

AN EMPIRICAL ANALYSIS OF RULE 23 TO ADDRESS THE RULEMAKING CHALLENGES

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Professor Edward H. Cooper's Rule 23: Challenges to the Rulemaking Process, echoing concerns of the Judicial Conference's Advisory Committee on Civil Rules, encourages investigation of the assumptions that underpin the policies behind Federal Rule of Civil Procedure 23. In this Article, Willging, Hooper, and Niemic respond to Cooper's call for action and examine these common assumptions supporting Rule 23, presenting their work through seventeen discrete issues raised by Professor Cooper as prevalent in class action litigation. Based on a study conducted by the Federal Judicial Center, this Article provides data and analyses concerning class action cases terminated between July 1, 1992, and June 30, 1994, in four federal district courts.

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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 1966.² The Judicial Conference's Advisory Committee on Civil Rules (the Advisory Committee) is currently considering proposals to amend Rule 23.

Creating a workable procedural standard for class actions has challenged rulemakers since the first draft was published in 1937.³

¹ Fed. R. Civ. P. 23, advisory committee's note to 1937 adoption. The United States Supreme Court adopted the rules of civil procedure on December 20, 1937, and ordered them to be reported to Congress at the beginning of the January 1938 session. Federal Civil Judicial Procedure and Rules 6-7 (1995).

² There were technical amendments in 1987, but no substantive change was intended. Fed. R. Civ. P. 23, 1987 amendment note.

³ See James W. Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551, 571 (1937) (explaining that "[i]t is difficult, however, to appraise the various problems involved and state a technically sound and thoroughly workable rule" for class actions).

The 1966 amendments to Rule 23 sparked a “holy war”⁴ 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.’”⁵

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.”⁶ Respect for Professor Kaplan’s caution may have dampened any Advisory Committee interest in revisiting the Rule.⁷ Now, a generation has passed and the current Advisory Committee has returned its attention to the hotly debated policy issues underlying the procedural framework of Rule 23. This Article 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.⁸ 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?⁹ 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

⁴ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 *Harv. L. Rev.* 664, 664 (1979).

⁵ *Id.* at 665 (citations omitted).

⁶ Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 *F.R.D.* 39, 52 (1967).

⁷ See, e.g., Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 *N.Y.U. L. Rev.* 14 (1996) (stating that “unspoken barrier” shielded Rule 23 from Advisory Committee scrutiny for many years).

⁸ See, e.g., Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 *U. Ill. L. Rev.* 69, 74-76 (noting traditional justifications of individual autonomy—including personal control of litigation, avoidance of complex, consolidated trials, and individual economic control of claims—“argue strongly against” use of mass trials in mass tort context).

⁹ See, e.g., *Private Securities Litigation*, Staff Report Prepared at the Direction of Senator Christopher J. Dodd, Chairman, Subcomm. on Securities of the Comm. on Banking, Housing, and Urban Affairs 8 (May 17, 1994), reprinted in *Abandonment of the Private Right of Action for Aiding and Abetting Sec. Fraud/Staff Report on Private Sec. Litig.*, Hearing Before the Subcomm. on Securities of the Comm. on Banking, Housing, and Urban Affairs, 103d Cong., 2d Sess. 166 (1995) [hereinafter *Senate Staff Report*] (indicating that “[c]ritics also argue that the dynamics of the litigation process itself give securities plaintiffs economic leverage to produce a settlement”).

burdens imposed on the courts and on those litigants who oppose the class?¹⁰

In 1985, a Special Committee on Class Action Improvements of the American Bar Association's Section of Litigation (ABA Special Committee) articulated a list of recommended revisions to Rule 23 and called it to the attention of the Advisory Committee.¹¹ 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."¹² Recommended changes included, inter alia, 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.¹³

In March 1991, the Judicial Conference acted on a report of its Ad Hoc Committee on Asbestos Litigation. The 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."¹⁴ 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 for comment to "civil procedure buffs," including academics, lawyers, interest groups, and bar organizations.¹⁵ Many of the responses questioned the need for change and

¹⁰ See *id.* at 7 (indicating that "[c]lass members are often individual investors who are unsophisticated about securities litigation, although their collective economic interest could be very large"); see also Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *Stan. L. Rev.* 497, 514-19 (1991) (indicating that, regardless of merits of claims on which they are based, settlements in securities class actions produce returns of only about 25% of potential loss).

¹¹ American Bar Ass'n, 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.

¹² *Id.* at 198.

¹³ *Id.* at 199-200.

¹⁴ Ad Hoc Comm. on Asbestos Litig. of the Judicial Conference of the U.S., *Ad Hoc Committee on Asbestos Litigation Report* 37-38 (Mar. 1991).

¹⁵ *Fed. R. Civ. P. 23* (Proposed Draft, Jan. 21, 1993) (on file with the *New York University Law Review*).

suggested that changes might upset settled practices and make matters worse.¹⁶

Legislative proposals to modify Rule 23 have paralleled the rulemaking policy debates over the past twenty years.¹⁷ 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.¹⁸ This legislation had bipartisan support and was an outgrowth of hearings and an extensive staff report in 1994.¹⁹ 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.²⁰ The statute also modifies the notice requirements applicable to the filing and settlement of securities class actions²¹ and limits attorneys' fees to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."²²

The Federal Judicial Center (FJC) conducted the present study in 1994-95 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

¹⁶ See Cooper, *supra* note 7, at 14 (commenting that "practicing lawyers . . . have tended to view the draft as modest, but believe that the cost of adoption would far exceed the possible benefits").

¹⁷ For example, the ninety-fifth and ninety-sixth Congresses considered proposals to amend Rule 23 at the behest of the United States Department of Justice's Office for Improvements in the Administration of Justice. See S. 3475, 95th Cong., 2d Sess. (1978) (stating that purpose of act is to improve class action procedures while preserving Rule 23(b)(1) and (b)(2) relief); see also H.R. 5103, 96th Cong., 1st Sess., tit. I (1979) (same). 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, 322-44 (1980) (concluding that H.R. 5103, Small Business Judicial Access Act, offers solutions to problems of certification, deterrence, management of case merits, and damage allocation plaguing small class damage actions).

¹⁸ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C.).

¹⁹ For a discussion of the issues raised at the hearings, see Senate Staff Report, *supra* note 9.

²⁰ Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77z-1(b) (West Supp. 1996).

²¹ *Id.* § 77z-1(a)(3), (a)(7).

²² *Id.* § 77z-1(a)(6).

encompass the study of mass tort class actions, which appear to occur relatively infrequently and remain pending for long periods of time.

This Article 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 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? 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? And 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 *Rule 23: Challenges to the Rulemaking Process*.²³ Our Article parallels Professor Cooper's article in that we have presented study data and analyses to correspond with his questions as closely as possible.²⁴ 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.

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 Article²⁵ 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).²⁶

²³ Cooper, *supra* note 7.

²⁴ Our headings and subheadings generally follow the structure of Part III of Professor Cooper's article, but occasionally we have adapted the titles or rearranged the parts to present the data more clearly.

²⁵ The Article is based on Thomas E. Willging et al., *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center, forthcoming 1996).

²⁶ Cases in the study represent a termination cohort—that is, 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. Be-

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 United States Courts (AO), and published opinions. We then reviewed all cases that were candidates for inclusion in the study.²⁷ 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.²⁸ In addition, we reviewed data about class actions from the Federal Judicial Center's 1987-90 District Court Time Study;²⁹ those data are summarized at relevant parts of this Article.³⁰

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 con-

cause 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 *id.*, app. D.

²⁷ See *id.*, app. D for details about the identification of class actions.

²⁸ Figures and tables of data, when necessary to support our discussion, are collected in the Appendix and cross-referenced in the text. For a more extensive set of figures and tables, see *id.*, app. D.

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").

²⁹ See Thomas E. Willging et al., Preliminary Report on Time Study Class Action Cases (Feb. 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* Part B.4.; see also Willging et al., *supra* note 25, app. D at tbl. 19. For further details about the time study, see *id.*, app. D.

³⁰ The current Federal Judicial Center (FJC) report supplements Willging et al., *supra* note 29, and supersedes our preliminary presentation of data to the Advisory Committee concerning the first two districts studied. Thomas E. Willging et al., Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of California in Cases Closed Between July 1, 1992 and June 30, 1994 (Revised Apr. 1995) (unpublished preliminary report, on file with the Information Services Office of the Federal Judicial Center).

trol 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.³¹

FINDINGS

The balance of this Article presents our findings. For the most part, these findings address the empirical content of—or the empirical assumptions underlying—questions raised by Professor Cooper in the preceding article.³²

*A. Individual Actions and Aggregation*³³

1. Average Recovery Per Class Member

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 section is “how many members of certified classes would have maintained individual actions absent the class action.”³⁴ 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.

Across the districts, the median level of the average recovery per class member³⁵ ranged from \$315 to \$528; 75% of the awards ranged

³¹ 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.

³² See Cooper, *supra* note 7, at 42-51.

³³ See generally Judith Resnik, From “Cases” to “Litigation,” *Law & Contemp. Probs.*, Summer 1991, at 5, 6-22 (describing changing attitudes and practices that have led to increasing aggregation of civil claims).

³⁴ See Cooper, *supra* note 7, at 43.

³⁵ 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.

from \$645 to \$3341; and the maximum awards ranged from \$1505 to \$5331.³⁶ 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 \$50,000 jurisdictional amount for a diversity case.³⁷ 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.

2. Consolidation and Related Cases

In the previous subsection, 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 growing out of the same transactional setting.”³⁸

We also address how often “individual actions proceed in the same court, or in different courts, without any attempt at aggregation.”³⁹ We found what appears to be a modest amount of interdistrict and intradistrict consolidation and also 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.”⁴⁰ 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 is to consider the pendency of other litigation concerning the controversy, in both state and federal courts, by or against members of the class.”⁴¹ Further, under Rule 23(c)(4)(A),

³⁶ See *infra* app. at fig. 1.

³⁷ 28 U.S.C. § 1332(a) (1994).

³⁸ Cooper, *supra* note 7, at 43.

³⁹ *Id.*

⁴⁰ Manual for Complex Litigation, Third § 30.3 (1995).

⁴¹ *Id.* § 30.15 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (finding that court should consider whether proposed nationwide class would improperly interfere with similar pending litigation in other courts)).

“common issues of fact or law have been carved out for class certification”⁴² on both an intradistrict⁴³ and on a nationwide basis.⁴⁴ Federal courts use Rule 42(a) of the Federal Rules of Civil Procedure⁴⁵ for intradistrict transfers and the Multidistrict Litigation (MDL) statute for interdistrict transfers.⁴⁶ There is no clear authority for a federal court to consolidate cases filed in state court with actions filed in federal court.

a. 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 (JPMDL) 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 six months in the other district.

⁴² *Id.* § 33.262 (citing *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 416 (N.D. Ill. 1994) (carving out common issue of “negligence liability for infected blood”), mandamus granted, class certification denied, 51 F.3d 1293, 1297 (7th Cir. 1995) (ordering district judge to decertify plaintiff class), cert. denied, No. 95-197, 1995 U.S. LEXIS 6153 (Oct. 2, 1995); *In re Copley Pharmaceutical, Inc., “Albuteral” Prods. Liab. Litig.*, 158 F.R.D. 485, 492 (D. Wyo. 1994) (carving out common issues of “negligence, [and] breach of warranty claims for contamination of bronchodilator”), defendant’s motion to decertify plaintiff class denied sub nom. *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456 (D. Wyo. 1995)).

⁴³ See, e.g., *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988) (affirming district court’s certification of opt-out class of water contamination victims in vicinity of landfill); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986) (affirming district court’s certification of districtwide class of asbestos injury claimants to resolve specific issues).

⁴⁴ See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1009 (3d Cir.) (nationwide 23(b)(3) class of schools seeking compensatory damages associated with presence of asbestos-containing building materials), cert. denied, 479 U.S. 852 (1986).

⁴⁵ Federal Rule of Civil Procedure 42(a) states:

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.

Fed. R. Civ. P. 42(a).

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 Lab., Inc.*, 454 F. Supp. 807, 812 (S.D.N.Y. 1978) (granting defendant’s cross-motion for consolidation of securities case); *Wellman v. Dickinson*, 79 F.R.D. 341, 348 (S.D.N.Y. 1978) (certifying five class action securities cases and consolidating them for all purposes).

⁴⁶ 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 parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a) (1994).

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

b. Data on Nonconsolidations. In addition, we 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 21% of the cases in the four districts. On the state level, we identified nonconsolidation with pending state litigation infrequently, ranging from 1% to 3% of the study cases.

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. While the nonconsolidations presented difficulties for the court, they did not appear to be insurmountable.

B. Routine Class Actions

1. *What Was the Relationship, If Any, Between the "Easy Applications" of Rule 23 and the Substantive Subjects of Dispute?*

Some have maintained that class actions in certain nature-of-suit categories⁴⁷ are often "easy" or "routine" applications of Rule 23 because they frequently involve complaints with boilerplate allegations, similar class-certification arguments, and standard settlements.⁴⁸ In particular, some have viewed securities class actions as fitting into such standard molds of routineness.⁴⁹ To test these premises, we compared study cases in different nature-of-suit categories. Since the

⁴⁷ By "nature-of-suit" categories, we refer to the approximately 80 different types of cases identified on the "Civil Cover Sheet (JS-44)" form that must generally accompany each civil action filed in federal court. Examples that appeared frequently in the study are securities, other civil rights, other statutory actions, and ERISA. The Administrative Office of the United States Courts uses these categories as part of presenting statistics on federal civil cases. See, e.g., Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* tbl. C-2 at 138-43 (1995).

⁴⁸ See Cooper, *supra* note 7, at 44.

⁴⁹ In *re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989) (noting "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*

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).

*a. Rule 23(b)(3) Cases.*⁵⁰ First, we compared indicators of routineness in cases filed as Rule 23(b)(3) class actions.⁵¹ The first indicator we looked at was duration of the case from complaint to closing. Despite the perceived complexity of securities cases,⁵² 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). In

Shareholders' Suits Against Officers and Directors, C735 ALI-ABA 91, 109 (1992) available in Westlaw, ALI-ABA database.

⁵⁰ Federal Rule of Civil Procedure 23(b) states:

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 a class action.

Fed. R. Civ. P. 23(b).

⁵¹ These include cases filed under Rule 23(b)(3) alone or in combination with one or more other subdivisions of 23(b).

⁵² See Cooper, *supra* note 7, at 47 (asking reader to “[c]onsider a securities fraud action in which, inevitably, different class members bought and sold different numbers of shares at different times” and suggesting that issues classes “may disguise differing interests in proving the ways and times at which the fraud affected the market”).

particular, the median case lengths for (b)(3) civil rights actions were about the same as—or longer than—those 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. 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 cases⁵³ as in securities cases.⁵⁴ Of special note is that objections on the basis of numerosity⁵⁵ 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 objections generally were raised more frequently. In two districts, it was at issue in 33% and 50% 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.

Another observed difference was in arguments concerning the representativeness of the principal plaintiffs—i.e., the ability of the putative class representatives to fairly and adequately protect the in-

⁵³ Certification objections were filed in 58% and 59% of nonsecurities class actions in these two districts.

⁵⁴ Certification objections were filed in 35% and 40% of securities class actions in these two districts.

⁵⁵ To be certified, among other requirements, a class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1).

terests of the class.⁵⁶ 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.⁵⁷ Generally, these objections occurred less frequently in nonsecurities (b)(3) cases. 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, indicate that these challenges were quite often overcome; for example, the class representative in some cases was replaced by one who was more “representative.”⁵⁸

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 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 monetary settlement amount by the number of notices sent to class members.⁵⁹ 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.

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. Securities cases were also 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.

⁵⁶ Rule 23(a) requires that to be certified as a class, the claims or defenses of the representative parties must be “typical of the claims or defenses of the class,” Fed. R. Civ. P. 23(a)(3), and the “representative parties must have the ability” to fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4).

⁵⁷ See *infra* Part F.2.a.

⁵⁸ See *infra* Part D.2.

⁵⁹ See *supra* Part A.1.

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.

*b. Rule 23(b)(2) Cases.*⁶⁰ 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. The rate of (b)(2) certification ranged from 50% to 95%. 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. 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. We also found no recognizable patterns in the frequency of defendant opposition to motions to certify a (b)(2) class. 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. 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.

2. *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?*

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.⁶¹ The underlying assumptions—sometimes explicitly

⁶⁰ See *supra* note 50.

⁶¹ 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) (asserting that “[d]efendants’ 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, 448 (1994) (asserting that

stated⁶²—are that the settlement rate for class actions is higher than that for other types of civil cases, and the trial rate is lower. In this subsection, 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.

Differences in data collection make it difficult to compare settlement rates in class actions and nonclass civil cases.⁶³ 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.⁶⁴ It also appears that settlement rates were higher for securities class actions than for all nonclass securities cases in all but one district.

The rate of trial (jury and bench) was about the same for class actions and nonclass civil cases in three of the districts. In the fourth district, the trial rate for class actions was 5.5% and the rate for nonclass civil cases was 3.2%.

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 a month and a half longer. The patterns were similar for securities cases.

Examining these 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 Part B.4., the amount of judicial time required by class actions distinguish them from other cases.

“substantial percentage of federal securities class actions have been resolved by judicial dismissal on the basis of a defendant’s motion”).

⁶² Alexander, *supra* note 10, at 524 (asserting that securities class actions are resolved by adjudication significantly less often than are other civil cases).

⁶³ 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 United States Courts (AO) upon termination of a case. We used the following AO categories: “dismissed: settled,” “dismissed: voluntarily,” and “judgment on consent” to indicate that the parties settled a case. The differences between AO 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.

⁶⁴ See *infra* app. at fig. 2.

3. *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. Under Rule 23, a case may be certified pursuant to subdivisions (b)(1)(A), (b)(1)(B), (b)(2), or (b)(3). Determining which subdivision to use under Rule 23 is not always clear.⁶⁵ 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.⁶⁶ 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)."⁶⁷

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)?⁶⁸ Some believe that the increased burden of mandatory no-

⁶⁵ One commentator's description of the conceptual overlap between (b)(1)(A) and (b)(3) actions illustrates the lack of clarity:

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).

⁶⁶ Fed. R. Civ. P. 23(c)(2).

⁶⁷ Manual for Complex Litigation, Third § 30.14 (1995) (citing *Rice v. Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974)).

⁶⁸ See, e.g., *Patrykus v. Gomilla*, 121 F.R.D. 357, 362-63 (N.D. Ill. 1988) (certifying class in civil rights case under both Rule 23 (b)(2) and (b)(3)); *National Treasury Employees Union v. Reagan*, 509 F. Supp. 1337, 1340-41 (D.D.C. 1981) (noting that in prior order court had conditionally certified class of civil rights plaintiffs under Rule 23(b)(1) and (b)(2)); *Bertozzi v. King Louie Int'l, Inc.*, 420 F. Supp. 1166, 1180 (D.R.I. 1976) (certifying class in securities case under Rule 23(b)(1) and (b)(2)); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 274-77 (N.D. Cal.) (certifying class in employment discrimination case

tice and other requirements⁶⁹ deters parties from seeking (b)(3) certification.⁷⁰ Similarly, some courts have expressed reluctance to certify a (b)(3) class when an action also meets the requirements of either a (b)(1)⁷¹ or (b)(2) class.⁷² One commentator recommends that

[i]f the court determines that both [(b)(2) and (b)(3)] apply, then it should treat the suit as having been brought under Rule 23(b)(2) so that all the class members will be bound. To 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).⁷³

Of the 138 certified classes for which information was available, eighty-four (61%) were (b)(3) classes, forty (29%) were (b)(2) classes, and the remaining fourteen (10%) reflected an equal number of (b)(1)(A) and (b)(1)(B) classes.⁷⁴

under Rule 23(b)(2) and (b)(3)), modified, 73 F.R.D. 289 (N.D. Cal. 1976), aff'd sub nom. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978).

⁶⁹ 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. Fed. R. Civ. P. 23(c)(2).

⁷⁰ See, e.g., 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 8.13 (explaining that advantage of classifying suit under Rule 23(b)(1) or (b)(2) is avoidance of mandatory Rule 23(c)(2) notice strictures).

⁷¹ See, e.g., *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 684-85 (2d Cir. 1977) (affirming district court's conclusion that when class action may be certified under either (b)(1) or (b)(3), former should be chosen to avoid litigation or compromise of class interests).

⁷² See, e.g., *Hummel v. Brennan*, 83 F.R.D. 141, 147 (E.D. Pa. 1979) (certifying labor action as Rule 23(b)(2) class rather than Rule 23(b)(3) class to ensure that one litigation would dispose of issue). The *Hummel* court reasoned that procedural safeguards are unnecessary when class is homogeneous and that any unfairness caused by inability of members to opt out was outweighed by the prevention of repetitious suits. *Id.*

⁷³ 7A Charles A. Wright et al., *Federal Practice and Procedure* § 1775, at 491-92 (2d ed. 1986 & Supp. 1995) (footnotes omitted) (citing *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973) (explaining that "[a]lthough suit could arguably 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) (commenting that when both (b)(3) and (b)(2) provisions apply, court should proceed under Rule (b)(2) so that all class members will be bound); *Tustin v. Heckler*, 591 F. Supp. 1049, 1068 (D.N.J.) (explaining that "it is well established that, if feasible, an action should be maintained under (b)(1) or (b)(2) rather than under (b)(3) because (b)(3) . . . classes are thought of as heterogeneous in composition"), vacated in part on other grounds, 749 F.2d 1055 (3d Cir. 1984)).

⁷⁴ See *infra* app. at fig. 3.

a. *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.⁷⁵ Similarly, two districts (N.D. Ill. and N.D. Cal.) certified a total of seven (b)(1)(B) classes.⁷⁶

b. *Rule 23(b)(2)*. The four districts had a total of forty cases with certified (b)(2) classes. One district (E.D. Pa.) 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 to Rule 23 that describes various civil rights actions as prototypes of the (b)(2) class⁷⁷ without suggesting that subdivision (b)(2) is limited to civil rights cases.

c. *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 with twenty-six (31%), followed by E.D. Pa. with twenty-four (28%), N.D. Cal. with twenty-three (27%), and S.D. Fla. with eleven (13%). In the four districts combined, 64% of the certified (b)(3) classes were securities cases (over 80% of S.D. Fla.'s certified (b)(3) classes, 74% in N.D. Cal., 62.5% in E.D. Pa., and 50% in N.D. Ill.).

d. *Multiple Certifications*. Multiple certifications were found in sixteen cases. Three courts each had five cases and one court had one case. The most frequent combination was (b)(2)/(b)(3), occurring in five cases. The second most frequent combination was (b)(1)(A)/(b)(2), occurring in three cases.

4. *How Much Judicial Time Did Class Actions Take, and How Did This Time Compare to Other Civil Actions?*

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

⁷⁵ The nature-of-suit categories were other personal property damage (one), civil rights (one), and ERISA (one) in one district and securities (one), civil rights (one), ERISA (one), and other statutory actions (one) in the other.

⁷⁶ N.D. Ill. certified five cases with the following nature-of-suit categories: ERISA (three), securities (one), and constitutionality of a state statute (one). N.D. Cal. certified the remaining two cases, which were securities actions.

⁷⁷ Fed. R. Civ. P. 23 advisory committee's note (citing *Bailey v. Patterson*, 323 F.2d 201, 206-07 (5th Cir. 1963) (ruling that appellants were entitled to classwide injunctive relief in desegregation case), cert. denied, 376 U.S. 910 (1964); *Potts v. Flax*, 313 F.2d 284, 289-90 (5th Cir. 1963) (ruling that school desegregation suit involves classwide discrimination and is appropriate for class relief); *Brunson v. Board of Trustees*, 311 F.2d 107, 109 (4th Cir. 1962) (ruling that common questions of fact in school desegregation case entitled multiple plaintiffs to join in one action under Rule 23(a)(3)), cert. denied, 373 U.S. 933 (1963)).

(Time Study),⁷⁸ we compared the judicial time expended on class actions with those of civil cases (including class actions) filed within the Time Study sample period.

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."⁷⁹

Class actions are not treated as a separate category for case-weighting purposes, but our analysis showed that the hours demanded for the class action cases in the Time Study would justify a case weight of 4.71, higher than any civil case type except death penalty habeas corpus (6.15).⁸⁰ RICO (3.02) is the next closest 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). The case weights for the three nature-of-suit categories that were most prevalent in the class action study were securities, commodities, and exchange (1.96); other civil rights (filed originally in federal court) (1.61); and prisoner civil rights (not United States defendant) (0.26).⁸¹ The average amount of time required for the average class actions 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.

⁷⁸ In the Time Study, district and magistrate judges maintained records of the time they had spent on a random sample of 8320 civil cases filed in 86 United States district courts between November 1987 and January 1990. Willging et al., *supra* note 29, at 1. Fifty-one of those cases (0.61%, an incidence of 6.1 class actions for every 1000 cases filed) contained class action allegations. *Id.* 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) [hereinafter Shapard Memorandum] (on file with authors).

⁷⁹ 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.

⁸⁰ See Shapard Memorandum, *supra* note 78, at 5-7 (listing case weights for civil cases). 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 (Feb. 8, 1994) (on file with authors).

⁸¹ Shapard Memorandum, *supra* note 78, at 6-7.

Class actions are far from routine. 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.⁸² 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.⁸³

C. Race To File⁸⁴

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.⁸⁵ Apparently, the purpose of such practice is to gain an advantage in the competition to be appointed lead counsel for the class.⁸⁶ 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.⁸⁷ 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.

⁸² Certified class actions are those in which the judge has determined, pursuant to Fed. R. Civ. P. 23(c)(1), that an action shall be maintained as a class action because it satisfies the prerequisites of Fed. R. Civ. P. 23(a) and the elements of one of the categories of Fed. R. Civ. P. 23(b). Noncertified class actions include cases in which the court denied a motion to certify and cases in which class certification was not raised.

⁸³ 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 11 for all class actions, but the amount of judge time for certified class actions was approximately three times that.

⁸⁴ See Cooper, *supra* note 7, at 84.

⁸⁵ See Senate Staff Report, *supra* note 9, at 14-29 (discussing impact of frivolous litigation under federal securities laws); see also, e.g., *Greenfield v. U.S. Healthcare*, 146 F.R.D. 118, 120-21 (E.D. Pa. 1993) (noting that Rule 11 sanctions were imposed in case filed on same day as article on earnings decline published), *aff'd sub nom. Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994).

⁸⁶ See Senate Staff Report, *supra* note 9, at 24 (testimony of William Lerach, a plaintiffs' class action attorney) (stating that "[w]e want to be the first to file so that we can control the case"); see also *Greenfield*, 146 F.R.D. at 122 (stating defendant's allegation that law firm substituted "speed" for "reasonable inquiry" in order to be "first to file" class action).

⁸⁷ Cooper, *supra* note 7, at 84.

1. *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, the frequency and size of multidistrict litigation consolidations, and the frequency with which we found related cases represent potential races to the courthouse. The cumulative number of such cases is considerable: 31%, 22%, 20%, and 37% of the cases in the four districts had one or more of these three forms of multiple litigation. Looking only at cases that led to either multidistrict or intradistrict consolidation indicates that from 14% to 26% 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.⁸⁸

2. *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,⁸⁹ 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.

D. *Representatives: Who? Whence? Why?*

In this section, we address issues related to the selection and supervision of class representatives.⁹⁰ To assure that a class is adequately represented, the court has "wide discretion" in selecting the

⁸⁸ See 28 U.S.C. § 1407(a) (1994) (stating that authority to transfer applies to "civil actions involving one or more common questions of fact"); Fed. R. Civ. P. 42(a) (stating that authority to consolidate applies to "actions involving a common question of law or fact").

⁸⁹ 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 72 cases in S.D. Fla. In N.D. Ill., there were no such cases.

⁹⁰ See Cooper, *supra* note 7, at 45-46. 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.

named representative and class counsel.⁹¹ 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 class⁹² and should present claims and raise defenses that are typical of the class claims and defenses.⁹³

1. *How Many "Repeat Players"?*

One of the questions asked was "[a]re there 'professional' representatives who appear repeatedly, at least in particular subject areas."⁹⁴ 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 individual 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 only one instance did the same name arise in two districts.⁹⁵

2. *Did Judges Add or Substitute Representatives?*

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."⁹⁶ 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."⁹⁷ We examined the frequency with which representatives were changed in certified class actions.

⁹¹ Manual for Complex Litigation, Third § 30.16 (1995).

⁹² *Id.* See generally Downs, *supra* note 65, at 651-58 (asserting that self-interest of class representative must be such as to benefit entire class).

⁹³ Fed. R. Civ. P. 23(a)(3); see also *General Tel. Co. v. Falcon*, 457 U.S. 147, 155-57 (1982) (stating that class claims should be limited to those "fairly encompassed" by claims of named representative); 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, 657-711 (1993) (reviewing Federal Rule of Civil Procedure's requirements of adequacy of representation, typicality of claims, and commonality of issues).

⁹⁴ Cooper, *supra* note 7, at 45.

⁹⁵ Our data, however, only include class actions that were terminated in four districts during a two-year span.

⁹⁶ Manual for Complex Litigation, Third § 30.16 (1995) (footnote omitted).

⁹⁷ *Id.*

Changes in class representatives occurred in a considerable percentage of certified class actions in the four districts⁹⁸ (21%, 8%, 21%, and 33%, representing ten, one, ten, and eleven cases, respectively). These differences in the rate of changes did not seem to have any direct relationship to the frequency of objections to certification based on the representativeness of the named plaintiffs in (b)(3) or (b)(2) cases. Nor did the differences appear to have any direct relationship to 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.

For approximately 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 appeared to be instances in which the change in representative appeared to reflect a significant change in the litigation. For example, seven 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; redefinition of class); and three involved voluntary withdrawal from or opting out of the class. One change added representatives of a subclass of stock option holders.

3. *Did Named Representatives Attend the Approval Hearing?*

Class representatives' "views may be important in shaping the [settlement] agreement and will usually be presented at the fairness hearing."⁹⁹ While representatives' views may be entitled to "special weight," they do not have veto power over a proposed settlement.¹⁰⁰

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.¹⁰¹ The rates in the other districts varied from 11% to 28%.

4. *What Was in It for the Class Representatives?*

Whether class representatives are entitled to a special award is not settled. One commentator summarized the cases as follows:

⁹⁸ The four districts, in the order in which they are listed, are E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal., respectively. All other listings of data from the four districts will be in the same order.

⁹⁹ Manual for Complex Litigation, Third § 30.44 (1995).

¹⁰⁰ Id.

¹⁰¹ See *infra* Part L.2.

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.¹⁰²

A notice of proposed settlement should "disclose any special benefits provided to the class representatives."¹⁰³

A substantial minority of all certified, settled class actions in which the court approved a settlement included designated awards to the named class representatives.¹⁰⁴ In the four districts, the percentages that included such awards were 26%, 46%, 40%, and 37%. The median amounts of all awards to class representatives in the four districts were \$7500 in E.D. Pa. and N.D. Ill., \$12,000 in S.D. Fla., and \$17,000 in N.D. Cal. In many cases, there was more than one representative. The median award per representative in three courts was under \$3000 and in N.D. Cal. was \$7560. The median percentage of the total settlement that was awarded to class representatives was less than or equal to eleven-thousandths of 1% (0.011%) in all four districts.

E. Time of Certification

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. Of these cases, ninety-three (33%) were unconditionally certified, fifty-nine (21%) were certified for settlement purposes only, seventy-six (27%) were denied certification, six (2%) were deferred, and fifty-two (18%) had no action indicated. In the following subsections, we discuss the process whereby decisions about certification were made.

1. Timing of Motions and Certification Decisions

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

¹⁰² 2 Newberg & Conte, *supra* note 70, § 11.38 (footnotes omitted); see also Downs, *supra* note 65, at 692 (indicating that "[c]ases in the late 1970s and early 1980s abhorred such preferences, but recent cases permit such practices more freely" (footnotes omitted)).

¹⁰³ Manual for Complex Litigation, Third § 30.212 (1995).

¹⁰⁴ 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 65, at 692-93 (reporting that often preferences are not disclosed to class in notice of settlement hearing and that 37% of cases studied in N.D. Cal. contained such preferences).

to see if there is "any pattern to the point at which the first certification decision is made."¹⁰⁵ Rule 23(c)(1) directs the court to determine "[a]s soon as practicable" after the commencement of a case whether an action is to be maintained as a class action.¹⁰⁶

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.¹⁰⁷ Seventy-five percent of the motions or orders were filed within a range of 6.5 months at one end to 16.3 months on the other.

How soon do courts rule on motions to certify after they have been filed?¹⁰⁸ 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.

2. *Local Rules on the Timing of Certification Motions*

In this subsection, we examine "the effect of local rules requiring that a motion for certification be made within a stated period."¹⁰⁹ As noted above, Rule 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 ninety days,¹¹⁰ and N.D. Cal. requires the

¹⁰⁵ Cooper, *supra* note 7, at 102.

¹⁰⁶ Fed. R. Civ. P. 23(c)(1).

¹⁰⁷ In the time study, 64% of the motions/orders in 51 class action cases were filed within 100 days of the filing of the complaint. Willging et al., *supra* note 29, at 9.

¹⁰⁸ For one standard of promptness, see 28 U.S.C. § 476 (1994) (stating that motions pending for more than six months need to be included in semiannual report under Civil Justice Reform Act). Note that the data reflects only those cases that contained both the certification motion filing date and the date of the court's ruling.

¹⁰⁹ Cooper, *supra* note 7, at 102.

¹¹⁰ United States District Court for E.D. Pa., Local Rule 27(c) (Aug. 1, 1980) states, in relevant part:

Within ninety (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.

E.D. Pa. Loc. R. 27(c).

United States District Court for S.D. Fla., 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 for 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.

filing of such a motion within 180 days.¹¹¹ N.D. Ill. has no local rule addressing the timing of motions to certify.

In the previous subsection, 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. 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 (7.7 months) between the two filings for 75% of the cases. 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.

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.

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 ninety-day rule, 75% of the cases took approximately 3.5 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 ninety-day rule. On the other hand, E.D. Pa. (ninety-day rule) disposed of 75% of its cases approximately one year faster than the other three courts.

S.D. Fla. Loc. R. 23.1(A)(3).

¹¹¹ United States District Court for N.D. Cal. Local Rule 200-6(c) (revised Nov. 1, 1988) states:

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.

N.D. Cal. Loc. R. 200-6(c).

The time from ruling on certification to settlement followed similar paths. It must be noted, however, 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.¹¹² 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 in the other district with the early certification rule and in the district with no rule were the same. Data showed that 75% of those cases were terminated in 34.1 months.

Thus, there has not been substantial compliance with the presumptive time limits of the local rules. It should be noted, however, that each local rule permits extensions for good cause.¹¹³ 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 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.

3. *Decisions on Merits in Relation to Certification*

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.¹¹⁴ Many assume that class action litigation proceeds directly from certification of a class to settlement without judicial examination of the merits of the claims.¹¹⁵ The data presented in this subsection indicate otherwise.

¹¹² See *infra* Part E.3.

¹¹³ See *supra* notes 110-11.

¹¹⁴ See Cooper, *supra* note 7, at 46-47.

¹¹⁵ See, e.g., Alexander, *supra* note 10, at 505 (asserting that "[i]n securities class actions . . . a combination of factors . . . make trial an unthinkable alternative, and adjudication without trial, as by summary judgment, unavailable as a practical matter"); Samuel M. Hill,

Parties often filed motions to dismiss or motions 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.

As noted above, Rule 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.¹¹⁶ 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 section 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.”¹¹⁷

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.¹¹⁸ 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. As the data below show,¹¹⁹ 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.¹²⁰ 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.

Small Claimant Class Actions: Deterrence and Due Process Examined, 19 Am. J. Trial Advoc. 147, 150 (1995) (indicating that “vast majority of class actions settle before an adjudication on the merits”).

¹¹⁶ Fed. R. Civ. P. 23(c)(1).

¹¹⁷ Fed. R. Civ. P. 23(d)(1)(b) (Proposed Draft, Jan. 21, 1993) (on file with the *New York University Law Review*).

¹¹⁸ See Bruce I. Bertelsen et al., Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 Geo. L.J. 1123, 1145 (1974) (arguing that “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”).

¹¹⁹ See *infra* text accompanying notes 126-28.

¹²⁰ See Bertelsen et al., *supra* note 118, at 1144 (indicating that “in the preliminary stages of litigation, the court showed no reluctance to dismiss or to 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 United States District Court for the District of Columbia between July 1, 1966, and December 31, 1972. *Id.* at 1123.

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 courts have interpreted the Supreme Court's ruling in *Eisen v. Carlisle & Jacquelin*¹²¹ to mandate that "the determination of class status is to be made 'before the decision on the merits.'"¹²² 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.¹²³ Other courts have approved precertification rulings on the merits, reasoning that a party filing a pretrial motion to dismiss or motion for summary judgment may explicitly or implicitly waive the protection against one-way intervention or opting out.¹²⁴ 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,¹²⁵ 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, precertification rulings on the merits in N.D. Ill. and that E.D. Pa. and N.D. Cal. would have more such rulings.

In three districts in the current study—putting aside N.D. Ill. which we will discuss separately below—the rate of precertification¹²⁶ rulings on motions to dismiss exceeded 70%. In cases in which there were rulings on both motions to dismiss and motions to certify, approximately four-fifths of the motions to dismiss were decided before

¹²¹ 417 U.S. 156 (1974).

¹²² *Nance v. Union Carbide Corp.*, 540 F.2d 718, 723 n.9 (4th Cir. 1976) (quoting *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 354 (7th Cir. 1975)), vacated, 431 U.S. 952 (1977).

¹²³ *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1317 (7th Cir.), cert. denied, 501 U.S. 1230 (1991); see also *Peritz*, 523 F.2d at 353-54 (explaining that Rule 23 "requires class certification prior to a determination on the merits").

¹²⁴ See *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (allowing implicit waiver where defendant "assumes the risk" by filing summary judgment motion); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir.) (en banc) (urging courts to find explicit waiver where defendant willingly runs risk of losing protection against one-way intervention before certification ruling), cert. denied, 419 U.S. 885 (1974).

¹²⁵ See *supra* notes 122-23. But see *Roberts v. American Airlines*, 526 F.2d 757, 762-63 (7th Cir. 1975) (explaining in dictum that by filing motion for summary judgment before a ruling on class certification, defendants "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).

¹²⁶ We use the term "precertification" to mean before a ruling on certification, whether or not the ruling is to grant or deny certification.

the motions to certify.¹²⁷ In all four districts, the rate of precertification rulings on motions for summary judgment was lower than the rate of precertification rulings on motions to dismiss, 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 one-fifth of the rulings on summary judgment preceded the class-certification ruling, and in N.D. Cal., two-thirds (ten of fifteen) of the summary-judgment rulings preceded the class-certification ruling.

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%) of the four districts but the second highest rate of precertification rulings on motions for summary judgment (eleven of twenty-seven, or 41%). Nevertheless, N.D. Ill. judges issued a substantial number of precertification rulings on both types of motions, suggesting that 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.¹²⁸

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 ninety days and N.D. Cal. requires filing within 180 days.¹²⁹ One might expect that the impact of such rules would be to have an early determination of class-certification issues before motions on the merits are decided. Still, in E.D. Pa., the percentage of precertification rulings was substantial for motions to dismiss (thirty-one of forty, or 78%), though not for motions for summary judgment (eight of twenty-six, or 31%). In N.D. Cal., the percentage of precertification rulings was higher for both motions to dismiss (twenty-six of thirty-two, or 81%) and for motions for summary judgment (ten of fifteen, or 67%).

¹²⁷ These data do not include rulings on motions to dismiss that terminated the case without the need for a ruling on class certification.

¹²⁸ Note that Federal Rule of Civil Procedure 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," Fed. R. Civ. P. 56(a), and that Federal Rule of Civil Procedure 12(b) calls for the filing of a motion "before pleading," Fed. R. Civ. P. 12(b). Neither rule, however, 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 classwide effect. See discussion *supra* note 124.

¹²⁹ See *supra* notes 110-11.

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 the local rules have any effect, 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 ninety-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 Rules 12(b)(6) or 12(b)(1) of the Federal Rules of Civil Procedure, which were generally the most frequently cited grounds in motions to dismiss. 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 than not 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.

a. Outcomes of Rulings on Dismissal and Summary Judgment. In this subsection, we present data about the outcomes of motions to dismiss and motions for summary judgment.

Critics of the class action device, especially critics of shareholders' securities class actions, frequently referred to such cases as "strike suits."¹³⁰ While it is difficult to find a definition of a strike suit that crisply distinguishes it from most other types of litigation,¹³¹ 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 the claims lead to a coerced

¹³⁰ See, e.g., Senate Staff Report, *supra* note 9, at 18 (reporting testimony of "corporate executives describ[ing] what they characterized as 'strike suits' that were filed against their companies, generally following an adverse earnings announcement and resulting stock price drop").

¹³¹ See, e.g., Tim O. Brandt, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 *Dick. L. Rev.* 355, 357 n.1 (1994) (explaining that "[t]he 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, 1340 n.5 (1993) (explaining that "'[s]trike suits' are 'those based on reckless charges and brought for personal gain'" (quoting Robert C. Clark, *Corporate Law* § 15.2 (1986))).

settlement because the defendants do not have a reasonable opportunity to litigate the merits.¹³²

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.¹³³ 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.¹³⁴

In general, if a claim for relief survives a motion to dismiss, its legal claims are probably not frivolous.¹³⁵ Likewise, if a claim survives a motion for summary judgment, its material factual allegations are probably not frivolous.¹³⁶

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. In such a context, a settlement cannot reasonably be said to be coerced from the product of a strike suit.

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. 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 (S.D. Fla.), approximately one case in nine had both types of rulings.¹³⁷

¹³² See Bertelsen et al., *supra* note 118, at 1136 (asserting that because defendants pressed for dismissal or summary judgment, they did not feel "forced to settle even if the plaintiff's claim is weak"). For a discussion of whether certification of class actions leads to coerced settlements, see *infra* Part M.1.

¹³³ Fed. R. Civ. P. 12(b)(6); 5A Wright et al., *supra* note 73, § 1357.

¹³⁴ Fed. R. Civ. P. 56.

¹³⁵ In the context of Rule 11 sanctions, at least one commentator has concluded that "if a party prevails in responding to a motion to dismiss, that victory should serve to insulate the party from sanctions under [Fed. R. Civ. P. 11](b)(2)." Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 201 (2d ed. 1994).

¹³⁶ Cf. Fed. R. Civ. P. 11(b)(3) advisory committee's note (stating that "if a party has evidence . . . that would suffice to defeat a motion for summary judgment . . . it would have sufficient 'evidentiary support' for purposes of Rule 11").

¹³⁷ An unknown number of those cases had multiple rulings on motions to dismiss and on motions for summary 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

Of the cases in which a motion to dismiss was filed, rulings were issued in 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.¹³⁸ Rulings in which all or part of the complaint was dismissed amounted to 47%, 49%, 76%, and 77% of the rulings in each district. 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,¹³⁹ filed by defendants. In two districts, rulings on such motions were issued approximately 85% of the time, and in the other two districts, rulings on such motions were issued approximately 60% of the time. These data are comparable to and, overall, somewhat higher than the rate of rulings in a study of general civil litigation.¹⁴⁰ Such motions were granted in whole or in part in more than half of the rulings (54% to 68%) in three of the four districts studied. In the fourth district (S.D. Fla.), such motions were granted in whole or in part 39% of the time.

Combining all dismissal and summary-judgment rulings for all cases in the four districts, we found 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. A ruling granting dismissal or summary judgment, however, did not necessarily end the litigation because an amended complaint may have been filed, the summary judgment may have been partial, or it may not have applied to all parties.

What effect did these rulings have on the litigation as a whole? In examining each class action file, we identified the event or events that resulted in the termination of 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.¹⁴¹

the first motion of a given type and examining the outcome of the first ruling on each type of motion.

¹³⁸ Thomas E. Willging, *Use of Rule 12(b)(6) in Two Federal District Courts 6-8* (Federal Judicial Center 1989) (finding rate of 83% and reporting rates of 77% and 56% from two other studies).

¹³⁹ See Joe S. Cecil & C.R. Douglas, *Summary Judgment Practice in Three District Courts 5* (Federal Judicial Center 1987) (indicating that defendants filed 59%, 71%, and 80% of motions for summary judgment in three district courts studied).

¹⁴⁰ *Id.* at 5 (finding that about two-thirds of motions for summary judgment produced rulings).

¹⁴¹ See *infra* app. at tbl. 1.

b. Timing of Rulings on Dismissal and Summary Judgment. One general standard of promptness is that motions should be decided within six months, or a reason should be given for the delay.¹⁴² 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. 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.

The timing of rulings on summary judgment followed a similar pattern, but involves 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. 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. The two slower courts were also slower in ruling on motions to dismiss.

Thus, 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.¹⁴³ 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 1966-72 in one federal district court.¹⁴⁴

¹⁴² 28 U.S.C. § 476 (1994) (explaining that motions pending for more than six months need to be included in semiannual report under Civil Justice Reform Act).

¹⁴³ In an empirical study of the use of Federal Rule of Civil Procedure 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 E.D. Pa. Willging, *supra* note 138, at 9. Motions were filed in 13% of the cases in the sample, and 23% of those cases were terminated as a result of a Rule 12(b)(6) ruling. *Id.* at 8. An earlier FJC study of a sample of cases in six federal district courts found higher rates of filing (15%) and disposition (40%), as well as a higher rate of granting motions (65% compared to 52% in later study). *Id.* at 5-8 (citing Paul Connolly & Patricia Lombard, *Judicial Controls and the Civil Litigative Process: Motions* (Federal Judicial Center 1980)).

¹⁴⁴ See Bertelsen et al., *supra* note 118, 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%.

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, do not fall within the broadest definition of a strike suit.

4. *Simultaneous Motions To Certify and Approve Settlement*

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. On occasion, however, parties will enter into settlement agreements before a class is certified. Courts have sometimes found it advantageous to approve settlement classes.¹⁴⁵ But settlement classes generally warrant "closer judicial scrutiny than . . . settlements where the class certification has been litigated."¹⁴⁶

Across the four districts, a total of 152 cases were certified in some form or fashion. Of this total, ninety-three cases (61%) were certified unconditionally, and fifty-nine cases (39%) were certified for settlement purposes only. Of those fifty-nine cases, twenty-eight (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

¹⁴⁵ See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982) (indicating that court approved use of settlement class because it was adequate, fair, and reasonable); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 176 (5th Cir. 1979) (stating that "creation of a temporary settlement class was undeniably necessary"); *In re Franklin Nat'l Bank Sec. Litig.*, 574 F.2d 662, 670-71 (2d Cir. 1978) (approving settlement class); cf. *Plummer v. Chemical Bank*, 668 F.2d 654, 658-60 (2d Cir. 1982) (affirming district court's settlement rejection while remanding for consideration of approval based on additional information).

¹⁴⁶ *Manual for Complex Litigation*, Third § 30.45 (1995).

statutory actions. The third district also had seven cases (25%), four of which were civil rights actions. 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.¹⁴⁷

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. These results parallel our finding that the (b)(3) class is the most frequent type of class sought and certified.¹⁴⁸

5. *Changes in Certification Rulings*

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.¹⁴⁹

The *Manual* also warns that “[u]ndesirable consequences may follow when an expansive class, formed on insufficient information, is later decertified or redefined.”¹⁵⁰

Of 152 certified cases, counsel in twenty-three (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.¹⁵¹ In nine (39%) of the twenty-three cases, the court affirmed its certification ruling. In five (22%) of the twenty-three cases, the court denied reconsideration of the matter altogether.

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

¹⁴⁷ For further discussion, see *infra* Part M.2.

¹⁴⁸ See *supra* Part B.3.

¹⁴⁹ *Manual for Complex Litigation, Third* § 30.1 (1995).

¹⁵⁰ *Id.* § 30.11.

¹⁵¹ Outcomes included: denying reconsideration, affirming certification, reversing certification, modifying certification, deferring reconsideration, taking no action, and lastly, taking some other form of action.

cases, the court either took some other action or did not rule on the request.

F. 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 among (b)(1), (b)(2), and (b)(3) classes, and does this correlate to the subject of the litigation?"¹⁵²

1. *How Many Certification Contests Were There, and How Much Time Did Counsel Spend Opposing Certification?*

Pursuant to Rule 23, class certification is left to the sound discretion of the district court.¹⁵³ 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.¹⁵⁴

In three of the four study courts, defendants opposed certification in slightly over 50%¹⁵⁵ 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.

2. *Was There a Relationship Between Disputes over Certification and the Nature of Suit?*

Most of the contested cases included arguments about three of the four traditional Rule 23(a) issues: typicality, representativeness, and commonality.¹⁵⁶ 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. Most disputes, except numerosity, arose in securities, civil rights, and labor cases. Numerosity disputes arose most frequently in civil rights and labor cases.

¹⁵² Cooper, *supra* note 7, at 47.

¹⁵³ See, e.g., *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038-39 (5th Cir. 1981) (applying abuse of discretion standard to district court's decision on class certification); *7B Wright et al.*, *supra* note 73, § 1785 (stating that "court has broad discretion in deciding whether to allow the maintenance of a class action").

¹⁵⁴ See *supra* Part E.3.

¹⁵⁵ This percentage is lower than the time study figure, which was 60%. See Willging et al., *supra* note 29, at 10 (finding opposition to 15 of 25 motions or orders regarding class certification).

¹⁵⁶ See Fed. R. Civ. P. 23(a).

a. *Representativeness Disputes.* Disputes regarding the ability of the representatives to adequately represent the class occurred most often. They appeared in eighty-nine of the 141 (63%) cases in which there was opposition to certification. Most of these disputes arose in securities (twenty-seven; 30%), civil rights (twenty-three; 26%), and labor (fifteen; 17%) cases.

b. *Typicality Disputes.* Disputes addressing the typicality of the class representatives' claims arose in eighty-seven (61%) cases. Similar to representativeness disputes, typicality disputes appeared most often in securities (twenty-six; 30%), civil rights (twenty-four; 28%), and labor (thirteen; 15%) cases.

c. *Commonality Disputes.* Disputes about the presence of common issues of law and fact appeared in seventy-four (52%) cases and again were generally found in securities (twenty-one; 28%), civil rights (nineteen; 26%), and labor (twelve; 16%) cases.

d. *Numerosity Disputes.* Numerosity disputes arose less frequently than the other types of disputes, occurring in forty-nine (34%) cases. Such disputes generally appeared in civil rights (twenty-one; 43%) and labor (six; 12%) cases.

3. *How Much Effort Was Devoted to the Choice Among (b)(1), (b)(2), and (b)(3) Classes, and Did the Effort Vary by Nature of Suit?*

One of the assumptions set forth in the September 1985 report of the ABA's Section of Litigation's Special Committee on Class Action Improvements is that disputes over the type of class to be certified are frequent and problematic.¹⁵⁷ 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."¹⁵⁸ Further, the Committee recommended eliminating the three subsections of subdivision (b) "in favor of a unified rule permitting any action meeting the prerequisites

¹⁵⁷ See ABA Special Committee Report, *supra* note 11, at 197 (explaining that "much wheel spinning, expense, and delay is often involved in the classification determination" as result of requirement of analysis of three subdivisions of Rule 23(b)); see also *Tober v. Charnita, Inc.*, 58 F.R.D. 74, 79-82 (M.D. Pa. 1973) (discussing requirements of class certification and choosing to certify class pursuant to Rule 23(b)(1)(A) rather than Rule 23(b)(3)); *Contract Buyers League v. F & F Inv.*, 48 F.R.D. 7, 10-14 (N.D. Ill. 1969) (certifying civil rights action under Rule 23(b)(3) but recognizing that action could be maintained under 23(b)(2)).

¹⁵⁸ ABA Special Committee Report, *supra* note 11, at 204.

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.'¹⁵⁹

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.¹⁶⁰ 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.¹⁶¹ One scholar suggests:

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 the opt-out for damages is necessary to protect high stakes plaintiffs¹⁶²

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 have ramifications both for the opt-out provisions and the notice requirements of the existing rule.¹⁶³ Others contend that collapsing the categories would undermine the legitimacy traditionally associated with (b)(1) classes and the

¹⁵⁹ Id. (quoting Federal Rule of Civil Procedure 23(b)(3)). The Committee Note of Proposed Rule 23 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.

Fed. R. Civ. P. 23 (Proposed Draft, Jan. 21, 1993) advisory committee's note (on file with the *New York University Law Review*).

¹⁶⁰ Fed. R. Civ. P. 23 (Proposed Draft, Jan. 21, 1993) advisory committee's note (on file with the *New York University Law Review*).

¹⁶¹ See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 *Rev. Litig.* 79, 83 (1994) (discussing elimination of Rule 23(b)'s class-certification categories in favor of unitary standard).

¹⁶² 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)).

¹⁶³ See id. (explaining that ambiguity in opt-out provisions may impede efforts to handle collective-action problems in class setting).

moral force associated with the civil rights cases' use of (b)(2) classes. Additionally, still others believe that 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.¹⁶⁴

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. Furthermore, "[e]liminating the three categories also 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."¹⁶⁵ Some have suggested that

[t]his 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.¹⁶⁶

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.¹⁶⁷

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 addressed the issue. In the 122 cases for which information was available, the parties' arguments in ninety-five cases (78%) did not address whether one type or another should be certified. In

¹⁶⁴ See, e.g., Memorandum from the Committee on Federal Courts of the Association of the Bar of the City of New York to the Advisory Committee on Civil Rules of the Judicial Conference of the United States 9 (Apr. 29, 1993) (on file with authors) (asserting that "merger of subdivisions (b)(1)[,](2)[,] and (3) introduces uncertainty, complexity and excessive judicial discretion that are likely to spawn, rather than eliminate, lengthy procedural disputes over class certification").

¹⁶⁵ Memorandum from Lawyers for Civil Justice et al. to the Advisory Committee on Civil Rules of the Judicial Conference of the United States 1-2 (Apr. 22, 1993) (on file with authors).

¹⁶⁶ *Id.* at 7.

¹⁶⁷ See, e.g., *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991) (finding that even though Rule 23(b)(3) class could properly be certified, there was real "risk of inconsistent adjudications which would subject the defendants to incompatible standards of conduct"; in order to prevent this risk and to bring the "controversy to a final and complete resolution," the court certified Rule 23(b)(1)(A) class); *Bell v. American Title Ins. Co.*, 277 Cal. Rptr. 583, 590 (Ct. App. 1991) (stating that when "determining whether a class action should be mandatory (that is, without any right to opt out), or permissive, the trial court 'must be vested with considerable discretion'" (quoting *Frazier v. City of Richmond*, 228 Cal. Rptr. 376, 381 (Ct. App. 1986))).

twenty cases (16%), the portion of the briefs devoted to such arguments was less than 25% of the size of the briefs.

Courts address the type of class to be certified less frequently than the parties.¹⁶⁸ In approximately 85% of the 140 cases for which information was available, the courts did not address the class-type issue at all. However, in the twenty-seven cases where counsel did raise the class-type issue, the courts in twenty-one of those cases (77%) addressed the issue. Of those twenty-one rulings, twenty devoted less than 25% of the opinion to the class-type issue and one devoted more than 50%.

Data collected from the four districts therefore do not support the ABA'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 Committee.

G. Plaintiff Classes

1. *Did Defendants Ever Seek and Win Certification of a Plaintiff Class?*¹⁶⁹

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 torts case which was subsequently certified. In approximately 79% of the cases with certification motions, plaintiffs were seeking to certify a plaintiff class. In over 12% of the remaining cases, the parties generally stipulated to a plaintiff class or settlement class.

2. *How Frequently Did Defendants Acquiesce in Certification of a Plaintiff Class by Failing To Oppose or by Stipulating to Class Certification?*¹⁷⁰

In half of the 152 certified cases, defendants acquiesced in certification of a plaintiff class by either failing to oppose the motion or sua

¹⁶⁸ Cf. Bertelsen et al., *supra* note 118, at 1143 (finding that "[o]rders granting certification seldom specified which category of rule 23 (b) was involved" in study of all class actions filed in the United States District Court for the District of Columbia between July 1, 1966, and December 31, 1972).

¹⁶⁹ Cooper, *supra* note 7, at 47.

¹⁷⁰ *Id.*

sponte order for certification or by stipulating to class certification. Our data did not reveal defendants' basis or rationale for acquiescing.

H. Defendant Classes¹⁷¹

The core questions are "How common are defendant classes?" and "Are there identifiable but narrow settings in which they are most likely?"¹⁷² Case law and commentary give us more information than the empirical data in the study, which simply confirm that use of defendant classes is rare. Defendant class actions have long been 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."¹⁷³ Certification of defendant classes, however, is presumed to be uncommon.¹⁷⁴

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."¹⁷⁵ Defendant classes have also been employed "in patent infringement cases in which a common question of patent validity is litigated against a defendant class of alleged infringers."¹⁷⁶ Case law

¹⁷¹ The traditional conception of a defendant class action is explained in Note, Defendant Class Actions, 91 Harv L. Rev. 630 (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 nonparties, rather than a method of conducting a unitary proceeding that determines the rights and liabilities of each class member represented in the suit.

Id. at 637.

¹⁷² Cooper, *supra* note 7, at 47. Professor Cooper also asks a number of questions about how defendant classes work. Id. Given the paucity of data on the subject, we are unable to respond meaningfully to those questions.

¹⁷³ Robert E. Holo, Note, Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution, 38 UCLA L. Rev. 223, 223 (1990).

¹⁷⁴ See *DeAllaume v. Perales*, 110 F.R.D. 299, 303 (S.D.N.Y. 1986) (explaining that "[a]lthough Rule 23 provides for defendant as well as plaintiff classes, certification of a defendant class is relatively rare").

¹⁷⁵ 1 Newberg & Conte, *supra* note 70, § 4.50.

¹⁷⁶ 1 Id. (citing *Dale Elecs., Inc. v. R.C.L. Elecs., Inc.*, 53 F.R.D. 531, 537-38 (D.N.H. 1971) (holding that designation of defendant class of patent infringers was appropriate); *Research Corp. v. Pfister Associated Growers*, 301 F. Supp. 497, 498-501 (N.D. Ill. 1969) (finding that class action is proper on patent issues pursuant to either Rule 23(b)(1)(A), (b)(1)(B), or (b)(2)); *Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc.*, 285 F. Supp. 714, 719-25 (N.D. Ill. 1968) (designating defendants to serve as representatives of class and of each subclass in patent infringement action)).

also reveals that defendant classes have been upheld in civil rights,¹⁷⁷ criminal justice,¹⁷⁸ mental health,¹⁷⁹ and securities¹⁸⁰ cases.

Our data support the assertion that defendant classes are uncommon. 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, the 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.

I. Issues Classes and Subclasses, and Conflicts of Interest

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 . . . ?"¹⁸¹ 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

¹⁷⁷ See, e.g., *Callahan v. Wallace*, 466 F.2d 59, 62 (5th Cir. 1972) (certifying defendant class of justices of peace and sheriffs who had pecuniary interest in rendering guilty verdicts in traffic cases); *Doss v. Long*, 93 F.R.D. 112, 115 (N.D. Ga. 1981) (certifying defendant class of judges who were paid fees for each service performed instead of receiving salary); *Florida Businessmen for Free Enter. v. Florida*, 499 F. Supp. 346, 350 (N.D. Fla. 1980) (certifying defendant class of sheriffs and state attorneys whom plaintiffs wished to enjoin from enforcing law which plaintiffs argued was unconstitutional), *aff'd sub nom. Florida Businessmen for Free Enter. v. Hollywood*, 673 F.2d 1213 (11th Cir. 1982).

¹⁷⁸ See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 107 (1975) (certifying defendant class in class dealing with right of prisoner to prompt probable-cause hearing after warrantless arrest); *Marcera v. Chinlund*, 91 F.R.D. 579, 582-85 (W.D.N.Y. 1981) (certifying defendant class of directors of New York sheriffs who administered county jails providing no contact visitation programs for pretrial detainees).

¹⁷⁹ See, e.g., *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 78 F.R.D. 413, 414-15 (E.D. Pa.) (certifying defendant class of directors of mental health and mental retardation facilities subject to regulation by Pennsylvania Secretary of Public Welfare), *rev'd on other grounds*, 442 U.S. 640 (1979); *Kendall v. True*, 391 F. Supp. 413, 416-17 (W.D. Ky. 1975) (certifying defendant class of judges deciding cases under mental health law which plaintiff argued was unconstitutional).

¹⁸⁰ See, e.g., *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 528, 532-38 (S.D. Fla. 1986) (certifying defendant class which allegedly violated federal securities and racketeering laws and explaining that "certification of defendant classes has gained considerable acceptance in securities fraud litigation"); see also *In re Iteq Sec. Litig.*, 89 F.R.D. 104, 121 (N.D. Cal. 1981) (indicating that existence of plaintiff class often enhances likelihood of defendant class certification).

¹⁸¹ Cooper, *supra* note 7, at 47. On this topic, Professor Cooper also raises a series of questions about how issues classes work. *Id.* at 47-48. Given the absence of issues classes in our study, we cannot address those questions.

named plaintiffs had a potential conflict of interest with other class members.

1. *Issues Classes and Subclasses*

Rule 23(c)(4) authorizes the court to allow a class action to be maintained with respect to particular issues or to divide the class into appropriate subclasses.¹⁸² Subdivision (c)(4) is helpful in assisting the courts to restructure complex cases in order to meet the other requirements for maintaining a class action, such as the superiority and manageability requirements.¹⁸³

All four of the districts, E.D. Pa.,¹⁸⁴ S.D. Fla.,¹⁸⁵ N.D. Ill.,¹⁸⁶ and N.D. Cal.,¹⁸⁷ have case law reflecting the courts' willingness to certify

¹⁸² 7B Wright et al., *supra* note 73, § 1790.

¹⁸³ 7B Id. § 1790, at 268-69.

¹⁸⁴ See, e.g., *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 109 (3d Cir. 1979) (finding certification of class for purpose of determining liability "entirely proper" in action seeking injunctive relief against continued maintenance of state school and hospital facility for care and training of persons suffering from mental retardation); *Samuel v. University of Pittsburgh*, 538 F.2d 991, 995-97 (3d Cir. 1976) (finding decertification of class in case attacking statewide residency rule to be in error when court could have used Rule 23(c)(4)(A) and (B) to better manage 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 issues in class action to recover damages to class members' property by construction activity); *Griffin v. Harris*, 83 F.R.D. 72, 74 (E.D. Pa. 1979) (holding that in light of Rule 23(c)(4)(A), court had authority to reconsider its prior ruling on class certification in action challenging Department of Housing and Urban Development's administration of rent supplement program as pertaining to damages); *Swarb v. Lennox*, 314 F. Supp. 1091, 1099 (E.D. Pa. 1970) (ordering class certification for class with limited issues in case involving legality of Pennsylvania judgment by confession practice), *aff'd*, 405 U.S. 191 (1972).

¹⁸⁵ See, e.g., *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (reversing district court's decision to deny class certification in suit brought for denial of medicaid benefits and noting that 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 antitrust action), *cert. denied*, 439 U.S. 1072 (1979).

¹⁸⁶ See, e.g., *Denberg v. United States R.R. Retirement Bd.*, 696 F.2d 1193, 1207-08 (7th Cir. 1983) (finding that although district court did not have jurisdiction over action challenging decision of Railroad Retirement Board to deny benefits to husbands of retired railroad workers, it was appropriate for 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 *3 (N.D. Ill. Jan. 19, 1988) (applying Rule 23(c)(4)(A) in securities action); *Skelton v. GMC*, 1985-2 Trade Cas. (CCH) ¶ 66,683 (N.D. Ill. June 21, 1985) (holding that issue of whether design or manufacturing defect breached implied warranty of merchantability was sufficiently common to justify classwide treatment in warranty case). But see *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (reversing district court's decision to certify class action as to issue of negligence only in product liability/negligence suit because district judge "exceed[ed] permissible bounds of discretion in the management of federal litigation"), *cert. denied*, No. 95-147, 1995 U.S. LEXIS 6153 (Oct. 2, 1995).

¹⁸⁷ See, e.g., *Valentino 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 product liability/negligence suit); *Arnold v. United*

an issues class if the other Rule 23 requirements are fulfilled. Additionally, case law also reveals that subclasses have been used in E.D. Pa.,¹⁸⁸ S.D. Fla.,¹⁸⁹ N.D. Ill.,¹⁹⁰ and N.D. Cal.¹⁹¹ in a variety of substantive case types.

Nevertheless, 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

Artists Theatre Circuit, Inc., 158 F.R.D. 439, 453 (N.D. Cal. 1994) (excluding plaintiff's deterrence claims for class certification in case under Americans with Disabilities Act); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 439 (N.D. Cal. 1985) (certifying defendant underwriter class with respect to particular issues and applying Rule 23(c)(4)); *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 civil rights action pursuant to Rule (c)(4)(A)). But see *In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 855-56 (9th Cir. 1982) (holding that "[t]he 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).

¹⁸⁸ See, e.g., *Samuel*, 538 F.2d at 996 (holding that district court abused its discretion by not investigating into 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 subclass in case against Housing Assistance Program); *Troutman v. Cohen*, 661 F. Supp. 802, 813 (E.D. Pa. 1987) (certifying subclasses for class action involving challenges to Medical Assistance Skilled Care Regulations); *Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs*, 469 F. Supp. 329, 391 (E.D. Pa. 1978) (certifying subclasses for discrimination class action); *Santiago v. City of Phila.*, 72 F.R.D. 619, 629 (E.D. Pa. 1976) (certifying subclasses in civil rights class action); *Dawes v. Philadelphia Gas Comm'n*, 421 F. Supp. 806, 814 (E.D. Pa. 1976) (certifying subclasses in action challenging certain policies and practices of Philadelphia Gas Works); *Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 66 F.R.D. 581, 585 (E.D. Pa. 1975) (certifying subclasses in Sherman antitrust class action); *Dorfman v. First Boston Corp.*, 62 F.R.D. 466, 476 (E.D. Pa. 1973) (certifying two subclasses in securities class action).

¹⁸⁹ See, e.g., *Appleyard*, 754 F.2d at 958 n.3 (vacating district court's decision to deny class certification and suggesting that court should have considered using Rule 23(c)(4)). But see *Mathews v. Diaz*, 426 U.S. 67, 71 n.3 (1976) (finding that district court in S.D. Fla. lacked jurisdiction over class action involving Social Security Act and that class and subclass as certified were too broadly defined).

¹⁹⁰ See, e.g., *Williams v. State Bd. of Elections*, 696 F. Supp. 1559, 1560 (N.D. Ill. 1988) (certifying subclasses in civil rights class action); *Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc.*, 285 F. Supp. 714, 725 (N.D. Ill. 1968) (certifying subclasses in patent class action).

¹⁹¹ *American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787 n.5 (9th Cir. 1982) (finding subclassification appropriate in usury class action suit); *Valentino v. Carter-Wallace, Inc.*, No. C94-2867, 1995 U.S. Dist. LEXIS 9938, at *1 (N.D. Cal. Mar. 15, 1995) (certifying subclass in product liability/negligence class action); *Sullivan v. Chase Inv. Servs., Inc.*, 79 F.R.D. 246, 272 (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 district court had no authority to create subclass in § 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, 156 & n.9 (N.D. Cal. 1983) (denying subclass in constitutional class action challenge for failure to satisfy numerosity requirement).

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 them only when the advantages outweigh the disadvantages of promoting additional litigation.¹⁹²

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. 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 therefore show 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.

2. *Conflicts of Interest*

As a general principle, class representatives' interests should not conflict with the interests of the class.¹⁹³ Pursuant to Rule 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 . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class."¹⁹⁴ 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.¹⁹⁵

¹⁹² See 7B Wright et al., *supra* note 73, § 1790 (discussing advantages and disadvantages of issues classes).

¹⁹³ But see *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 407 (D.N.J. 1990) (finding fact that named plaintiff in securities fraud action had purchased her stock through stepfather-broker who resided in same household as her did not produce conflict of interest between her and other class members nor did it show that she had access to inside information, thus not precluding finding that her claims were typical of those of class members).

¹⁹⁴ Fed. R. Civ. P. 23(a)(3).

¹⁹⁵ 7A Wright et al., *supra* note 73, § 1768; see also *id.* § 1768 (Supp. 1995) (citing *Michaels v. Ambassador Group, Inc.*, 110 F.R.D. 84, 91 (E.D.N.Y. 1986) (stating that any conflict of interest arising among members of proposed class in action for alleged violations of § 10(b) of 1934 Securities Exchange Act was minimal when compared to substantial questions common to all members and that any conflicts were too peripheral to

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 or potential conflicts of interest between the representative and class members occurred with some frequency. 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. In our study, 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.¹⁹⁶

mandate denial of class certification); *United States v. Rhode Island Dept. of Employment Sec.*, 619 F. Supp. 509, 513 (D.R.I. 1985) (stating "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'" (quoting *Lamphere v. Brown Univ.*, 71 F.R.D. 641, 650 (D.R.I. 1976), appeal dismissed, 553 F.2d 714 (1st Cir. 1977))).

¹⁹⁶ The general types of conflicts included but were not limited to the following: (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 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; and (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* Part D.2., sometimes denying class certification, and sometimes overruling the objection.

J. Notice

1. *What Types of Notice Have Been Required in (b)(1), (b)(2), and (b)(3) Actions, and in What Time Frame?*¹⁹⁷

Two different situations may call for notice: class certification and settlement. Regarding notice of certification, Rule 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.”¹⁹⁸ In (b)(1) and (b)(2) actions, district judges have discretion to provide notice whenever they deem it necessary “for the protection of the members of the class or otherwise for the fair conduct of the action.”¹⁹⁹ The *Manual for Complex Litigation, Third* indicates that notice of certification “may at times be advisable for (b)(1) and (b)(2) classes.”²⁰⁰

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.”²⁰¹ Courts and commentators have concluded that “notice of [voluntary] dismissal or compromise is now mandatory in all cases under Rule 23.”²⁰²

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.”²⁰³ 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 settlement or disposition of the liability issues is imminent.²⁰⁴ If the class prevails on liability, the ruling might have the effect of shifting the burden of paying the cost of notifying the class.²⁰⁵ If the case settles, the parties, subject to the

¹⁹⁷ See Cooper, *supra* note 7, at 48.

¹⁹⁸ Fed. R. Civ. P. 23(c)(2).

¹⁹⁹ Fed. R. Civ. P. 23(d)(2); 7B Wright et al., *supra* note 73, § 1786.

²⁰⁰ *Manual for Complex Litigation, Third* § 30.211 (1995). 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 70, § 8.05.

²⁰¹ Fed. R. Civ. P. 23(e).

²⁰² 7B Wright et al., *supra* note 73, § 1797, at 365 (footnote omitted).

²⁰³ *Manual for Complex Litigation, Third* § 30.211 (1995).

²⁰⁴ *Id.* § 30.211, at 224-25 (stating that when parties are nearing settlement or when developments indicate it may be necessary to revise certification, it may be reasonable to delay notice temporarily).

²⁰⁵ See 2 Newberg and Conte, *supra* note 70, § 8.09 (arguing that postponing notice may represent good “litigation strategy and ingenuity”).

court's approval,²⁰⁶ 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.²⁰⁷

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."²⁰⁸ The proposed amendment to Rule 23 that the Advisory Committee circulated in 1993 would give the district judge discretion to require "appropriate notice." In making that decision, the judge would be directed to take into account a host of factors, including "the expense and difficulty of providing individual notice, and the nature and extent of any adverse consequences from failure to receive actual notice."²⁰⁹ 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.

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. Although notice of certification before settlement is not required in (b)(1) and (b)(2) actions, the majority of such cases included some notice. Generally, the notice in those cases was notice of settlement, but a sizable minority included personal notice of class certification.²¹⁰ 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.²¹¹

²⁰⁶ Fed. R. Civ. P. 23(e).

²⁰⁷ Failure to give adequate notice may mean that members of the class will not be bound by the judgment. See 7B Wright et al., *supra* note 73, § 1789, at 247-48 (stating that "an absent member of the class . . . will not be bound if he can establish that to affect his rights would deprive him of property without due process of law, either because the class was inadequately represented or because of a failure to give him adequate notice").

²⁰⁸ ABA Special Committee Report, *supra* note 11, at 208 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974)).

²⁰⁹ Cooper, *supra* note 7, at 34.

²¹⁰ In all four districts, notice was issued in 37 cases certified in whole or in part under sections (b)(1) and (b)(2). Data were 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 *infra* Part K.1.b.

²¹¹ 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

In the (b)(3) certified class actions, notice of certification or settlement was sent in all but six of the cases in the study.²¹² 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 merits²¹³ and may as well have deprived the defendants of a final judgment of classwide effect.²¹⁴

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 (N.D. Cal.), 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. In the other districts, the median times were 3.8, 8.3, and 3.3 months. In all four districts, at least 25% of the certification notices were issued more than six months after the class was certified.

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 twenty-seven (38%) class actions that were certified and later settled (that is, excluding settlement classes), the first notice sent to the class was a notice of settlement. Overall, sixteen (59%) of those twenty-seven 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 district. The number of cases in which such time gaps occur is a relatively small proportion—less than 13%—of all cer-

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.

²¹² 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 had been certified as both a (b)(2) and a (b)(3) class action, were terminated by dismissal or summary judgment.

²¹³ One of the purposes of notice is to give the absent class member an opportunity to "enter an appearance through counsel." Fed. R. Civ. P. 23(c)(2).

²¹⁴ See *supra* note 163. For further discussion of notice in settlement classes, see *infra* Part M.2.

tified and settled class actions. Nevertheless, the numbers are sufficient to show that the practice of delaying notice of class certification occurs and that the time gap between certification and notice of settlement can be quite wide.

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 or guideline in Rule 23(c)(2) has in some cases allowed the parties to postpone or avoid notice. Such omissions thwart the intention 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.²¹⁵ 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. The proposal to address the merits of a case before certification—currently under Advisory Committee consideration²¹⁶—might also provide a mechanism for allocating the costs of notice. The proposal does not, however, contemplate a precertification or prenotification ruling that would bind the class.²¹⁷

2. *In What Form Was the Notice Issued, Who Paid the Cost, and Does the Cost of Notice Discourage Legitimate Actions?*²¹⁸

Rule 23(c)(2) requires individual notice in (b)(3) actions for class members “who can be identified through reasonable effort.”²¹⁹ Others are to be given “the best notice practicable under the circumstances.”²²⁰ The *Manual for Complex Litigation, Third* states that “[p]ublication in newspapers or journals may be advisable as a supplement.”²²¹ As previously discussed, *Eisen v. Carlisle & Jacquelin* re-

²¹⁵ See Frankel, *supra* note 6, at 41 (asserting that “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 70, § 8.09 (suggesting that when read in combination, first two subdivisions of Rule 23(c) require that notice of class certification be given promptly).

²¹⁶ Advisory Comm. on Civil Rules, Agenda Book for November 9-11, 1995, Meeting in Tuscaloosa, Ala., pt. VI.A (on file with authors).

²¹⁷ See *id.*

²¹⁸ See Cooper, *supra* note 7, at 48.

²¹⁹ Fed. R. Civ. P. 23(c)(2).

²²⁰ *Id.*

²²¹ Manual for Complex Litigation, Third § 30.211 (1995).

quires that class representatives be responsible for the cost.²²² 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.”²²³ 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 be sent to all identifiable class members.”²²⁴

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.²²⁵ 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 3000 individuals in one district to a median of over 15,000 in another. 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 no less than half 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.²²⁶ In at least 25% of the cases in each district, the cost of notice exceeded

²²² *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (holding that “usual rule is that a plaintiff must initially bear the cost of notice to the class”).

²²³ *Manual for Complex Litigation, Third* § 30.211 (1995).

²²⁴ 7B Wright et al., *supra* note 73, § 1788.

²²⁵ In only one case was it clear that notice other than individual notice was used. In that case, notice was communicated to an estimated one 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.

²²⁶ These costs refer to notice of certification or settlement or both, depending on what type or types of notice were issued in each case.

\$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.²²⁷ 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?²²⁸ 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.

3. *How Much Litigation of Notice Issues Occurred?*²²⁹

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. Overall, twenty-one objections were filed, 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 about their rights in the proposed settlement. Six objectors com-

²²⁷ See *supra* Part J.1.

²²⁸ See *supra* text accompanying notes 223-24.

²²⁹ Cooper, *supra* note 7, at 48.

plained that the notice had not been received in a timely manner, sometimes arriving 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.²³⁰

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.

Overall, the number of objections as well as their tenor and force was not great. Whether that is a sign of the process 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 as previously discussed in Part J.1 or as will be discussed in Part J.4.

4. *Did the Notices of Proposed Settlements Contain Sufficient Detail To Permit Intelligent Analysis of the Benefits of Settlement?*²³¹

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 to consider approval of the settlement, and an explanation of the procedure for allocating and distributing the settlement.²³² 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 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.²³³

²³⁰ For a discussion of objections to substance of settlements that were presented at settlement approval hearing, see *infra* Part M.3.

²³¹ Cooper, *supra* note 7, at 48.

²³² *Manual for Complex Litigation, Third* § 30.212 (1995); cf. 2 Newberg & Conte, *supra* note 70, § 8.32 (suggesting that notice of proposed settlement include, *inter alia*, description of litigation, summary of proposed settlement, requested allowance for attorneys' fees, procedure for filing proofs of claims, procedure for filing appearances and objections, and procedure for obtaining documents related to litigation and settlement).

²³³ See *Manual for Complex Litigation, Third* § 30.212, at 228 (1995) (recommending contents of settlement notices for different stages of class action litigation with goal that notice will allow for efficiency, clarity, and informed decisionmaking).

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.²³⁴ 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."²³⁵ Courts have not demanded precision but have called for estimates of monetary benefits, fees and expenses, and individual recoveries.²³⁶ Language in a notice should be clear and direct.²³⁷

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, one-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.

Missing from most disclosures was information about the amount of attorneys' fees, costs of administration, and other expenses. In only one district did more than half of the notices include the amount of

²³⁴ An estimate of the individual shares in the settlement or the percentage of damages to be compensated would, of course, serve the same purpose.

²³⁵ 2 Newberg & Conte, *supra* note 70, § 8.32.

²³⁶ See, e.g., *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.) (indicating that "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); *Bogges v. Hogan*, 410 F. Supp. 433, 442 (N.D. Ill. 1975) (noting that "the notice should . . . include the best available information concerning fees and expenses together with an estimated range of unitary recovery").

²³⁷ See, e.g., *Avery v. Secretary of Health and Human Servs.*, 762 F.2d 158, 165 (1st Cir. 1985) (affirming district court's decision choosing proposed notice that is written in "plain and direct English," since "[i]t is more likely that its recipients will understand it"). See generally 2 Newberg & Conte, *supra* note 70, § 8.39 (emphasizing need for clear, objective language in notice provided to absent class members).

attorneys' fees; at the other end of the range, in one district, only 10% of the notices included such information. In all four districts, however, more than two-thirds of the notices included information about either the percentage or the amount of attorneys' fees. 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 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.²³⁸

Notices generally included sufficient information on the non-monetary 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.

As mentioned, 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. Rule 23(a)(1)'s requirement that "the class is so numerous that joinder of all members is impracticable"²³⁹ 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

²³⁸ The median percentage of the gross settlement devoted to administrative costs was 2% across the four districts in the 29 cases for which data were available. See *infra* note 334.

²³⁹ Fed. R. Civ. P. 23(a)(1).

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 plaintiffs,²⁴⁰ 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, and hearings and objections. Counsel in these cases often followed routine formats for developing notices and presenting settlement approval information to the court.²⁴¹ The practice appears to be routinized, and one would expect that counsel would follow any explicit guidelines established through the rulemaking 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.²⁴² Experience with Rule 8(a)'s requirement of "a short and plain statement of the claim," however, suggests that there are limits to the ability to mandate "plain and direct English."²⁴³

K. *Opt-Out and Opt-In Classes*

1. *Opt-Out Classes*

a. Number of Opt Outs and Relationships with Subject Areas and Size of Claims. The questions in this section are "[h]ow frequently do members opt out of (b)(3) classes?" and "[c]an this [opting-out] be correlated with specific subject areas, [or] size of typical individual claims . . . ?"²⁴⁴ The background question, which our data cannot answer directly, is "[w]hy do members choose to opt out . . . ?"²⁴⁵ The choice of opting out may arise in two distinct contexts: af-

²⁴⁰ See discussion and data *infra* Part O.4.

²⁴¹ 2 Newberg & Conte, *supra* note 70, § 8.32 (indicating that "Rule 23(e) notices are becoming standardized in format"). For sample forms, see 2 *id.*, app. 8-2 at 8-146 to -150; see also Manual for Complex Litigation, Third § 41.4 (1995).

²⁴² For any researchers who wish to take up this call for further research, we can make available a file which includes most of the notices we encountered in the four districts.

²⁴³ See *supra* text accompanying notes 236-37 and note 237.

²⁴⁴ See Cooper, *supra* note 7, at 48.

²⁴⁵ *Id.*

ter certification but before settlement or after a settlement has been proposed. As the discussion of notice indicates,²⁴⁶ 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.

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. 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 58% in the fourth.

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. These percentages are somewhat lower than the percentage of opt outs observed in the Georgetown empirical study.²⁴⁷

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 a hundred total opt outs. This left seven cases in the study with more than 100 opt outs.²⁴⁸ Two cases had 2500 and 5203 members, respectively, who opted out. In both of these cases, objectors who were represented by attorneys appeared at the settlement hearings, a sign that they might be planning further litigation.²⁴⁹

²⁴⁶ See *infra* Part J.

²⁴⁷ See Bertelsen et al., *supra* note 118, at 1161 (finding that in 36 class actions primarily from United States District Court of District of Columbia, class members opted out in 21 (58%) of cases).

²⁴⁸ 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.

²⁴⁹ The case with 5203 opt outs was *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 781 (3d Cir.) [hereinafter *General Motors Pick-Up Truck Litig.*], 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. *Id.* at 775-76. The settlement approval was vacated and remanded on appeal. *Id.* at 822-23. In the other large case, 2500 (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

Data regarding opt outs at the settlement stage suggest that there may be an inverse relationship between the average net amount of the settlement and the presence of one or more opt outs. 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 were 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.

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. The largest average net individual award was \$5331, and the great majority of the awards were below \$1000.²⁵⁰

For the type of awards in this study—none of which seem high enough to support individual lawsuits on a contingent-fee basis²⁵¹—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.

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.²⁵² The levels of opting out reported in the Georgetown study, in fact, indicate that opting out may have declined considerably.²⁵³

in the case file of further litigation; but the presence of the attorneys and the large number of opt outs supply the ingredients for further litigation by the opt-out members.

²⁵⁰ See *supra* Part A.1.

²⁵¹ See *supra* Part A.1.

²⁵² See Bertelsen et al., *supra* note 118, at 1161 (summarizing opt-out rates in 36 studied cases). 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 1157-59.

²⁵³ 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 1.2% or less of the class opt out. See *supra* text accompanying notes 247-48. Only two cases in the entire study had opt-out rates above 10%. See *supra* text accompanying notes 248-49.

b. Opt Outs in (b)(1) or (b)(2) Classes. With one minor exception,²⁵⁴ there were no opt outs in classes certified exclusively under Rule 23(b)(1) or (b)(2). 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 Rule 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 classwide basis. None of the cases, however, appeared to represent abuses of the mandatory class categories to evade opt-out requirements.²⁵⁵

2. *Opt-In Classes*

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.²⁵⁶ The Georgetown empirical 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%.²⁵⁷ In the national portion of 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.²⁵⁸ Along similar lines, Newberg and Conte re-

²⁵⁴ 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 employees 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.

²⁵⁵ 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 and that damages were incidental to the injunctive relief.

²⁵⁶ Cooper, *supra* note 7, at 49.

²⁵⁷ Bertelsen et al., *supra* note 118, at 1150.

²⁵⁸ *Id.* at 1149-50.

port a small number of opt-in cases that were approved under state-court rules.²⁵⁹

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.²⁶⁰ 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.

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. 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. Other types of cases that typically generate monetary awards such as antitrust and employment discrimination also used claims 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.²⁶¹

L. Individual Member Participation

1. Participation Before Settlement

a. *Attempts by Class Members To Intervene.* The question is “[h]ow frequently do nonrepresentative class members seek to partici-

²⁵⁹ 3 Newberg & Conte, *supra* note 70, § 13.22.

²⁶⁰ We encountered a few cases filed as statutory opt-in class actions under § 216(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b) (1994), and under § 626(b) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b) (1994), 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.

²⁶¹ 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 70, § 12.35.

pate before the settlement stage?"²⁶² Intervention by putative class members can proceed under either Rule 24(a) of the Federal Rules of Civil Procedure,²⁶³ Rule 24(b),²⁶⁴ or Rule 23(d)(2).²⁶⁵ 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."²⁶⁶

Attempts to intervene in cases filed as class actions occurred relatively infrequently in the study, in 11%, 9%, 5%, and 0% of the cases in the four districts. Overall, judges granted about half of the requests. The most frequently cited basis for intervention was Rule 24. 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.

b. Attempts by Nonmembers To Intervene. In all four districts, a total of six nonmembers of an alleged class attempted to intervene in the class actions. Courts granted two of the six applications. Aside from representing special interests, there was no pattern to their applications.²⁶⁷ All four of those 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.²⁶⁸ In addition to appeals from the denial of an application to intervene, three proposed intervenor-plaintiffs

²⁶² Cooper, *supra* note 7, at 49.

²⁶³ Rule 24(a) allows intervention of right when granted by statute or when necessary to protect an interest of the prospective intervenor. Fed. R. Civ. P. 24(a).

²⁶⁴ Rule 24(b) allows permissive intervention when a statute provides for conditional intervention, or there are common questions of law or fact. Fed. R. Civ. P. 24(b).

²⁶⁵ Rule 23(d)(2) states that the 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 otherwise to come into the action." Fed. R. Civ. P. 23(d)(2).

²⁶⁶ 7B Wright et al., *supra* note 73, § 1799.

²⁶⁷ 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 Apr. 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). For a description of two unsuccessful attempts at intervention, see *infra* note 268.

²⁶⁸ In one case, a bankruptcy trustee for a corporate defendant sought to ensure 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 dismissed. *Weiner v. Southeast Banking Co.*, No. 90-760 (S.D. Fla. filed Mar. 22, 1990). In another case, a pro-life coalition sought to intervene as a defendant in an abortion rights case against a defendant class of state attorneys. The district court denied the application, and

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.

2. *Class Member Participation in Settlement by Filing Objections or Attending Settlement Hearings*

The question raised is how frequently do nonrepresentative class members appear to contest settlement and with what effect?²⁶⁹ 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 corporation.²⁷⁰ 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.²⁷¹

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., we were frequently unable to obtain transcripts of the settlement approval hearings, so our report of attendance in the other three districts is likely to undercount the participation of class members and objectors. With this caveat, our data show that nonrepresentative parties attended the settlement hearing infrequently,²⁷² with 14% in E.D. Pa. being the high mark, and the other three districts showing 7% to 11% rates of participation. 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%.²⁷³

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.

The most frequent type of objection was to the amount of attorneys' fees as being disproportionate to the amount of the settlement;

the denial was affirmed on appeal. *Keith v. Daley*, 764 F.2d 1265, 1272 (7th Cir.), cert. denied, 474 U.S. 980 (1985); see also discussion of appeals *infra* Part Q.

²⁶⁹ Cooper, *supra* note 7, at 49.

²⁷⁰ 2 Newberg & Conte, *supra* note 70, § 11.55.

²⁷¹ 2 *Id.* § 11.56.

²⁷² While appearances at hearings were infrequent, there are few data from other studies to tell us what to expect. The Georgetown study did not examine participation or objections. See Bertelsen et al., *supra* note 118.

²⁷³ See also *supra* Part D.3.

in twenty-one cases, 14% to 22% of the cases in the four districts, objectors raised this point. The next most frequent objection, which occurred in fifteen cases, 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.²⁷⁴

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.²⁷⁵

Specific objections to the amount of attorneys' fees requested likewise produced little change in the proposed settlement. Overall, in twenty cases, objections to the amount of fees were filed. In eighteen of those twenty cases, the court awarded 100% of the request, and in the other two, the court awarded less than the full fee request.²⁷⁶

²⁷⁴ For example, in *General Motors Pick-Up Truck Litig.*, 55 F.3d 768, 781 (3d Cir.), cert. denied, 116 S. Ct. 88 (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.

²⁷⁵ 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, 1992). 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. In *re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1177 (N.D. Cal. 1993). 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. *Id.* at 1190.

²⁷⁶ 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

While our study was not designed to trace the responses to each objection, our general impression is that the parties summarized and discussed most objections in a motion for settlement approval. Such a motion was generally filed 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.

3. *Nonrepresentative Class Member Participation by Filing Appeals*²⁷⁷

As noted above in Part L.1.b., 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.²⁷⁸ 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 fifty-dollar coupons toward the purchase of specified automotive equipment to replace prior purchases of similar equipment.²⁷⁹ That appeal is pending.

M. Settlement

1. *Did Certification Coerce Settlement of Frivolous or Near-Frivolous Claims?*

We earlier 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.²⁸⁰ 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

and 100% in the other four cases with objections. In the other two districts, 100% of the requested fees were awarded in a total of 10 cases with objections to fees.

²⁷⁷ Cooper, *supra* note 7, at 49.

²⁷⁸ 55 F.3d at 781.

²⁷⁹ *McKenna*, No. 92-2227.

²⁸⁰ See *supra* Part E.3.a.

of certifying a class coerce settlement of frivolous or near-frivolous claims?²⁸¹ 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.

a. Outcomes of Certified Classes Compared with Outcomes for Noncertified Cases. Table 1²⁸² 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 ruled on certification. Thus, the settlement could not be said to be a product of a certification ruling.

Across the four districts, certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified. The percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals)²⁸³ for cases not certified ranged from 20% to 30%. The converse proposition—that certified class actions are less likely to be terminated by traditional rulings on motions or trials—is also true. 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. For the most part, this finding follows directly from having a high percentage of settlements that terminated

²⁸¹ See Cooper, *supra* note 7, at 49.

²⁸² See *infra* app. at tbl. 1.

²⁸³ 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.

the litigation. Combining the motion and trial categories in Table 1 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.²⁸⁴ These data confirm empirical data from an earlier study of class action activity in the N.D. Cal.²⁸⁵

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 impending trial date. In the following subsection, we will look at the data on these alternatives.

b. Frequency of Rulings on Motions To Dismiss, Motions for Summary Judgment, Trial Dates Scheduled, and Trials Held in Certified Class Actions. 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 one-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. 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%. Finally, trial dates were set in percentages ranging from 17% to 56% in the four districts.

Overall, between 72% and 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. 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.

Of the three factors discussed, the effect of setting 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

²⁸⁴ See *infra* app. at tbl. 1.

²⁸⁵ 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—36 out of 46 cases—compared to a 15% settlement rate for cases filed as class actions but not certified—11 out of 73 cases. Seventy percent of the uncertified cases were disposed of by motion to dismiss or by summary judgment.

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.

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 Study reinforce this finding. Judges spent about eleven times more time on class actions than on the average civil case in the Time Study.²⁸⁶ Judicial rulings and active case management, including the setting of trial dates and holding pretrial conferences, 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 the 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.”²⁸⁷ 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, arises from 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 flows from a realistic assessment of the liability the litigation might be expected to impose.

c. Timing of Settlements in Relation to Class Certification. Another indicator of the relationship between certification and settlement is the timing of the two events. Unless settlement follows reasonably promptly after certification, the settlement would not seem to be related directly to the certification. If settlement occurs before or simultaneously with certification or long after certification, the pos-

²⁸⁶ See *supra* Part B.4 and note 83.

²⁸⁷ Garth, *supra* note 285, at 504.

sibility of any connection between the two seems remote. 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.²⁸⁸

The time from certification to settlement varied widely. The median times in the four districts ranged from 9.2 to 18.9 months. The majority of the cases in one district (S.D. Fla.) settled before certification, and in the other three districts, 15% to 37% of the cases settled before 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-a-half years or more.

The data on timing of settlements therefore 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.

2. Notice

The question raised is how effective is the attempt to ensure compliance with notice and certification requirements when certification is first sought at the settlement stage.²⁸⁹ Rule 23(e) requires notice of settlement or compromise in all class actions, regardless of the type.²⁹⁰ Thus, all cases certified for settlement purposes would be expected to have a notice of the certification combined with a notice of the settlement communicated to the class.²⁹¹ We found, however, in Part J.1., that six settled (b)(2) classes received no notice of settlement. Our analysis in this section overlaps with that analysis.²⁹² We also found that five certified (b)(3) classes received no notice of certification before being disposed of on the merits (four) or by stipulation (one).²⁹³ We also found a tendency to delay notice after certification

²⁸⁸ For a discussion on the effect of filing the complaint on settlement, see *supra* Part E.3.

²⁸⁹ Cooper, *supra* note 7, at 49

²⁹⁰ See *supra* text accompanying notes 201-02.

²⁹¹ 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.

²⁹² See *supra* text accompanying note 211.

²⁹³ See *supra* text accompanying notes 212-14.

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.²⁹⁴

Settlement classes are difficult for the court to evaluate because of the lack of an adversarial proceeding on class certification.²⁹⁵ Complicated issues, such as conflicts between class counsel and counsel for individual plaintiffs or the need to protect future claimants, may challenge the court.²⁹⁶ The settlement approval process generally involves two steps: a preliminary evaluation of fairness and a later review, after notice, at a fairness hearing.²⁹⁷

In S.D. Fla. and N.D. Cal., notice of settlement was disseminated to the class in all class actions certified for settlement purposes. In E.D. Pa., thirteen of sixteen (81%) and in N.D. Ill., twelve of fifteen (80%) settlement classes included notice to the class. 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.

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 E.D. Pa. Overall, there were twelve settlement classes, eight in E.D. Pa., that did not appear to include a preliminary approval ruling. 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. None of those seven cases was certified as a (b)(3) class and none involved money damages.

Thus, a handful of cases in the study had no notice to the class of a classwide 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, however, 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.²⁹⁸ Without notice to the class and the

²⁹⁴ See *supra* Part J.1.

²⁹⁵ *Manual for Complex Litigation, Third* § 30.45 (1995).

²⁹⁶ *Id.*

²⁹⁷ *Id.* § 30.41.

²⁹⁸ *Manual for Complex Litigation, Third* § 30.45 (1995) (explaining that “[a]pproval under Rule 23(e) of settlements involving settlement classes . . . requires closer judicial scrutiny than approval of settlements where class certification has been litigated”).

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 must better accommodate such persons and stop denying them floor level seating.²⁹⁹ One assumes that the 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. A more open process would seem likely to supply 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.³⁰⁰ Class members, their family members, attorneys, or caseworkers would certainly be able to contribute information about whether the settlement would be likely to meet their needs.

Another consequence of the lack of notice of settlement is that the parties may fail to effectuate their intent to bar future claims. Lack of notice and a hearing leaves the settlement open to collateral attack by class members who were not notified of its provisions.³⁰¹

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. 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

²⁹⁹ Levin v. Spectacor, Inc., No. 92-4725 (E.D. Pa. filed Aug. 12, 1992).

³⁰⁰ Ruth L. v. White, No. 90-5562 (E.D. Pa. filed Aug. 27, 1990).

³⁰¹ 2 Newberg & Conte, *supra* note 70, § 11.23.

representatives or the court or both. If so, a rule allowing truncated notice (for example, to 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 Committee's consideration.

3. *How Often Did Magistrate Judges or Special Masters Evaluate Settlements?*

The proposed revision to Rule 23(e) "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."³⁰² 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 designated as a special master, upon the consent of the parties.³⁰³

The proposed revision to Rule 23(e) also authorizes referring settlement or dismissal proposals to magistrate judges for evaluation.³⁰⁴ Currently, in civil litigation generally, district judges assign a variety of duties to magistrate judges.³⁰⁵ These judicial officers perform duties that range from resolving discovery disputes³⁰⁶ to presiding, with the consent of the parties, over civil trials.³⁰⁷

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 Committee cited some examples of situations in which 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 pro-

³⁰² Fed. R. Civ. P. 23 (Proposed Draft, Jan. 21, 1993) advisory committee's note (e) (on file with the *New York University Law Review*).

³⁰³ 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, purpose, and proposed uses 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).

³⁰⁴ Fed. R. Civ. P. 23(e) (Proposed Draft, Jan. 21, 1993) (on file with the *New York University Law Review*).

³⁰⁵ See 28 U.S.C. § 636 (1994); see also Carroll Seron, *The Role of Magistrates: Nine Case Studies* 35-46 (Federal Judicial Center 1985).

³⁰⁶ 28 U.S.C. § 636(b)(1)(A).

³⁰⁷ *Id.* § 636(c).

vide 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.³⁰⁸

Of 126 proposed settlements in certified cases, a settlement was assigned to a special master (other than a magistrate judge) in only two cases.³⁰⁹ 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 settlement. Moreover, courts appointed masters in only three cases in the study as a whole, counting all appointments for whatever purpose.³¹⁰

The study found that referrals to magistrate judges for settlement purposes³¹¹ were somewhat more frequent. By far, the greatest rate of magistrate referrals occurred in N.D. Cal. (47% of certified cases with proposed settlement; fourteen of thirty cases).³¹² In the other three courts, the comparable rates were 5%, 23%, and 20%.³¹³ 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.

The rarity of master 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.³¹⁴

³⁰⁸ Fed. R. Civ. P. 23(e) (Proposed Draft, Jan. 21, 1993) advisory committee's note (c) (on file with the *New York University Law Review*).

³⁰⁹ There were no referrals to review dismissal.

³¹⁰ In the third case, a master reviewed requests for attorneys' fees.

³¹¹ There were no referrals to review dismissal.

³¹² 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%; 7 of 19 cases). District judges eventually approved settlement in 20 of the 21 cases referred to magistrate judges.

³¹³ The numbers of cases referred were small (respectively two of 43, three of 13, and eight of 40). Rates of referral were similar for noncertified cases.

³¹⁴ 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. The district's rate of referral for pretrial case management, however, was comparatively low, and its rate of referring class-certification issues was about average compared to the other three districts.

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 contend, 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 collusive settlements or other alleged abuses.³¹⁵

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.³¹⁶

*N. Trials*³¹⁷

The Advisory Committee 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 and by other case characteristics, such as certification status and Rule 23(b) subdivision.

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. A little less than half of the eighteen trial cases were certified as class actions.³¹⁸ Given the small number of trials, we did not attempt to stratify trial outcome data by district.³¹⁹ Instead, we aggregated data for the four districts; however, inferences about

³¹⁵ See generally Sylvia R. Lazos, Note, Abuse in Plaintiff Class Action Settlement Negotiations, 84 Mich. L. Rev. 308, 326-32 (1985) (discussing merits of guardian mechanism in pretrial settlement negotiations).

³¹⁶ See, e.g., Macey & Miller, *supra* note 303, at 57-58 (suggesting use of special master as alternative method for reducing burden of fee calculation).

³¹⁷ Cooper, *supra* note 7, at 50.

³¹⁸ The percentage of certified class actions in which a trial began ranged from 0% to 14% in the four districts.

³¹⁹ We did however gather data on the percentage of class action cases in which a trial date was entered on the docket, the percentage of certified cases in which a trial date was entered on the docket, the timing of the first entry of the trial date, and the timing of the scheduled trial date. 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. One district set a trial date in all of its cases within the first two years of the case. See Willging et al., *supra* note 25, app. C at figs. 56, 62-66 and tbls. 43-44. For a discussion of the effect of setting a trial date on settlement, see *supra* Part M.1.b.

the universe of trials in class actions nationwide 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,³²⁰ no trial resulted in a final judgment for a plaintiff class. Judgments in two of the three trials that found for individual plaintiffs were vacated. Five of the eighteen trials led to settlement during or after trial.

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.³²¹ 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 classes³²² and two (b)(2)/(b)(3) Title VII classes.³²³

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

1. *Jury Trials*

Ten of the eighteen trials were before a jury. 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.³²⁴

³²⁰ 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.

³²¹ See Cooper, *supra* note 7, at 50.

³²² These five were jury trials, generally involving fraud issues, with all but one of the classes certified.

³²³ Both were combination jury/bench trial cases, one certified and the other not.

³²⁴ Seven out of the 10 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.

a. *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.

b. *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.

2. *Bench Trials*

Eight of the eighteen trials were bench trials. 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 trials,³²⁵ 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.

O. *Fee/Recovery Rates*

An overarching question concerning attorneys' fees is whether, in addition to conferring benefits on attorneys, class action outcomes

³²⁵ 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.

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?³²⁶

1. *What Were the Ratios of Attorneys' Fees to Recoveries?*

Professor Cooper has referred to the "cynical belief" that "many class actions serve only to confer benefits on class counsel."³²⁷ To address this issue, we computed a "fee-recovery rate" (attorneys' fee awards³²⁸ divided by gross monetary settlement³²⁹) for certified class actions where the court approved a settlement.³³⁰ 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%.³³¹

³²⁶ Cooper, *supra* note 7, at 50.

³²⁷ *Id.* Some argue that class counsel at times receive large fees from settlements that provide nominal benefits or only speculative benefits to the class. See Manual for Complex Litigation, Third § 30.42 (1995) (favoring separation of negotiations for class settlement from negotiations for attorneys' fees in order to avoid conflict of interest); see also Senate Staff Report, *supra* note 9, at 73-74 (discussing criticism that plaintiffs' attorneys accept small recovery because it includes large fee award).

³²⁸ "Fee awards" exclude sanctions and out-of-pocket expenses.

³²⁹ "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.

³³⁰ No case that went to trial and did not settle resulted in a final judgment or verdict in favor of a class. See *supra* text accompanying note 320.

³³¹ 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 a distribution of \$1000 coupon certificates to an estimated five to six million class members. Objecting class members placed economic value on the coupon distribution that differed significantly from defendant's estimates. *General Motors Pick-Up Truck 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.

There were no fee awards to, and few fee requests by, counsel other than plaintiffs' counsel. In most cases, net monetary distributions to the class exceeded attorneys' fees by substantial margins. The fee-recovery rate infrequently exceeded the traditional one-third 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.³³²

Some distribution cases also included other class relief that the court did not quantify.³³³ 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.³³⁴

³³² See *infra* app. at fig. 4. In 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 \$1.4 million. 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 of \$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. 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.

³³³ For example, in one case, class counsel valued the settlement's "non-cash" 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.

³³⁴ See *supra* note 331. 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. 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.

2. *How Were Fees Calculated?*

In most study cases, the court awarded attorneys' fees under the century-old common fund doctrine.³³⁵ 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."³³⁶ In recent years, the trend has been toward the percentage-of-recovery method.³³⁷ For example, the Eleventh Circuit has required the percentage method in common fund class actions.³³⁸ The Third,³³⁹ Seventh,³⁴⁰ and Ninth³⁴¹ Circuits authorize either the lodestar or the percentage method.

³³⁵ 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 generally Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation 49-75* (1994) (discussing awarding fees under common fund doctrine).

³³⁶ The Supreme Court never formally adopted the lodestar method in a common fund case. *Manual for Complex Litigation*, Third § 24.121 (1995) (footnotes omitted).

³³⁷ *Id.* § 24.121, at 189. The latest swing away from lodestar received momentum from a footnote in a 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*, 465 U.S. 886, 900 n.16 (1984).

Additional momentum came in 1985 when a Third Circuit task force, formed to examine court-awarded attorneys' fees, recommended the percentage-of-recovery method for common fund cases. Third Circuit Task Force, *Court Awarded Attorneys Fees*, 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.

³³⁸ See *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (stating that "[h]enceforth 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").

³³⁹ 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." *General Motors Pick-Up Truck Litig.*, 55 F.3d 768, 821 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

³⁴⁰ See, e.g., *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (stating that 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). Although permitting either method, the Seventh Circuit has expressed a preference for the percentage method. See *id.* at 572-73 (emphasizing what lawyer with contingent-fee contract would receive for bundle of services instead of what market would pay for each individual hour of work).

³⁴¹ See, e.g., *Six (6) 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 "depend[ing] on the circumstances"). In *Paul, Johnson, Alston & Hunt v.*

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.³⁴² 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.³⁴³

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. 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.³⁴⁴

In a relatively small number of study cases, courts awarded fees pursuant to fee-shifting statutes, such as the one governing civil rights

Grauly, 886 F.2d 268 (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. *Id.* at 272.

³⁴² "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 65, at 667; see also Kirchoff v. Flynn, 786 F.2d 320, 324 (7th Cir. 1986) (asserting that hourly fee arrangements create incentive to run up hours in relation to stakes of case); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 693-97 (N.D. Cal. 1990) (same); 3 Newberg & Conte, *supra* note 70, § 14.03 (comparing lodestar and percentage methods, concluding that "courts have essentially concluded that the proper use of both methods results in a calculation to a percentage of the common fund to support a finding of reasonableness" (footnote omitted)); Monique Lapointe, Note, Attorney's Fees in Common Fund Actions, 59 Fordham L. Rev. 843, 847-61 (1991) (discussing perceived problems with lodestar method).

³⁴³ See, e.g., Skelton v. General Motors Corp., 860 F.2d 250, 253 (7th Cir. 1988) (noting that in common fund cases, "the court becomes the fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications"), cert. denied, 493 U.S. 810 (1989).

³⁴⁴ 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 John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, Law & Contemp. Probs., Summer 1985, at 5, 35-36, 41-44 [hereinafter Coffee, *Unfaithful Champion*] (providing examples and analysis of class counsel reaching point of diminishing returns); see also John C. Coffee, Jr., *The 'New Learning' on Securities Litigation*, N.Y. L.J., Mar. 25, 1993, at 5, 6 [hereinafter Coffee, *New Learning*] (indicating that class counsel in securities litigation may "settle cheaper in larger cases at a lower percentage" rather than risk defeat at trial or declining percentage of recovery "as the recovery goes above \$20 million or so"). See generally Manual for Complex Litigation, Third § 30.16 (1995) (discussing conflicts of interest that use of percentage method creates between class counsel and class).

claims,³⁴⁵ 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.³⁴⁶

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. 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 six to one over lodestar, and N.D. Ill. used the percentage method nearly two to one over lodestar. It appeared that the percentage method was the exclusive method in S.D. Fla.

Interestingly, S.D. Fla., which did not use lodestar, had the lowest average fee-recovery rate (24%) while E.D. Pa., which used lodestar the most, had the highest average rate (30%). The differences were not as pronounced for median fee-recovery rates, which ranged from 27% (S.D. Fla.) to 30% (N.D. Ill.).³⁴⁷ 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.

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. As one would expect, in settlements where the only benefits to the certified class were those that could not

³⁴⁵ See, e.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (1994) (authorizing court to award attorneys' fees to prevailing party in civil rights 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. Manual for Complex Litigation, Third § 24.11 (1995). The availability of statutory fees is driven by public policy, encouraging private enforcement of substantive rights under the law. *Id.* § 24.13. 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 342, at 865-67 (discussing differences between statutory fee and common fund cases, noting differences in risk allocation, size and value of judgments, and plaintiff/defendant fee liability).

³⁴⁶ See *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (indicating that lodestar approach is "centerpiece of attorney's fee awards" in statutory fee case (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983))). See Hirsch & Sheehy, *supra* note 335, at 19-44 (discussing calculation of fees under fee-shifting statutes).

³⁴⁷ Generally, the study could not measure the degree to which higher fee-recovery rates reflected high quality of work done, efforts to pursue challenging but deserving claims, or other factors. For a discussion of fee adjustments and multipliers, see *infra* Part O.3.

be easily quantified (no-distribution cases), courts generally used lodestar or relied on consensual fee determinations.

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 one-third of the cases in E.D. Pa.³⁴⁸ 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.³⁴⁹ In N.D. Cal., judges used it in 78%³⁵⁰ of the distribution cases, compared to about 60%³⁵¹ in N.D. Ill. and 45%³⁵² in E.D. Pa.³⁵³

In “no-distribution” cases, lodestar was the dominant method in two districts. 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.³⁵⁴ It appears that, in many cases, the court opted for lodestar when it could not quantify the value of class benefits, thus making a percentage-of-recovery calculation problematic.

Civil rights claims were generally more prevalent in “no-distribution” cases.³⁵⁵ 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.³⁵⁶

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. For example, the Third Circuit recently cited an E.D. Pa. decision that noted

³⁴⁸ Willging et al., *supra* note 25, app. C at fig. 73. The mean and median fee-recovery rates in E.D. Pa. for all net distribution cases were 30% and 28% respectively, compared to 28% and 27% solely using the percentage method.

³⁴⁹ In S.D. Fla., all percentage method cases involved securities claims.

³⁵⁰ In N.D. Cal., over 80% of the percentage method cases involved securities issues. None involved civil rights claims.

³⁵¹ In N.D. Ill., 60% were securities cases; 10% involved civil rights.

³⁵² In E.D. Pa., nearly 90% were securities cases; no cases involved civil rights.

³⁵³ In one case in each of two districts, the courts applied both the lodestar and percentage-of-recovery methods. 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.

³⁵⁴ For the four districts combined, the courts determined fees by lodestar in nine cases and by the percentage method in three cases; parties stipulated to fees in 16 cases, and the fee method in 11 cases was unknown.

³⁵⁵ 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.

³⁵⁶ See *supra* text accompanying note 346.

fee awards have ranged from 19% to 45% of the common fund.³⁵⁷ In recent decisions, the Seventh³⁵⁸ and Eleventh³⁵⁹ Circuits have discussed benchmarks or ranges of 20% to 30%. In addition, the Eleventh Circuit has instructed district courts to apply the twelve factors in *Johnson v. Georgia Highway Express, Inc.*³⁶⁰ and other pertinent factors³⁶¹ in determining the fee percentage. The Ninth Circuit has indicated that 25% should be the "benchmark"³⁶² for such awards, subject to adjustment upward or downward to account for any unusual circumstances involved in a case.³⁶³ 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.³⁶⁴

³⁵⁷ *General Motors Pick-Up Truck Litig.*, 55 F.3d 768, 822 (3d Cir.) (citing *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 533 (E.D. Pa. 1990)), cert. denied, 116 S. Ct. 88 (1995).

³⁵⁸ See, e.g., *Florin v. Nationsbank of Ga.*, 60 F.3d 1245, 1248-49 (7th Cir. 1995) (indicating that "benchmark in common fund cases is 20%-30%") (quoting *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 886 F. Supp. 445, 463 (E.D. Pa. 1995), aff'd, 61 F.3d 896 (3d Cir. 1995)).

³⁵⁹ See, e.g., *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (noting that percentage method is "better reasoned" for common fund cases and that "majority of common fund fee awards fall between 20% to 30% of the fund"). In addition, the Eleventh Circuit stated, as a general rule, that 50% may be established as an upper limit. *Id.* at 774-75.

³⁶⁰ 488 F.2d 714, 717-19 (5th Cir. 1974) (holding that district court should consider reasonableness of award in light of: (1) time and labor required; (2) novelty and difficulty of question; (3) skill requisite to perform legal service properly; (4) preclusion of other employment by attorney on account of case; (5) customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and result obtained; (9) experience, reputation, and ability of attorney; (10) "undesirability" of case; (11) nature and length of attorney's professional relationship with client; and (12) awards in similar cases).

³⁶¹ 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 the settlement, and the economics involved in prosecuting a class action." *Camden I*, 946 F.2d at 775. For a discussion on fee enhancements, see *infra* Part O.3.

³⁶² "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 342, at 867 n.165.

³⁶³ See *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (approving fee award of 25% of \$1,846,500 in damages and observing that 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 *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming district court's holding that award of 33% was justified because of complexity of issues and risks); *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 273 (9th Cir. 1989) (directing 25% of \$4,736,000 recovery as "proper benchmark"). For a discussion of fee enhancements, see *infra* Part O.3.

³⁶⁴ *Manual for Complex Litigation*, Third § 24.121 (1995); Hirsch & Sheehy, *supra* note 335, at 68.

To prevent a windfall to plaintiffs' counsel in cases where the settlement fund is unusually large, some courts have used the lodestar method³⁶⁵ or a sliding scale percentage method, with the percentage to be awarded decreasing as the size of the fund increases (sliding scale percentage method).³⁶⁶ Only one case in the study had a gross monetary settlement amount greater than \$50 million.³⁶⁷ The fee-recovery rate in that N.D. Cal. case was 19%, below the Ninth Circuit benchmark of 25%.³⁶⁸

In another case, as part of a bidding process for lead class counsel, the court selected a fee structure that included a modified sliding scale percentage method under which the fee percentage 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.³⁶⁹ 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.³⁷⁰ To offset any incentives for attor-

³⁶⁵ See, e.g., *In re Washington Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1297 (9th Cir. 1994) (approving district court's conclusion that 25% "benchmark" was of "little assistance" in case where settlement fund was large (\$687 million)).

³⁶⁶ See Task Force Report, *supra* note 337, at 256 (asserting that in "most instances, [determination of the fee] will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of fund increases"); see also *Florin v. Nationsbank of Ga.*, 60 F.3d 1245, 1245-48 (7th Cir. 1995) (indicating that "fee awards usually fall in the 13%-20% range for funds of \$51-\$75 million, and in the 6%-10% range for funds of \$75-\$200 million"); *Coffee, New Learning*, *supra* note 344, at 7 & n.13 (noting decrease in percentage as amount of award increases). But, it has been noted that:

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 342, at 868.

³⁶⁷ *Stender v. Lucky Stores*, No. 88-1467 (N.D. Cal. filed Apr. 22, 1988).

³⁶⁸ The parties stipulated to attorneys' fees, and the court awarded the full amount of the fee request.

³⁶⁹ *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 541 (N.D. Cal. 1990). The selected lead counsel fee structure was as follows:

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

Id.

³⁷⁰ See *supra* note 344 and accompanying text.

neys 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.

3. *How Was Benefit to the Class Taken into Account?*

In determining fee awards, the courts often considered the extent to which the class benefitted from the settlement. We looked for the following as indicators of the court's consideration of benefits to the class: (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 courts 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.³⁷¹ In the balance of the distribution 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 for fee decisions in these cases. To the extent that they did, the percentages cited above are understated.

One method courts have used to take class benefits and other considerations into account has been to apply enhancements or reductions to fee awards.³⁷² In common fund cases, the trend had been that fee enhancements, where not otherwise prohibited, should be re-

³⁷¹ Willging et al., *supra* note 25, § 16(c). This finding is in contrast to Professor Downs's findings that "[c]lass attorneys received substantial awards . . . with little or no judicial scrutiny." Downs, *supra* note 65, app. at 710-11.

³⁷² 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 ask for adjustments to reflect the novelty of the issues presented, risk of nonpayment, and delay in payment (loss of use of money). See Hirsch & Sheehy, *supra* note 335, at 36-40, 69-70 (discussing possible arguments for fee modification in statutory fee-shifting and common fund cases, respectively); 3 Newberg & Conte, *supra* note 70, § 14.03 (discussing standards for common fund fee awards); see also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563-66 (1986) (reaffirming that in context of fee-shifting statutes, many of *Johnson* factors are subsumed within lodestar amount absent extraordinary circumstances); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting *Johnson*-like factors for determining fees), cert. denied, 425 U.S. 951 (1976); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (listing twelve factors to be used in determining reasonable attorneys' fees in fee-shifting civil rights case prior to enactment of 42 U.S.C. § 1988(b)). But see *Blanchard v. Bergeron*, 489 U.S. 87, 92-94 (1989) (clarifying use of lodestar and *Johnson* factors in civil rights case involving statutory fees and private fee arrangements; fee award may exceed amount determined by contingent-fee arrangement).

served for the rare case in which the standard fee calculation method will not adequately compensate the professional.³⁷³

One method used to enhance fees has been to apply a multiplier to the lodestar amount.³⁷⁴ In the past, the Seventh Circuit suggested limiting multipliers to a doubling of the lodestar.³⁷⁵ The majority of courts, however, had not imposed such limits.³⁷⁶

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 and a \$9.5 million fee award in the *General Motors Pick-Up Truck Litigation* settlement recently vacated on appeal.³⁷⁷

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 generally in fee-shifting cases a mandate, to incorporate those factors into the lodestar components.³⁷⁸ Also, it is possible that, prior to 1994 ap-

³⁷³ See Hirsch & Sheehey, *supra* note 335, at 71 & n.335 (predicting that under *City of Burlington v. Dague*, 505 U.S. 557 (1992), the Court would reject risk enhancements in common fund cases).

³⁷⁴ In a decision that might have affected the use of multipliers in study cases, the Supreme Court barred risk multipliers (fee enhancers that account for counsel's risk of nonpayment) in a statutory fee-shifting case. *Dague*, 505 U.S. at 567. 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 Ga.*, 34 F.3d 560, 564-65 (7th Cir. 1994) (holding that risk multiplier may be used to enhance lodestar in common fund cases); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300-01 (9th Cir. 1994) (holding that district court erred by refusing to award risk multiplier to lodestar calculation). On the other hand, a recent Third Circuit opinion, interpreting *Dague*, could be read to prohibit the use of multipliers for lodestar enhancement in common fund class actions. See *General Motors Pick-Up Truck Litig.*, 55 F.3d 768, 822 (3d Cir.) (ruling that district court erred in applying risk multiplier to lodestar calculation), cert. denied, 116 S. Ct. 88 (1995).

³⁷⁵ *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 relative contribution of counsel); see also *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 896 (N.D. Ill. 1990) (not allowing use of multiplier), rev'd, 962 F.2d 566 (7th Cir. 1992) (ruling that district court's refusal to allow risk multiplier for risk of noncompensation was erroneous). These three cases were not in the study.

³⁷⁶ See Richard B. Schmitt, *Shareholder Suits Pay Attorneys Less*, Wall St. J., Feb. 1, 1991, at B1 (observing that "courts are retreating from nearly two decades of awarding plaintiff attorneys a multiple of their actual hours as a bonus for winning risky cases").

³⁷⁷ *General Motors Pick-Up Truck Litig.*, 55 F.3d at 822.

³⁷⁸ See Hirsch & Sheehey, *supra* note 335, at 36-40, 69-70 (discussing possible arguments for fee modification in statutory fee-shifting and common fund cases, respectively).

pellate decisions affecting two of the study courts, *City of Burlington v. Dague*³⁷⁹ had a chilling effect on enhancements in common fund cases.³⁸⁰

4. *What Percentage of the Fee Amounts Requested Were Awarded, and How Often Were Objections and Appeals Filed Concerning Fees?*

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 (S.D. Fla.) 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 (38%, 33%, 25%, and 24%) were higher in cases using the percentage method.³⁸¹ Since objections were filed in percentage method cases 4.5 times as often as in lodestar cases, these results could be read to indicate that objections are more likely under the percentage method. One must also consider, however, that notices of proposed settlement identified fee-related amounts³⁸² 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. Note, however, that one cannot extrapolate

³⁷⁹ 505 U.S. 557 (1992).

³⁸⁰ See *supra* note 374.

³⁸¹ The rate reflects the number of percentage method cases with at least one fee objection divided by the number of percentage method cases.

³⁸² 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.

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.³⁸³ For three of the four districts, 3% to 7% of these appeals (four or fewer per district) involved attorneys' fees issues,³⁸⁴ 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.

P. *Duplicative or Overlapping Classes*

The core questions are: How common are duplicative or overlapping classes? What difficulties were posed by such classes?³⁸⁵ 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.³⁸⁶ These multiple actions can result in conflicting or overlapping classes that may produce inconsistent adjudications, duplication of effort, and confusion for class members, litigants, and judges.³⁸⁷ "When such an overlap occurs, the individual's claims become subject to an 'irrational resolution by a race to judgment,'"³⁸⁸ and "[e]ven if absent class mem-

³⁸³ See *infra* Part Q.1.

³⁸⁴ This 3% to 7% does not include appeals on sanctions.

³⁸⁵ See Cooper, *supra* note 7, at 57.

³⁸⁶ See, e.g., *Garcia-Mir v. Civiletti*, 32 Fed. R. Serv. 2d (Callaghan) 509 (D. Kan. 1981) (denying class certification, citing danger of overlapping classes and of wasted judicial effort; noting cases pending in other district involving same class members and issues; transferring case to that district).

³⁸⁷ George T. Conway III, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1101 (1987); see *id.* at 1101 n.11 (warning that "[a]mong the hypothetical parade of horrors which can be projected is the scenario in which 50 competing, national, multistate opt-out class actions are brought on the same claims and all members remain silent in response to the fifty notices" (quoting John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 Ariz. L. Rev. 3, 81 (1983))).

³⁸⁸ Conway, *supra* note 387, at 1101 (citing Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 70 (1986)). Conway also states that:

bers 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."³⁸⁹ Problems arising from competing classes may benefit from consolidation of the actions in one court.³⁹⁰

We found that overlapping classes generally arose in related cases that were not consolidated with similar litigation pending in federal and state courts.³⁹¹ 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 motion to 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.

Q. Appeals

Under the final judgment rule,³⁹² orders granting or denying class certification are interlocutory and generally are not appealable until the entry of a final judgment.³⁹³ In certain cases, however, courts

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)).

³⁸⁹ Id. at 1101.

³⁹⁰ Newberg and Conte assert:

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 70, § 7.31 (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. (citing *In re Coordinated Pre-trial 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)).

³⁹¹ See *supra* Part A.2.

³⁹² Federal "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291 (1994).

³⁹³ See, e.g., *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) (noting that order decertifying class is not appealable under 28 U.S.C. § 1292(a)(1)); *Coopers*

have allowed interlocutory appeal under the limited exceptions of 28 U.S.C. § 1292(a) and (b).³⁹⁴ 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 . . .' under 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.³⁹⁵

Pendent appellate jurisdiction over an otherwise unappealable order is available only to the extent necessary to ensure meaningful review of an appealable order.³⁹⁶ Granting a petition for writ of mandamus for certification review is rare.³⁹⁷

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.³⁹⁸ 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.³⁹⁹ The underlying theory is that class-certification rulings very often have make-or-break significance for the litigation, with

& *Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (holding that order decertifying class is not appealable under 28 U.S.C. § 1291). But see *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990) (noting that class representative's failure to prosecute its individual claims created final judgment and that denial of class certification merged into that judgment), cert. denied, 498 U.S. 1025 (1991).

³⁹⁴ See *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (interlocutory appeal reversed denial of class certification); *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1331 (9th Cir. 1977) (holding that ruling on class certification that is integral to preliminary injunction ruling, also appealed, may be reviewed pursuant to § 1292(a)); see also *Castano v. American Tobacco Co.*, 162 F.R.D. 112, 117 (E.D. La. 1995) (certifying class certification ruling for interlocutory appeal in tobacco class action, with stay pending appellate decision, pursuant to 28 U.S.C. § 1292(b)), rev'd, No. 95-30725, 1996 U.S. App. LEXIS 11815 (5th Cir. May 23, 1996). But see *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 208-09 (3d Cir. 1990) (holding that class certification not reviewable under pendent appellate jurisdiction because preliminary injunction was vacated).

³⁹⁵ *Downs*, supra note 65, at 701.

³⁹⁶ *Hoxworth*, 903 F.2d at 209.

³⁹⁷ See *In re Catawba Indian Tribe*, 973 F.2d 1133, 1138 (4th Cir. 1992) (ruling that writ of mandamus will not be issued unless denial of certification amounted to usurpation of judicial power), cert. denied, 507 U.S. 972 (1993). But see *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir.) (ruling that mandamus was justified because district court certification of class was in error and delaying review would cause irreparable harm), cert. denied, 116 S. Ct. 184 (1995); *In re American Medical Sys., 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).

³⁹⁸ Fed. R. Civ. P. 23(f) (Proposed Draft, Jan. 21, 1993) (on file with the *New York University Law Review*).

³⁹⁹ 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 court

denial of certification sometimes leading to quick dismissal of the case and with granting of certification at times seen as forcing defendants to settle.⁴⁰⁰ The draft Committee Note anticipates that orders permitting immediate appellate review will be "rare."⁴⁰¹ Others speculate about whether losing parties will seek interlocutory appellate review of nearly every decision on certification.

In 1986, the ABA Special Committee recommended a code change that would be similar in effect to the proposed rule amendment.⁴⁰² 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."⁴⁰³ The ABA Special Committee also anticipated that orders permitting such interlocutory review would be "rare."⁴⁰⁴

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.⁴⁰⁵ 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.

or court of appeals so orders." Fed. R. Civ. P. 23(f) (Proposed Draft, Jan. 21, 1993) advisory committee's note (f) (on file with the *New York University Law Review*).

⁴⁰⁰ See *supra* Part M.1.

⁴⁰¹ Fed. R. Civ. P. 23 (Proposed Draft, Jan. 21, 1993) advisory committee's note (f) (on file with the *New York University Law Review*).

⁴⁰² The ABA Special Committee made this recommendation prior to the enactment of 28 U.S.C. § 1292(e) which provides the statutory authority for using the rulemaking process to permit an appeal of interlocutory orders. 28 U.S.C. § 1292(e) (1994).

⁴⁰³ ABA Special Committee Report, *supra* note 11, at 200. The report cited 28 U.S.C. § 1927 (1988), Federal Rule of Civil Procedure 7, Federal Rule of Appellate Procedure 38, and inherent judicial power as "ample deterrents against abusive resort to interlocutory review." ABA Special Committee Report, *supra* note 11, at 211.

⁴⁰⁴ ABA Special Committee Report, *supra* note 11, at 211.

⁴⁰⁵ See *supra* Part E.3.

1. *How Often Were Appeals Filed?*

In the four districts, the rate of filing at least one appeal in class action cases ranged from 15% to 34%.⁴⁰⁶ 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.⁴⁰⁷ 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.⁴⁰⁸ The overall rate of appeal might have been even higher had it not been for the high rate of class settlement. Significant differences in appeal rates for settled cases (appeal rates ranging from 9% to 21%) and nonsettled cases (ranging from 33% to 43%) were observed in three districts. In the fourth district, 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.⁴⁰⁹ These findings may reflect the higher rate of settlement found in certified cases.⁴¹⁰ 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 ap-

⁴⁰⁶ In the Time Study, 14% of the class actions included one or more appeals. Willging et al., *supra* note 29, at 28. See generally Carol Krafka et al., *Stalking the Increase in the Rate of Federal Civil Appeals* 21 n.13 (1995) (providing discussion and statistics on appeal rates in federal civil cases); 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 n.57 (1993) (charting appeals filed in civil cases as percentage of estimated appealable terminations from 1988 to 1991); Richard A. Posner, *The Federal Courts: Crisis and Reform 89-91* (1985) (discussing federal appeal rates for 1960, 1982, and 1983).

⁴⁰⁷ There are other ways to estimate appeal rates for these and other purposes. See, e.g., Krafka et al., *supra* note 406, at 4-6, 21-22 (relying on two measures to estimate rates of appeal: one with denominator of cases terminating with recorded action by district court judge or magistrate and the other with a denominator of cases terminating with merits decision); McKenna, *supra* note 406, at 29 n.57 (dividing number of appeals filed in courts of appeals during year by number of civil cases terminated in district courts of each circuit in prior statistical year, excluding certain types of terminations such as settlement).

⁴⁰⁸ See *supra* Part M.1.

⁴⁰⁹ For more complete data on appeals, see Willging et al., *supra* note 25, app. C at figs. 76-83 and tbls. 49-55.

⁴¹⁰ See *supra* Part M.1.a.

peals on trial-related issues,⁴¹¹ a 67% rate of appeal.⁴¹² Looking only at fully completed trials—that is excluding four cases that settled during trial (one of which also led to an 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 nationwide 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 1978.⁴¹³

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 one-third of the cases with appeals; the comparable rate for the other two districts was around 10%.

2. *How Often Did Appeals Alter the Prior Decision of the Trial Judge?*

Few of the appeals resulted in altering the prior decision of the trial judge.⁴¹⁴ The appellate courts reversed, vacated, or remanded in full in about 15% of the appeals from three districts and 6% from the fourth.⁴¹⁵ 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, either 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.⁴¹⁶

⁴¹¹ Eight of 12 appeals of trial results led to an appellate ruling and the other four appeals were dismissed. See *supra* Part N.

⁴¹² 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 trial commenced.

⁴¹³ Gordon Bermant et al., *Protracted Civil Trials: Views from the Bench and the Bar* 41 tbl. 6 (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* 35 tbl. 2.5 (1981).

⁴¹⁴ See *infra* app. at fig. 5.

⁴¹⁵ See *infra* app. at fig. 5. 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 amount to about 3.6% of appeals filed in study cases in the four districts combined.

⁴¹⁶ See *infra* app. at fig. 5. These calculations exclude appeals where no appellate disposition information was available. See *supra* note 415.

Plaintiffs were appellants more often than defendants were. Plaintiffs filed about 75% of the appeals in three districts and 85% in the fourth.⁴¹⁷ The Preliminary Time Study found that plaintiffs filed 71% of the appeals in that sample of fifty-one class actions nationwide.⁴¹⁸

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.⁴¹⁹ The fourth court did not have a sufficient number of appeals for this stratification. Few defendants' appeals resulted in reversal or vacation.

Generally in the 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.

a. 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. 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.⁴²⁰ The fourth case settled despite the court of appeals's 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

⁴¹⁷ This is not surprising given the frequency and outcome of defendant motions to dismiss some or all of plaintiffs' claims, the frequency and outcome of plaintiff motions for class certification, and 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. 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* Part E.

⁴¹⁸ Willging et al., *supra* note 29, at 28.

⁴¹⁹ See *supra* note 415 for a description of percentage calculation methodology.

⁴²⁰ 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.

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.

b. 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. 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.

All but one of the thirteen were plaintiff appeals of claim dismissal or summary judgment for the defendants.⁴²¹ Despite appellate reversal of these judgments,⁴²² 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.⁴²³

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 nationwide. 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.⁴²⁴ 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

⁴²¹ 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.

⁴²² 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.

⁴²³ 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.

⁴²⁴ Fed. R. Civ. P. 23 (Proposed Draft, Jan. 21, 1993) advisory committee's note (f) (on file with the *New York University Law Review*) (stating that "[t]he certification ruling is often the crucial ruling in a case filed as a class action").

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.⁴²⁵ 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.⁴²⁶ These outcomes may indicate a higher 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.

3. *To What Extent Did Appellate Review Serve To Correct Errors in Procedural Decisions Relating to the Class Action Mechanism, Such As Class 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.

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

⁴²⁵ 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. 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* Part M.1.a. 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* Part E.3.

⁴²⁶ See *supra* Part M.1.

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.⁴²⁷ When the certification decision later came up for appellate review with a final order, the court of appeals affirmed class certification.

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.⁴²⁸ 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.⁴²⁹

When certification is granted, some defendants might settle rather than incur the costs of litigating to final judgment and appeal.⁴³⁰ 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.⁴³¹ These projections of the impact on 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.⁴³²

⁴²⁷ *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 209 (3d Cir. 1990); see also *supra* note 394.

⁴²⁸ See *supra* Part F.1.; see also *supra* Part B.1.

⁴²⁹ See *supra* Part E.4.

⁴³⁰ Fed. R. Civ. P. 23 (Proposed Draft, Jan. 21, 1993) advisory committee's note (f) (on file with the *New York University Law Review*) (asserting that "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").

⁴³¹ As described above, 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." *Id.* The infrequency of these types of cases in the study does not necessarily mean that they occur as infrequently in other cases or in other districts.

⁴³² 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 rul-

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.⁴³³ The discretionary nature of the proposed rule, however, is designed to be a guard against abuse of the appellate process.

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.⁴³⁴

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.

We saw that the certified class actions included twenty-one objections to some aspect of the notice process.⁴³⁵ But no appeal involved any issue related to notice to the class.

CONCLUSION

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

Based on assumptions in the ABA Special Committee Report, we expected to find considerable litigation over the appropriate Rule 23 category,⁴³⁶ judicial reluctance to examine the merits of cases before

ing. 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 11, at 210-11.

⁴³³ See *supra* Part M.1.a.

⁴³⁴ For a discussion of results on these appeals, see *supra* Part O.4.

⁴³⁵ See *supra* Part J.3.

⁴³⁶ ABA Special Committee Report, *supra* note 11, at 197 (stating that "this problem arises frequently").

ruling on class certification,⁴³⁷ 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 notice, 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 & Jacquelin*.⁴³⁸ 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, study data confirmed the assumption in the ABA Special Committee's Report that there are limited opportunities for appellate review, interlocutory or not, of decisions on certification.⁴³⁹ We also found limited success by appellants in altering district 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

⁴³⁷ *Id.* at 200 (stating that “[c]larification [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”).

⁴³⁸ 417 U.S. 156, 178 (1974) (holding that “usual rule is that a plaintiff must initially bear the cost of notice to the class”).

⁴³⁹ See ABA Special Committee Report, *supra* note 11, at 210-11 (recommending discretionary interlocutory appellate review of rulings on certification).

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.⁴⁴⁰ 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 the claims.⁴⁴¹ 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

⁴⁴⁰ See, e.g., Senate Staff Report, *supra* note 9, at 7 (indicating that "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) (indicating that 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").

⁴⁴¹ See *supra* Part E.3; see also *supra* Part M.1.

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 nonmeritorious 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.⁴⁴² 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.⁴⁴³

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.

In many respects, this Article 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 Article 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. Nationwide statistics on class actions are reported to and by the Administrative Office of the United States Courts (AO), 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 AO.⁴⁴⁴ 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.

⁴⁴² See *supra* Part B.2.

⁴⁴³ See Donna Stienstra & Thomas E. Willging, *Alternatives to Litigation: Do They Have a Place in the Federal District Courts?* 34 (1995) (noting that federal civil trial rate diminished from more than 7% to less than 4% between 1970 and 1993).

⁴⁴⁴ See Willging et al., *supra* note 25, app. D at tbl. 57 (discussing and presenting identification and definition of class actions in study).

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 the 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.⁴⁴⁵ Surveying class members might provide a better source of information about individual damages and the percent of those damages recovered through the class action 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.⁴⁴⁶ 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.⁴⁴⁷ 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.

Studying the *res judicata* effects of class settlements or adjudications 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.

APPENDIX

We have selected the following figures and tables to present data that were not amenable to summary presentation in the text. The FJC Report contains a complete set of tables and figures.⁴⁴⁸

⁴⁴⁵ See Senate Staff Report, *supra* note 9, at 151-61 (summarizing studies of whether merits matter in securities class actions).

⁴⁴⁶ See *supra* Part J.4.

⁴⁴⁷ See *supra* Part A.2.

⁴⁴⁸ Willging et al., *supra* note 25, app. C at figs. 1-83 and tbls. 1-56.

TABLE 1
OUTCOMES OF CERTIFIED^a AND NONCERTIFIED CASES

Outcome	Number of Cases (Percent of Total Cases)									
	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.		N.D. Cal.	
Dismissed on Motion	5 (14%)	23 (36%)	0 (0%)	0 (0%)	22 (37%)	4 (11%)	28 (43%)	0 (0%)	23 (34%)	0 (0%)
Summary Judgment Granted	2 (5%)	10 (16%)	1 (17%)	4 (7%)	4 (7%)	7 (20%)	10 (15%)	2 (13%)	7 (10%)	0 (0%)
Judgment Following Bench Trial	1 (3%)	0 (0%)	0 (0%)	1 (2%)	1 (2%)	0 (0%)	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Judgment Following Jury Verdict	2 (5%)	1 (2%)	0 (0%)	0 (0%)	0 (0%)	2 (6%)	1 (2%)	0 (0%)	1 (1%)	0 (0%)
Default Judgment	0 (0%)	1 (2%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Voluntary Dismissal by Plaintiff	0 (0%)	4 (6%)	0 (0%)	0 (0%)	9 (15%)	0 (0%)	10 (15%)	0 (0%)	4 (6%)	0 (0%)
Stipulated Dismissal	1 (3%)	12 (19%)	0 (0%)	0 (0%)	9 (15%)	0 (0%)	7 (11%)	0 (0%)	18 (27%)	0 (0%)
Nonclass Settlement Approved	0 (0%)	4 (6%)	0 (0%)	0 (0%)	4 (7%)	1 (3%)	8 (12%)	0 (0%)	2 (3%)	0 (0%)
Class Settlement Approved	23 (62%)	1 (2%)	6 (100%)	0 (0%)	0 (0%)	25 (71%)	0 (0%)	14 (88%)	4 (6%)	0 (0%)
Other (e.g., Case Transferred)	3 (8%)	12 (19%)	0 (0%)	0 (0%)	12 (20%)	2 (6%)	7 (11%)	0 (0%)	8 (12%)	0 (0%)

^a Note: Cases certified for settlement purposes only are not included. Some cases involved more than one form of disposition (e.g., motion to dismiss and summary judgment), and a few cases did not have information on the outcome. For these reasons the total percentages in the column generally add up to more than 100%.

FIGURE 1
MEDIAN NET SETTLEMENT PER CLASS MEMBER IN ALL
SETTLED, CERTIFIED CLASS ACTIONS

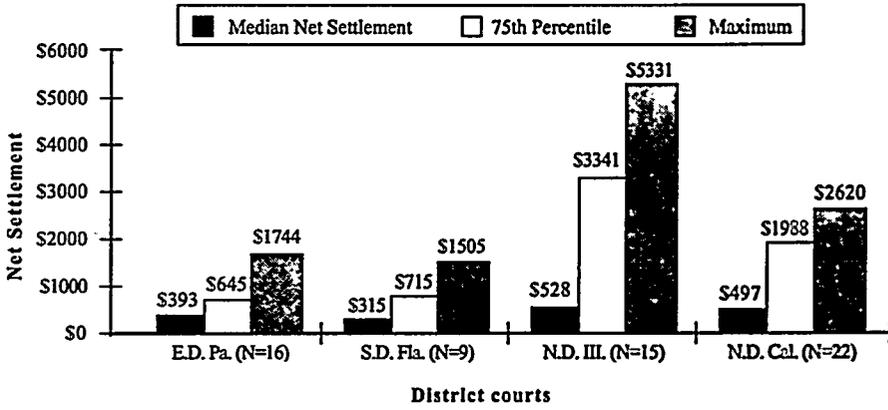
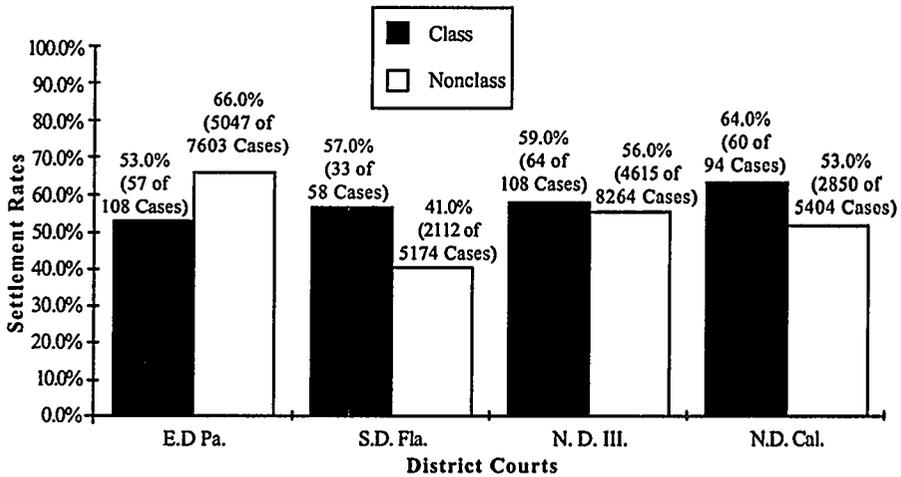


FIGURE 2
SETTLEMENT RATES FOR CLASS ACTIONS COMPARED
TO NONCLASS CIVIL ACTIONS IN CASES
TERMINATED BETWEEN JULY 1, 1992
AND JUNE 30, 1994

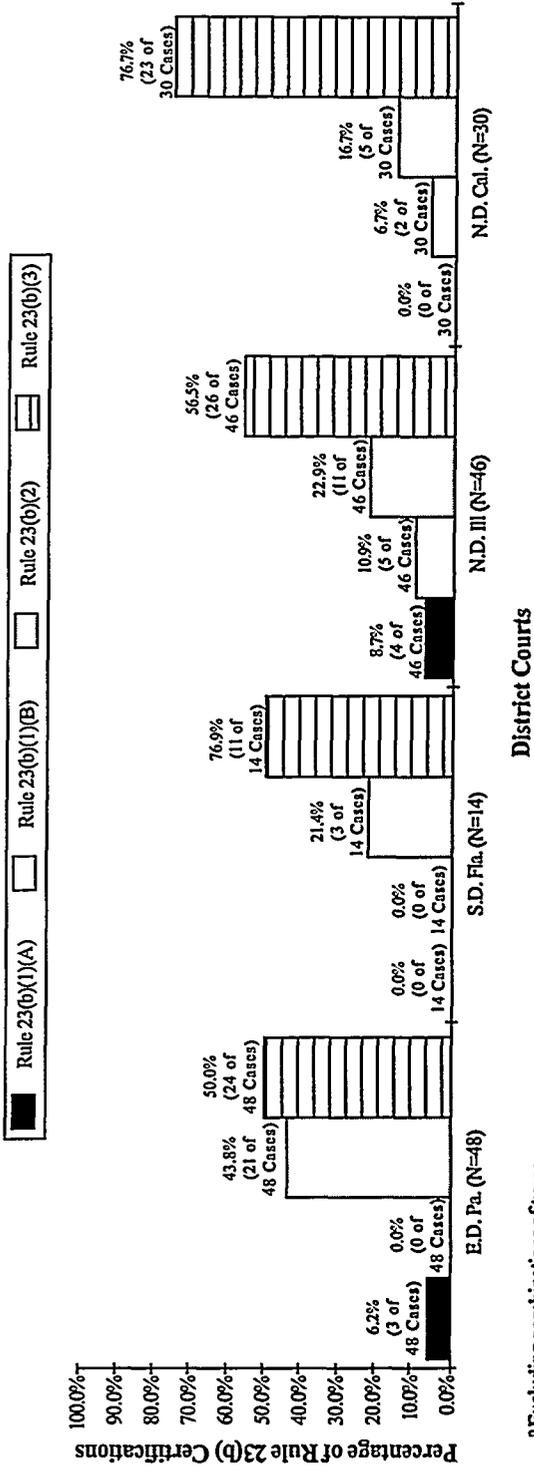


Source: Nonclass: FJC Integrated Data Base of AO Data*

Class: FJC Class Actions Project Data Base*

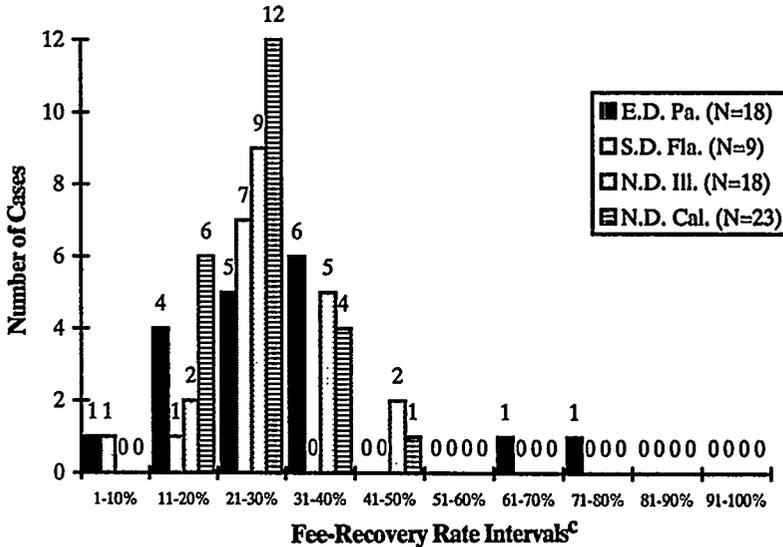
* Data excludes prisoner cases. See Willging et al., *supra* note 25, § 2(b) and app. C, fig. 7 for additional information on the data bases.

FIGURE 3
RULE 23(b) CERTIFICATIONS^a



^aExcluding combinations of types.

FIGURE 4
FEE-RECOVERY RATE INTERVALS IN CERTIFIED CASES^a
WITH COURT-APPROVED SETTLEMENTS
PROVIDING NET MONETARY
DISTRIBUTION TO CLASS^b

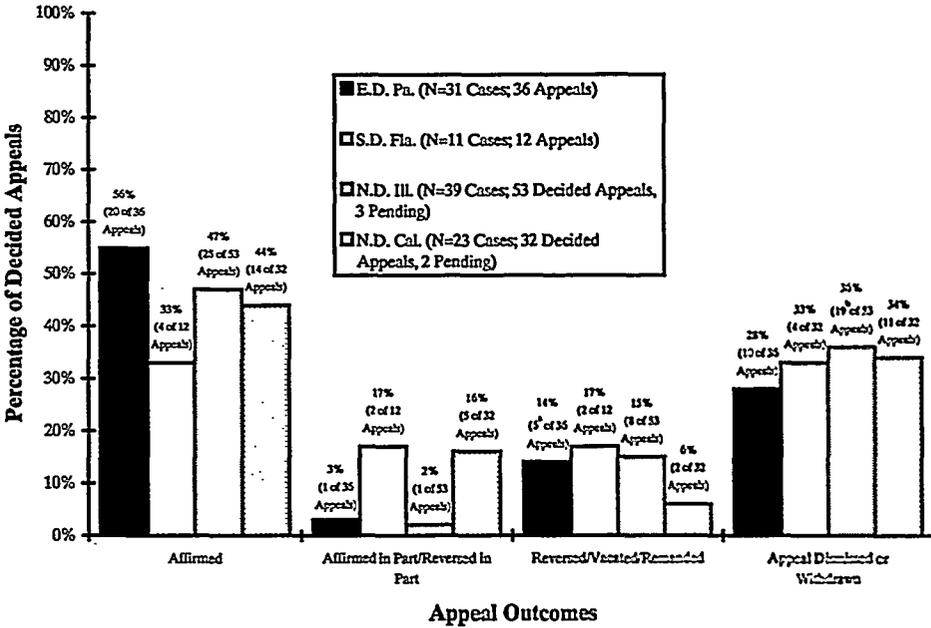


^a Figure 4 excludes 14 cases where the only monetary distribution was to class representatives, 24 cases where the only monetary distribution was for attorneys' fees or administrative expenses, and 3 cases where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class.

^b "Net Monetary Distribution" is net of attorneys' fees and administrative expenses.

^c "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 5
DISPOSITION ON APPEAL



Note: ^aIncludes the Third Circuit vacating the settlement in the *General Motors Pick-up Truck Litigation*.

^bIncludes one case where party opposing the class filed a writ of mandamus which the court of appeals denied.