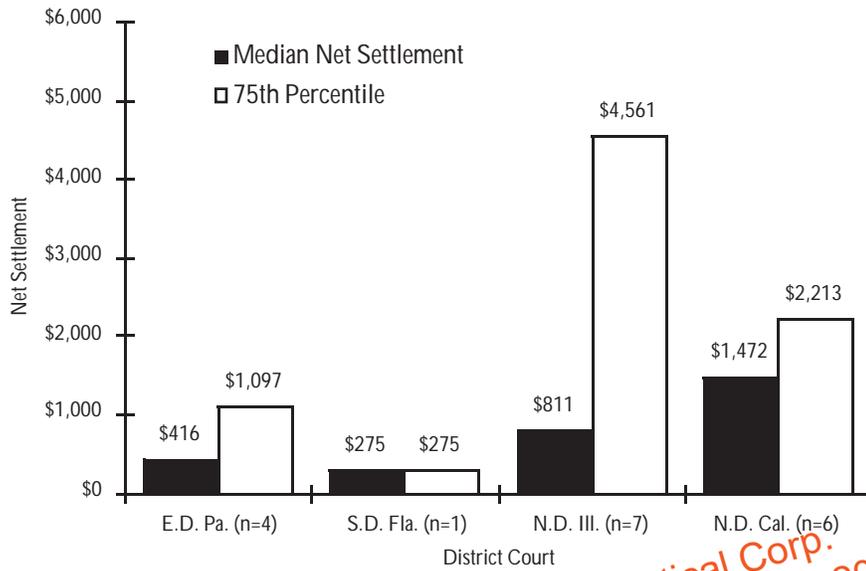
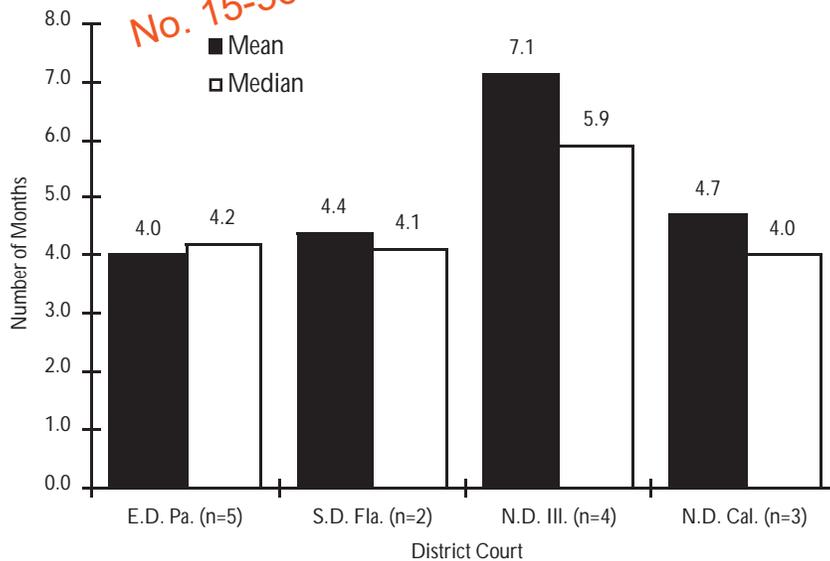
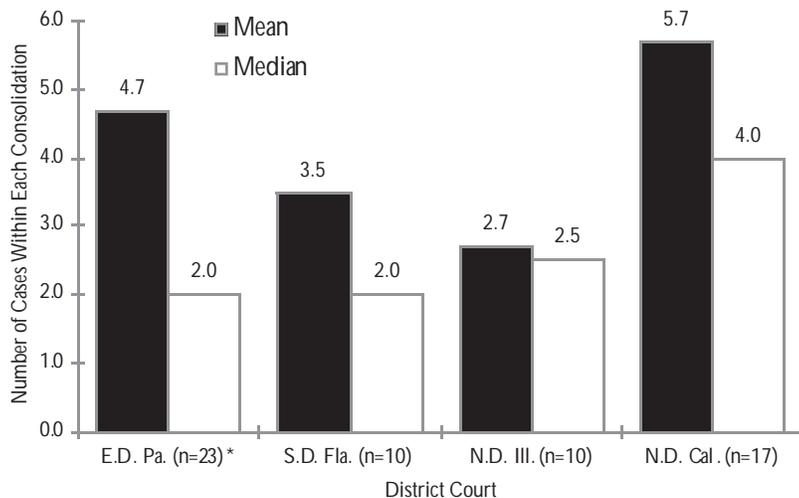


Figure 4: Mean and Median Times from Filing of Complaint to Multidistrict Litigation Consolidation



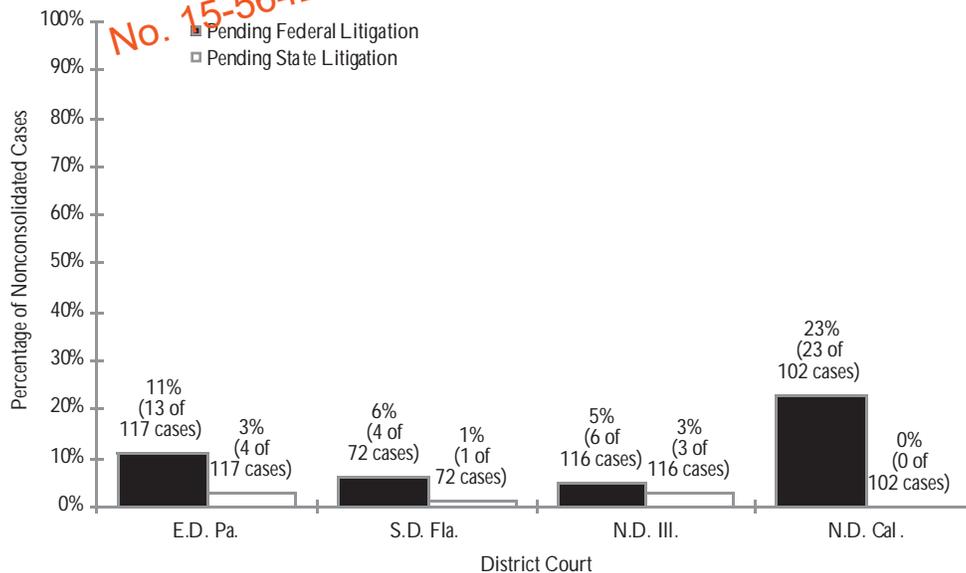
*cited in Lambert v. Nutraceutical Corp.
No. 15-56423 archived on September 12, 2017*

Figure 5: Mean and Median Number of Cases Within Each Consolidation by the District Courts



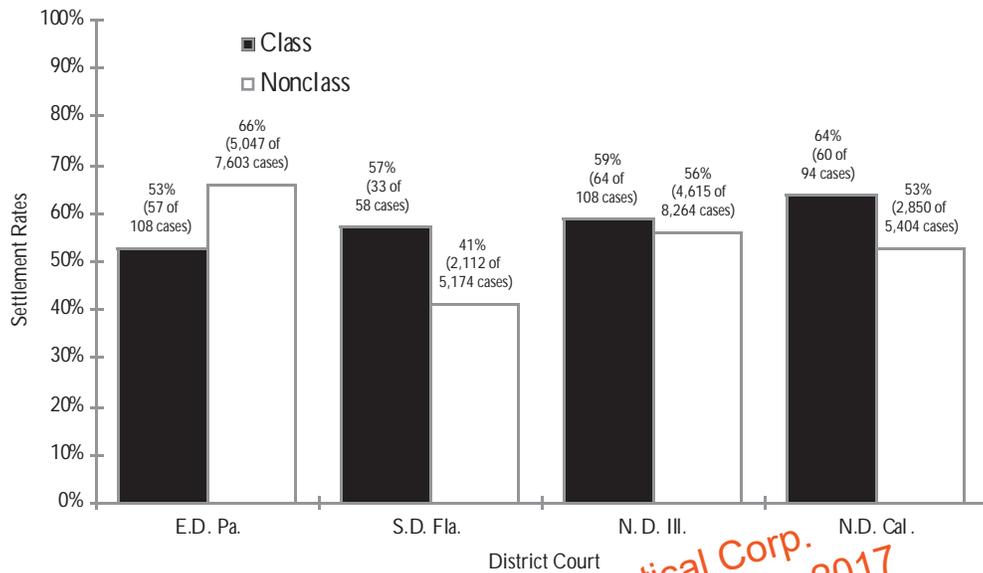
*Missing value = 1.

Figure 6: Percentage of Related Cases Not Consolidated with Similar Litigation Pending in Federal and State Courts



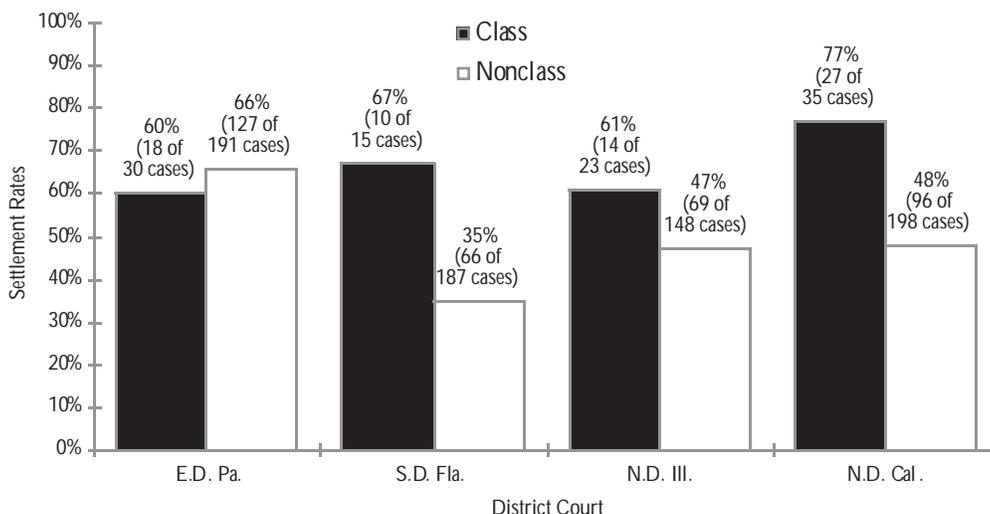
cited in Lambert v. Nutraceutical Corp.
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Figure 7: Settlement Rates for Nonprisoner Class Actions Compared to Nonprisoner Civil Actions in Cases Terminated Between July 1, 1992, and June 30, 1994



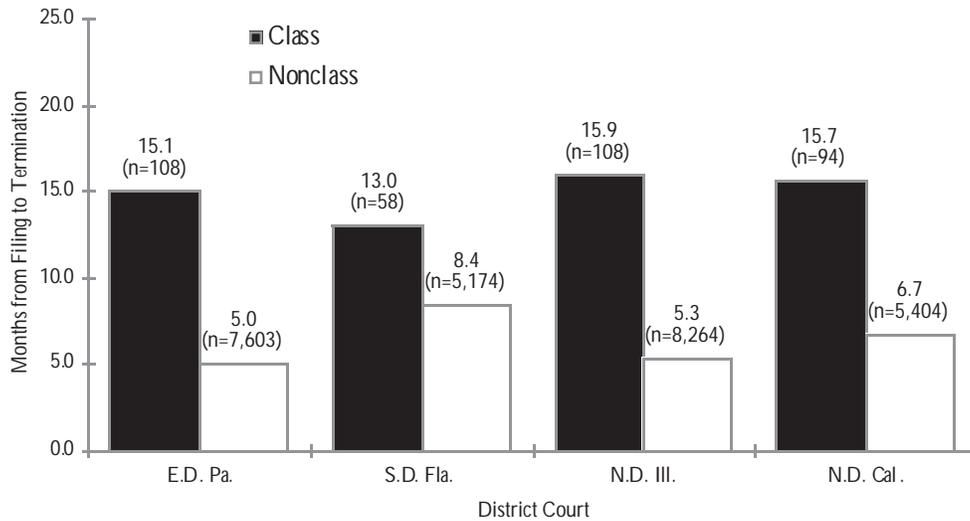
Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data; Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994. The Administrative Office data on settlement for the study cases differed from our data for the same set of cases. The differences were not consistently in the same direction. Overall, the Administrative Office data showed 190 settlements in the four districts compared to 214 in the Federal Judicial Center database. The settlement rates and numbers shown by the Administrative Office data for class cases were 64% (69), 41% (24), 47% (51), and 49% (46), respectively.

Figure 8: Settlement Rates for Securities Class Actions Compared to Securities Civil Actions



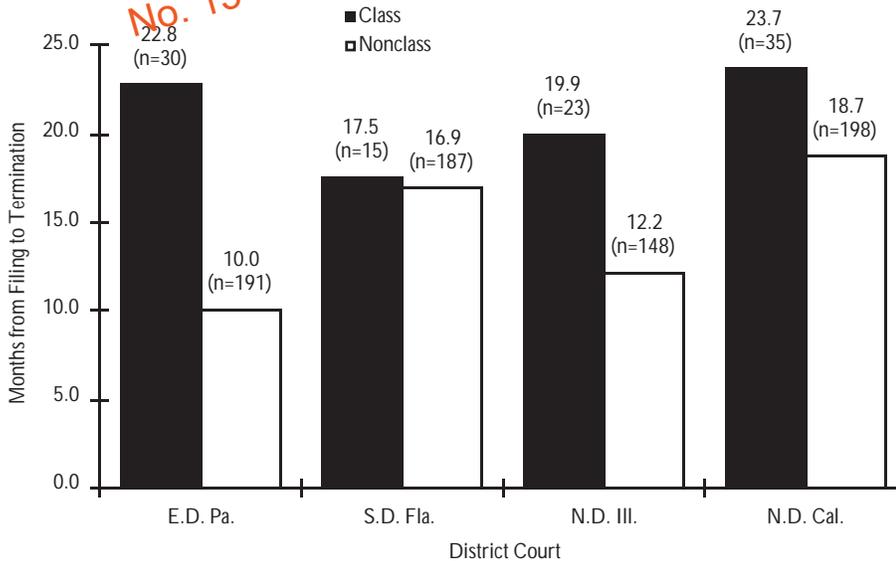
Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data; Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994. The Administrative Office data on settlement differed from our data for the same set of cases. The differences were not consistently in the same direction. Overall, the Administrative Office data showed fifty-seven settlements in the four districts compared to sixty-nine in the Federal Judicial Center database. The settlement rates shown by the Administrative Office data for securities class actions were 80% (twenty-four), 27% (four), 52% (twelve), and 49% (seventeen), respectively.

Figure 9: Median Time from Filing to Disposition of Nonprisoner Class Actions Compared to Nonprisoner Civil Actions



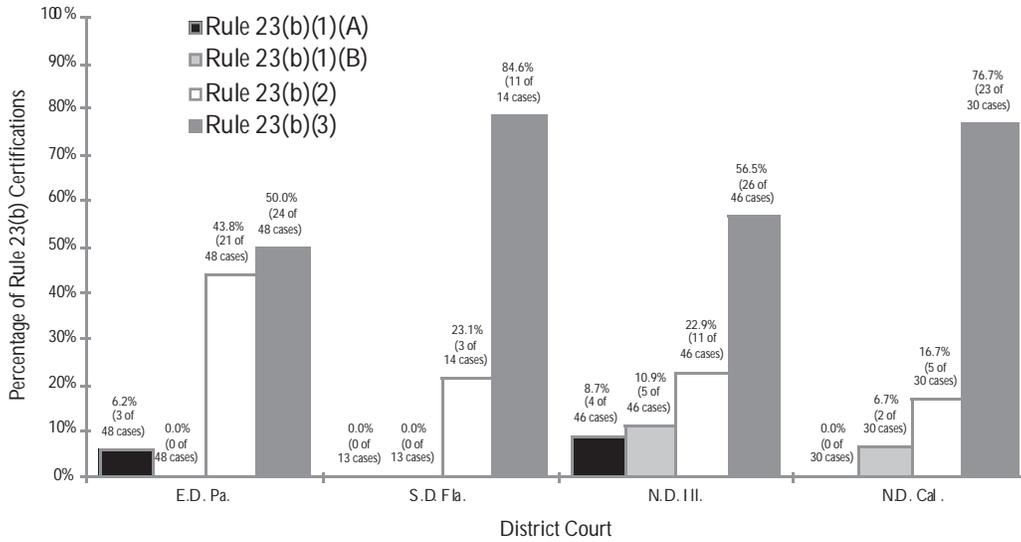
Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data, Class: Federal Judicial Center class action project database (see first paragraph, Appendix D).

Figure 10: Median Time from Filing to Disposition of Securities Class Actions Compared to Securities Civil Actions



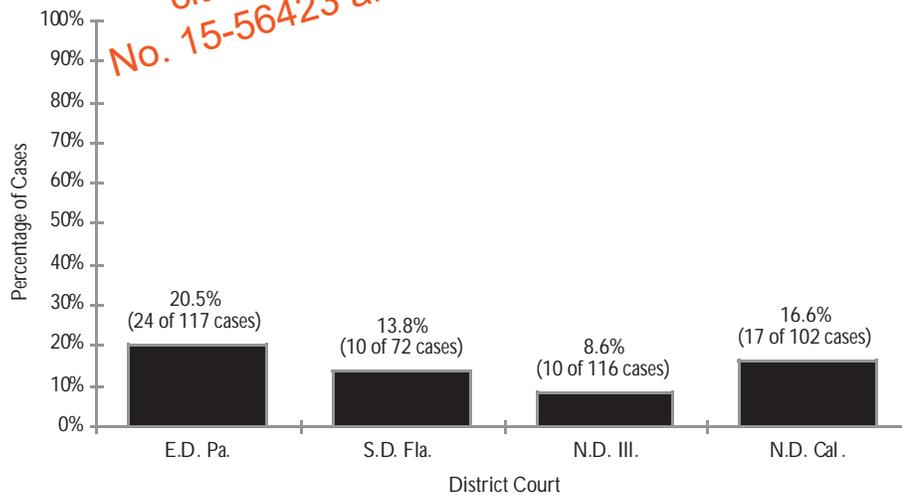
Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data, Class: Federal Judicial Center class action project database (see first paragraph, Appendix D).

Figure 11: Rule 23(b) Certifications



Note: Data exclude combinations of types.

Figure 12: Cases with Intradistrict Consolidation



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Figure 13: Cases Referring to a Related Federal or State Case

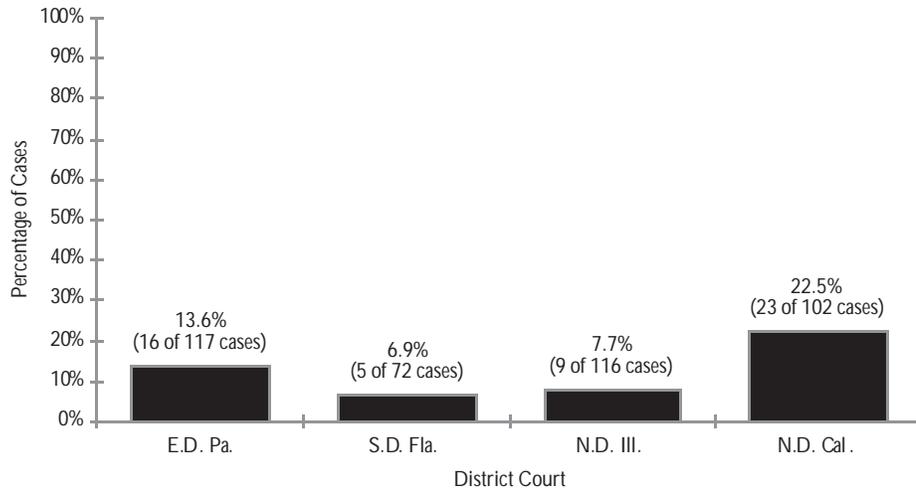


Figure 14: Cases with Multidistrict Litigation Consolidation or Intradistrict Consolidation or Related Case

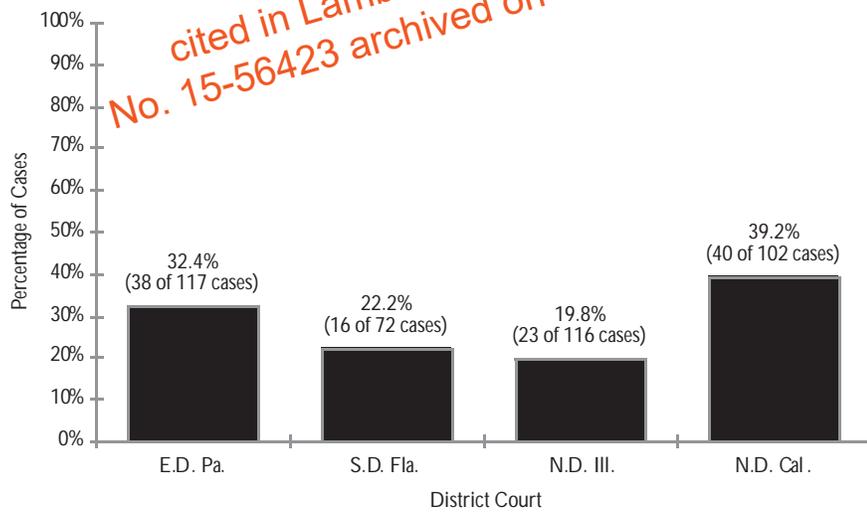


Figure 15: Certified Class Actions in Which Class Representatives Were Changed

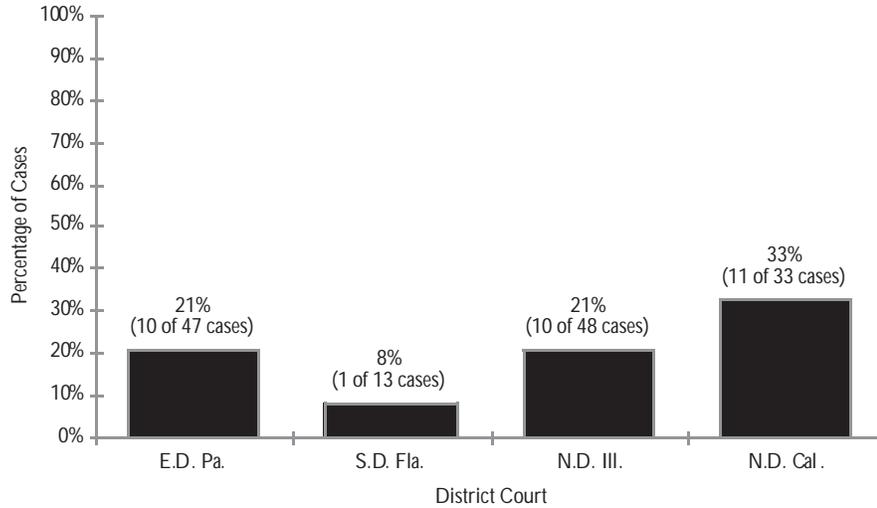


Figure 16: Certified, Settled, Approved Class Actions with Separate Award to Class Representatives

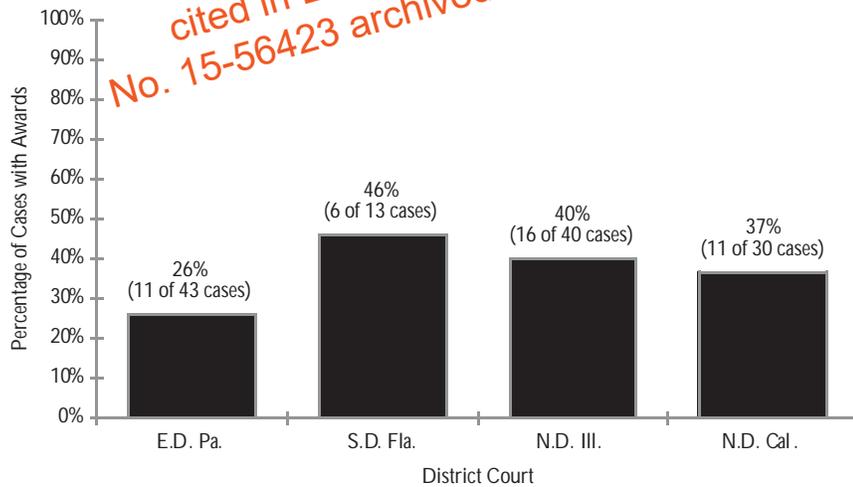


Figure 17: Median Amount of Separate Awards to Class Representatives in Certified, Settled, Approved Class Actions

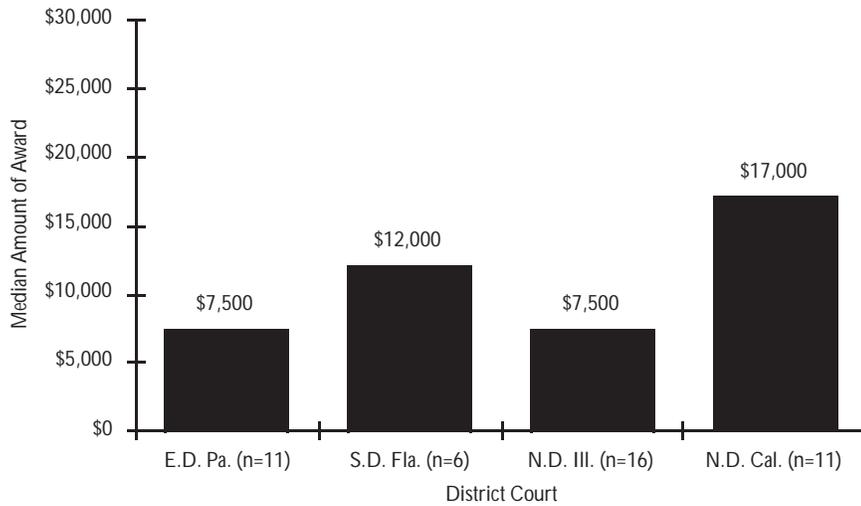


Figure 18: Median and 75th Percentile of Award per Individual Class Representative in Certified, Settled, Approved Class Actions



Figure 19: Time from Filing of Complaint to Filing of Motion for Class Certification

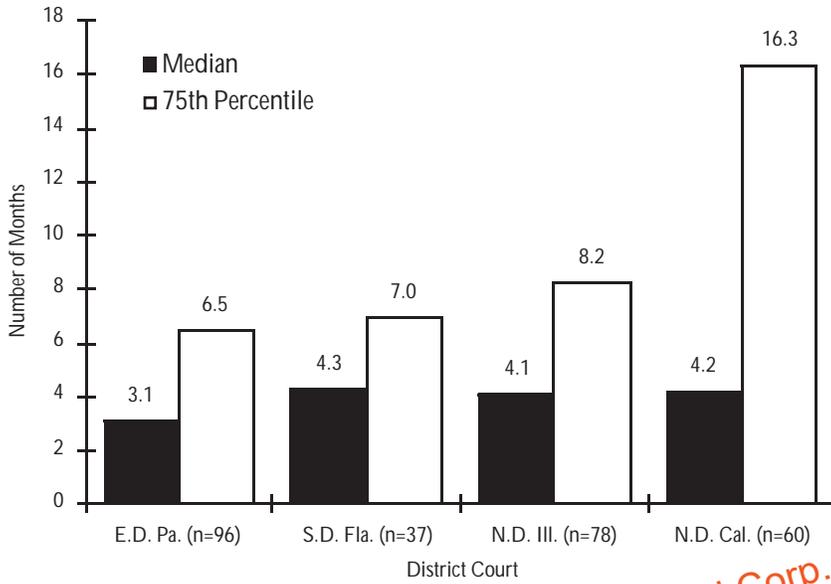
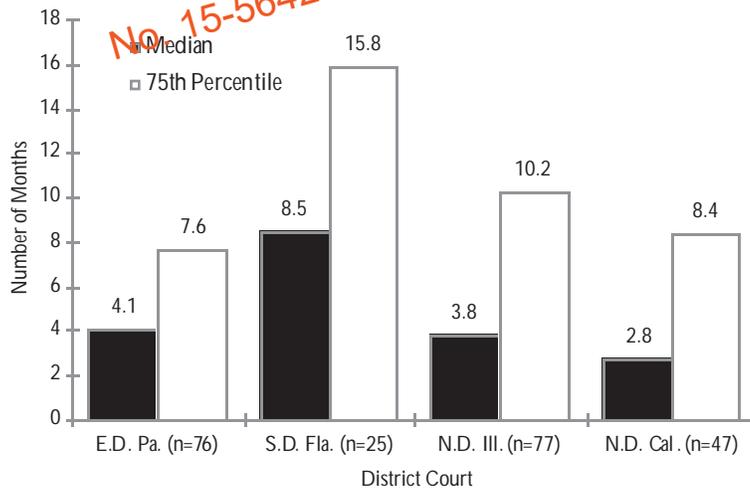


Figure 20: Time from Filing Motion for Class Certification to Judicial Ruling on Certification Issue



*cited in Lambert v. Nutraceutical Corp.
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Figure 21: Length of Time from Filing of Complaint to Settlement in Settled Cases

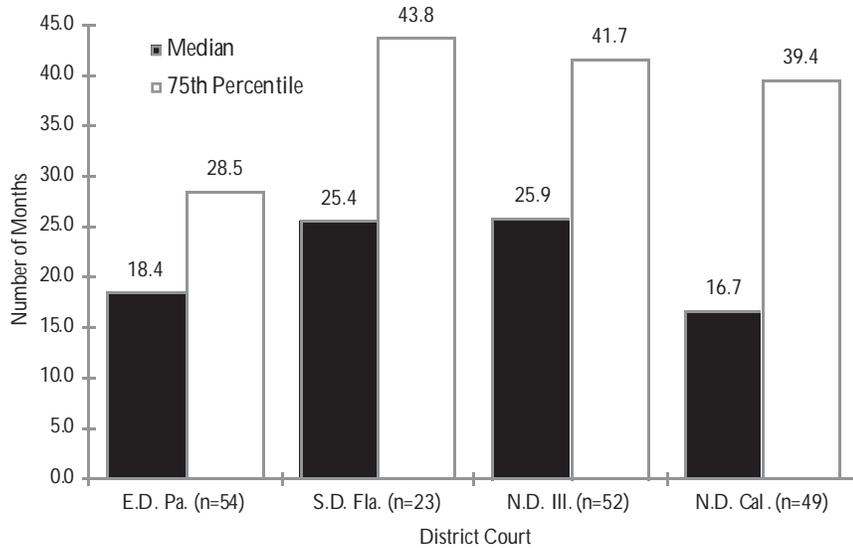


Figure 22: Length of Time from Ruling on Certification Motion to Settlement in Settled Cases

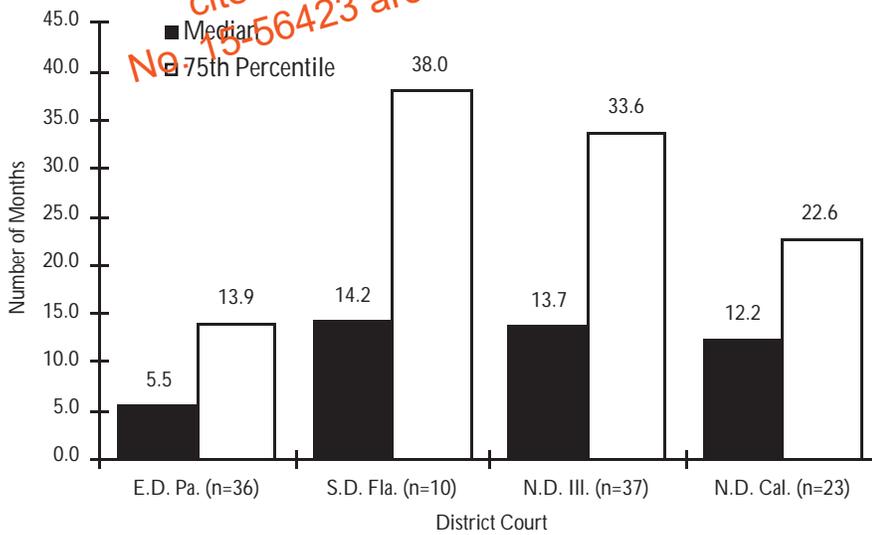
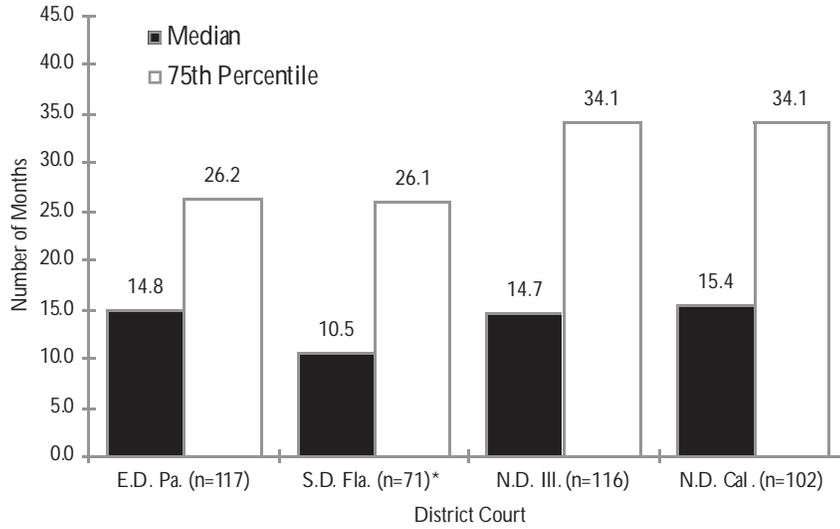
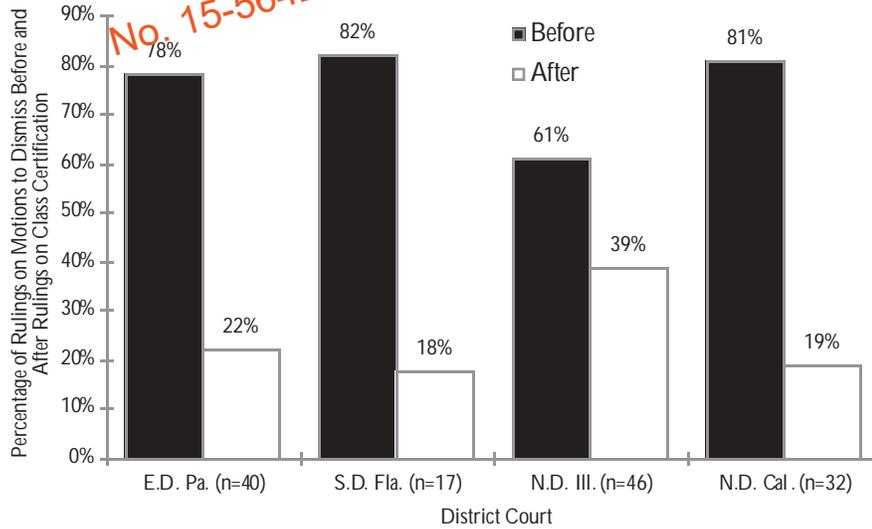


Figure 23: Length of Time from Filing of Complaint to Termination



*Missing value = 1.

Figure 24: Timing of Rulings on Motions to Dismiss in Relation to Rulings on Class Certification



No. 15-56423 archived on September 12, 2017
 cited in Lambert v. Nutraceutical Corp.

Figure 25: Timing of Rulings on Motions for Summary Judgment in Relation to Rulings on Class Certification

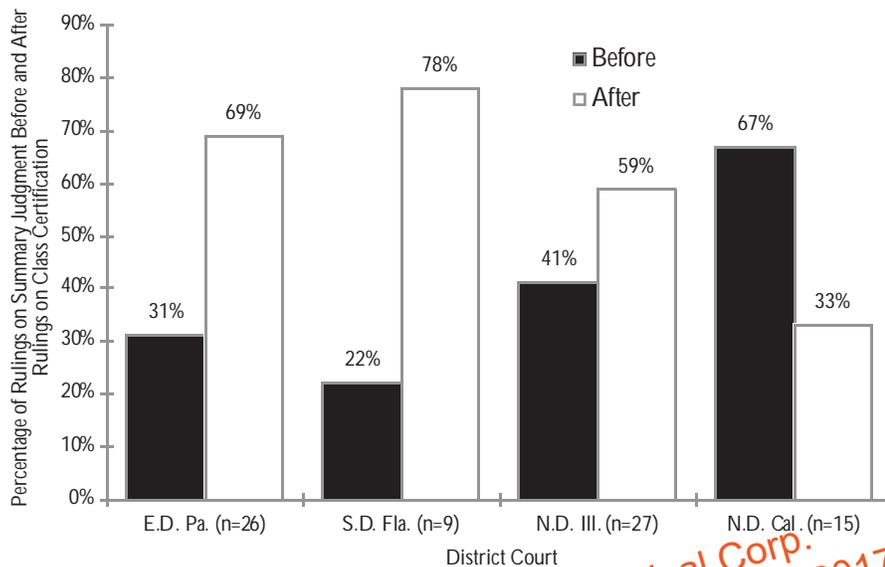


Figure 26: Type of Party Filing Motion for Summary Judgment

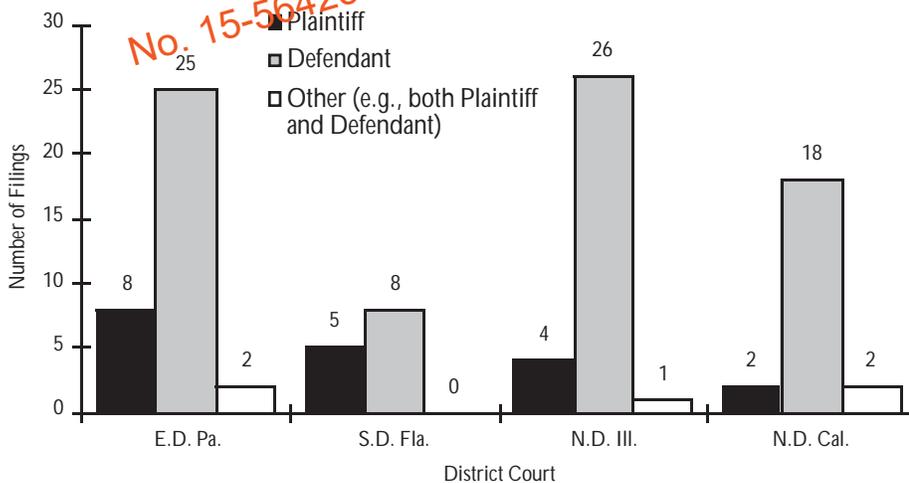


Figure 27: Rulings on Motions for Summary Judgment

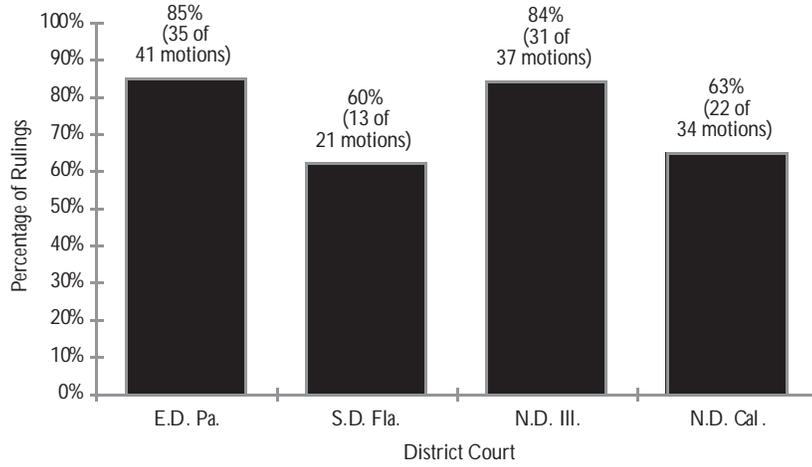


Figure 28: Percentage of Rulings Granting Dismissal or Summary Judgment

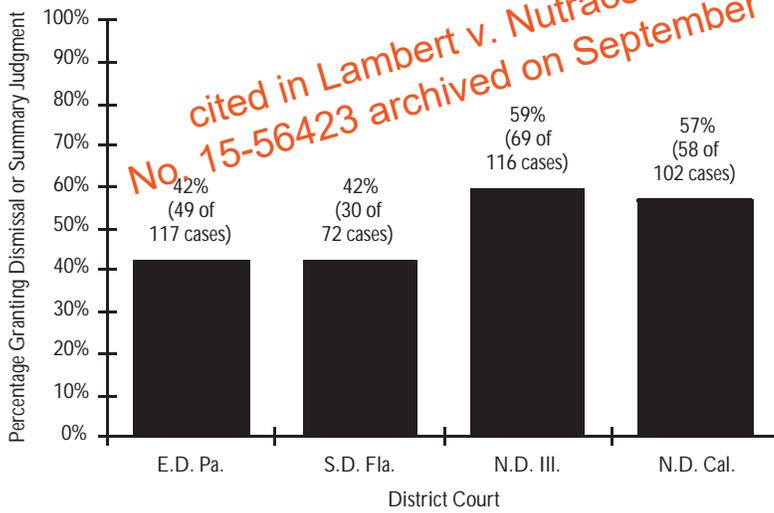
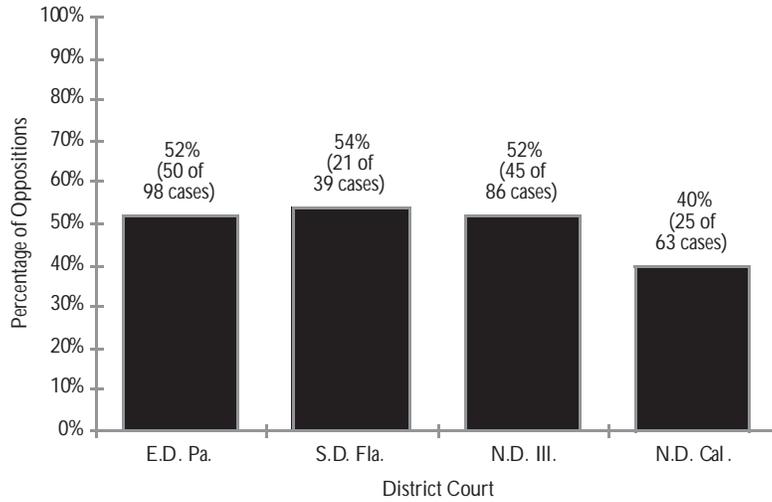


Figure 29: Percentage of Oppositions to Motions to Certify and Sua Sponte Orders Regarding Certification



Note: Data include only those cases where either a motion to certify was filed or a sua sponte order issued.

Figure 30: Percentage of Submissions of Opposition Memoranda to Certification Motions and Sua Sponte Orders Regarding Certification

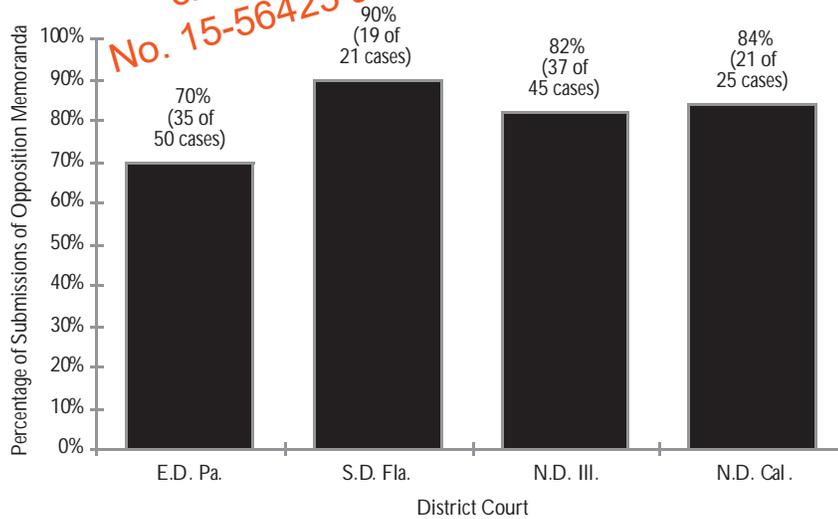


Figure 31: Supporting and Opposition Brief Lengths in Cases with Opposition to Motion for Certification or Sua Sponte Orders Regarding Certification

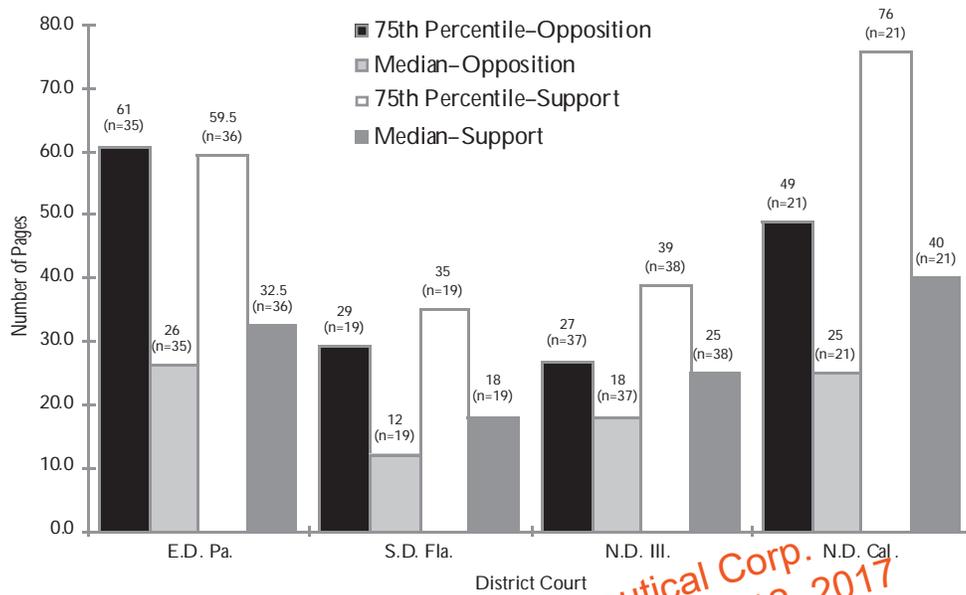


Figure 32: Length of Judicial Opinions in Certified and Noncertified Cases with Certification Disputes

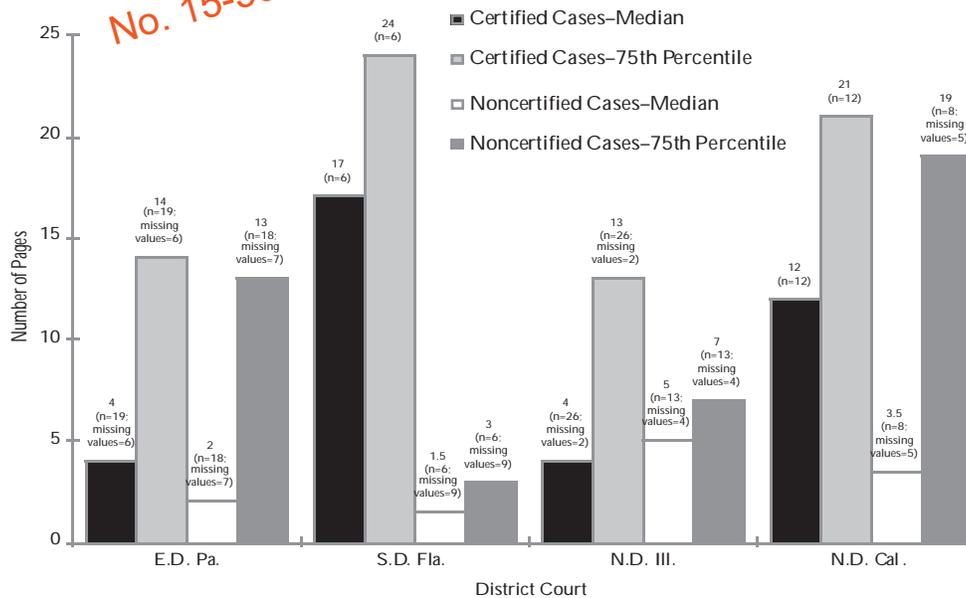


Figure 33: Arguments Raised in Cases Opposing Motion for Class Certification or Sua Sponte Order Regarding Certification

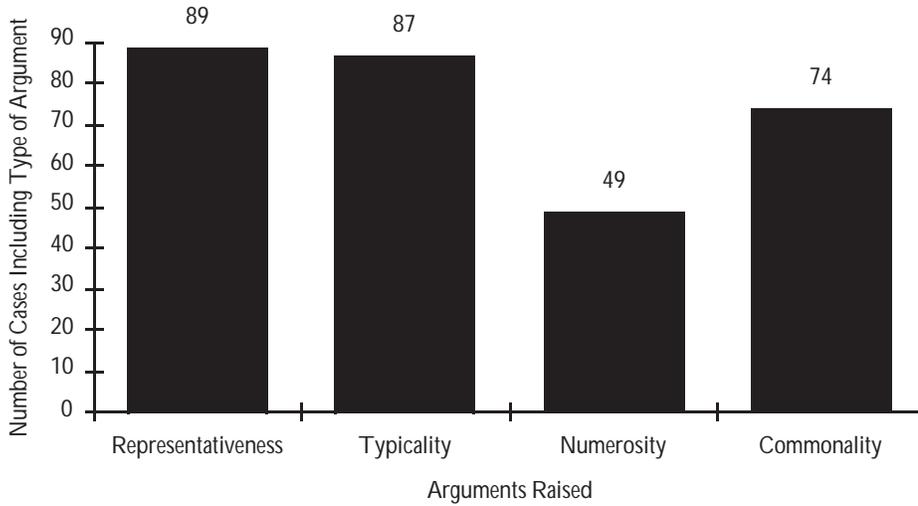


Figure 34: Number of Party-Filed Motions For or Against Class Certification

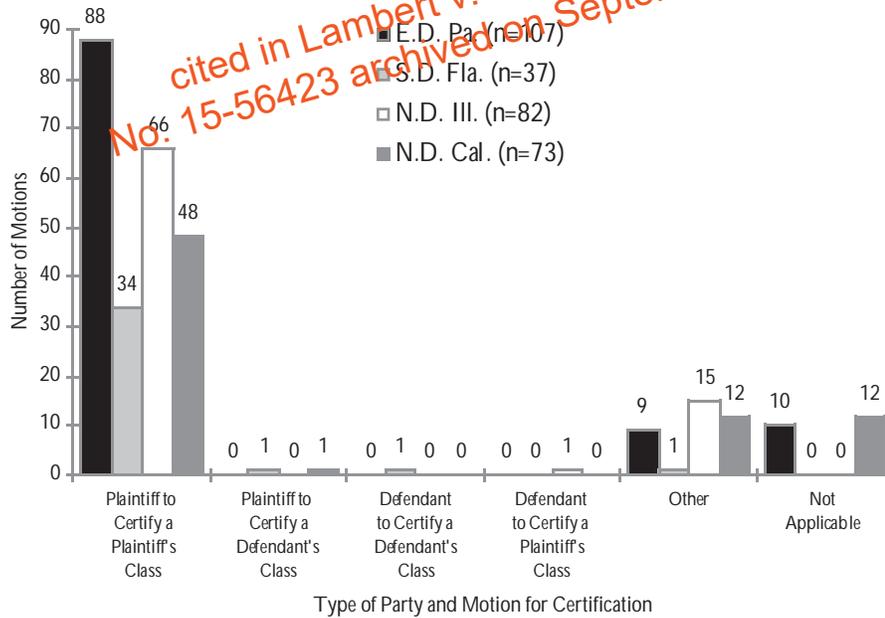


Figure 35: Certified Subclasses and Nature of Suit

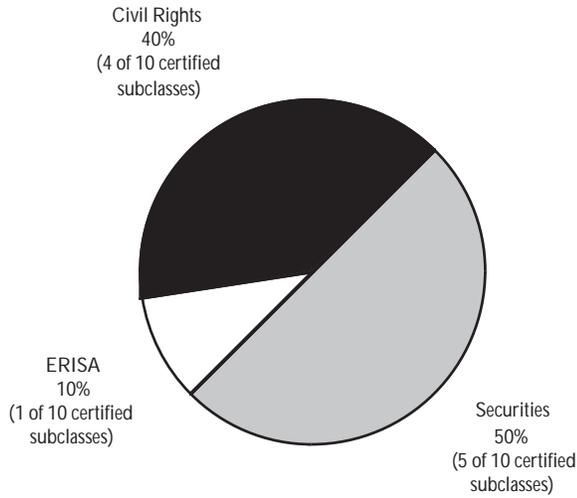
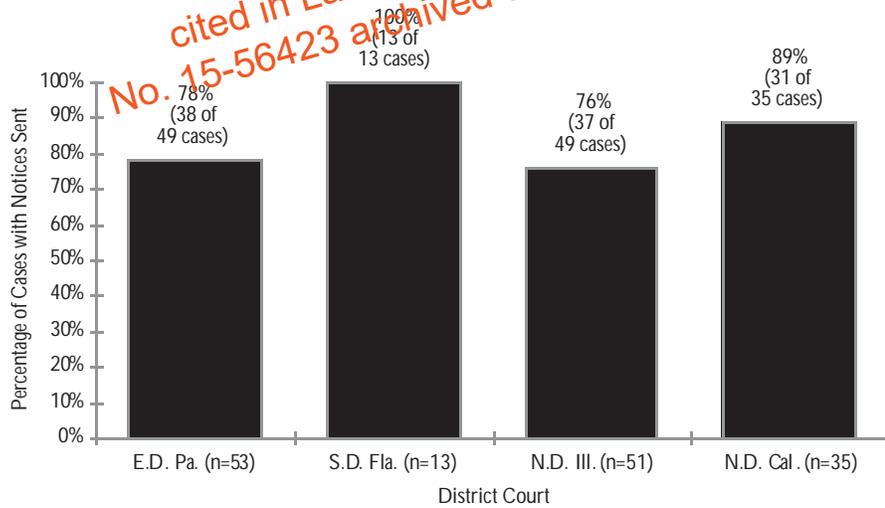


Figure 36: Class Notice Issued as a Percentage of Certified Class Actions



Note: Data are missing for some cases in two districts.

Figure 37: Time from Ruling on Certification to Notice of Certification for Cases in Which Notice Was Issued

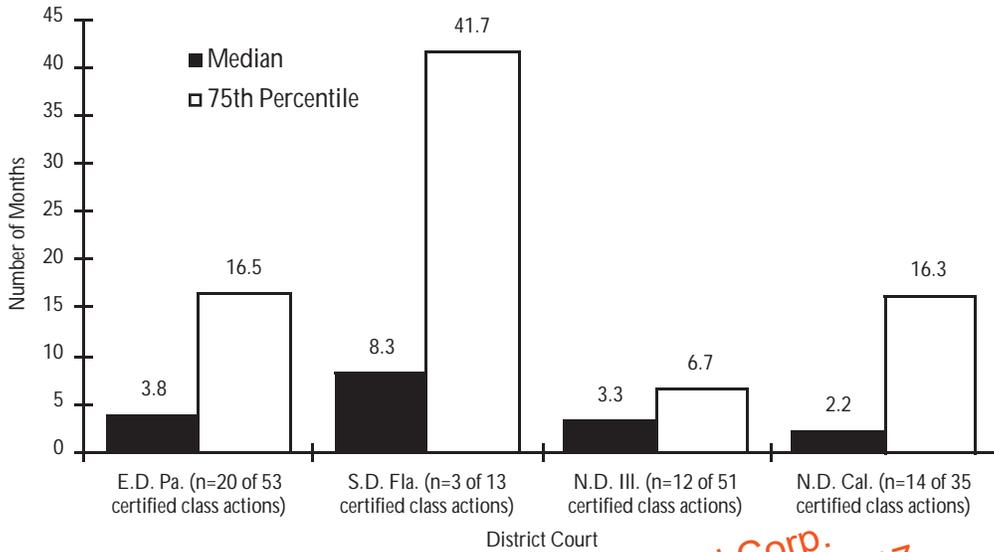


Figure 38: Median Number of Recipients of Individual Notice in Certified (b)(3) Class Actions

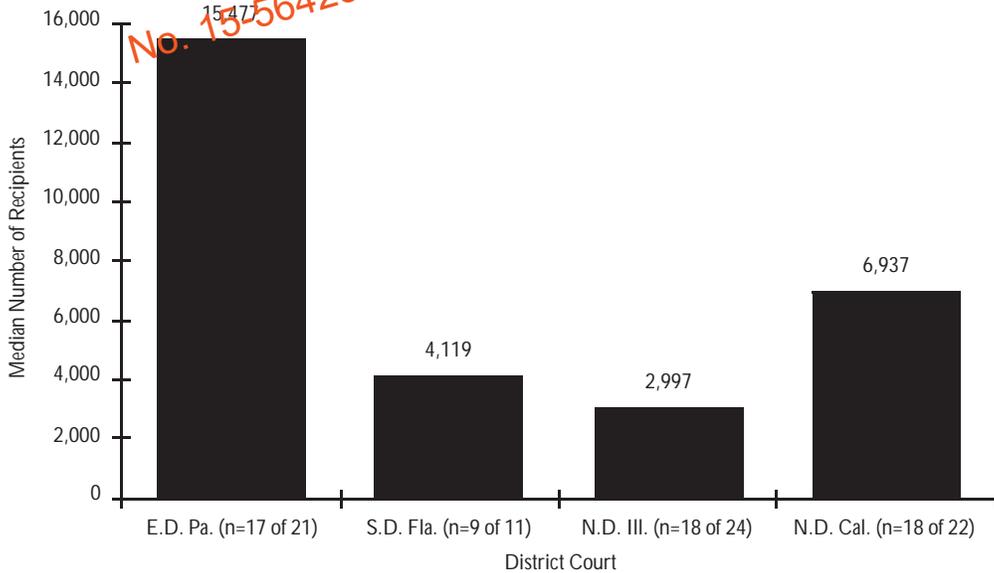


Figure 39: Percentage of Contests of the Notice Process in Cases with Notice

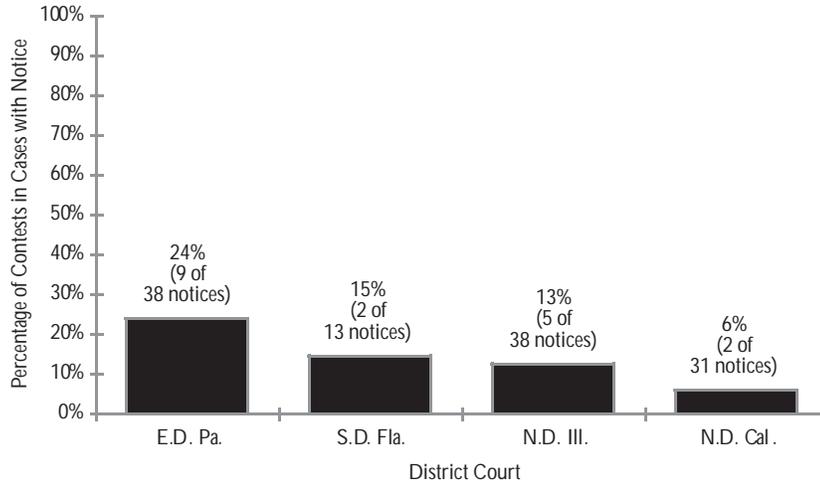
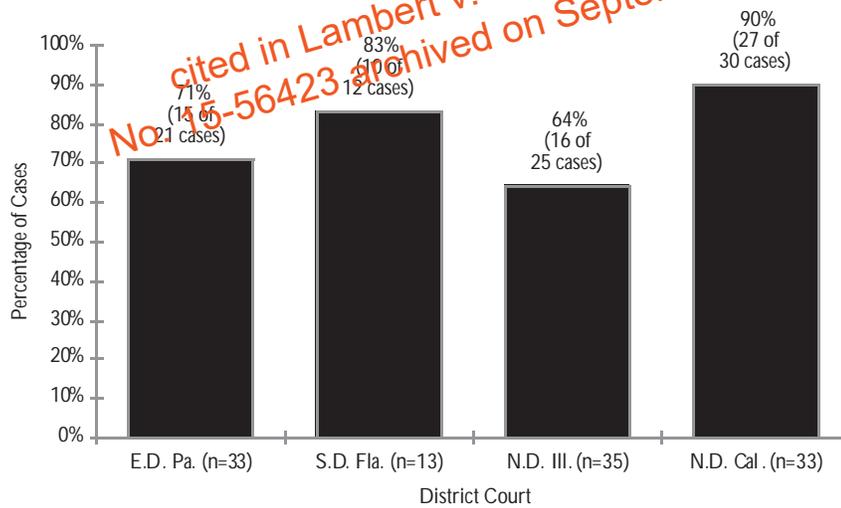
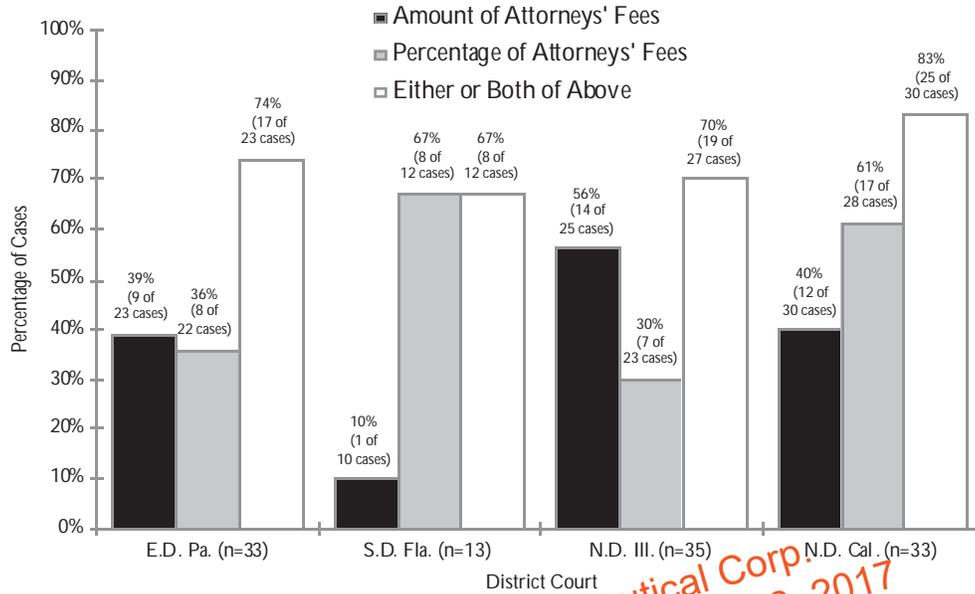


Figure 40: Percentage of Settled Class Actions with Notice Where Notice Includes the Gross Amount of the Settlement



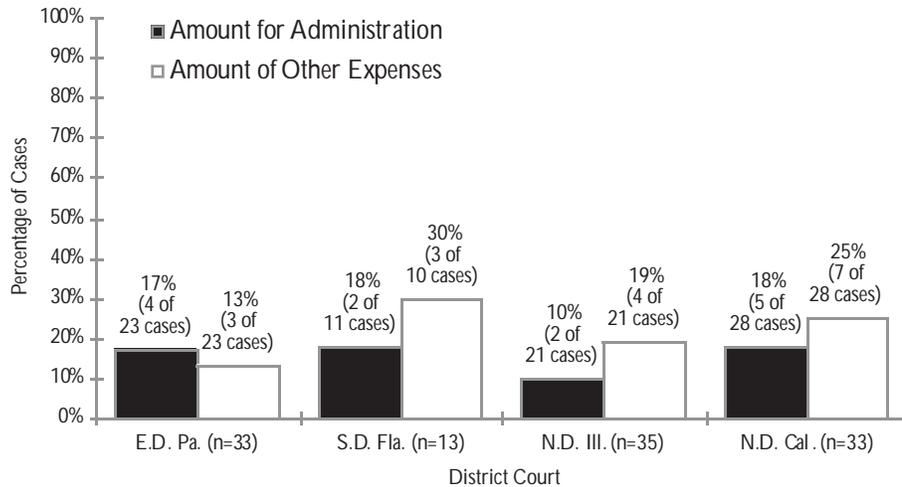
Note: The balance of the cases for each court had missing or inapplicable data.

Figure 41: Percentage of Settled Class Actions with Notice Where Notice Included Amount or Percentage of Attorneys' Fees



Note: The balance of the cases for each court had missing or inapplicable data. In some cases, notices included both the percentage and amount of attorneys' fees.

Figure 42: Percentage of Settled Class Actions with Notice Where Notice Included Amounts for Administration or Other Expenses



Note: The balance of the cases had missing or inapplicable data.

Figure 43: Percentage of Certified 23(b)(3) Class Actions with One or More Opt Outs

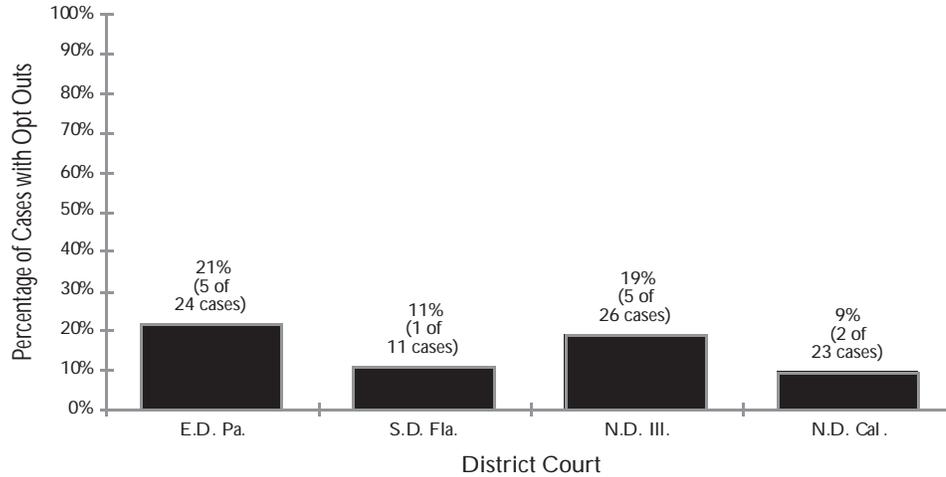


Figure 44: Percentage of Certified 23(b)(3) Civil Rights, ERISA, Securities, and Other Class Actions with One or More Opt Outs

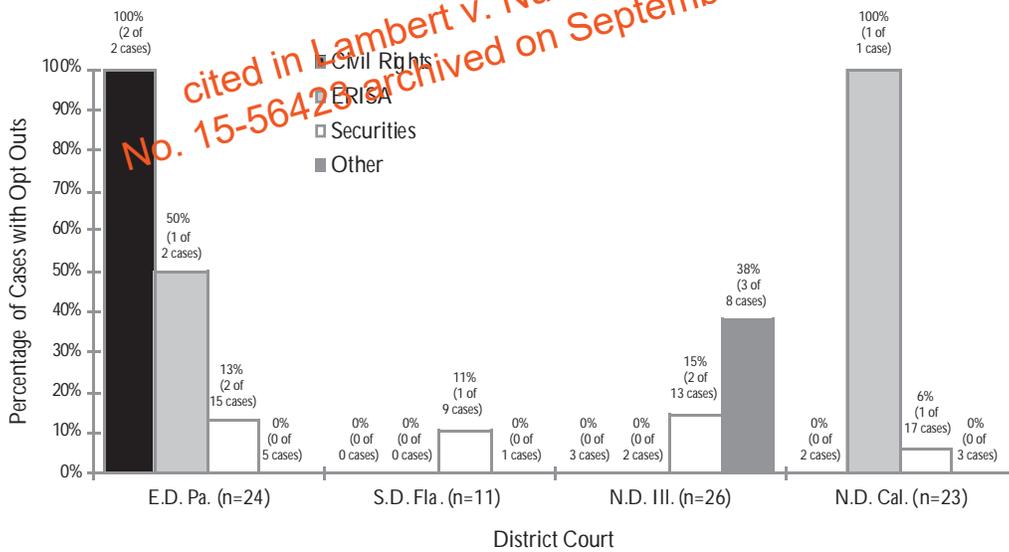


Figure 45: Percentage of Certified, Settled 23 (b)(3) Class Actions with One or More Opt Outs of a Proposed Settlement

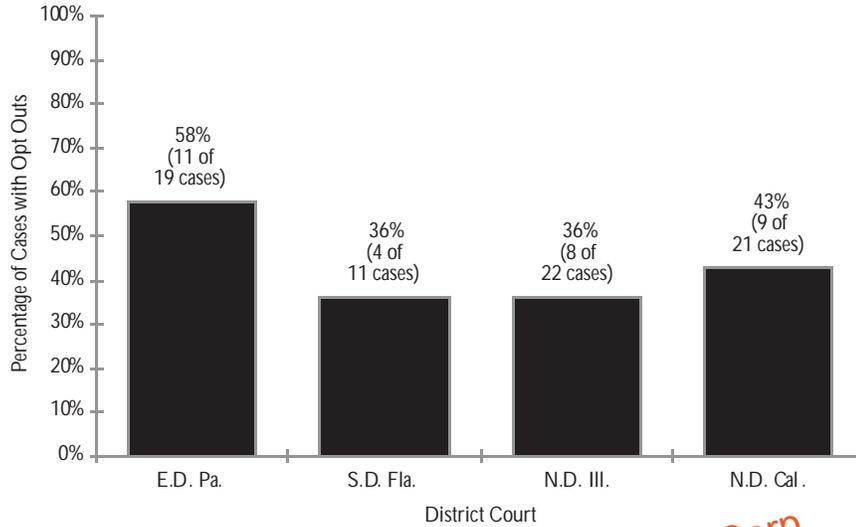


Figure 46: Percentage of Certified, Settled 23 (b)(3) Class Actions with One or More Opt Outs from a Proposed Settlement by Nature of Suit

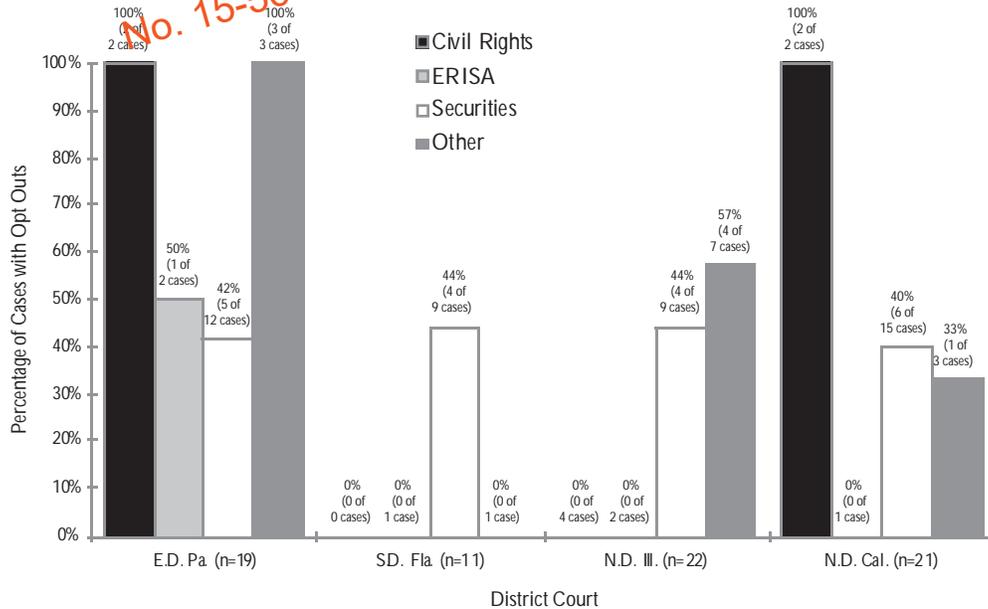


Figure 47: Percentage of Certified (b)(3) Class Actions with One or More Opt Outs from Certification or Settlement

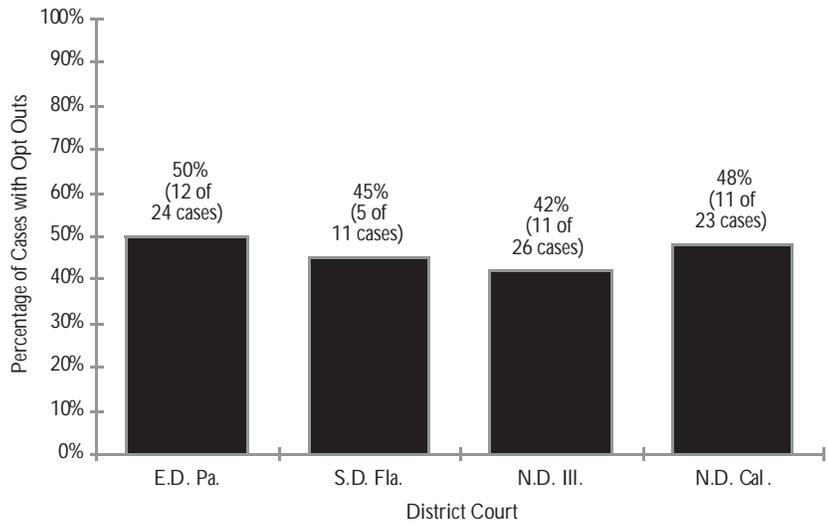
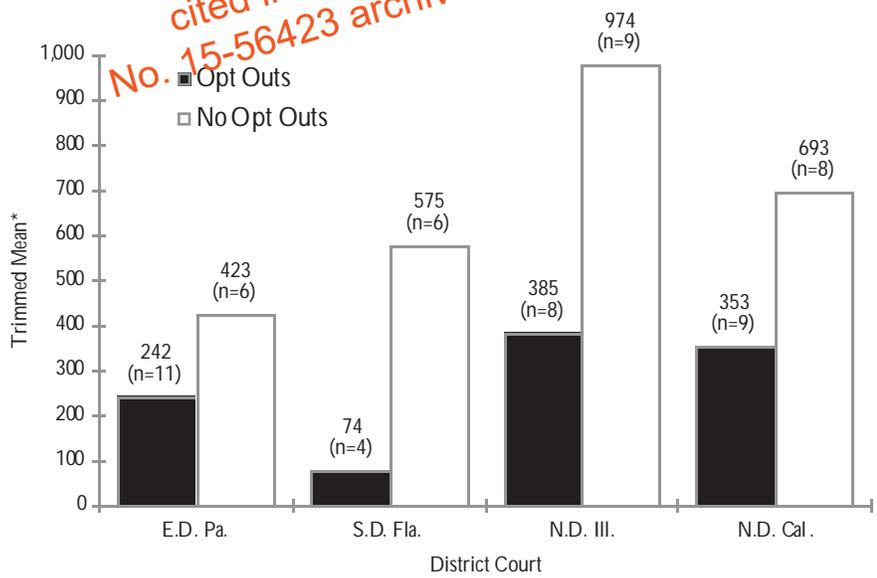


Figure 48: Net Settlement Value Per Class Member of Certified, Settled Rule 23(b)(3) Classes With or Without One or More Opt Outs



* The trimmed mean statistic is, like the mean (average) and the median (midpoint), a measure of the central tendency of a set of data. In this case, to reduce the distortion of extreme values, a 10% trimmed mean was used, that is, a mean of the data after eliminating 10% of the data from the top and the bottom.

Figure 49: Percentage of Certified, Settled Class Actions Using Claims Procedures to Distribute Settlements

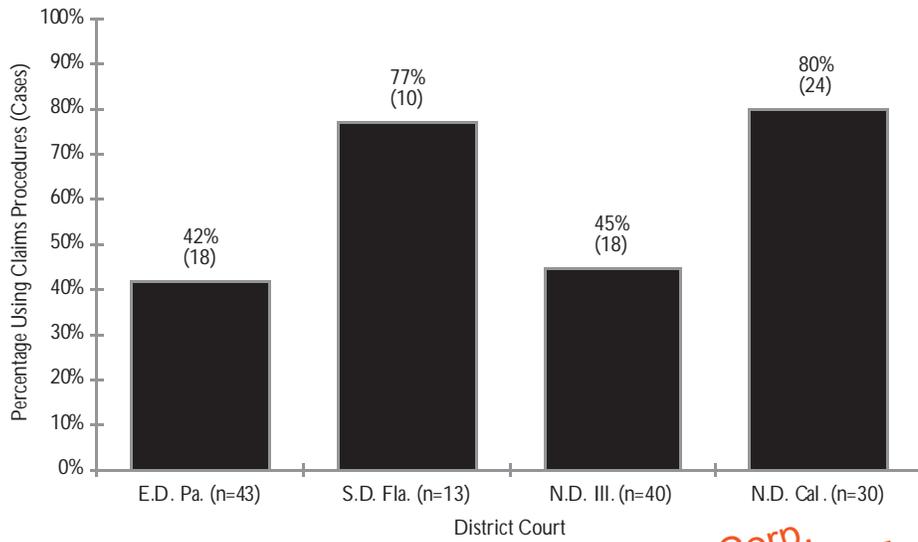


Figure 50: Percentage of Certified, Settled Securities Class Actions Using Claims Procedures to Distribute Settlements

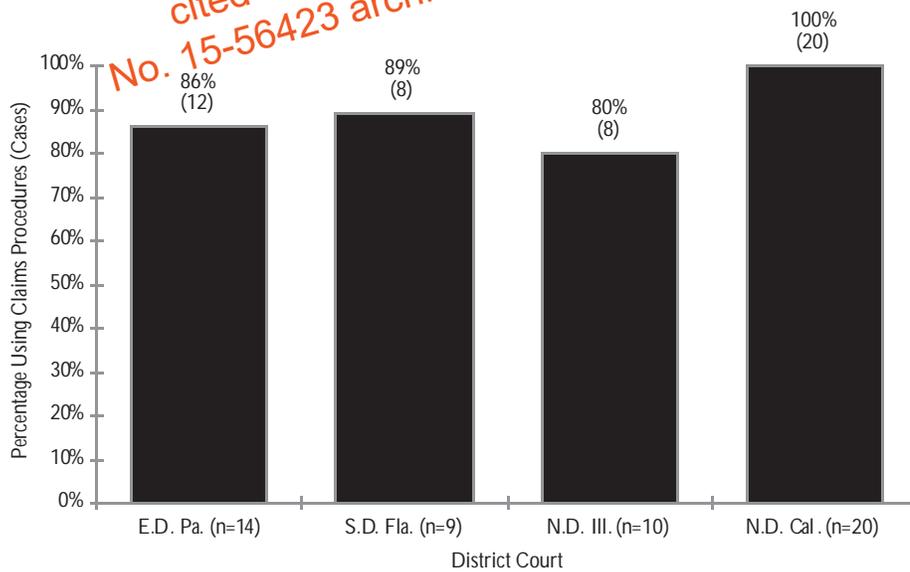


Figure 51: Percentage of Cases with Attempts of Putative Class Members to Intervene and Percentage of Cases with Interventions Allowed

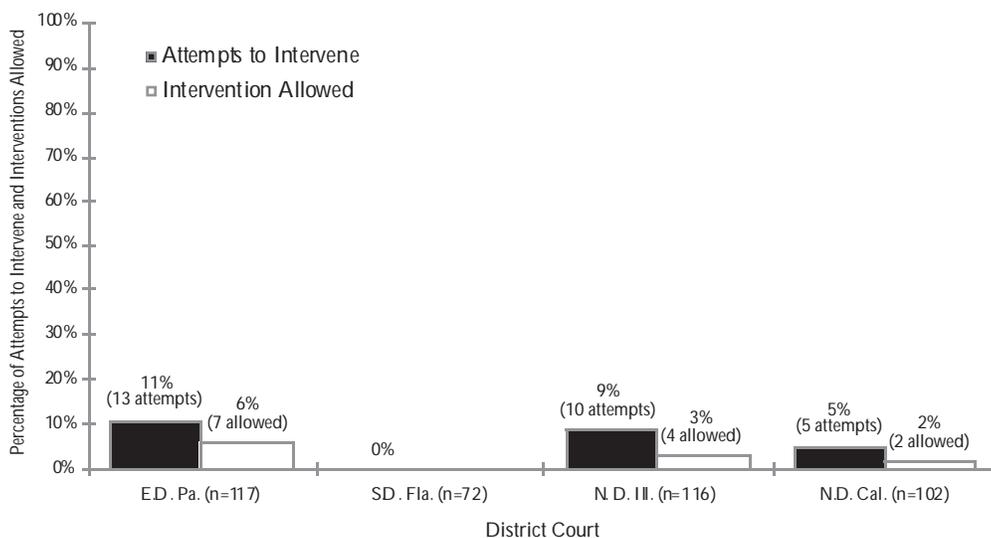
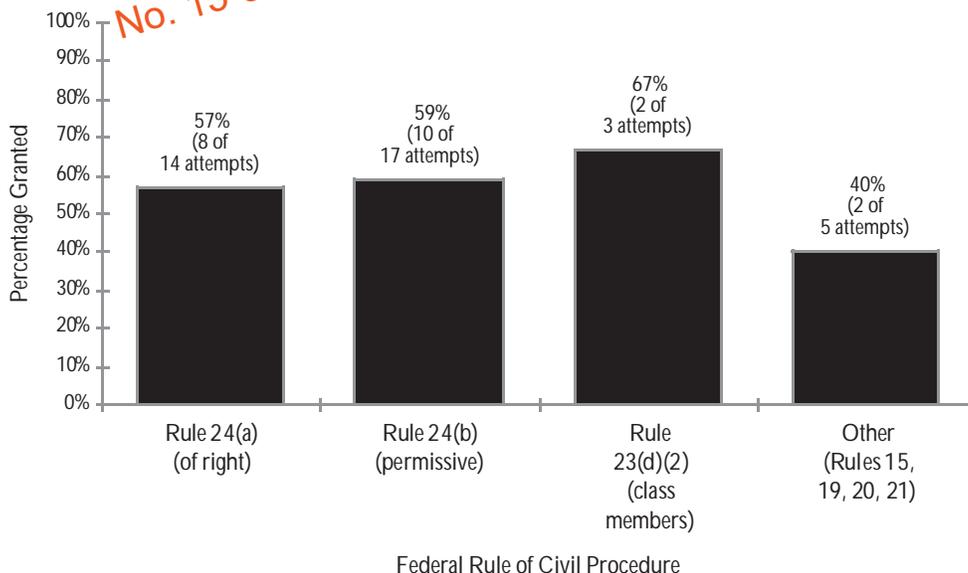


Figure 52: Success Rates for Various Bases for Attempted Intervention by Putative Class Members



Note: Some motions cited more than one source.

Figure 53: Percentage of Settlement Approval Hearings with Participation by Class Representatives or Nonrepresentative Class Members or Objectors

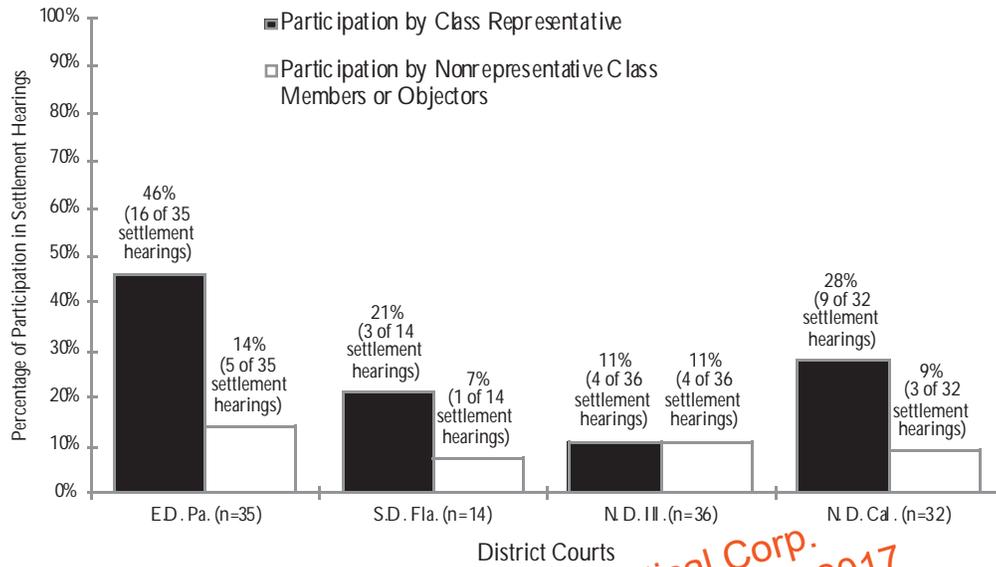
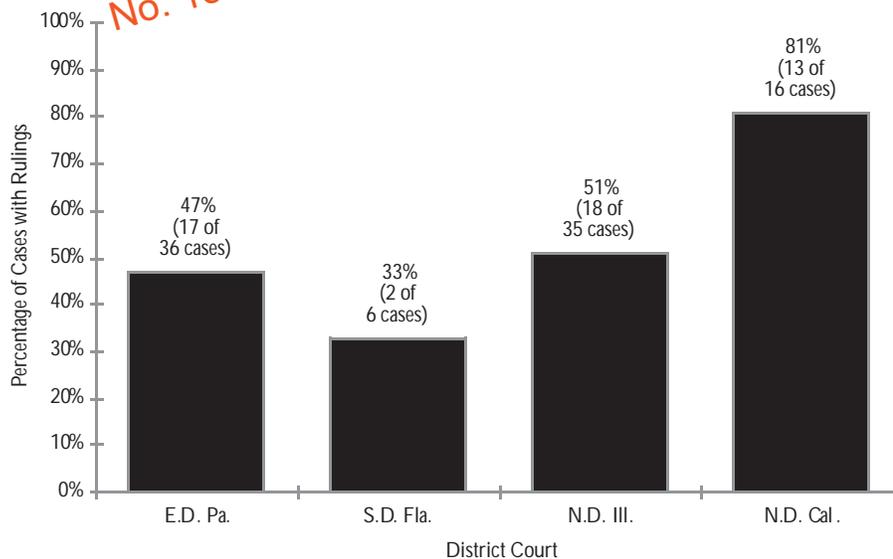
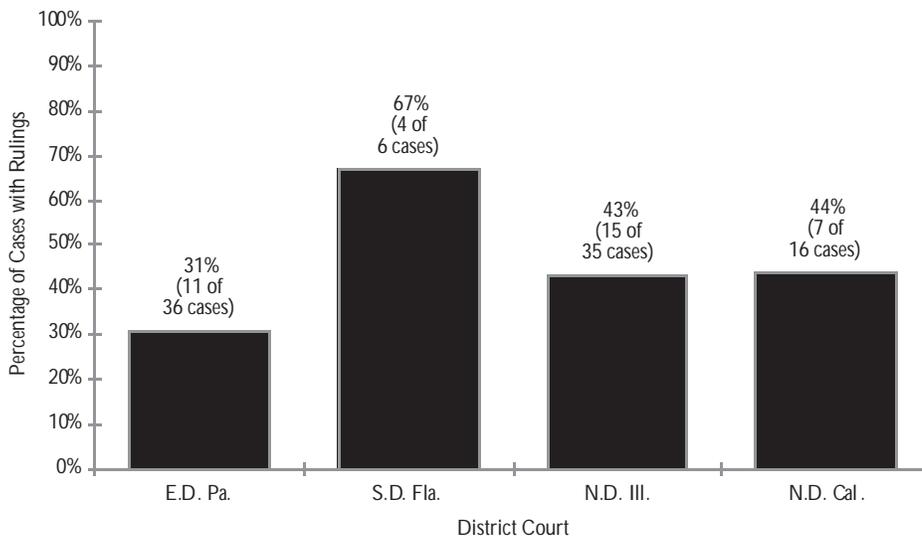


Figure 54: Percentage of Certified Class Actions with a Ruling on a Motion to Dismiss



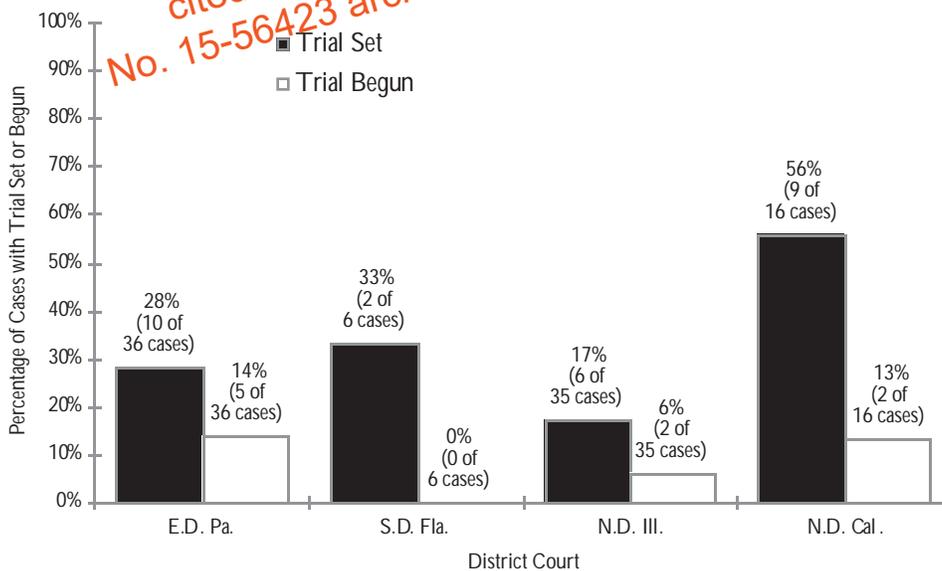
Note: Cases certified for settlement purposes are not included.

Figure 55: Rulings on Motions for Summary Judgment in Certified Class Actions



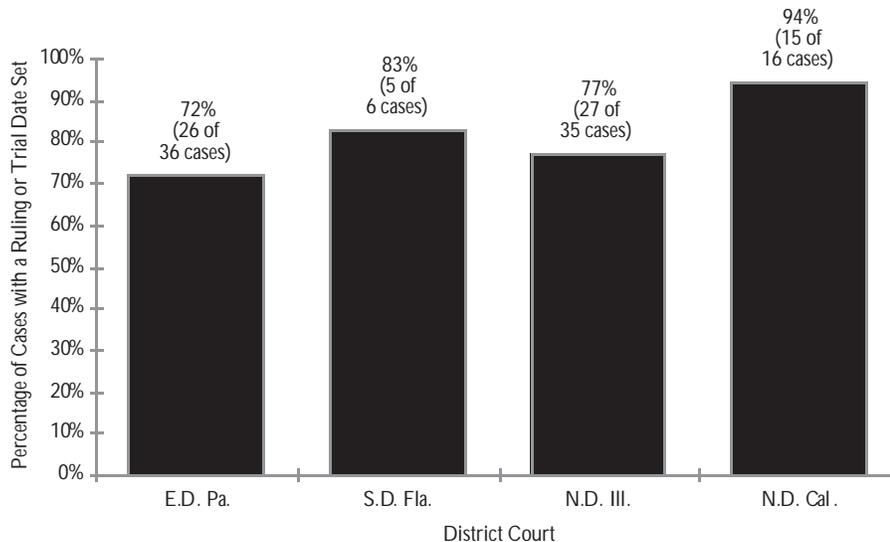
Note: Cases certified for settlement purposes only are not included.

Figure 56: Percentage of Certified Class Actions with Trial Date Set



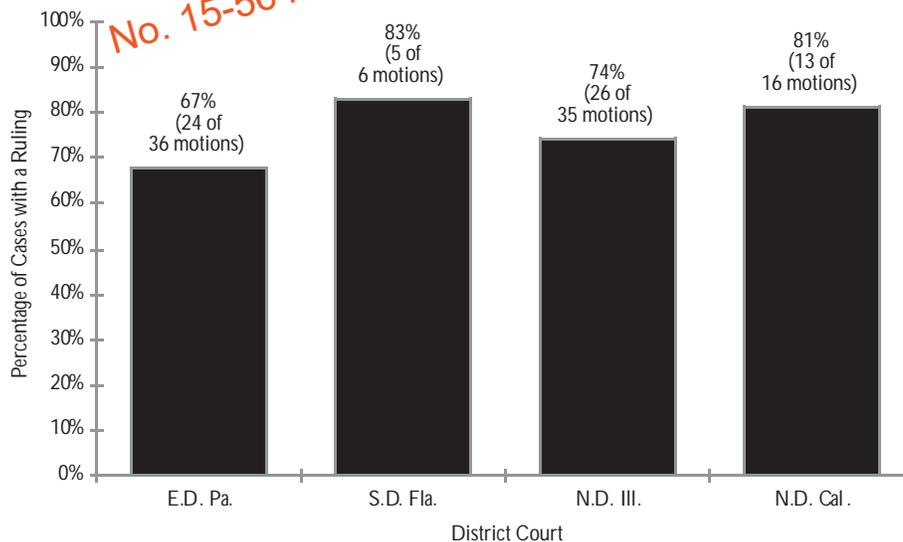
Note: Cases certified for settlement purposes only are not included.

Figure 57: Percentage of Certified Class Actions with a Ruling on a Motion to Dismiss or a Motion for Summary Judgment or a Trial Date Set



Note: Cases certified for settlement purposes only are not included.

Figure 58: Percentage of Certified Class Actions with a Ruling on a Motion to Dismiss or a Motion for Summary Judgment or Both



Note: Cases certified for settlement purposes only are not included.

Figure 59: Percentage of Settlement Class Actions in Which Notice of Settlement Was Communicated to the Class

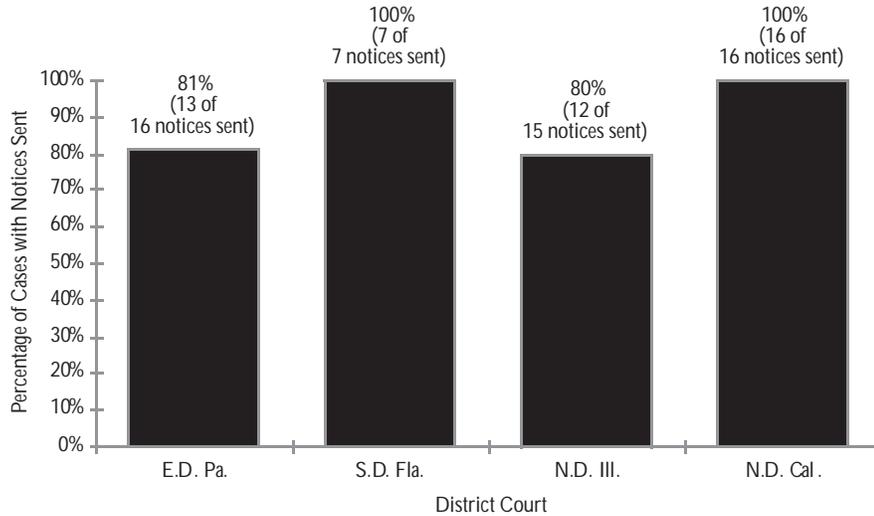


Figure 60: Percentage of Settlement Class Actions in Which Preliminary Findings Were Entered

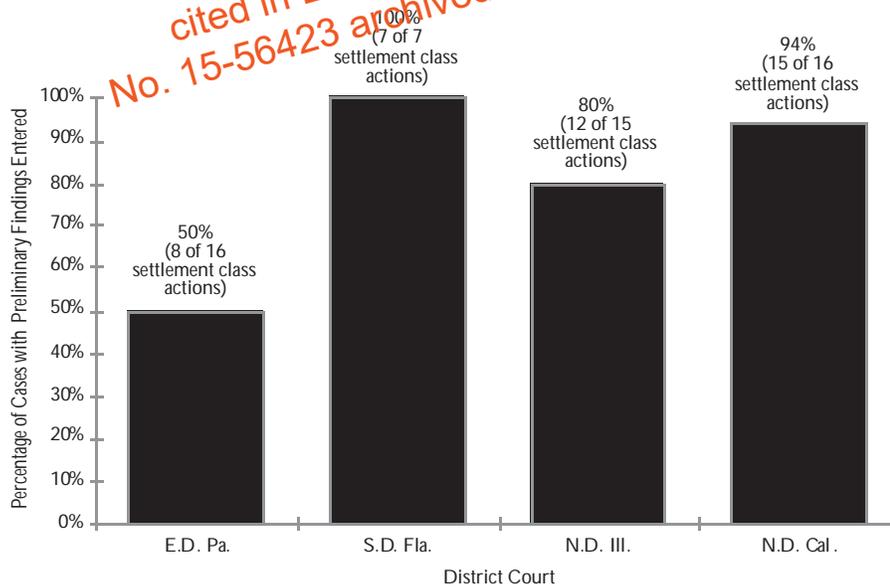


Figure 61: Percentage of Settlement Class Actions in Which Hearings Were Held Prior to Approval of Settlement

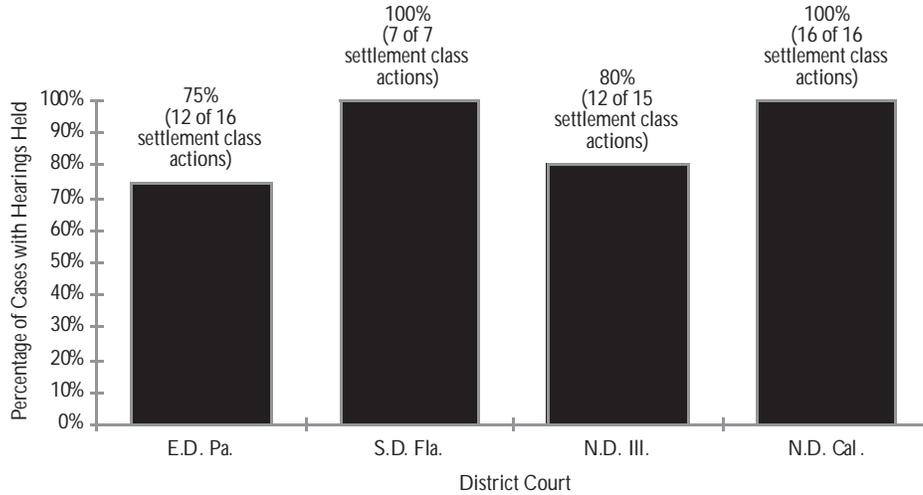


Figure 62: Percentage of Cases with a Trial Date Set

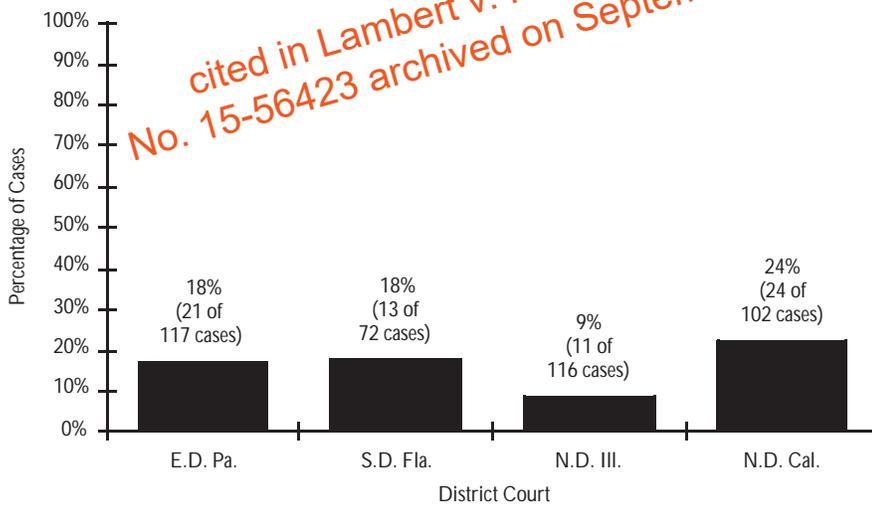


Figure 63: Mean and Median Time from First Complaint to First Entry of Trial Date for Cases with a Trial Date Entered

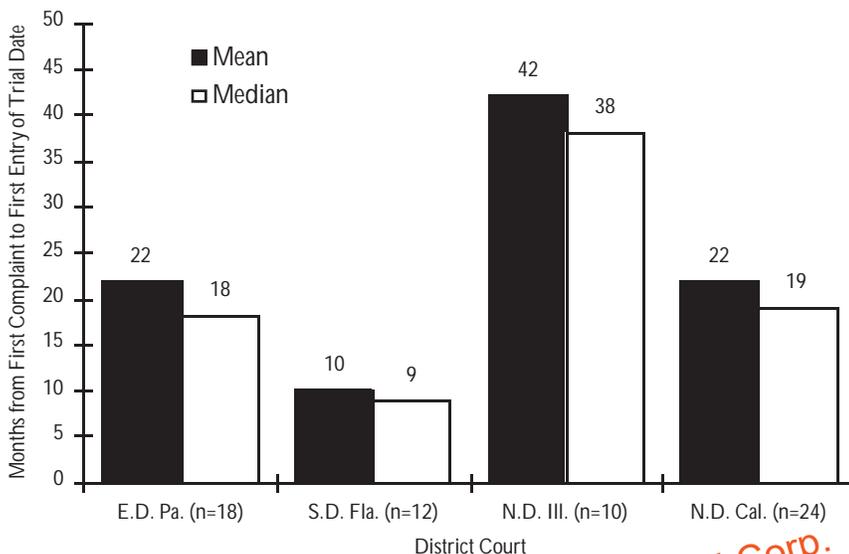


Figure 64: Time from First Complaint to First Entry of Trial Date for Cases with Trial Date Entered

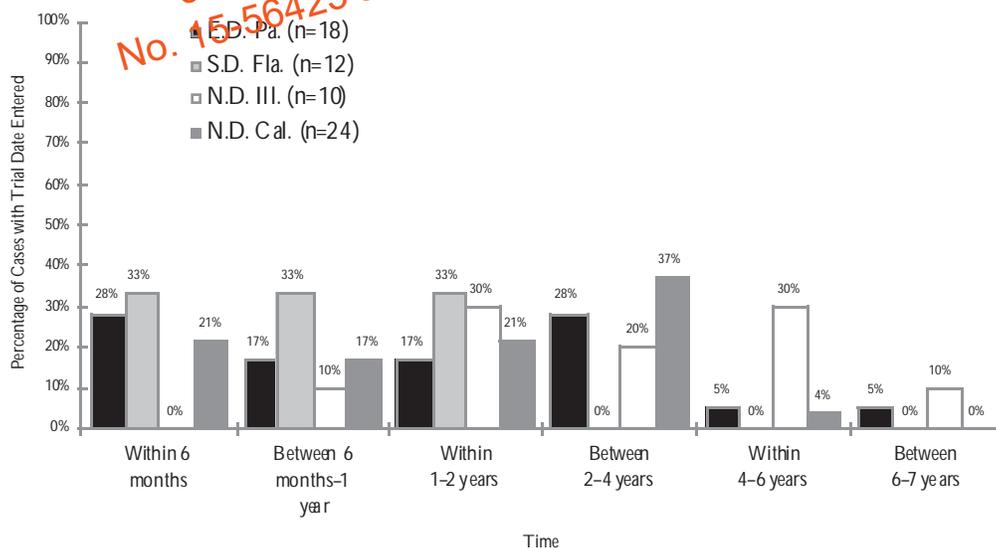


Figure 65: Time from First Complaint to Scheduled Trial Date—Mean and Median for Cases with Trial Date Scheduled

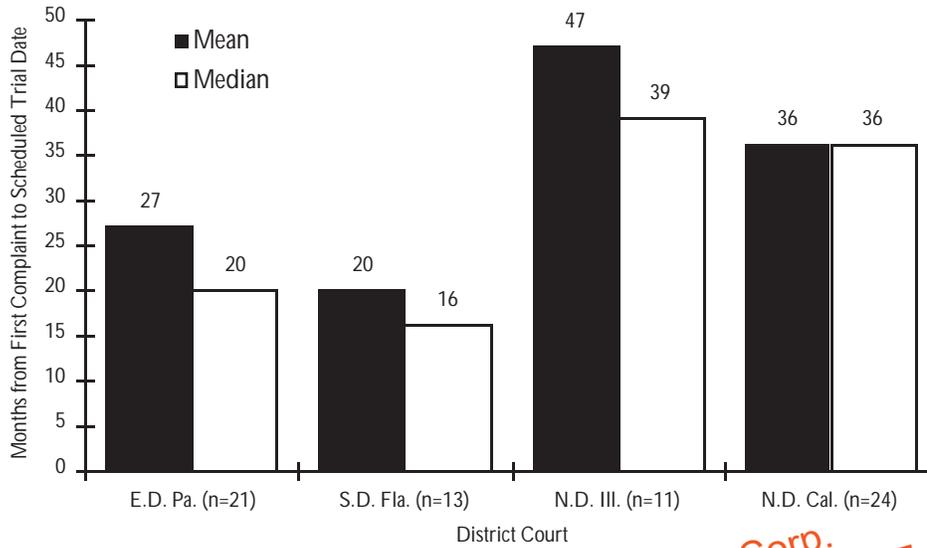


Figure 66: Time from First Complaint to Scheduled Trial Date for Cases with Trial Date Scheduled

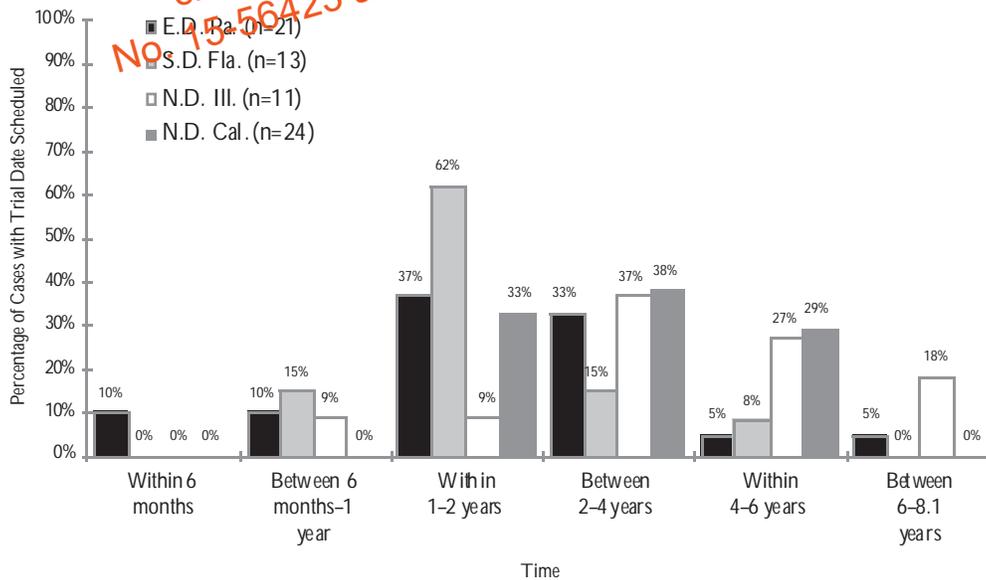
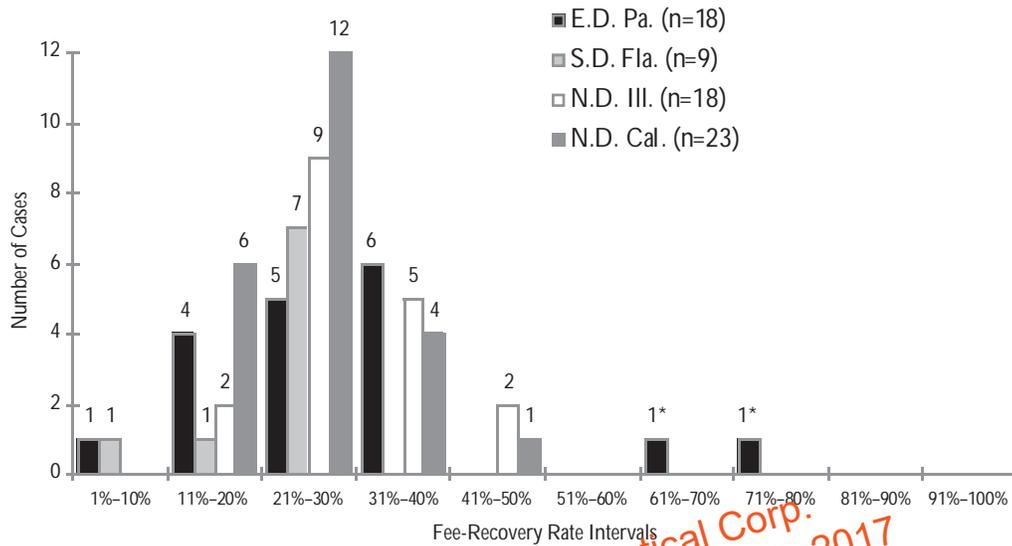


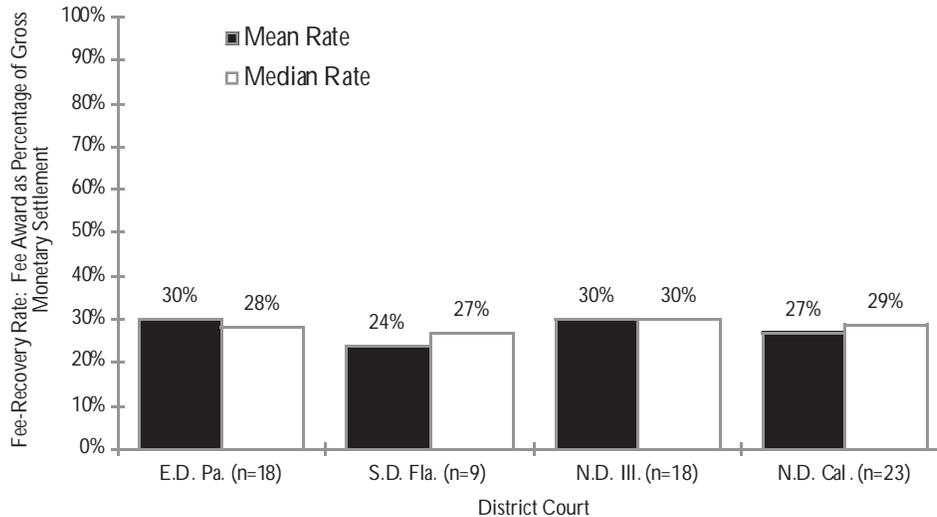
Figure 67: Fee-Recovery Rate Intervals in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67-70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys' fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67-70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expenses. "Fee-recovery rate" is fee awards as a percentage of gross monetary settlement. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross monetary settlement" includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses, and administrative costs of the settlement.

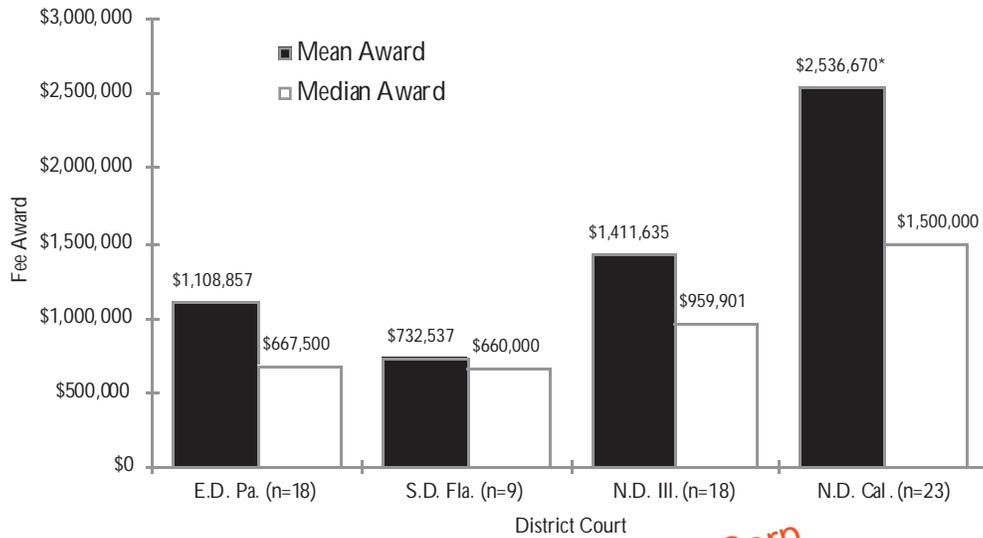
* In the case with the 63% rate, a certified class of approximately 2,000 stockholders received net cash distributions of \$1.8 million for damages related to stock sales. For the 71% rate, the settlement included a relatively small amount of interest a county prothonotary agreed to pay class members related to interpleaded funds in its trust account in the past six years. In addition, the prothonotary agreed to place interpleaded funds in separate interest-bearing accounts in the future.

Figure 68: Mean and Median Fee-Recovery Rates in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67–70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys’ fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67–70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. “Net monetary distribution” is net of attorneys’ fees and administrative expenses. “Fee-recovery rate” is fee awards as a percentage of gross monetary settlement. “Fee award” equals the total amount of fees awarded to plaintiffs’ counsel, excluding sanctions and out-of-pocket expenses. “Gross monetary settlement” includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys’ fees and expenses, and administrative costs of the settlement.

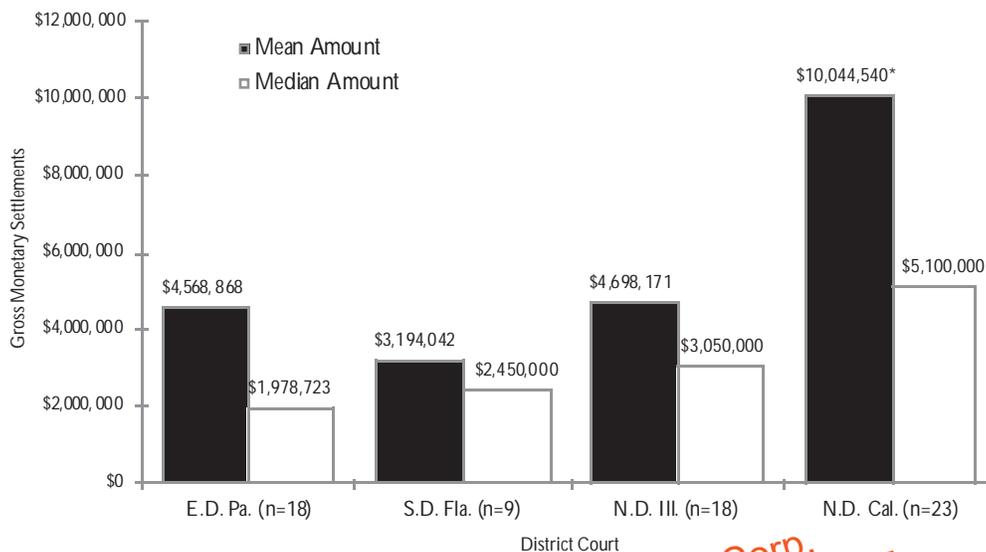
Figure 69: Mean and Median Fee Awards in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67–70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys' fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67–70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expenses. "Fee-recovery rate" is fee awards as a percentage of gross monetary settlement. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross monetary settlement" includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses, and administrative costs of the settlement.

* Includes one case with fee award of \$13,875,000.

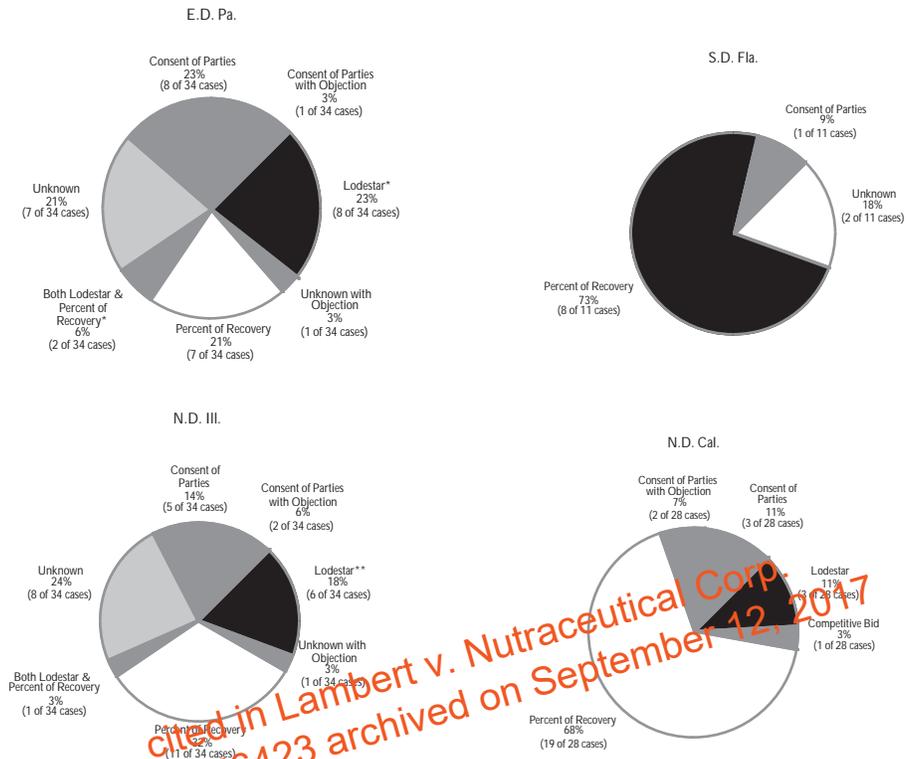
Figure 70: Mean and Median Gross Monetary Settlements in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67–70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys’ fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67–70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. “Net monetary distribution” is net of attorneys’ fees and administrative expenses. “Fee-recovery rate” is fee awards as a percentage of gross monetary settlement. “Fee award” equals the total amount of fees awarded to plaintiffs’ counsel, excluding sanctions and out-of-pocket expenses. “Gross monetary settlement” includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys’ fees and expenses, and administrative costs of the settlement.

* Includes one case with gross settlement of \$73,570,000.

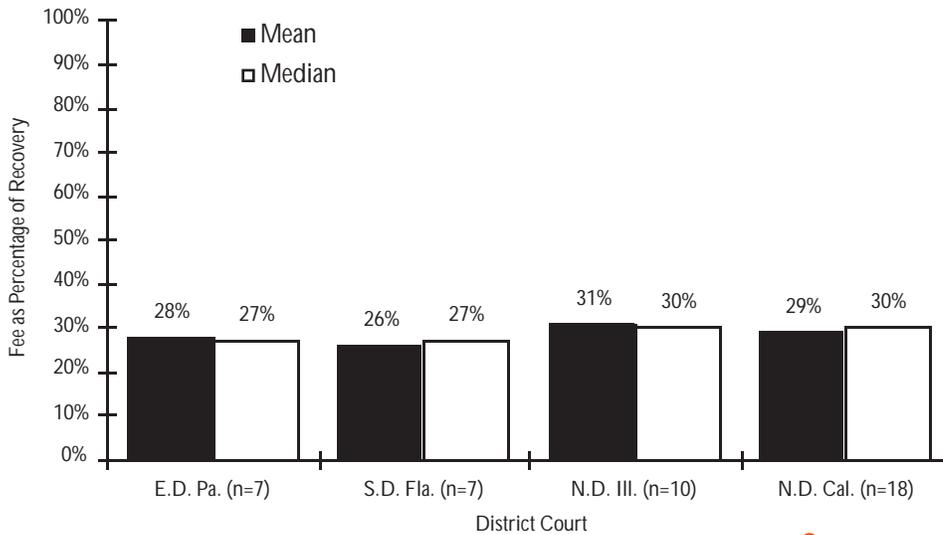
Figure 71: Fee Calculation Method in Certified Cases with Court-Approved Settlements



* Includes one of two cases where the court enhanced the lodestar calculation by a 2.5 multiplier.

** Includes at least two cases (6% of thirty-four cases) where the court reduced the lodestar calculation by more than 25%.

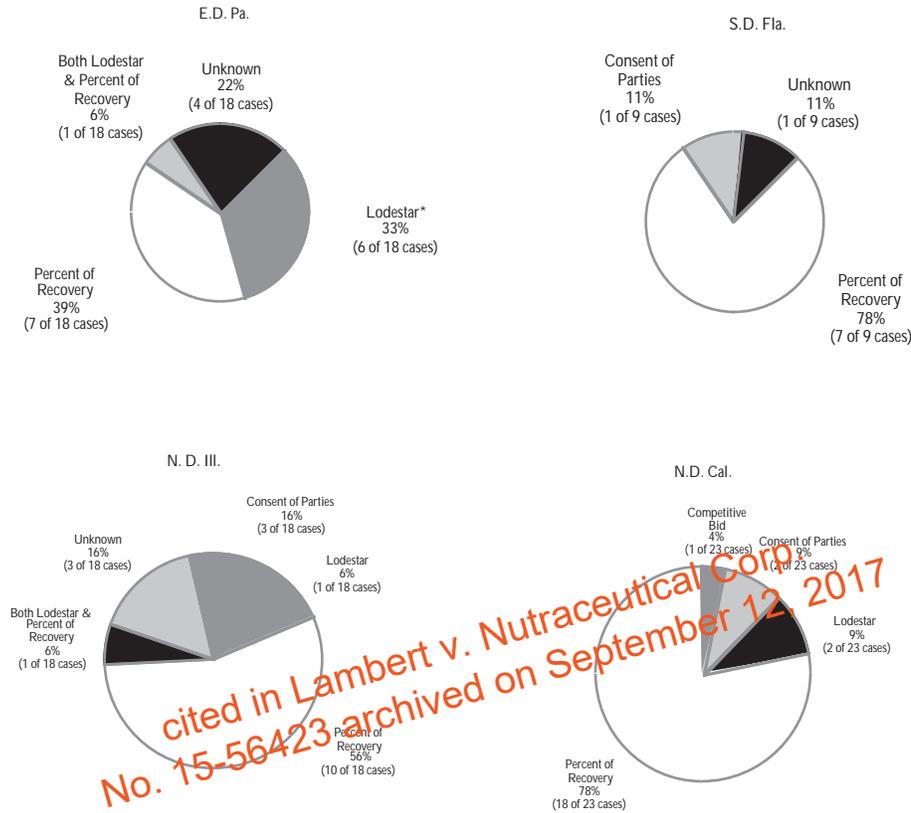
Figure 72: Mean and Median Fee-Recovery Rates in Certified Cases Using Percentage of Recovery Method and Providing Net Monetary Distribution to Class



Note: "Net monetary distribution" is net of attorneys' fees and administrative expenses.

*cited in Lambert v. Nutraceutical Corp.
No. 15-56423 archived on September 12, 2017*

Figure 73: Fee Calculation Method in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class

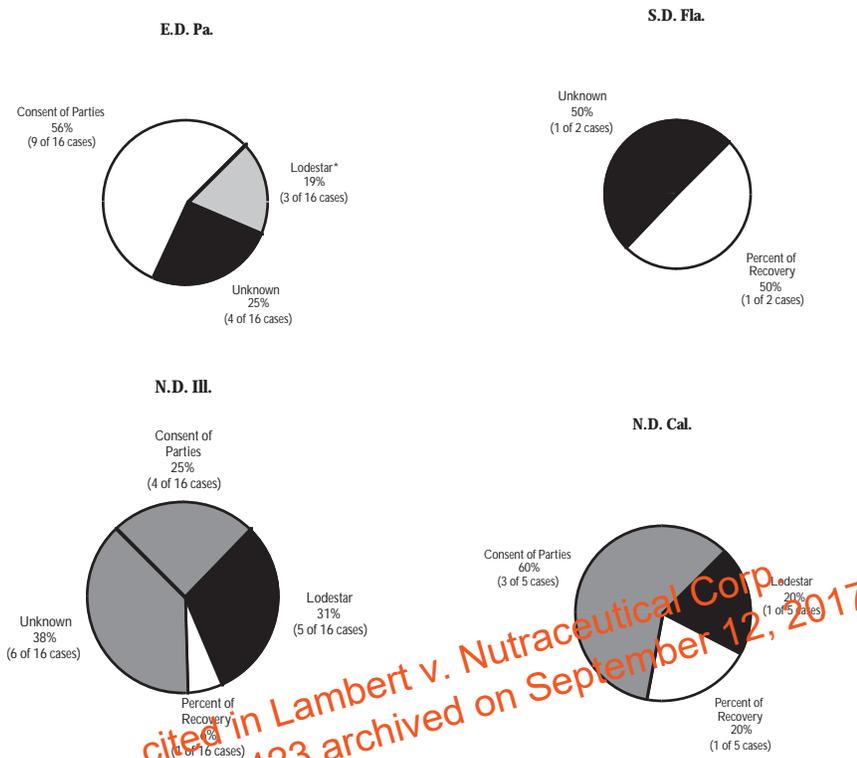


cited in Lambert v. Nutraceutical Corp.
No. 15-56423 archived on September 12, 2017

Note: "Net monetary distribution" is net of attorneys' fees and administrative expenses.

*Includes *Masnik v. Bolar Pharmaceutical Co., Inc.*, No. 90-4086 (E.D. Pa. filed June 15, 1990), where a 2.5 enhancer was applied to the lodestar amount.

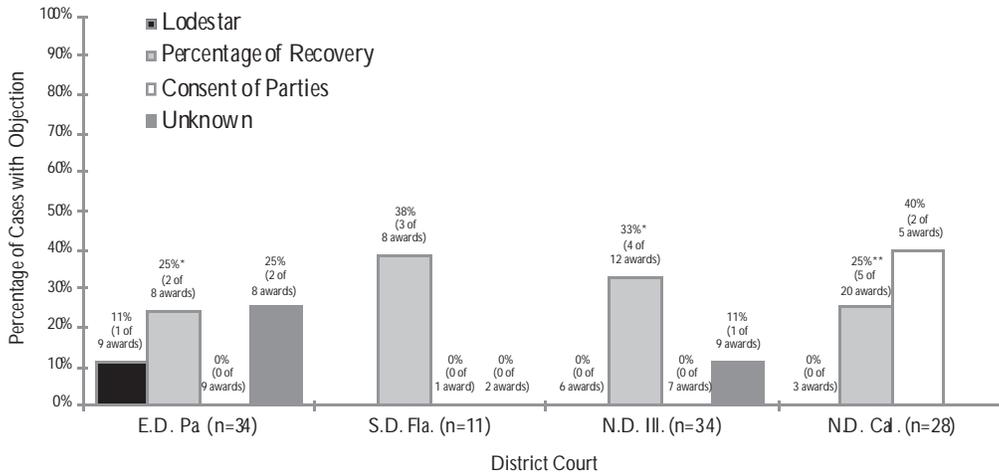
Figure 74: Fee Calculation Method in Certified Cases with Court-Approved Settlements Providing *No* Net Monetary Distribution to Class



Note: "Net monetary distribution" is net of attorneys' fees and administrative expenses. This figure includes cases where the only monetary distribution was to class representatives, to class counsel for fees, or for administrative expenses.

*Includes *General Motors Pick-Up Truck Liability Litigation* (55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1988)), where district court used both lodestar and percentage methods, including a 2.5 multiplier applied to the lodestar amount. The award was vacated and remanded on appeal.

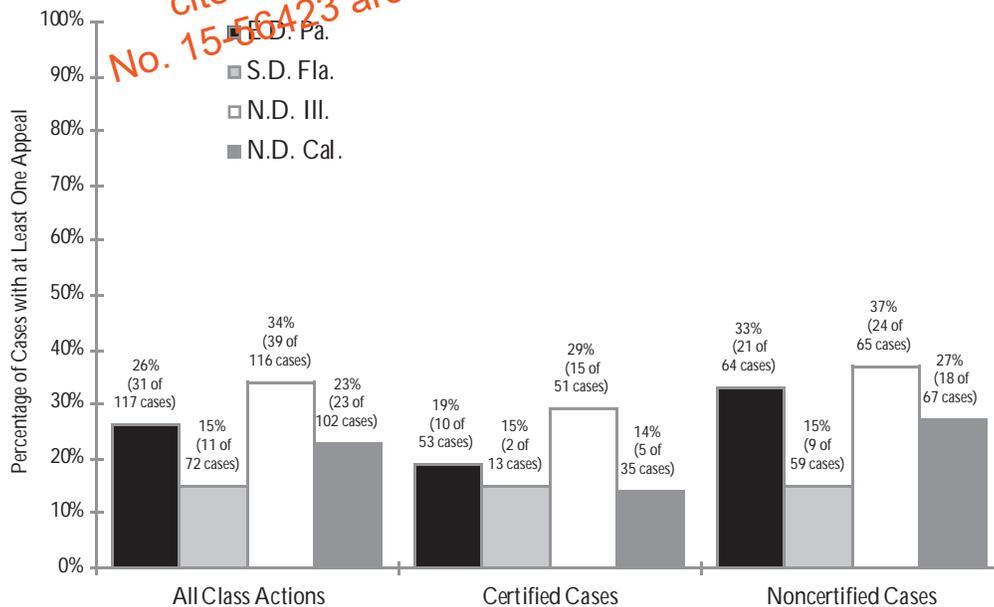
Figure 75: Objections to Attorneys' Fees by Fee Calculation Method in Certified Cases with Court Approved Settlements



* Percentage of recovery cases include one case with both lodestar and percentage methods.

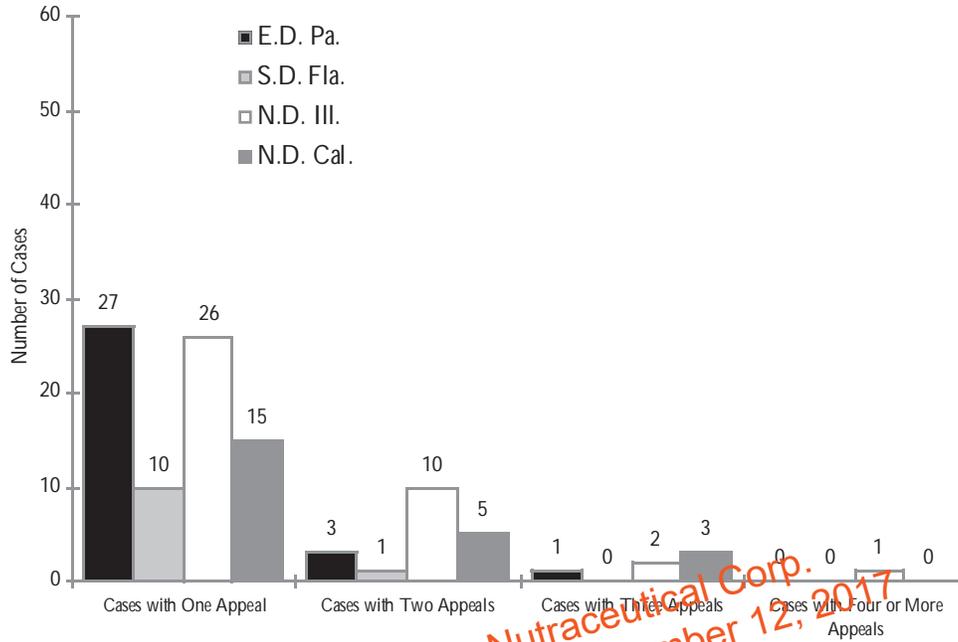
** Includes fee objections in the one case involving competitive bidding by prospective lead class counsel.

Figure 76: Percentage of Cases with at Least One Appeal (All Class Actions: Certified Cases and Noncertified Cases)



cited in Lambert v. Nutraceutical Corp.
 No. 15-56423 archived on September 12, 2017

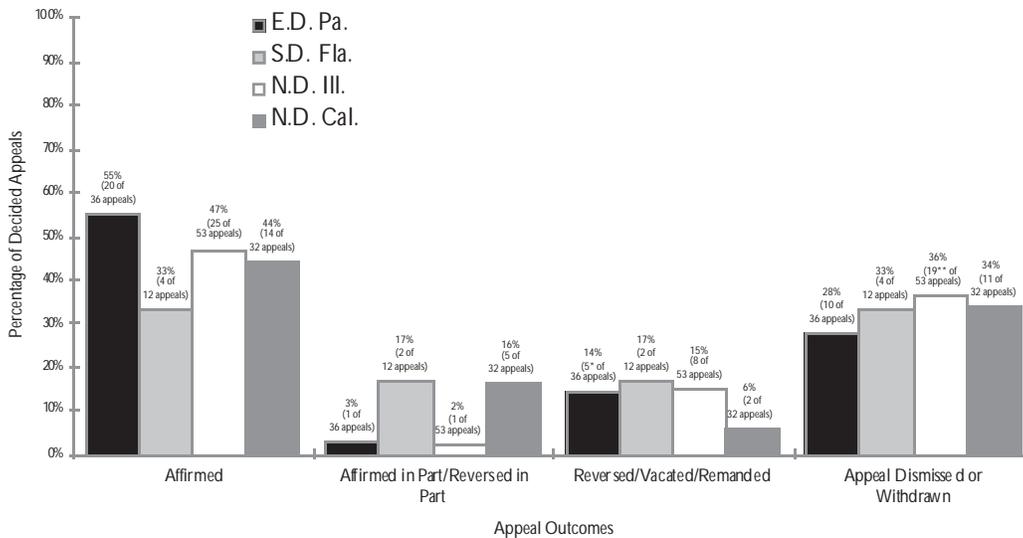
Figure 77: Cases with Only One Appeal and Cases with Multiple Appeals



Note: E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

cited in Lambert v. Nutraceutical Corp. No. 15-56423 archived on September 12, 2017

Figure 78: Disposition on Appeal



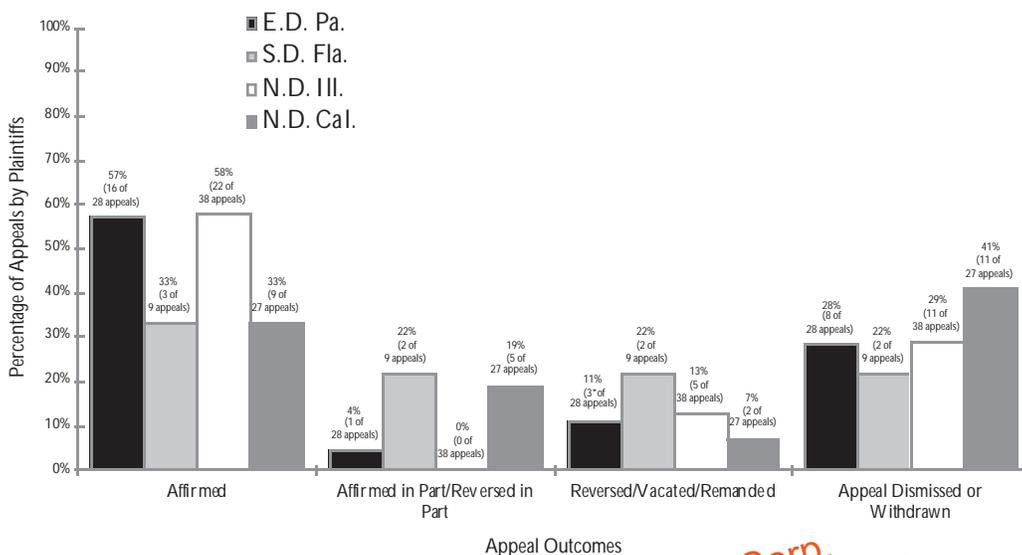
Note: E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

* Includes the Third Circuit vacating the settlement in the *General Motors Pick-Up Truck* case (55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995)).

** Includes one case where party opposing the class filed a writ of mandamus which the court of appeals denied.

cited in *Lambert v. Nutraceutical Corp.*
 No. 15-56423 archived on September 12, 2017

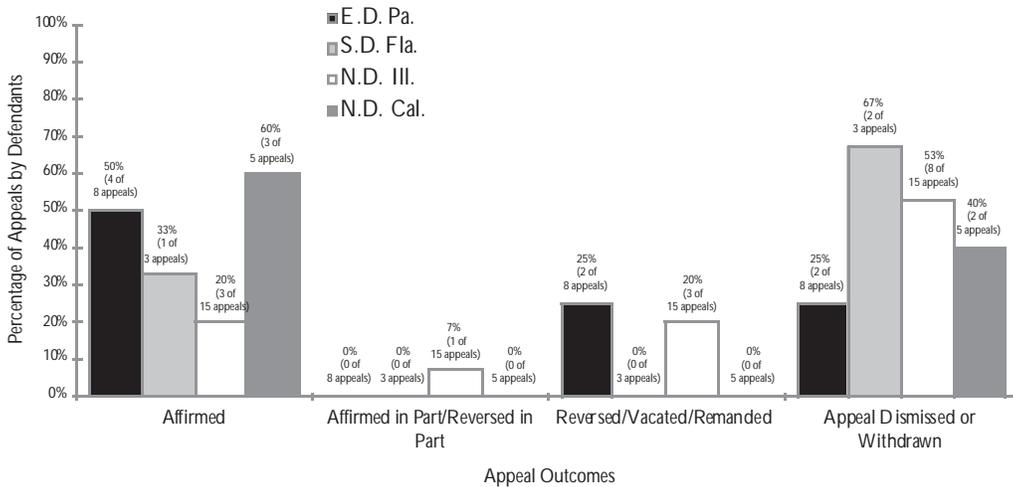
Figure 79: Disposition on Appeals Brought by Plaintiffs



Note: Most appeals were filed on behalf of the class; others were filed by individual plaintiffs or proposed intervenor-plaintiffs. E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

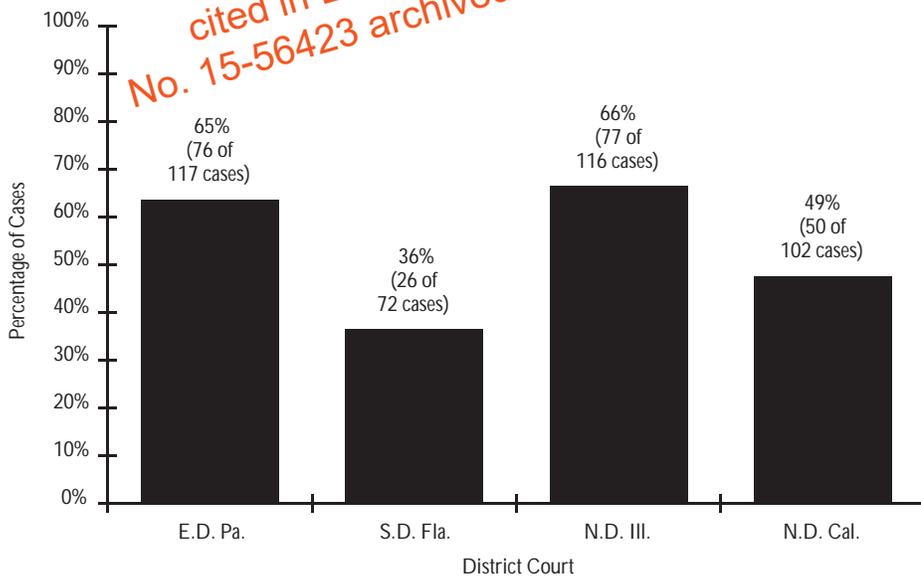
* Includes the Third Circuit vacating the settlement in the *General Motors Pick-Up Truck* case (55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995)).

Figure 80: Disposition on Appeals Brought by Defendants



Note: Includes defendants, third-party defendants, and proposed intervenor-defendants. E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

Figure 81: Percentage of Cases with Rulings on Certification



*cited in Lambert v. Nutraceutical Corp.
No. 15-56423 archived on September 12, 2017*

Figure 82: Appeals in Cases with Ruling on Certification

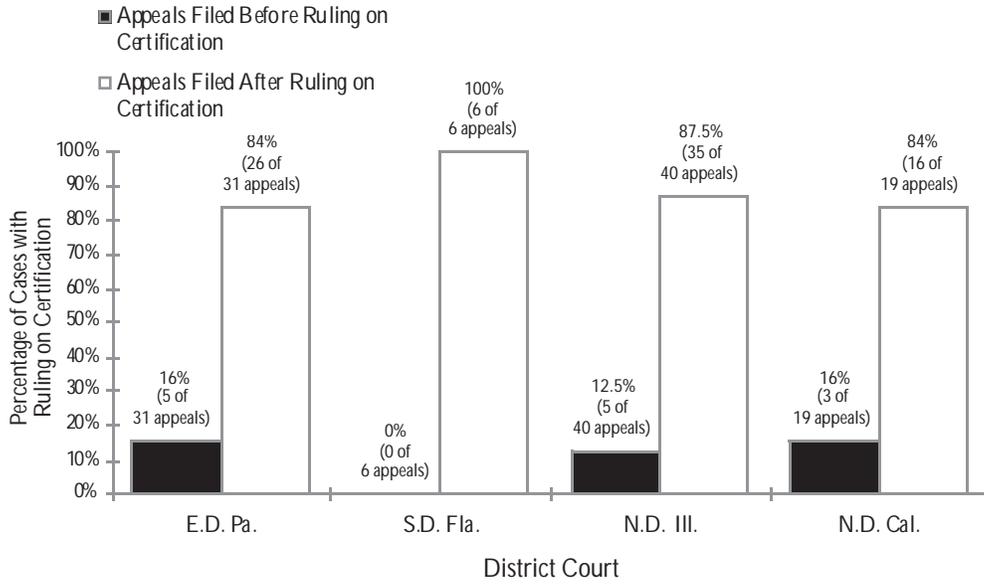


Figure 83: Number of Cases with at Least One Appeal in Cases with Ruling on Certification

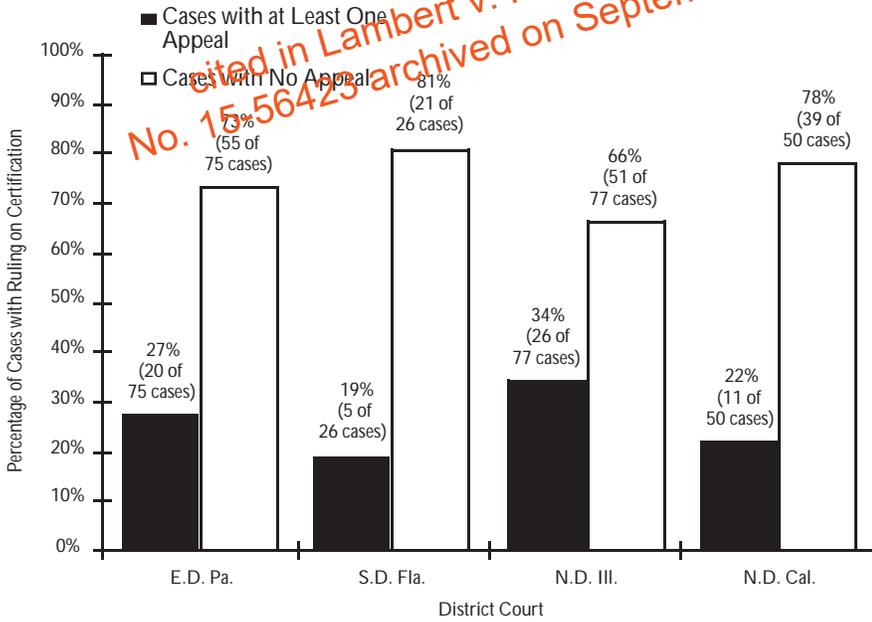


Table 1: Certified, Settled (b)(3) Classes with Average Net Distribution < \$100 Per Class Member

Caption, Docket No., and District	Class Definition	Gross Monetary Award	Net Monetary Award/ No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (method) (% of gross monetary award)
(1) Masnik v. Bolar Pharmaceutical, No. 90-4086 (E.D. Pa. filed June 15, 1990).	Holders of SmithKline Beckman Corp. common stock who sold it during class period or who exchanged it in the merger	\$2.55 M	\$1.48 M/ 75,000 members = \$19.69 per member	\$6,000	None	\$765,000 (Iodestar) (30% of gross monetary award)
(2) Mandel v. Mortgage & Realty, No. 90-1848 (E.D. Pa. filed Mar. 16, 1990).	Purchasers of Mortgage & Realty common stock during class period	\$1.33 M	\$752,705/ 17,640 members = \$42.67 per member	None indicated	None	\$351,467 (% of recovery) (26% of gross monetary award)
(3) Hoxworth v. Blinder, No. 88-285 (E.D. Pa. filed Jan. 14, 1988).	Buyers and sellers of 21 companies' securities through defendant during class period	\$5.27 M	\$3.19 M/ 72,519 members = \$44.06 per member	\$21,000	None	\$1.73 M (% of recovery) (33% of gross monetary award)
(4) Weiner v. Meridian Bancorp., Inc., No. 90-6211 (E.D. Pa. filed Sept. 26, 1990).	Purchasers of Meridian Bancorp securities during class period	\$3.25 M	\$421,045,290 members = \$48.89 per member	\$27,500	None	\$973,320 (\$975,000 requested; method not specified) (30% of gross monetary award)
(5) Cannon v. Royce Laboratories, Inc., No. 92-923 (S.D. Fla. filed Apr. 23, 1992).	Purchasers of securities of Royce Laboratories during class period	\$0.85 M	\$416,047/ 5,980 members = \$69.57 per member	None indicated	750,000 shares of common stock and 1,975,000 warrants were included in the settlement, 70% of which were distributed to the class	\$255,000 (% of recovery; plus 30% of common stock and warrants awarded) (30% of gross monetary award)
(6) Weiner v. Southeast Banking Co., No. 90-760 (S.D. Fla. filed Mar. 22, 1990).	Purchasers of Southeast Banking securities during class period	\$5 M	\$3.64 M/ 46,068 members = \$78.95 per member	\$14,000	None	\$1.25 M (% of recovery) (25% of gross monetary award)
(7) <i>In re</i> GE Energy Choice Light Bulb Consumer Litigation, No-92-4447 (N.D. Cal. filed Nov. 12, 1992).	Consumer purchasers of GE Energy Choice throughout the U.S. during a 3.5 year class period	\$3.25 M	\$2 M/ 123,000 members = <\$16.26 per member ^a	None indicated	Modifications of advertising and packaging practices ^b	\$975,000 (% of recovery) (30% of gross monetary award)

(cont.)

Table 1: Certified, Settled (b)(3) Classes with Average Net Distribution < \$100 Per Class Member (continued)

Caption, Docket No., and District	Class Definition	Gross Monetary Award	Net Monetary Award/ No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (method) (% of gross monetary award)
(8) Sahadi v. Stone, No. 93-20645 (N.D. Cal. filed Sept. 1, 1993).	Purchasers of Read-Rite stock during the class period	\$2 M	\$1.24 M/ 17,000 members = \$73.17 per member	None indicated	None	\$600,000 (% of recovery) (30% of gross monetary award)
(9) Nathanson IRA v. Tenera, No. 91-3454 (N.D. Cal. filed Oct. 2, 1991).	Purchasers of units of Tenera during class period	\$0.125 M	\$73,327/ 3,000 members = \$24.44 per member	\$3,000	None	\$20,077 (\$37,500 requested; % of recovery) (16% of gross monetary award)

Note: M = millions of dollars.

^aThe distribution per class member was probably less because purchasers of GE Energy Choice products who were not class members were also allowed to participate.

^bNote that the monetary relief consisted of a funded rebate program with any surplus to be donated to charity or energy research purposes.

Table 2: Number of Consolidated Cases Transferred by the Judicial Panel on Multidistrict Legislation and Nature of Suit

Nature of Suit	E.D. Pa. (n=7)	S.D. Fla. (n=2)	N.D. Ill. (n=6)	N.D. Cal. (n=4)
Other contract actions	1	0	0	0
Contract product liability	1	1	0	0
Personal injury-product liability	1	0	1	0
Antitrust	2	0	2	3
Racketeer Influenced and Corrupt Organization Act (RICO)	0	0	1	0
Property rights-trademark	1	0	0	0
Securities	1	1	2	1

Table 3: Number of Consolidations by District Court and Nature of Suit

Nature of Suit	E.D. Pa. (n=24)	S.D. Fla. (n=10)	N.D. Ill. (n=10)	N.D. Cal. (n=17)
Contract	5	0	1	0
Torts–other fraud	1	0	1	1
Antitrust	1	0	0	0
Other civil rights	0	0	1	1
Racketeer Influenced and Corrupt Organization Act (RICO)	0	0	1	0
Prisoner petitions–habeas corpus	0	0	0	1
Other labor litigation	0	1	0	0
Employee Retirement Income Security Act (ERISA)	1	0	1	0
Trademark	2	0	0	1
Securities	13	9	5	13
Other statutory actions	1	0	0	0

Table 4: Number of Related Cases Not Consolidated with Similar Litigation Pending in Federal Courts and Nature of Suit

Nature of Suit	E.D. Pa. (n=19)	S.D. Fla. (n=9)	N.D. Ill. (n=6)	N.D. Cal. (n=23)
Contracts–stockholders suits	0	0	0	1
Other contract actions	0	0	0	0
Contract product liability	1	0	0	0
Personal injury–product liability	0	0	0	1
Other fraud	0	0	1	0
Antitrust	0	0	0	1
Other civil rights	2	0	1	1
Civil rights–jobs	1	0	0	2
Racketeer Influenced and Corrupt Organization Act (RICO)	2	0	0	0
Prisoner petitions–habeas corpus	0	0	0	1

(cont.)

Table 4: Number of Related Cases Not Consolidated with Similar Litigation Pending in Federal Courts and Nature of Suit (continued)

Nature of Suit	E.D. Pa. (n=13)	S.D. Fla. (n=4)	N.D. Ill. (n=6)	N.D. Cal. (n=23)
Prisoner–civil rights	0	0	0	1
Employee Retirement Income Security Act (ERISA)	0	0	0	2
Property rights–trademark	1	0	0	0
Securities	4	4	3	11
Other statutory actions	0	0	1	2

Table 5: Number of Related Cases Not Consolidated with Similar Litigation Pending in State Courts and Nature of Suit

Nature of Suit	E.D. Pa. (n=4)	S.D. Fla. (n=1)	N.D. Ill. (n=3)
Contract product liability	1	0	0
Personal injury–medical malpractice	1	0	0
Other personal property damage	0	1	0
Other civil rights	0	0	2
Securities	2	0	0

Table 6: Difficulties in Cases Not Consolidated in Federal Courts

Case	Type of Case	Difficulty
Case 1	Statutory action	Documents were filed in both cases—one was a class action and the other was not. On different occasions, class-related documents were filed in the nonclass case, but not in the class case, which caused confusion not only for the parties but for the court.
Case 2	Contract	Nonconsolidated case was stayed and later closed because the related case was farther along. It was not clear from the case file how much time and effort had been expended on the discovery process, but one can assume that there was duplication of effort.
Case 3	Racketeer Influenced and Corrupt Organization Act (RICO)	In this case, five other class actions were pending against the defendants who moved before the Judicial Panel on Multidistrict Litigation for transfer of all of the cases to a single district. Prior to the court's ruling on the MDL issue the case was dismissed without prejudice. Defendant later learned that to have the case transferred by the Judicial Panel the case had to be open. Defendant then had to move for reconsideration of the court's dismissal of the case. The court denied vacating the dismissal order.
Case 4	Securities	This case contained identical issues and the same defendants as in other related cases. The court found that the case was related but decided not to consolidate it.

Table 7: Difficulties in Cases Not Consolidated in State Courts

Case	Type of Case	Difficulty
Case 1	Personal injury– medical mal- practice	In this case the district court decided to abstain from ruling on its case while the state court case was still pending with parallel claims. There was considerable delay in the case before the district court ruled that the state court was a better forum for the plaintiffs.
Case 2	Contract prod- uct liability	A number of class action complaints were filed in several state courts relying on state law products liability claims. Plaintiffs in those cases objected to the settlement. The court responded by coordinating the notice and settlement proposal to account for the state actions.
Case 3	Statutory ac- tions	Class action sought on state law claims. Defendant objected because of the duplicative nature of the litigation.
Case 4	Securities	Co-lead counsel filed a motion to take action against another attorney, who attempted to dismiss voluntarily the federal action and file a duplicative class action in state court. The court held that the federal action could only be voluntarily dismissed after counsel represented to the court that he would dismiss the state class action and not file any other duplicative class actions.

Table 8: Median Case Duration (in Months) of (b)(3) Securities and Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.			S.D. Fla.		
	Securities	Non- securities	Civil Rights	Securities	Non- securities	Civil Rights
Settled Cases	27 (n=13)	13 (n=6)	25 (n=2)	24 (n=9)	50 (n=2)	— (n=0)
Nonsettled Cases	48 (n=3)	18 (n=8)	— (n=0)	— (n=0)	— (n=0)	— (n=0)

	N.D. Ill.			N.D. Cal.		
	Securities	Non- securities	Civil Rights	Securities	Non- securities	Civil Rights
Settled Cases	28 (n=9)	36 (n=13)	78 (n=3)	28 (n=16)	11 (n=6)	55 (n=2)
Nonsettled Cases	12 (n=4)	48 (n=1)	— (n=0)	46 (n=2)	58 (n=1)	— (n=0)

Note: The “median case duration” is from filing the first complaint to termination of the case.

Table 9: Rate of Certification in (b)(3) Securities and Nonsecurities Cases with Motions or Orders Filed on Certification

	E.D. Pa.			S.D. Fla.		
	Securities (n=16)	Non- securities (n=14)	Civil Rights (n=2)	Securities (n=9)	Non- securities (n=2)	Civil Rights (n=0)
Percentage of Cases Certified	94	64	100	100	100	—

	N.D. Ill.			N.D. Cal.		
	Securities (n=13)	Non- securities (n=14)	Civil Rights (n=3)	Securities (n=18)	Non- securities (n=7)	Civil Rights (n=2)
Percentage of Cases Certified	100	93	100	94	86	100

Table 10: Number of Numerosity and Representativeness Objections to Certification in (b)(3) Securities and Nonsecurities Cases with Disputes Over Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Securities (n=10)	Non- securities (n=8)	Securities (n=3)	Non- securities (n=2)	Securities (n=6)	Non- securities (n=0)	Securities (n=8)	Non- securities (n=3)
Numerosity objection	0 (0%)	4 (50%)	0 (0%)	0 (0%)	0 (0%)	3 (33%)	2 (25%)	2 (67%)
Represent- ativeness objec- tion	9 (90%)	5 (63%)	3 (100%)	2 (100%)	6 (100%)	4 (44%)	6 (75%)	2 (67%)

Table 11: Median Settlement Fund Distribution Comparisons for Certified (b)(3) Securities and Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Securities (n=12)	Non- securities (n=6)	Securities (n=9)	Non- securities (n=2)	Securities (n=9)	Non- securities (n=13)	Securities (n=14)	Non- securities (n=6)
Net distribution ^a	\$2,014,370	\$0 ^c	\$1,734,571	\$123,973	\$2,691,651	\$44,639	\$3,040,348	\$1,100,000
Fee award ^b	\$1,230,559	\$225,000	\$660,000	\$175,000	\$1,200,000	\$338,771	\$1,500,000	\$1,987,500
Net settlement per class mem- ber	\$299 (n=11)	\$0 (n=5) ^d	\$315 (n=9)	— (n=0)	\$412 (n=9)	\$562 (n=8)	\$336 (n=12)	\$956 (n=5)

^a“Net distribution” is net of attorneys’ fees and administrative expenses.

^b“Fee award” equals the total amount of fees awarded to plaintiffs’ counsel, excluding sanctions and out-of-pocket expenses.

^c Mean = \$19,377.

^d Mean = \$166.

Table 12: Median Case Duration (in Months) of (b)(3) Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Settled	Nonsettled	Settled	Nonsettled	Settled	Nonsettled	Settled	Nonsettled
All non- securities	13 (n=14)	17 (n=11)	41 (n=2)	41 (n=2)	60 (n=6)	106 (n=3)	21 (n=3)	46 (n=1)
Civil rights	13 (n=5)	13 (n=1)	57 (n=1)	57 (n=1)	26 (n=6)	26 (n=3)	21 (n=1)	— (n=0)

Note: The “median case duration” is from filing the first complaint to termination of the case.

Table 13: Rate of Certification in (b)(2) Nonsecurities Cases with Motions or Orders Filed on Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Non- securities (n=19)	Civil Rights (n=12)	Non- securities (n=3)	Civil Rights (n=3)	Non- securities (n=12)	Civil Rights (n=6)	Non- securities (n=4)	Civil Rights (n=1)
Percentage of Cases Certified	95	92	67	67	83	67	50	100

Table 14: Number of Numerosity and Representativeness Objections to Certification in (b)(2) Nonsecurities Cases with Disputes over Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Non-securities (<i>n</i> =7)	Civil Rights (<i>n</i> =5)	Non-securities (<i>n</i> =2)	Civil Rights (<i>n</i> =2)	Non-securities (<i>n</i> =8)	Civil Rights (<i>n</i> =4)	Non-securities (<i>n</i> =2)	Civil Rights (<i>n</i> =1)
Numerosity Objection	5 (71%)	3 (60%)	0 (0%)	0 (0%)	3 (38%)	2 (50%)	1 (50%)	1 (100%)
Representativeness Objection	3 (43%)	2 (40%)	0 (0%)	0 (0%)	7 (88%)	4 (100%)	1 (50%)	1 (100%)

Table 15: Median Fee Awards for Certified (b)(2) Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Non-securities (<i>n</i> =9)	Civil Rights (<i>n</i> =6)	Non-securities (<i>n</i> =1)	Civil Rights (<i>n</i> =1)	Non-securities (<i>n</i> =6)	Civil Rights (<i>n</i> =3)	Non-securities (<i>n</i> =2)	Civil Rights (<i>n</i> =1)
Median Fee Award ^a	\$49,000	\$34,779	\$1,378	\$1,378	\$112,500	\$224,810	\$69,000	\$53,000

^a“Fee award” equals the total amount of fees awarded to plaintiffs’ counsel, excluding sanctions and out-of-pocket expenses.

Table 16: Trial Rates for Nonprisoner Class Actions Compared to Nonprisoner Nonclass Civil Actions

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Class (<i>n</i> =108)	Nonclass (<i>n</i> =7,603)	Class (<i>n</i> =58)	Nonclass (<i>n</i> =5,174)	Class (<i>n</i> =108)	Nonclass (<i>n</i> =8,264)	Class (<i>n</i> =94)	Nonclass (<i>n</i> =5,404)
Rate	5.5%	4.4%	3.4%	3.6%	5.5%	3.2%	4.3%	2.7%
Number	6	338	2	5,174	6	264	4	148

Note: Nonclass: Federal Judicial Center integrated database of Administrative Office of the U.S. Courts data; Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994.

The Administrative Office data on trial rates for the study cases differed from our data for the same set of cases. In three districts, the Administrative Office data showed fewer trials than the Federal Judicial Center data and in the other district the numbers were the same. Overall, the Administrative Office data showed thirteen trials compared to eighteen in the Federal Judicial Center database. The trial rates shown by the Administrative Office data were 4% (four), 2% (one), 6% (six), and 2% (two), respectively.

Table 17: Trial Rates for Securities Class Actions Compared to Securities Civil Actions

Trial	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Class (<i>n</i> =30)	Nonclass (<i>n</i> =191)	Class (<i>n</i> =15)	Nonclass (<i>n</i> =187)	Class (<i>n</i> =23)	Nonclass (<i>n</i> =148)	Class (<i>n</i> =35)	Nonclass (<i>n</i> =198)
Rate	10.0%	16.7%	0%	5.8%	8.7%	5.4%	0%	0%
Number	3	32	0	11	2	8	0	0

Note: Nonclass: Federal Judicial Center integrated database of Administrative Office of the U.S. Courts data, Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994.

The Administrative Office data on trial rates for securities class actions differed from the Federal Judicial Center data on the same cases in only one instance. In E.D. Pa., the Administrative Office data showed two trials, a rate of 7%, whereas the Federal Judicial Center data showed three trials, a rate of 10%.

Table 18: Number of Multiple Certifications and Rule 23(b) Certifications

Rule 23(b) Combinations	E.D. Pa. (<i>n</i> =5)	S.D. Fla. (<i>n</i> =1)	N.D. Ill. (<i>n</i> =5)	N.D. Cal. (<i>n</i> =5)
23(b)(1)(A) and (b)(2)	0	0	1	0
23(b)(1)(A), (b)(1)(B), and type not specified	0	0	1	0
23(b)(1)(A) and (b)(2)	0	0	1	0
23(b)(1)(A), (b)(1)(B), and (b)(2)	0	0	1	0
23(b)(1)(B) and (b)(2)	0	0	1	0
23(b)(1)(B), (b)(2), and (b)(3)	0	0	0	1
23(b)(1)(B) and (b)(3)	0	0	0	1
23(b)(2) and (b)(3)	3	1	0	1
23(b)(3) and type not specified	0	0	0	2

Table 19: District Judge and Magistrate Judge Time Expended

Type of Activity	Judge Time (in Hours)		Average Hours per Case	
	Certified (<i>n</i> = 11)	Not certified (<i>n</i> = 40)	Certified	Not certified
Class certification	79	16	7.2	0.4
Motions to dismiss	61	13	5.5	0.3
Discovery	64	7	5.8	0.2
Summary judgment	30	48	2.7	1.2
Notice to class	4	0	0.4	0
Pretrial conference	1	1	0.1	0
All other pretrial conferences	1	0	0.1	0
Trial	0	10	0	0.3
Facilitating settlement	38	20	3.5	0.5
Review and rule on proposed settlement	31	6	2.8	0.2
Presiding at settlement approval hearing	16	1	1.5	0
Ruling on attorneys' fees	25	0	2.3	0
Monitoring or enforcing final order	11	0	1	0
Other	18	119	1.6	3
Total	379	241	34.5	6.1

Source: Willging et al., Preliminary Report on Time Study: Class Action Cases (1999, 1995) (unpublished report on file with the Information Services Office of the Federal Judicial Center)

Table 20: Grounds Cited in Rulings on Motions to Dismiss in Relation to Timing of Ruling on Certification

Grounds Cited in Ruling ^a	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Before (<i>n</i> = 31)	After (<i>n</i> = 9)	Before (<i>n</i> = 14)	After (<i>n</i> = 3)	Before (<i>n</i> = 28)	After (<i>n</i> = 18)	Before (<i>n</i> = 26)	After (<i>n</i> = 6)
Rule 12(b)(1)	6	1	0	0	3	7	1	0
Rule 12(b)(2)	0	0	0	0	0	1	0	0
Rule 12(b)(3)	0	0	0	0	0	1	0	0
Rule 12(b)(6)	18	4	6	0	11	12	15	3
Rule 12(b)(7)	2	0	0	0	0	0	0	0
Other	12	4	4	2	5	3	12	2
Unknown	3	2	5	0	9	2	5	1
Total	41	11	15	2	28	26	33	6

^aMore than one citation in some rulings.

Table 21: Grounds Cited in Rulings on Motions to Dismiss in All Class Actions Terminated Between July 1, 1992, and June 30, 1994

Grounds Cited in Ruling ^a	E.D. Pa. (n= 61)	S.D. Fla. (n= 31)	N.D. Ill. (n= 63)	N.D. Cal. (n= 48)
Rule 12(b)(1) (lack of subject matter jurisdiction)	11	2	15	2
Lack of federal question	5	0	4	0
Incomplete diversity	0	0	1	0
Insufficient class amount in controversy	2	0	1	0
Insufficient individual amount in controversy	0	0	0	0
Other	1	0	3	1
Rule 12(b)(2) (lack of personal jurisdiction)	0	0	2	1
Rule 12(b)(3) (improper venue)	1	0	1	0
Rule 12(b)(4) (insufficiency of process)	0	0	0	0
Rule 12(b)(5) (insufficiency of service of process)	0	1	0	0
Rule 12(b)(6) (failure to state a claim)	33	9	33	27
Rule 12(b)(7) (failure to join a party)	2	0	0	0
Rule 9(b) (failure to plead fraud with specificity)	7	3	3	10
Rule 41(a) (voluntary dismissal)	1	0	0	0
Rule 41(b) (by court order)	1	4	2	0
28 U.S.C. 1915(d) (frivolous)	0	5	3	3
Mootness	3	1	0	1
Abstention	2	0	1	0
Standing	1	0	2	0
Stipulated	2	0	1	4
Other	8	8	2	4
Unknown	10	13	15	8
Total	82	46	80	60

^aSome rulings cited more than one source.

Table 22: Outcomes of Rulings on Motions to Dismiss in Relation to Timing of Rulings on Class Certification

Outcome	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Before	After	Before	After	Before	After	Before	After
Dismiss all	4	2	4	1	8	9	8	3
Dismiss part	6	3	1	0	11	6	11	1
Deny	16	2	8	2	7	3	5	2
Defer	0	0	0	0	0	0	1	0
No action	0	0	0	0	0	0	0	0
Other	5	2	1	0	0	1	1	0
Total	31	9	14	3	26	19	26	6

Table 23: Outcomes of Rulings on Motions for Summary Judgment in Relation to Timing of Rulings on Class Certification

Outcome	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Before	After	Before	After	Before	After	Before	After
Granted	1	8	1	2	4	11	2	3
Granted in part	1	4	0	0	1	2	1	1
Denied	6	6	0	5	4	3	2	0
Deferred	0	0	0	0	0	0	2	0
Other	0	1	1	0	2	0	0	1
Total	8	18	2	7	11	16	10	5

Table 24: Percentage of Cases with Rulings on Motions to Dismiss, Motions for Summary Judgment, and Sua Sponte Dismissals

Action	E.D. Pa. (n=121)	S.D. Fla. (n=72)	N.D. Ill. (n=117)	N.D. Cal. (n=107)
Motions to dismiss	61	31	63	48
Sua sponte dismissals	7	12	12	12
Motions for summary judgment	35	13	31	22
Cases with at least one ruling regarding dismissal or summary judgment	81 (67%)	48 (67%)	85 (73%)	64 (60%)
Cases with both a dismissal ruling and a summary judgment ruling	22 (18%)	8 (11%)	21 (18%)	17 (16%)

Table 25: Outcome of Rulings on Motions to Dismiss

Outcome of Motion to Dismiss	E.D. Pa. (n= 61)	S.D. Fla. (n= 31)	N.D. Ill. (n= 62)	N.D. Cal. (n= 48)
Dismissed entire complaint	26% (16 cases)	39% (12 cases)	42% (26 cases)	48% (23 cases)
Dismissed one or more claims or parties	21% (13 cases)	10% (3 cases)	34% (21 cases)	29% (14 cases)
Denied the motion	38% (23 cases)	45% (14 cases)	22% (14 cases)	19% (9 cases)
Other	15% (9 cases)	6% (2 cases)	2% (1 case)	4% (2 cases)

Table 26: Outcome of Summary Judgment Rulings

Outcome	E.D. Pa. (n= 35)	S.D. Fla. (n= 13)	N.D. Ill. (n= 31)	N.D. Cal. (n= 22)
Granted in whole	12 (34%)	4 (31%)	17 (55%)	8 (36%)
Granted in part	7 (20%)	1 (8%)	4 (13%)	6 (27%)
Denied	13 (37%)	7 (54%)	8 (26%)	5 (23%)
Deferred	0 (0%)	0 (0%)	0 (0%)	2 (9%)
Other	3 (9%)	1 (8%)	1 (6%)	1 (5%)

Table 27: Cases Closed as a Result of a Ruling on a Motion to Dismiss or Summary Judgment

Ruling	E.D. Pa. (n= 117)	S.D. Fla. (n= 72)	N.D. Ill. (n= 116)	N.D. Cal. (n= 102)
Dismissal	24 (20%)	14 (19%)	20 (17%)	18 (18%)
Summary judgment	16 (14%)	6 (8%)	19 (16%)	11 (11%)
Subtotal	40 (34%)	20 (27%)	39 (33%)	29 (28%)
Minus duplicate cases	-3 (-3%)	-1 (-1%)	-3 (-3%)	0 (0%)
Total	37 (31%)	19 (26%)	36 (30%)	29 (28%)

Table 28: Median Times (in Months) from Filing of Complaint to Filing of First Motion to Dismiss and from Filing of First Motion to Dismiss to the First Ruling on a Motion to Dismiss

Time	E.D. Pa.	S.D. Fla.	N.D. Ill.	N.D. Cal.
Median time from complaint to first motion to dismiss	2.4	2.5	2.7	4.2
Median time from first motion to dismiss to first ruling	3.1	7.4	3.8	2.6
75th percentile of time from first motion to dismiss to first ruling	4.7	13.7	8.6	5.4

Table 29: Median Times (in Months) from Filing Complaint to Filing of First Motion for Summary Judgment and from Filing of First Motion for Summary Judgment to First Ruling on Summary Judgment

Time	E.D. Pa.	S.D. Fla.	N.D. Ill.	N.D. Cal.
Median time from complaint to first motion for summary judgment	7.8	9.6	12.2	12.2
Median time from first motion for summary judgment to first ruling	3.7	7.4	9.0	3.5
75th percentile of time from first motion for summary judgment to first ruling	7.9	15.4	16.8	5.2

*cited in Lambert v. Nutraceutical Corp.
No. 15-56423 archived on September 12, 2017*

Table 30: Number of Cases with Simultaneous Motion to Certify and Approve Settlement and Nature of Suit

Nature of Suit	E.D. Pa. (n= 7)	N.D. Ill. (n= 7)	N.D. Cal. (n= 14)
Torts–other fraud	0	0	1
Antitrust	0	1	0
Civil rights–prisoner	1	0	0
Civil rights–accommodations	0	0	1
Civil rights–other	4	1	1
Racketeer Influenced and Corrupt Organization Act (RICO)	1	0	0
Labor laws–other litigation	0	0	1
Employee Retirement Income Security Act (ERISA)	0	0	2
Securities	0	1	8
Other statutory actions	0	4	0
Contract: insurance	1	0	0

Table 31: Number of Certified Cases With and Without a Simultaneous Settlement and Type of Class

Case type	Federal Rule of Civil Procedure			
	23(b)(1)(A)	23(b)(1)(B)	23(b)(2)	23(b)(3)
With simultaneous settlement	4	2	8	17
Without simultaneous settlement	11	8	18	36

Table 32: Number of Certified Cases with Motions to Reconsider or Decertify and Outcome

Outcome	E.D. Pa. (n=11)	S.D. Fla. (n=1)	N.D. Ill. (n=6)	N.D. Cal. (n=5)	Total
Certification affirmed	5	0	3	1	9
Certification reversed	1	0	0	0	1
Certification modified	0	0	1	1	2
Reconsideration denied	2	1	1	1	5
Reconsideration deferred	0	0	0	1	1
No action taken	1	0	0	1	2
Other	2	0	1	0	3

Table 33: Number of Oppositions to Certification and Nature-of-Suit Categories

Nature of Suit	E.D. Pa. (n=50)	S.D. Fla. (n=21)	N.D. Ill. (n=45)	N.D. Cal. (n=25)
Stockholders suits	0 (0%)	0 (0%)	0 (0%)	1 (4%)
Other contract actions	1 (2%)	2 (10%)	1 (2%)	1 (4%)
Contract product liability	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Torts-marine	0 (0%)	0 (5%)	0 (0%)	1 (4%)
Torts-motor vehicle-product liability	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Personal injury-medical malpractice	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Personal injury-product liability	1 (2%)	0 (0%)	1 (2%)	0 (0%)
Torts-other fraud	1 (2%)	0 (0%)	3 (7%)	0 (0%)
Torts-truth in lending	0 (0%)	0 (0%)	1 (2%)	0 (0%)
Torts-other personal property damage	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Antitrust	2 (4%)	0 (0%)	0 (0%)	2 (8%)
Withdrawal	0 (0%)	1 (5%)	0 (0%)	0 (0%)
Other civil rights	7 (14%)	2 (10%)	10 (22%)	2 (8%)

(cont.)

Table 33: Number of Oppositions to Certification and Nature-of-Suit Categories (continued)

Nature of Suit	E.D. Pa. (n=50)	S.D. Fla. (n=21)	N.D. Ill. (n=45)	N.D. Cal. (n=25)
Civil rights-jobs	5 (10%)	1 (5%)	4 (9%)	2 (8%)
Civil rights-accommodations	2 (4%)	1 (5%)	0 (0%)	1 (4%)
Civil rights-welfare	2 (4%)	0 (0%)	1 (2%)	0 (0%)
Racketeer Influenced and Corrupt Organization Act (RICO)	2 (4%)	0 (0%)	2 (4%)	1 (4%)
Prisoner-civil rights	2 (4%)	4 (19%)	2 (4%)	0 (0%)
Labor/Management Relations Act	0 (0%)	0 (0%)	1 (2%)	0 (0%)
Other labor litigation	0 (0%)	1 (5%)	1 (2%)	0 (0%)
Employee Retirement Income Security Act (ERISA)	5 (10%)	3 (14%)	6 (13%)	1 (4%)
Securities	13 (26%)	4 (19%)	7 (16%)	11 (44%)
Social security-black lung	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Social Security-Social Security Disability Income, Title XVI	0 (0%)	0 (0%)	1 (2%)	0 (0%)
Tax suits	0 (0%)	0 (0%)	0 (0%)	1 (4%)
Other statutory actions	2 (4%)	1 (5%)	3 (7%)	1 (4%)
Constitutionality of state statutes	0 (0%)	0 (0%)	1 (2%)	0 (0%)

Table 34: Number of Oppositions to Certification and Nature of Suit for All Categories of Civil Rights, Securities, and ERISA Cases

Nature of Suit	E.D. Pa. (n=50)	S.D. Fla. (n=21)	N.D. Ill. (n=45)	N.D. Cal. (n=25)
All civil rights	16 (32%)	4 (19%)	15 (33%)	5 (20%)
Securities	13 (26%)	4 (19%)	7 (16%)	11 (44%)
Employee Retirement Income Security Act (ERISA)	5 (10%)	—	6 (13%)	—
Prisoner-civil rights	—	4 (19%)	—	—

Table 35: Class Notice of Certification or Settlement Issued in Certified Class Actions by Type

Type of Class	E.D. Pa. (n= 53)	S.D. Fla. (n= 13)	N.D. Ill. (n= 51)	N.D. Cal. (n= 35)
23(b)(1)(A)	100% (3)	0% (0)	75% (3)	0% (0)
23(b)(1)(B)	0% (0)	0% (0)	80% (4)	100% (2)
23(b)(2)	60% (12)	100% (3)	45% (5)	100% (5)
23(b)(3)	88% (21)	100% (11)	92% (24)	96% (22)
No type specified	60% (3)	0% (0)	67% (4)	73% (8)

Note: Some cases were certified under more than one subsection.

Table 36: Type of Notice in Certified (b)(3) Class Actions

Type of Notice	E.D. Pa. (n= 24)	S.D. Fla. (n= 11)	N.D. Ill. (n= 26)	N.D. Cal. (n= 23)
Personal	21	11	23	21
Publication	15	9	15	15
Broadcast	0	1	0	1
Other (e.g., posting)	2	1	2	3
No notice	3	0	2	1

Note: Most cases used more than one type of notice.

Table 37: Intervention Success Rates for Various Nature of Suit Categories

Nature of Suit	Attempted	Granted	Percentage Granted
Contract	2	0	0
Product liability–medical malpractice	1	1	100
Fraud personal property	2	1	50
Antitrust	3	2	67
Other civil rights	2	0	0
Jobs–civil rights	2	1	50
Welfare–civil rights	2	2	100
Racketeer Influenced and Corrupt Organization Act (RICO)	1	0	0
Employee Retirement Income Security Act (ERISA)	1	1	100
Securities, commodities, exchange	7	4	57
Social security	1	1	100
Other statutory actions	2	0	0
Constitutionality of state statutes	1	0	0

Table 38: Types of Objections Raised During Settlement Approval Process as a Percentage of All Settlement Hearings

Type of Objection	E.D. Pa. (n=35)	S.D. Fla. (n=14)	N.D. Ill. (n=36)	N.D. Cal. (n=32)
Insufficient compensation	20% (7)	0% (0)	17% (6)	6% (2)
Insufficient deterrence	3% (1)	0% (0)	3% (1)	6% (2)
Representation parties favored	3% (1)	0% (0)	8% (3)	0% (0)
Groups unfairly disfavored	11% (4)	7% (1)	3% (1)	3% (1)
Collusion with opposing party	3% (1)	7% (1)	6% (2)	0% (0)
Attorneys' fees disproportionate	17% (6)	21% (3)	14% (5)	22% (7)
Other	29% (10)	14% (2)	44% (16)	25% (8)
No objection	51% (18)	64% (9)	42% (15)	60% (19)

Table 39: Outcomes of Certified and Noncertified Cases

Outcome	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Certified (n=36)	Not Certified (n=64)	Certified (n=6)	Not Certified (n=59)	Certified (n=35)	Not Certified (n=65)	Certified (n=16)	Not Certified (n=67)
Dismissed on motion	5 (14%)	23 (36%)	0	22 (37%)	4 (11%)	28 (43%)	0	23 (34%)
Summary judgment granted	2 (5%)	10 (16%)	1 (17%)	4 (7%)	7 (20%)	10 (15%)	2 (13%)	7 (10%)
Judgment after bench trial	1 (3%)	0	0	1 (2%)	0	1 (2%)	0	0
Judgment after jury trial	2 (5%)	1 (2%)	0	0	2 (6%)	1 (2%)	0	1 (1%)
Default judgment	0	1 (2%)	0	0	0	0	0	0
Voluntary dismissal by plaintiff	0	4 (6%)	0	9 (15%)	0	10 (15%)	0	4 (6%)
Stipulated dismissal	1 (3%)	12 (19%)	0	9 (15%)	0	7 (11%)	0	18 (27%)
Nonclass settlement approved	0	4 (6%)	0	4 (7%)	1 (3%)	8 (12%)	0	2 (3%)
Class settlement approved	23 (62%)	1 (2%)	6 (100%)	0	25 (66%)	0	14 (88%)	4 (6%)
Other (e.g., case transferred)	3 (8%)	12 (19%)	0	12 (20%)	2 (6%)	7 (11%)	0	8 (12%)

Note: Cases certified for settlement purposes only are not included.

Table 40: Settlement of Certified Class Actions Compared with Settlement of Cases with Class Allegations that Were Not Certified

Outcome	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Certified (n=36)	Not Certified (n=64)	Certified (n=6)	Not Certified (n=59)	Certified (n=35)	Not Certified (n=65)	Certified (n=16)	Not Certified (n=67)
Stipulated dismissal	1 (3%)	12 (19%)	0	9 (15%)	0	7 (11%)	0	18 (27%)
Nonclass settlement approved	0	4 (6%)	0	3 (5%)	1 (3%)	8 (12%)	0	2 (3%)
Class settlement approved	23 (62%)	1 ^a (2%)	6 (100%)	0	25 (66%)	0	14 (88%)	4 (6%)
Total	65%	27%	100%	20%	69%	23%	88%	36%

Note: Cases certified for settlement purposes only are not included.

^aCase involved some class relief but not a class certification, either explicitly or implicitly.

Table 41: Disposition by Motion or Trial of Certified Cases Compared with Cases with Class Allegations Not Certified

Outcome	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Certified (n=36)	Not Certified (n=64)	Certified (n=6)	Not Certified (n=59)	Certified (n=35)	Not Certified (n=65)	Certified (n=16)	Not Certified (n=67)
Dismissal on motion	5 (14%)	23 (36%)	0	22 (37%)	4 (11%)	28 (43%)	0	23 (34%)
Summary judgment granted	2 (6%)	10 (16%)	1 (17%)	4 (7%)	7 (20%)	10 (15%)	2 (13%)	7 (10%)
Judgment after bench trial	1 (3%)	0	0	1 (2%)	0	1 (2%)	0	0
Judgment after jury trial	2 (6%)	1 (2%)	0	0	2 (6%)	1 (2%)	0	1 (1%)
Total	29%	54%	17%	46%	37%	62%	13%	45%

Note: Cases certified for settlement purposes only are not included.

Table 42: Time from Ruling on Certification to Filing of Settlement in Certified, Settled Class Actions

Category	E.D. Pa. (n=43)	S.D. Fla. (n=13)	N.D. Ill. (n=40)	N.D. Cal. (n=30)
25th percentile	1.9 months	1.2 months	0 months	0 months
Median	9.2 months	18.9 months	15.6 months	14.7 months
75th percentile	14.5 months	41.5 months	36 months	22.6 months
Settlement filed before class certification	10 cases (23%)	7 cases (54%)	6 cases (15%)	11 cases (37%)
No data available	4 cases	0 cases	3 cases	0 cases

Table 43: Jury Trials

Caption, Docket No., and District	Class Status	Nature of Suit	Days of Trial	Outcome of Trial	Results on Appeal
Hoxworth v. Blinder, No. 88-285, E.D. Pa.	Certified (b)(3)	Securities	1	Default judgment for plaintiff class	Affirmed; remanded for settlement
Melendez v. Illinois Bell Telephone Co., No. 90-5020, N.D. Ill.	Not certified (b)(2) & (b)(3)	Title VII	8 ^a	Injunction and damages for individual plaintiff; partial summary judgment for defendant ^a	Appeal dismissed
Jacobs v. Information Resources, No. 89-3772, N.D. Ill.	Certified ^b	Contracts	20	For defendant against plaintiff class	Affirmed
In re Atlantic Financial, No. 89-645, E.D. Pa.	Certified (b)(3)	Securities	12	For defendant against plaintiff class	Appeal dismissed
Ceisler v. First Pennsylvania Corp., No. 89-9234, E.D. Pa.	Certified (b)(3)	Securities	11	For defendant against plaintiff class	Affirmed
Schwartz v. System Software, No. 91-1154, N.D. Ill.	Certified (b)(3)	Securities	10	For defendant against plaintiff class	Affirmed
Bd. of Managers v. West Chester Areas, No. 92-3407, E.D. Pa.	Not certified (b)(2)	Civil rights	4	Directed verdict for defendant against individual plaintiff	Reversed in part; affirmed in part
Igo v. County of Sonoma, No. 90-353, N.D. Cal.	Not certified ^b	Civil rights	3	For defendant against individual plaintiff	Appeal dismissed
Stender v. Lucky Stores, No. 88-1467, N.D. Cal.	Certified (b)(2)&(b)(3)	Title VII	44 ^a	Parties settled after finding for one subclass ^a	No appeal
Pucci v. Litwin, No. 88-10923, N.D. Ill.	Not certified (b)(3)	Securities	4	Parties settled	No appeal

^aCombination bench and jury trial.

^bRule 23(b) type not specified.

Table 44: Bench Trials

Caption, Docket No., and District	Class Status	Nature of Suit	Days of Trial	Outcome of Trial	Results on Appeal
Packard v. Provident Nat'l. Bank, No. 91-5229, E.D. Pa.	Certified (b)(1)(A)&(B); (b)(2)	Personal property damage	4	For individual plaintiff after prior class settlement	Vacated; remanded for dismissal
Hedges v. Wauconda Community, No. 90-6604, N.D. Ill.	Not certified ^a	Civil rights	2	For individual plaintiff	Vacated in part; remanded
Dowling v. Commonwealth of Pennsylvania, No. 88-7568, E.D. Pa.	Certified (b)(2)	Civil rights	20	For defendant against plaintiff class and individual plaintiff	No appeal
Berndt v. Budget Rent-A-Car, No. 91-8294, N.D. Ill.	Not certified ^a	Civil rights	5	For defendant against individual plaintiff	No appeal
Williams v. Cordis Corp., No. 91-484, S.D. Fla.	Not certified (b)(3)	Employee Retirement Income Security Act (ERISA)	3	For defendant against individual plaintiff	No appeal
Mateo v. M/S KISO, No. 90-2357, N.D. Cal.	Not certified (b)(1),(2) & (3)	Personal injury	NA	For defendant against individual plaintiff	Affirmed
Merrill Drydock v. Longkeel, No. 90-2238, S.D. Fla.	Not certified ^b (b)(3)	Contracts	2	Parties settled (appeal on damages)	Appeal dismissed
Buttino v. FBI, No. 90-1639, N.D. Cal.	Certified (b)(2)	Civil rights	3	Parties settled after finding for plaintiff on liability	No appeal

Note: NA = not available.

^aRule 23(b) type not specified.

^bMotion for certification of defendant class denied.

Table 45: Means and Medians for Fee Awards as Percentage of Gross Settlement Costs in Certified Cases with Court-Approved Settlements Providing No Net Monetary Distribution to Class

No Net Monetary Distribution to Class	E. D. Pa. (n=16)	S. D. Fla. (n=2)	N. D. Ill. (n=16)	N. D. Cal. (n=4)
Fee awards as percentage of gross settlement costs:				
Mean	96%	88%	91%	80%
Median	100%	88%	98%	100%
Maximum	100%	100%	100%	100%
Minimum	63%	77%	50%	21%
Fee awards:				
Mean award	\$911,250	\$171,948	\$351,638	\$1,826,288
Median award	\$86,002	\$171,948	\$60,000	\$1,676,076
Gross settlement costs:				
Mean amount	\$915,812	\$197,500	\$357,566	\$1,877,538
Median amount	\$101,000	\$197,500	\$80,197	\$1,676,076

Note: This table shows the thirty-eight cases where the only monetary distribution was for payments to class representatives, attorneys' fees, or administrative expenses. In addition to these thirty-eight cases, in fourteen certified cases (seven, one, four, two cases in the four districts, respectively), there was no record of a fee request or a fee award and court-approved settlements provided no net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expense. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross settlement costs" include the following payments by defendants to fund the settlement where applicable: payments to class representatives, attorneys' fees and expenses, and administrative costs of the settlement such as notice costs.

Table 46: Certified, Settled (b)(3) Classes with No Monetary Distribution to the Class

Caption, Docket No., and District	Class Definition	No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (Method)
Brownell v. State Farm Mutual Auto Ins., No. 90-2224 (E.D. Pa. filed Mar. 29, 1990).	All insureds who submitted a medical payment claim for personal injuries	1.4 M	None indicated	Defendant agreed (1) not to use written criteria with respect to the duration, frequency, cost, and type of treatment without disclosing such criteria; and (2) not to compensate peer reviewers on a percentage or contingency fee basis	\$225,000 (stipulated)
Assad v. Hibbard Brown & Co., No. 90-7420 (E.D. Pa. filed Nov. 20, 1990).	All who purchased or sold Children's Workshop Limited securities through defendant	Unknown	\$6,000	Class members who file claims are to receive certificates of monetary credits to be applied to future transactions with defendant	\$50,000 (method not specified; \$110,000 requested)
The Lindner Fund, Inc. v. Pollock, No. 91-6901 (E.D. Pa. filed Nov. 4, 1991).	All purchasers of defendant's common stock during class period	Unknown	None indicated	Settlement stated that plaintiffs' counsel reviewed the prospectuses and, based on discovery, stated that there is no good faith basis for asserting that the prospectuses contain any false or misleading statement or omission	\$225,000 (stipulated)
Cherkas v. General Motors Corp., No. 92-6450 (E.D. Pa. filed Nov. 9, 1992). ^a	Purchasers and owners of specific full-size GM pick-up trucks or chassis cab models	3.7 M	None indicated	Certificates with a face value of \$1,000 toward the purchase of a new GM pick-up truck (Notes: personal injury claims were not released; settlement vacated on appeal)	\$9.6 M (stipulated)
Cohen v. Alan Bush Brokerage Co., No. 85-8018 (S.D. Fla. filed Jan. 10, 1985).	Purchasers of common stock of Comterm during class period	305	\$8,000	Coupons of a total estimated value of \$1 million representing a credit for up to 60% of standard commission rates for common stock trading on an agency basis	\$168,894 (stipulated up to \$420,000; award contingent on number of claims)
Rodriguez v. Township of Dekalb, No. 82-20190 (N.D. Ill. filed Nov. 10, 1982).	All applicants for General Assistance (a local welfare program)	Unknown (notice by posting)	\$750	Injunction that all local government administrators adopt and consistently apply written General Assistance standards, maintained in a publicly available manual	\$25,000 (method not specified)

(cont.)

Table 46: Certified, Settled (b)(3) Classes with No Monetary Distribution to the Class (continued)

Caption, Docket No., and District	Class Definition	No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (Method)
Harris v. DeRobertis, No. 86-5094 (N.D. Ill. filed July 14, 1986).	All inmates of Cellhouse B-West, Stateville Correctional Center, from 1/8/92 to 1/11/92	Unknown	None indicated	Claims procedure established— inmates could choose \$50 payment without proof of injury or up to \$3,000 for physical or psychological injuries sustained as a direct result of the lack of heat in the cellblock	\$20,000 (method not specified)
Schlansky v. EAC Industries, No. 90-854 (N.D. Ill. filed Feb. 13, 1990).	Purchasers of EAC securities during class period	222	\$2,000	40,000 shares of common stock and 370,000 warrants to buy an issue of stock at \$4 a share during a five-year period	\$200,000 plus 10,000 shares and 30,000 warrants (stipulated)
Aitken v. Fleet Mortgage, No. 90-3708 (N.D. Ill. filed June 28, 1990).	Residential real estate mortgagors with tax and insurance escrows computed by a particular method during the past year	1.58 M	\$12,000	Rebates to be paid to current and past mortgage holders using a set formula	\$1.35 M (stipulated, based on percentage of recovery)
Wesley v. GM Acceptance Corp., No. 91-3368 (N.D. Ill. filed May 31, 1991).	Illinois GMAC auto lessees who terminated a lease early and were assessed termination fees	848	\$3,428	Recalculation of lease termination charges on an actuarial basis for post-settlement terminations; for pre-settlement terminations, choice of \$80 cash or \$300 applied to a new consumer lease within a year of the settlement	\$127,542 (lodestar; \$150,000 requested)
Koerber v. S. C. Johnson & Sons, No. 93-20267 (N.D. Ill. filed Oct. 6, 1993).	All direct and indirect purchasers of Raid or Raid Max during class period	2,418	None indicated	(1) Requiring the defendant Bayer to affirmatively offer a license for Cyfluthrin to all of defendant's competitors on nondiscriminatory terms; (2) provide \$1.4 million in promotional benefits to direct purchasers and \$6.6 million to indirect (consumer) purchasers	\$2.5 M (stipulated)
McKenna v. Sears Roebuck & Co., No. 92-2227 (N.D. Cal. filed June 12, 1992).	All purchasers of auto repairs from any Sears Center during class period of more than four years	1 M	None indicated	(1) Enforcing its policy of satisfaction guaranteed or your money back and (2) establishing a method of distributing \$50 coupons toward the purchase of brake calipers, coil springs, master cylinder, or idle arm upon showing proof of prior purchase of such an item	\$3 M (stipulated)

Note: M = Millions.

^aThe *General Motors Pick-Up Truck Litigation* (55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995)).

Table 47: Injunctive Relief in Certified (b)(2) Cases Providing No Net Monetary Distribution to Class

Caption, Docket No., and District	Injunctive Relief	Fee Award
Bonsall Village v. Patterson, No. 90-457, E.D. Pa.	Modifying a township's zoning and development plans, encouraging development of an area occupied primarily by minorities	\$140,000
Bozzi v. Sullivan, No. 90-2580, E.D. Pa.	Readjudicating claims for widow, widower, survivor and disability benefits using appropriate regulations	\$167,500
Packard v. Provident Nat'l Bank, No. 91-5229, E.D. Pa.	Establishing a grievance-arbitration procedure allowing class members to challenge a bank's "sweep fees" applied to investment accounts	\$90,000
Avery v. City of Philadelphia, No. 92-7024, E.D. Pa.	Replacing the psychological examination process for police officer applicants, giving class members an opportunity for psychological reexamination	\$49,000
Williams v. Philadelphia Housing Authority, No. 92-7072, E.D. Pa.	Establishing a housing authority's policy that applicants will not be determined ineligible for Section 8 housing solely on the basis of a related debt to the housing authority unless that debt is the legal responsibility of the applicant; providing hearing/review procedures for applicants who disagree with authority's findings	\$20,558
Felix v. Sullivan, No. 92-7376, E.D. Pa.	Changing the services offered under pharmaceutical, dental, and other medical plans for all state residents who receive medical assistance benefits	\$3,997
Brooks v. Philadelphia Housing Authority, No. 93-232, E.D. Pa.	Requiring a housing authority to rewire certain housing units and install a separate meter for common area electric service	\$6,624
Keith v. Daley, No. 84-5602, N.D. Ill.	Entering a consent decree (1) that allows the state to regulate abortions and (2) that protects women's right to choose an abortion and receive family planning services	\$224,810
Bogard v. Duffy, No. 88-2414, N.D. Ill.	Improving treatment resources and placement opportunities for developmentally disabled Medicaid recipients	\$682,681
Castaneda v. Greyhound Retirement and Disability Plan, No. 88-4184, N.D. Ill.	Refraining from denying claims for return of individual contributions to a pension plan	\$75,000
Blum v. Icul Service Corp., No. 93-4399, N.D. Ill.	Agreeing that no letter shall be sent threatening consequences for failure to pay a debt before the 30-day validation period during which the alleged debtor may challenge the claim	\$10,000
Hiestand v. Schillerstrom, No. 93-6657, N.D. Ill.	Agreeing to modify defendant's collection letter so that no letter is sent demanding payment until after the applicable validation period has expired	\$5,500
Buttino v. FBI, No. 90-1639, N.D. Cal.	Adopting Federal Bureau of Investigation policy that "sexual orientation or preference may not be considered as a basis for a negative factor in determining one's suitability for employment"	\$53,000

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Table 48: Donations to Charitable or Public Interest Organizations in Certified Cases with Court Approved Settlements

Caption, Docket No., and District	Distribution for Charitable Purposes
N.D. Ill.	
M&M v. Chicago Bd. Options, No. 88-02139	<i>Cy pres</i> grants to: Chicago-Kent College of Law—\$14,000; DePaul Univ. Law School—\$35,000; John Marshall Law School—\$35,000; Public Interest Law Initiative—\$10,500; Illinois Institute of Technology—\$20,000; Loyola Univ. of Chicago—\$19,000.
<i>In re</i> Clozapine Anti-Trust Litigation, No. 91-2431	(1) Discount credits with a value of \$3 million to be used by mental health agencies of thirty-four states to treat patients who do not otherwise qualify for Medicaid benefits for therapy using the drug Clozapine; (2) additional \$3 million to the National Organization for Rare Diseases (NORD) for treating new Clozaril patients not otherwise qualified for Medicaid reimbursement; and (3) a 15% rebate (to be distributed through NORD) for purchases, over a two-year period, of the drug Clozaril by patients on Social Security Disability Income.
<i>In re</i> Scouring Pads, No. 93-6594	\$150,000 to Chicago Bar Foundation for specified programs on domestic abuse, juvenile justice, and tutoring/mentoring.
N.D. Cal.	
Lucky Stores No. 88-01467	A specified donation to a nonprofit organization in a Title VII employment discrimination case.
<i>In re</i> G.E. Energy Choice Light Bulb Consumer Litig., No. 92-4447	Any money remaining in a rebate and coupon settlement fund to an unspecified charity.

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Table 49: Reversals and Remands in Cases with Previously Certified Class

	Cherkas v. General Motors Corp., Case No. 92-06450, E.D. Pa.	Packard v. Provident Nat'l. Bank, Case No. 91-05229, E.D. Pa.	Berman v. Int'l Controls Corp., Case No. 88-06206, S.D. Fla.	Bennett v. Bombela, Case No. 83-00480, N.D. Ill.	Harris v. DeRobertis, Case No. 86-05094, N.D. Ill.	Castaneda v. Greyhound Retirement and Disability Plan, Case No. 88-04184, N.D. Ill.	Untermeyer v. Margolis, No. 87-5491, Case No. 87-05491, N.D. Cal.
Issues on appeal	Certification of settlement class; settlement approval; class counsel fees	Bench trial award of punitive damages for individual plaintiff after class settlement	Summary judgment for defendants	Second of two summary judgments for defendants ^a	Case dismissal for failure to state a claim	Summary judgment on liability; declaratory judgment for plaintiff class	Summary judgment for defendants
Appeal filed by	Objecting class members	Defendants	Plaintiffs	Plaintiffs	Plaintiffs	Defendants	Plaintiffs
Outcome of appeal	Vacated; remanded	Vacated; remanded for case dismissal for lack of subject matter jurisdiction	Reversed in part; vacated in part	Reversed; remanded	Reversed; remanded	Reversed summary judgment; remanded	Affirmed in part; reversed in part; remanded with respect to claims against auditors
Eventual outcome of case	Pending ^b	Case dismissed	Court-approved class settlement	Court-approved class settlement	Court-approved class settlement	Court-approved class settlement	Pending ^b

^aPrior to class certification, the court of appeals reversed and remanded the first summary judgment for defendants.

^bOn remand after the study's cutoff date of June 30, 1994.

Table 50: Reversals and Remands in Cases with No Class Previously Certified

	Bd. of Managers v. West Chester Areas, Case # 92-03407, E.D. Pa.	Baby Neal v. Casey, Case # 90-02343, E.D. Pa.	O'Neill v. City of Philadelphia, Case # 91-06759, E.D. Pa.	Flores v. Carni- val Cruise, Case # 92-02766, S.D. Fla.	Grant v. U.S. Parole Comm., Case # 92- 00484, S.D. Fla.	Joaquim v. Royal Caribbean, Case # 92- 02767, S.D. Fla.
Cert. ruling preappeal	Yes (not cer- tified)	Yes (not cer- tified)	Yes (not cer- tified)	No ruling	Yes (not cer- tified)	Yes (not cer- tified)
Issues on appeal	Directed verdict for defendants	Denial of class certification; partial summary judgment for defendants; stipulated judg- ment against named plaintiffs	Appeal #1: Denial in part of defendants' motion for summary judg- ment Appeal #2: Partial summary judgment for defendant	Summary judg- ment for defen- dants	Dismissal of case	Dismissal of case
Appeal filed by	Plaintiffs	Plaintiffs	#1: Defendants #2: Plaintiffs	Plaintiffs	Plaintiffs	Plaintiffs
Outcome on appeal	Reversed in part; affirmed in part; remanded	Reversed; re- manded (without review of partial summary judg- ment	#1: Vacated; remanded for dismissal of case #2: Appeal dismissed	Affirmed in part; reversed in part; remanded on compensatory claim	Affirmed in part; reversed in part	Reversed in part; vacated in part
Class certifi- cation after remand	No	No	No	No	No	No
Eventual out- come of case	Case dismissal	Case dismissal	Case dismissal	Pending ^b	Case dismissal	Pending ^b

(cont.)

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Table 50: Reversals and Remands in Cases with No Class Previously Certified (continued)

	Bennett v. Bombela, Case # 83-00480, N.D. Ill.	Retired Chicago Police v. City of Chicago, Case # 90-00407, N.D. Ill.	Hedges v. Wauconda Community, Case # 90-06604, N.D. Ill.	Twenty-First Century v. Sherwood, Case # 87-05774, N.D. Cal.	Adesanya v. West America Bank, Case # 88-04342, N.D. Cal.	Miller v. Pacific Lumber Co., Case # 89-03500, N.D. Cal.	Vandenbosch v. Georgia Pacific Corp., Case # 90-00389, N.D. Cal.
Cert. ruling preappeal	No ruling	Yes (not certified)	No ruling	No ruling	No ruling	Yes (not certified)	No ruling
Issues on appeal	First of two summary judgments for defendants ^a	Denial of motion for class certification and intervention; dismissal of case	Permanent injunction against defendants and nominal damages for individual plaintiffs	Partial summary judgment for defendants; denial of plaintiffs' summary judgment motion	Dismissal of certain claims	Denial of class certification; dismissal of certain class representatives; partial summary judgment for defendant; disqualification of plaintiffs' counsel	Summary judgment for defendants
Appeal filed by	Plaintiffs	Plaintiffs; intervenors	Defendants	Plaintiffs	Plaintiffs	Plaintiffs	Plaintiffs
Outcome on appeal	Reversed; remanded	Affirmed in part (including affirmed of denial of class certification); reversed in part; remanded	Vacated injunction and damages; remanded on damages	Reversed; remanded	Affirmed in part; reversed in part; remanded	Reversed in part; remanded in part; affirmed disqualification of counsel	Affirmed in part; reversed in part; remanded
Class certification after remand	Yes	No	No	Yes	No	No	No
Eventual outcome of case	Court-approved class settlement ^b	Pending ^b	\$1 to plaintiffs; case dismissal	Court-approved class settlement	Case dismissal	Case dismissal	Case dismissal stipulated by parties

^a The second remand after appeal is shown in Table 49.

^b On remand after the study's cutoff date of June 30, 1994.

Table 51: Issues and Dispositions on Appeal in E.D. Pa. Class Actions Terminated Between July 1, 1992, and June 30, 1994 (n=36 appeals in 31 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
2	Defendant	Certification of class	1 affirmed; 1 not reviewable
1	Defendant	Default judgment for plaintiff	1 affirmed
1	Defendant	Denial in part of summary judgment	1 vacated, remanded for dismissal
1	Defendant	Denial of arbitration	1 affirmed
1	Defendant	Bench trial judgment for plaintiff	1 vacated, remanded for dismissal
1	Defendant	Motion for stay	1 affirmed
1	Defendant	Preliminary injunction	1 affirmed
1	Defendant	Summary judgment for plaintiff	1 affirmed
1	Defendant	Denial of partial summary judgment	1 appeal dismissed
11	Plaintiff	Dismissal of case	9 affirmed; 2 appeals dismissed
5	Plaintiff	Summary judgment for defendant	3 affirmed; 2 appeals dismissed
3	Plaintiff	Partial summary judgment for defendant	1 affirmed; 1 reversed and remanded; 1 vacated, remanded for dismissal
2	Plaintiff	Order deeming dismissal motion to be summary judgment motion; issue not available	1 appeal dismissed as interlocutory; 1 affirmed
2	Plaintiff	Taxation of defendant's costs	2 affirmed
1	Plaintiff	Directed verdict for defendant	1 reversed in part, affirmed in part
1	Plaintiff	Denial of class certification	1 reversed and remanded
1	Plaintiff	Denial of sanctions	1 appeal dismissed
1	Plaintiff	Dismissal of certain claims	1 appeal dismissed
1	Plaintiff	Verdict for defendant	1 appeal dismissed
1	Objecting class members	Certification of class ^a	1 vacated and remanded
1	Objecting class members	Award of fees to plaintiff counsel ^a	1 vacated and remanded
1	Objecting class members	Settlement approval ^a	1 vacated and remanded
1	Party opposing class	Issue not available	1 withdrawn
1	Proposed intervenors	Denial of intervention	1 affirmed

Note: Some appeals had more than one issue and some cases had more than one appeal.

^a*General Motors Pick-Up Truck Litigation* (55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995)).

Table 52: Issues and Dispositions on Appeal in S.D. Fla. Class Actions Terminated Between July 1, 1992, and June 30, 1994 ($n=12$ appeals in 11 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
1	Defendant	Dismissal of case	1 appeal dismissed
1	Defendant	Award of fees to plaintiff counsel	1 affirmed
1	Defendant	Judgment for plaintiff after trial	1 appeal dismissed
5	Plaintiff	Dismissal of case	2 affirmed; 1 affirmed in part, reversed in part; 1 appeal dismissed; 1 reversed in part, vacated in part
2	Plaintiff	Summary judgment for defendant	1 affirmed in part, reversed in part; 1 reversed in part, vacated in part
1	Plaintiff	Award of fees to plaintiff counsel	1 affirmed
1	Non-named class member	Award of fees to plaintiff counsel	1 appeal dismissed

Table 53: Issues and Dispositions on Appeal in N.D. Ill. Class Actions Terminated Between July 1, 1992, and June 30, 1994 ($n=36$ appeals in 39 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
3	Defendant	Summary judgment for plaintiff	1 affirmed; 1 appeal dismissed; 1 reversed
2	Defendant	Award of fees to plaintiff counsel	1 remanded for reconsideration; 1 pending
2	Defendant	Judgment for plaintiff	1 affirmed in part, vacated in part, and remanded; 1 appeal dismissed
1	Defendant	Petition for writ of mandamus to recuse trial judge	1 petition denied
1	Defendant	Denial of motion to dissolve preliminary injunction	1 appeal dismissed
1	Defendant	Judgment for plaintiff	1 affirmed
1	Defendant	Extension of time for filing plaintiff notice of appeal	1 remanded for settlement
18	Plaintiff	Dismissal of case	10 affirmed; 4 appeals dismissed; 1 reversed and remanded; 1 remanded for settlement; 2 pending

(cont.)

Table 53: Issues and Dispositions on Appeal in N.D. Ill. Class Actions Terminated Between July 1, 1992, and June 30, 1994 (n=56 appeals in 39 cases) (continued)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
9	Plaintiff	Summary judgment for defendant	6 affirmed; 1 appeal dismissed; 2 reversed and remanded
7	Plaintiff	Dismissal of certain claims	1 affirmed; 5 appeals dismissed; 1 pending
2	Plaintiff	Verdict for defendant	2 affirmed
2	Plaintiff	Partial summary judgment for defendant	1 appeal dismissed; 1 pending
1	Plaintiff	Denial of class certification	1 affirmed
1	Plaintiff	Denial of plaintiff attorneys' fees	1 appeal dismissed
1	Plaintiff	Dismissal of third-party complaint	1 affirmed
1	Plaintiff	Sanctions against plaintiff counsel	1 affirmed
1	Plaintiff	Reduction of plaintiff fee request	1 vacated and remanded
1	Plaintiff	Transfer of case	1 appeal dismissed
1	Plaintiff and proposed intervenor	Denial of injunction	1 affirmed
1	Plaintiff and proposed intervenor	Denial of class certification	1 affirmed
1	Plaintiff and proposed intervenor	Denial of intervention	1 affirmed
1	Plaintiff and proposed intervenor	Summary judgment for defendant	1 affirmed
2	Third-party defendant	Settlement approval	2 appeals dismissed
1	Third-party defendant	Denial of motion for reconsideration	1 appeal dismissed
1	Third-party defendant	Dismissal of third-party defendant's counter-complaint	1 appeal dismissed
1	Proposed intervenor-defendant	Denial of intervention	1 affirmed

Note: Some appeals had more than one issue and some cases had more than one appeal.

Table 54: Issues and Dispositions on Appeal in N.D. Cal. Class Actions Terminated Between July 1, 1992, and June 30, 1994 ($n=34$ appeals in 23 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
2	Defendant	Partial summary judgment for plaintiff	1 affirmed; 1 appeal dismissed
1	Defendant	Preliminary injunction	1 appeal dismissed
1	Defendant	Denial of summary judgment	1 affirmed
10	Plaintiff	Dismissal of case	6 affirmed; 3 appeals dismissed; 1 pending
3	Plaintiff	Summary judgment for defendant	1 affirmed; 1 affirmed in part, reversed in part, and remanded; 1 reversed in part, affirmed in part
2	Plaintiff	Partial summary judgment for defendant	1 reversed; 1 reversed and re- manded
2	Plaintiff	Judgment for defendant	1 affirmed; 1 appeal dismissed
2	Plaintiff	Denial of motion for reconsideration	1 affirmed in part, reversed in part, and remanded; 1 appeal dismissed
2	Plaintiff	Dismissal of certain claims	1 affirmed; 1 affirmed in part, reversed in part, and remanded
2	Plaintiff	Denial of class certification	1 appeal dismissed; 1 reversed
1	Plaintiff	Denial of injunction	1 appeal dismissed
1	Plaintiff	Denial of in forma pauperis application	1 appeal dismissed
1	Plaintiff	Denial of motion for modification of order	1 appeal dismissed
1	Plaintiff	Denial of motion to disqualify judge	1 appeal dismissed
1	Plaintiff	Denial of motion to vacate dismissal	1 appeal dismissed
1	Plaintiff	Denial of plaintiff attorneys' fees	1 reversed and remanded
1	Plaintiff	Bench trial judgment for defendant	1 affirmed
1	Plaintiff	Summary judgment for opposing class members	1 affirmed
1	Plaintiff	Dismissal of certain class representatives	1 remanded
1	Plaintiff	Disqualification of plaintiff counsel	1 affirmed
1	Objecting class member	Award of fees to plaintiff counsel	1 pending
1	Third-party defendant	Summary judgment for plaintiff	1 affirmed

Note: Some appeals had more than one issue and some cases had more than one appeal.

Table 55: Appeals Involving Certification Issues

	E.D. Pa. Case No. 88-00285	E.D. Pa. Case No. 90-02343	E.D. Pa. Case No. 92-06450	N.D. Ill. Case No. 90-00407	N.D. Ill. Case No. 92-07076	N.D. Cal. Case No. 89-03500	N.D. Cal. Case No. 93-03160	
Issues on appeal	Appeal #1: Certification of class; preliminary injunction	Appeal #2: Certification of class; default judgment for plaintiffs	Denial of motion to certify class; partial summary judgment for defendants; stipulated order of judgment against all named plaintiffs on individual claims	Certification of class; class settlement; attorneys' fee award	Denial of motion to certify class; summary judgment for defendants; denial of intervention; denial of preliminary injunction	Denial of motion to certify class; summary judgment for defendants	Denial of motion to certify class; partial summary judgment for defendants	Denial of motion to certify class; denial of injunction
§1292(b) certification for appeal	No	No	No; prior motion for 1292(b) certification was denied		No	No; prior motion for 1292(b) certification was denied	No	No
Appeal filed by	Defendant	Defendant	Plaintiffs	Objecting class members	Plaintiffs and proposed intervenors	Plaintiff	Plaintiffs	Plaintiffs
Outcome of appeal	Injunction vacated; certification decision not reviewable	Affirmed	Reversed; remanded	Vacated; remanded	Affirmed in part (including alternative of denial of class certification); reversed in part; remanded	Affirmed; remanded ^a	Reversed; remanded ^a	Appeal dismissed
Eventual outcome of case	See Appeal #2 (next column)	Court-approved class settlement ^b	Class certified on remand; case pending ^b	Pending ^b	Pending ^b	No class certified; case dismissed	No class certified; case dismissed	No class certified; case dismissed

^aCourt of appeals held certification is reviewable in combination with partial summary judgment for defendant, settlement of rest of individual claims, and entry of judgment against all named plaintiffs on their individual claims. Appellate court did not review the trial court's partial summary judgment decision, but reversed and remanded it because of the reversal of denial of class certification.

^bOn remand after the study's cutoff date of June 30, 1994.

Table 56: Firms Most Frequently Serving as Lead or Co-Lead Counsel (Number of Class Action Cases)

Firm	Firm's Offices	E.D. Pa. Cases	S.D. Fla. Cases	N.D. Ill. Cases	N.D. Cal. Cases	Total No. of Cases
Chimicles Burt et al. (and Greenfield & Chimicles)	Los Angeles, Cal. West Palm Beach, Fla. Haverford, Pa.	7	4 ^a	0	6	17 ^a
Milberg Weiss	San Diego, Cal. New York, N.Y.	1	1	0	14	16
Berger & Montague	San Francisco, Cal. Philadelphia, Pa.	7	2	0	5	14
Lieff Cabraser	San Francisco, Cal.	1	0	0	7	8
Community Legal Services	Philadelphia, Pa.	8	0	0	0	8
Barrack Rodos	San Diego, Cal. Philadelphia, Pa.	6	0	0	1	7
Stephen F. Gold	Philadelphia, Pa.	5	0	0	0	5
Beeler Schad	Chicago, Ill.	0	0	4	0	4
Cohen, Milstein	Washington, D.C.	0	1	2	1	4
Edelman & Combs	Chicago, Ill.	0	0	1	0	1
Kohn (Nast) Savett	Philadelphia, Pa.	4	0	0	0	4
Lawrence Walner & Assoc.	Chicago, Ill.	0	0	4	0	4

Note: Some firm names changed after they were entered on court records. Each consolidation of cases is counted as one class action case.

^aFirm was liaison counsel in two additional cases.

Appendix D

Methods

Nature of the Database. The data in this field study report represent a full census of the population of class action cases that were terminated in E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal. between July 1, 1992, and June 30, 1994. Unlike the time study data presented to the committee,³⁵⁸ the field study is not a random sample. It documents all identifiable class action activity in the four districts in cases terminated during the study period and is a sample only in the sense of being limited to that time period.

Selection of Courts. The four courts were selected for the field study on the basis of the level of class action activity shown in the Administrative Office of the U.S. Courts data and on the basis of geography. We undertook to study one court in the eastern, western, midwestern, and southern regions of the country and to study courts that were among the ten courts with the most class action cases filed.³⁵⁹ We chose the regional approach so that we could examine class actions in different courts, in different circuits, and in different local legal cultures. Our purpose was to study a variety of approaches used by the bench and bar in litigating and adjudicating class actions.

For each case in the study, an attorney-researcher examined pleadings, documents, briefs, orders, affidavits, declarations, and, when available, transcripts. In particular, we looked at rulings on motions to dismiss, motions for summary judgment, all briefs relating to class certification, filings relating to notice and approval of settlement, applications for attorneys' fees, and any orders relating to these matters. For certified class actions, we gathered a complete set of the notices the court approved. These documents are available to researchers who wish to study the notice process.

Identification and Definition of Class Actions. With each court's assistance we conducted various searches for class actions. Our aim was to find all cases with class action allegations in the complaint or with indications of class action activity in the text of docket entries or published opinions. Because of limited resources available for the study we restricted the time period covered and selected all such cases that had been terminated³⁶⁰ between July 1, 1992, and

³⁵⁸. See Willging et al., *supra* note 26.

³⁵⁹. We selected the courts before we discovered a substantial undercount of class action activity in the Administrative Office data, as explained below, in this section.

³⁶⁰. We included in the "terminated" category cases that were closed but had issues pending appeal at the time of our field visit. Our subsequent follow-up on the outcome on appeal determined that, in a few cases, the district court case has been reopened after remand from the court of appeals. Nevertheless, these reopened cases are in-

June 30, 1994.³⁶¹ Cases that were consolidated or otherwise grouped were counted as a single case. This approach avoids counting cases more than once when the post-consolidation litigation and rulings took place only once. However, for one purpose in the report, to capture the total number of class action filings, we include the number of cases included in the consolidations (*see supra* § 1(b)).

Our initial search focused on databases provided on tape by the Administrative Office of the U.S. Courts for the five years prior to August 1994. An initial visit to two courts focused on cases identified in the Administrative Office data. In both jurisdictions, a subsequent LEXIS search of published opinions uncovered a large number of class action opinions in cases that were not identified as class actions in the Administrative Office database.

Discovering these cases led us to ask both courts to conduct three searches of their electronic records: one for the class action “flag” that is entered when a case is originally docketed; another for specific “event codes,” such as the filing of a motion to certify a class, that identify class action activity; and a final search of the court’s electronic docketing system, looking for the word “class.”³⁶² These searches uncovered the majority of the cases in this study.³⁶³ In Table 57 cases in the column “class action allegation” were the only cases identified in the Administrative Office data as class actions. The class action status of all other cases that were eventually included in our study had been recorded in the Administrative Office database as “missing.” As Table 57 shows, Administrative Office statistics identified from one-fifth to one-half of the class actions in the four courts.

Table 57: Class Action Status in Administrative Office Data for All Class Actions Terminated Between July 1, 1992, and June 30, 1994

Class Action Status	E.D. Pa. (<i>n</i> =117)	S.D. Fla. (<i>n</i> =72)	N.D. Ill. (<i>n</i> =117)	N.D. Cal. (<i>n</i> =102)
Class Action Allegation	22% (26 cases)	51% (37 cases)	35% (41 cases)	45% (46 cases)
Missing Data	78% (91 cases)	49% (35 cases)	65% (76 cases)	55% (56 cases)

cluded in the study because they were closed at the time of our field visit.

³⁶¹ We chose this period because the advisory committee expressed an interest in recent class action activity, and July 1, 1992, to June 30, 1994, was the most recent period for which data were available. Two years of data represents the longest continuous period that could be studied with the resources available.

³⁶² After identifying a case that appeared to be a class action, an attorney on the research team examined the docket sheet and file. If a case did not include a class action allegation, class certification activity, or class settlement activity, we excluded it from the study.

³⁶³ There may be class action cases that would escape identification by these searches, but they would be cases in which there was no detectable docket entry identifying class action activity and in which the initial complaint and cover sheet did not identify the case as a class action. Presumably, such cases, if they exist, would be rare, would have no or negligible class action activity, and would add little to the reader’s understanding of class action litigation.

Those data lead to the conclusion that information on class actions reported in the Administrative Office database substantially undercounted class action activity during the study period. Data in our time study report³⁶⁴ indicated that a substantial, but smaller, undercount occurred during the 1987–1989 time study period. Data from the Federal Judicial Center time study sample and from the Federal Judicial Center study of four courts support the conclusion that in the recent past there were no reliable national data on the number of class action filings and terminations in the federal courts.³⁶⁵

The time study. In the Federal Judicial Center’s district court time study, district and magistrate judges maintained records of the time they spent on a random sample of 8,320 civil cases filed in 86 U.S. district courts between November 1987 and January 1990. Fifty-one of those cases (0.61%, an incidence of 61 class actions for every 10,000 cases filed) contained class action allegations. A case was defined as a class action either by reference to the case statistics maintained by the Administrative Office (36, or 71%) or, where there was no class action indicator in the Administrative Office statistics, to class action activity in a judge’s time records (15, or 29%).³⁶⁶ For all 51 time study cases, we reviewed docket sheets and case file documents of the type we reviewed in the four study districts, as described above.

Though informative, the time study class action data need to be used with caution. The time study data should be read as descriptive of a small national random sample of class actions. In total, the data are certainly more than anecdotal evidence; however, in many instances, information on important class action activity was available only for a small number of cases per district and these instances should be viewed as anecdotal examples. The time study data should not be thought of as representing the universe of class action activity nation-wide.³⁶⁷

Termination cohort limits. The cases studied comprise what is often called a termination cohort, consisting of all cases that terminated within a fixed time. Fluctuations in case filing rates affect the composition of a termination cohort. For example, if the rate of filing of securities class actions was to have increased abruptly in 1991, terminated securities class actions in our cohort might include more cases of shorter duration (e.g., perhaps more settlements than

³⁶⁴. See Willging et al., *supra* note 26, at 1, 4–5. Subsequent to the preliminary time study report, our further analysis of the time study data revealed more evidence of a serious undercount. In February 1995 we examined the published Administrative Office statistics for the period of the time study. Between January 1, 1988, and December 31, 1989, the core period of the time study, Administrative Office data indicate that there were 461,050 cases filed in all of the federal district courts and that 1,069 of these, or 0.23%, were recorded as being class actions. That incidence rate—23 class actions per 10,000 cases—is far lower than the rate of 61 per 10,000 cases found in the time study. See Willging et al., *supra* note 27, at 8 n.4.

³⁶⁵ In January 1995 the Administrative Office of the United States Courts began reminding U.S. district courts, on a monthly basis, of the correct procedures for reporting filing and termination data related to class action cases. To the extent that these efforts have resulted in a change in reporting from the courts, beginning in 1995 the reported statistics will more accurately reflect class actions in the courts. For further discussion and documentation of the lack of reliable national data on class action activity, see Willging et al., *supra* note 26, at 4–5.

³⁶⁶ One case identified in the Administrative Office data as a class action had no indication on the docket sheet or in the documents in the file that any class action allegations were involved. That case was eliminated from the sample discussed in Willging et al., *supra* note 26.

³⁶⁷ The time study data as a whole, of course, are fully suitable to their intended purpose of assigning case weights to various types of cases that were observed with much greater frequency than class actions. There is no separate case weight for class actions.

trials) than if the filing pattern had been steady. We are unable to examine the filing patterns of class actions because, as discussed above, there are no reliable national data on class action filings. But we do know that the filing pattern for all securities cases (class actions and nonclass actions) has been declining steadily at a rate of about 10% a year during the 1990s. And, securities class actions were the largest single nature of suit in our study, comprising 20% to 35% of the cases in the four districts. Other changes in filing patterns may have affected our cohort of cases. If such fluctuations have occurred, they would likely create an error of a few percentage points. Accordingly, our results—particularly on the time from filing to termination, settlement, or ruling on motions—should be viewed as approximations with a margin of error.

Limits of the data. The field study data should be read as descriptive of class action activity solely in the districts and the time period studied. We present these data as a systematic description of such activity, as four snapshots of courts selected because of their level of class action activity and their differences. Activity in one district cannot be generalized to other districts nor, of course, to a universe of class action activity nation-wide.

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