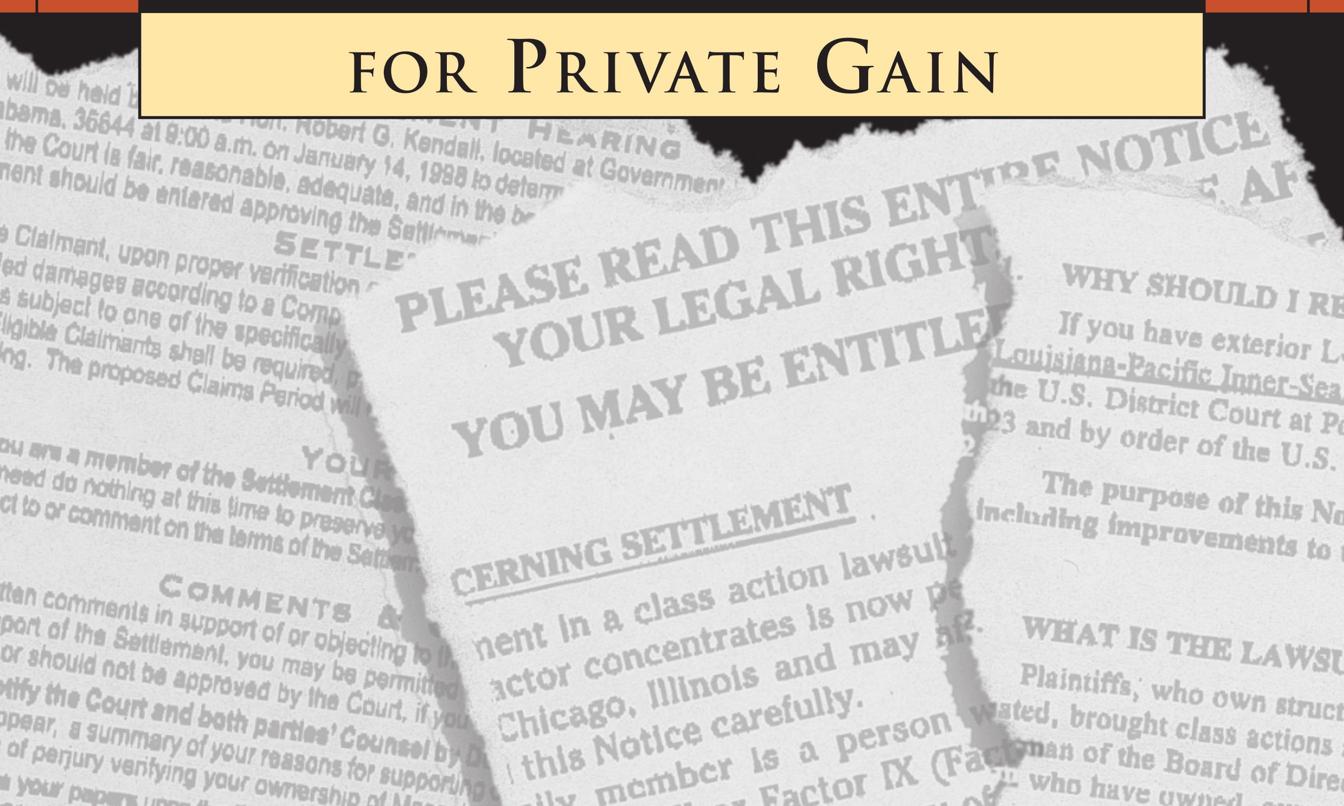
CLASS ACTION DILEMMAS

PURSUING PUBLIC GOALS FOR PRIVATE GAIN



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FOREWORD

When the RAND Institute for Civil Justice approached Neuberger Berman with a proposal to fund a study of class action litigation, we were intrigued. Billions of dollars were being spent on these suits, and nobody really understood the implications: What types of lawsuits should be handled in a class action format? Were class participants receiving their fair share of settlements? On what basis should plaintiff lawyers be paid? There were many opinions on what was right and wrong with the class action system, but little objective research on which to base policy recommendations.

We knew that for this type of research to be valuable, it had to be conducted by an independent organization, above reproach and experienced in civil justice issues. The ICJ seemed ideal. From 1988 to 1994 I sat on the ICJ Board and experienced firsthand the quality and thoroughness of the ICJ's work. I saw and respected its groundbreaking research on aviation accident and asbestos litigation, and alternative dispute resolution. Confident in the ICJ's capabilities and credentials, Neuberger Berman agreed to fund a disciplined study that could help shed light on an arcane and controversial part of our legal and economic system.

The ICJ worked on the study from 1996 to late 1999. During that time, Neuberger Berman's involvement was limited to being given study completion dates, as it was important to both organizations that the ICJ's work remain totally independent. The results you are about to read fulfill Neuberger Berman's goal to provide all who are interested in class action policy with legislative recommendations based on research by a nonpartisan authority on civil justice. We hope this study will be a valuable addition to every law school library, law firm, and corporate boardroom, and the subject of active, enlightened debate.

Lawrence Zicklin
Managing Principal
Neuberger Berman, LLC

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All of those who helped fund the study did so without placing any conditions upon the design or conduct of our research, and none had any control over the publication of the results. We gratefully acknowledge these donors' willingness to support independent research in the public interest.

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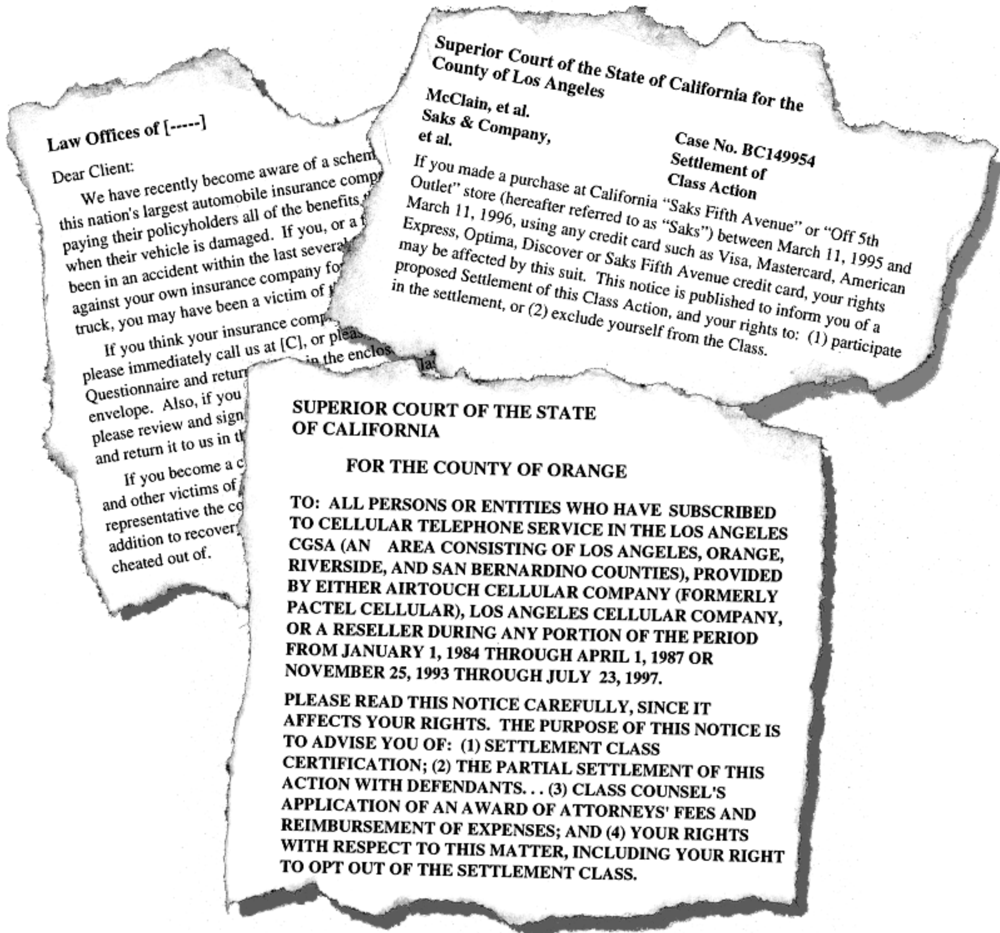
Section I

"ATTENTION: ALL PERSONS OR ENTITIES"



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Superior Court of the State of California for the County of Los Angeles

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Case No. BC149954
Settlement of Class Action

If you made a purchase at California "Saks Fifth Avenue" or "Off 5th Outlet" store (hereafter referred to as "Saks") between March 11, 1995 and March 11, 1996, using any credit card such as Visa, Mastercard, American Express, Optima, Discover or Saks Fifth Avenue credit card, your rights may be affected by this suit. This notice is published to inform you of a proposed Settlement of this Class Action, and your rights to: (1) participate in the settlement, or (2) exclude yourself from the Class.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

TO: ALL PERSONS OR ENTITIES WHO HAVE SUBSCRIBED TO CELLULAR TELEPHONE SERVICE IN THE LOS ANGELES CGSA (AN AREA CONSISTING OF LOS ANGELES, ORANGE, RIVERSIDE, AND SAN BERNARDINO COUNTIES), PROVIDED BY EITHER AIRTOUCH CELLULAR COMPANY (FORMERLY PACTEL CELLULAR), LOS ANGELES CELLULAR COMPANY, OR A RESELLER DURING ANY PORTION OF THE PERIOD FROM JANUARY 1, 1984 THROUGH APRIL 1, 1987 OR NOVEMBER 25, 1993 THROUGH JULY 23, 1997.

PLEASE READ THIS NOTICE CAREFULLY, SINCE IT AFFECTS YOUR RIGHTS. THE PURPOSE OF THIS NOTICE IS TO ADVISE YOU OF: (1) SETTLEMENT CLASS CERTIFICATION; (2) THE PARTIAL SETTLEMENT OF THIS ACTION WITH DEFENDANTS. . . (3) CLASS COUNSEL'S APPLICATION OF AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES; AND (4) YOUR RIGHTS WITH RESPECT TO THIS MATTER, INCLUDING YOUR RIGHT TO OPT OUT OF THE SETTLEMENT CLASS.

In the past several years, notices like these, published in local and national newspapers or sent through the mail, have stirred interest and controversy. Class actions—lawsuits filed on behalf of a number of individuals who together seek a legal remedy for some perceived wrong—seem to be growing in number and variety.[1] Many Americans have seen notices about class actions in their

daily newspapers. Many more have learned about high-profile class actions, such as the litigation against tobacco companies, through television and radio. An unknown number of Americans have obtained payments offered as a result of the resolution of class action suits, in amounts ranging from a few dollars to tens of thousands of dollars to much larger sums.

Much of the attention focused on class actions now and in the past has been negative. In the 1960s and 1970s, critics opposed the use of class actions to achieve school desegregation, improve prison conditions, and obtain welfare rights. More recently, critical attention has shifted to securities, consumer, and product defect class actions—suits for “money damages.” Critics argue that lawyers seek out opportunities to bring these large-scale suits in the expectation that they will receive large fees, whether or not the suit has underlying merit and whether or not the individuals on whose behalf the suit is brought benefit significantly from its resolution. The critics argue that such class actions impose unnecessary costs on manufacturers and service providers, which are passed on to consumers in the form of higher prices, and that such litigation deters innovation, impairs financial markets, and threatens U.S. economic competitiveness.[2] They also argue that misuse of class actions has brought the legal system into disrepute.

Notwithstanding this criticism, class actions for money damages have many supporters. Consumer advocates look to these lawsuits to impose penalties for corporate wrongdoing that may result in harms that are quite modest on an individual basis—for example, overcharging individuals by a few cents or a few dollars for each transaction they engage in—but may in the aggregate produce large sums for these companies. When individual losses are small, any one individual who is subject to them is unlikely to file a lawsuit against the corporation. Class actions provide a means of bringing a legal action on behalf of a large number of consumers who may be harmed when corporations engage in wrongful behavior. In the long run, consumer advocates argue, consumers are well-served by lawsuits that succeed in eliminating inappropriate business practices that would otherwise impose unwarranted costs on individuals.

Government regulators, as well, often applaud class actions. Because their own ability to enforce regulations is constrained by limited resources—and sometimes by political pressure—some state and federal regulators say they look to class action lawsuits filed by private attorneys to provide additional incentives for businesses to comply with regulations.

Corporate representatives are prominent among the critics of money-damage class actions. But corporations themselves sometimes embrace class actions as a means of more efficiently resolving thousands of similar claims, such as

claims that sometimes arise out of injuries associated with pharmaceutical products, medical devices, or exposure to toxic substances.

Criticism of class actions for money damages has led to federal legislation intended to restrain securities class actions. Such criticism has also stimulated efforts to amend Rule 23, the procedural rule that provides for class actions in federal courts, in ways that would probably increase the difficulty of initiating class actions. Because most states have modeled their class action rules on the federal rule, any change in how the federal courts treat class actions is also likely to reverberate through state court systems.[3] But policymakers who hear calls to reform class action rules have little objective evidence on class action processes or outcomes to guide their decisions.

Why don’t we know more about class actions? Studying this form of litigation is extraordinarily difficult. No national registry exists that can tell us how many class actions there are, or what types of situations lead to them. Much of the controversy over class actions for money damages concerns the practices of parties, lawyers, and judges. Charges and countercharges of unethical behavior abound. The best sources of information on class action litigation practices are the parties, lawyers, and judges involved in class action lawsuits. But while litigation is under way, the stakes are too high for most participants to be willing to share information or views on the process. Once the litigation is concluded, many participants do not want to reveal much about what transpired.

In 1996, the RAND Institute for Civil Justice embarked on a study of damage class actions. The Institute is a private, nonprofit organization that has played a leading role in policy debates over civil justice issues by providing empirically based analyses of litigation issues and policy proposals. This book is the product of the study.

The study team used a variety of data sources and research approaches to learn about class actions for money damages. We reviewed commentary on the federal class action rule, going back to when it was last significantly modified in 1966. And we studied the most recent attempt to revise the rule, which occupied much of the past decade. We describe the history of the controversy over the federal rule, which frames our later analysis, in Chapter Two.

A persistent theme in the debate over class actions has been the lack of information on the numbers and types of cases that are being filed. We assembled data on current class action litigation from a variety of electronic databases and from interviews with leading plaintiff class action attorneys, representatives of Fortune 50 corporations, public interest attorneys, and regulators. In Chapter Three, we use these data to paint a picture of the landscape of class actions toward the end of the 1990s.

Two types of class actions—suits brought on behalf of consumers for relatively small monetary losses and suits brought on behalf of individuals for medical and other losses associated with personal injuries (so-called "mass torts")—have attracted particular criticism in recent years. The first type is criticized as "lawyer-driven," intended to line plaintiff attorneys' pockets rather than benefit consumers. The second type is criticized as trammeling the rights of injured individuals to individualized legal procedures and outcomes. Chapter Three explores the analytic and empirical bases for these charges, drawing on case law, scholarly and practitioner commentary, and our attorney interviews. The chapter closes with a discussion of the dilemmas that damage class actions pose for public policy.

Scholarly commentary on class actions deals in broad abstractions, while political rhetoric focuses on a few notorious cases selected to demonstrate a particular point of view. To get beyond the abstractions and away from the focus on "problem cases," we selected ten recently completed class action lawsuits for deeper study. Most of these cases had not been written about previously, and at the time we selected them for study we did not know what their outcomes had been. To further explore the issues raised in Chapter Three, we selected six consumer cases and four mass tort cases for our analysis. We examined how these cases arose, what was at stake for class members, and what outcomes they achieved, for whom, and at what cost to the parties. Section II reports the results of this phase of our study. Chapter Four briefly describes how we selected the cases for analysis and our research approach. Chapters Five through Fourteen tell the stories of these class action lawsuits. Some readers may not wish to read all of the case studies. But each provides a window into the issues in controversy, and together they provide a rich portrait of the diverse uses of damage class actions in the 1990s.

In Section III we return to analysis. Chapter Fifteen considers what the case study data tell us about the "great big question" at the heart of the damage class action controversy: Do they accomplish more good than harm? The charges and countercharges about damage class actions that we reviewed in Chapter Three provide the structure for our analysis.

As we examined the historical record, talked with practitioners, and analyzed the data that we had collected, we came to understand better the difficult dilemma that class actions for money damages present to public policymakers. Damage class actions have significant capacity to achieve public goals: to compensate those who have been wrongfully injured, to deter wrongful behavior, and to provide individuals with a sense that justice has prevailed. But what drives damage class actions is private gain: the opportunity they offer lawyers to secure large fees by identifying, litigating, and resolving claims on behalf of large numbers of individuals, many of whom were not previously aware that

they might have a legal claim and most of whom play little or no role in the litigation process. These financial incentives produce significant opportunities for lawyers to make mischief, to misuse public and private resources for litigation that does not serve a useful social purpose. How to respond to this dilemma is the central question for public policy.

The controversy about how to respond to the dilemma posed by damage class actions implicates deep beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society. In democracies such as ours, such controversies often are difficult to resolve and may roil for decades. But at present, many of those on opposite sides of the political controversy over damage class actions share concerns about how class actions are litigated. These shared concerns present opportunities for reform. In the final chapter, we analyze popular proposals for damage class action reform, drawing upon what we learned in our study. Our goal is to identify the approaches that show the most promise for improving the balance between the public and private gains in class action practice—and that offer the best opportunities for finding common ground amidst the controversy.

NOTES

[1]Class actions may also be used by a group of defendants who choose to be represented in a litigation by a single individual or entity. This book focuses on class actions brought on behalf of multiple plaintiffs, because these lawsuits are more numerous and more controversial. On the infrequent use of defendant classes, see Herbert Newberg and Alba Conte, *Newberg On Class Actions* 4–181 (Colorado Springs, Colo.: Shepard's/McGraw-Hill, 3rd ed. 1992).

[2]Ed Gillespie and Bob Schellhas, *Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey and the House Republicans to Change the Nation* (New York: Random House, 1994), at 150. These charges are part of a larger controversy about the impact of civil litigation on the U.S. economy. Analysts have different opinions about the factual basis for such assertions. Peter Huber, *Liability: The Legal Revolution and Its Consequences* (New York: Basic Books, 1988); Peter Huber and Robert Litan, eds., *The Impact of Liability Law on Safety and Innovation* (Washington, D.C.: The Brookings Institution, 1991); Peter Schuck, ed., *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* (New York: W.W. Norton, 1991).

[3]Rule 23 is one of a set of rules that specify the procedures to be used by litigants and judges in civil litigation in federal courts, which are formally termed the Federal Rules of Civil Procedure. State courts adopt their own rules for governing civil litigation, many of which are identical or similar to the federal rules. Most states have adopted rules for class actions that are modeled after the federal rule. Thomas Dickerson, *Class Actions: The Law of 50 States* (New York: Law Journal Seminars-Press, 1997) (hereinafter Dickerson, *State Class Actions*).

Chapter Two

A MATTER OF SOME INTEREST

> "It's standing room only here. . . . It must be a matter of some interest to provoke this kind of attendance."
>
> *Senator Christopher Dodd, at the opening of the U.S. Senate Hearings on Securities Class Actions, June 17, 1993*

Whether and when to enable large numbers of individuals to bring claims collectively against a single or a few defendants has long been a subject of debate in the civil law. The language of the debate is the language of civil procedure: the formal rules that govern when and how plaintiffs may bring suits against defendants; how those defendants may contest the plaintiffs' claims; and how the adversaries may bring to bear the facts and law that are relevant to their dispute, so as to ultimately reach a resolution of the case.[1] But underlying disagreements about procedural rules rests the sometimes unspoken but widely shared understanding that procedural rules have important effects on litigation outcomes. Nowhere in the law is this truth more evident than in the battle over the class action rule, which empowers plaintiffs to bring cases that otherwise either would not be possible or would only be possible in a very different form.[2] At times, the protagonists in the class action debate have focused on "big questions," such as securing civil rights and protecting consumers, and at times they have focused on narrow technical issues, such as when the decision to permit a class action can be challenged. But the larger social and political conflicts of the day always echo in the rooms in which the proper uses of class actions are debated.

To understand the current controversy over class actions, and the important public policy issues that it implicates, it is useful to step back and consider the evolution of the class action procedure in the United States. The story of that evolution involves powerful committees charged with drafting procedural rules; the U.S. Supreme Court and other federal and state courts that have shaped class action practice through their rulings; Congress, which has enacted some statutes that facilitate class actions and others that restrict them; and lawyers, as practitioners and scholars, who have influenced all of the preceding through

their writings and oral testimony. The record of controversy and change in the class action rule and its implementation signals the complex dilemmas posed by class actions and the powerful political forces at play whenever reform is in the air.

A. THE HISTORICAL ROOTS OF CLASS ACTIONS

By the late 1990s, the term "class action" conjured up images of tobacco, silicone gel breast implant, and securities litigation, along with memories of discount coupons for air travel, blue jeans, and other products offered to consumers in settlements. As a result, some may imagine that the class action lawsuit is a recent invention of the American civil justice system. In fact, the United States has always provided a means for groups of plaintiffs with similar claims against a defendant to come together to bring a single lawsuit.

For many years, legal historians placed the origin of class actions in seventeenth century England. In their telling, class actions were born as something called the "Bill of Peace" that enabled multiple plaintiffs or defendants to resolve common questions in a single legal action brought in the Courts of Chancery.[3] Generally, all plaintiffs had to be physically present in court and legally joined together in the action. However, when the number of plaintiffs was so large that it was not practical to require them all to come forward (physically and legally), the courts allowed representative plaintiffs to present the case for all potential plaintiffs, present or absent. The representative plaintiffs were required to show that they adequately reflected the interests of the entire group because the judgment would be binding on *all* plaintiffs, whether or not they were actually involved in the proceedings.

Professor Stephen Yeazell challenged this version of English legal history, arguing instead that group litigation arose in multiple forms several hundred years earlier. For our purposes, the key teaching from Yeazell's work is that there was a long tradition in medieval England of both formally organized and more loosely associated groups of individuals bringing complaints about *communal* harm—merchants manipulating the marketplace, church officials disturbing religious peace, powerful families intimidating juries—and being granted both a hearing and remedies by government institutions. Over the years, the use of representative actions for collective harms diminished in England, as the idea of an *individualized* justice system, rooted in concepts of individual rights and remedies, took hold.[4]

Early American courts incorporated the notion of collective action in their codes of civil procedure. In 1833, the first provision for group litigation in federal courts was set forth as Equity Rule 48.[5] This rule allowed for a representative suit when the parties on either side were too numerous for convenient

administration of the suit; unlike the Bill of Peace, however, at first the outcomes of such group litigation were not binding on similarly situated absent parties. Ten years later, in a case arising out of the pre–Civil War tensions between North and South, the U.S. Supreme Court held that absent parties could be bound by the outcomes of cases brought under Equity Rule 48.[6]

The Equity Rules were overhauled in the beginning of the next century, but the representative action device remained on the books as Equity Rule 38. The new rule clearly stated that a representative action would bind absent plaintiffs. Equity Rule 38 was probably the most straightforward of all the rules adopted to date to provide for class or representative actions, stating simply:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.[7]

For about 25 years, this language provided the basis for class actions in federal courts. Representative actions could also be brought in many state courts, under various state court rules.[8]

B. THE BIRTH OF RULE 23

The end of the early history of class actions in the United States was marked by the adoption of the Federal Rules of Civil Procedure in 1938. The new rules, drafted by an advisory committee appointed by the Chief Justice of the U.S. Supreme Court, provided a significantly different structure for civil litigation. The rules changed the requirements for initiating lawsuits, provided for regularized exchange of information prior to adjudication (i.e., "discovery"), and did away with the distinction between Equity and Law cases. They also changed the ground rules for class actions.[9]

The new Rule 23, like the earlier rules, required that the lawsuit present an issue or issues common to multiple parties, and that the number of parties be so numerous that it would be difficult and inefficient to bring them all into court. But after that, things got complicated.

The 1938 version of Rule 23 provided for three types of class actions, dubbed "true," "spurious," and "hybrid." The bases for differentiating the categories were various features of the litigation that provided a rationale for allowing the parties to proceed jointly, rather than singly. The most important difference among the three types of class actions, however, was whether the outcome would bind "absent" (i.e., represented) parties, as well as those who came forward in their own name. Only "true" class actions could bind absent parties. "Spurious" class actions bound only the class representatives and those absentees who explicitly chose to be bound. "Hybrid" class actions were binding on

absent parties in some respects, but not all. Because the degree to which it binds class members is a class action lawsuit's most consequential feature, the category to which it was assigned was critically important. Parties seeking permission to proceed on a class basis had to choose a category for their lawsuit and argue for that categorization before a trial court judge, who then would decide whether to grant class status.[10]

For more than 20 years, the federal rules of civil procedure remained essentially the same.[11] In 1960, the Chief Justice appointed a new Advisory Committee on the Civil Rules, which took a fresh look at all of them. The records of its deliberations indicate that class actions captured a great deal of the committee's attention, and in 1966 the Supreme Court issued a new version of Rule 23.[12]

Practitioners and scholars have told different stories about the forces that motivated the 1966 revision of Rule 23. According to John Frank, a member of the Advisory Committee, the committee's deliberations were powerfully affected by the social upheavals of the 1960s:

> . . . the race relations echo of that decade was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.
>
> The other factor is that 1964 was the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who must not exploit the whole population, of a fairly simplistic good guy–bad guy outlook on the world, had its consequences.[13]

Others believe that the committee was engaged primarily in technical revision. According to Professor Arthur Miller, who was present as an assistant to Committee Reporter Benjamin Kaplan, the committee "had few, if any, revolutionary notions about its work product." It sought to clarify the ground rules for class actions and to deal with some specific issues, such as how to inform absent parties that a lawsuit was proceeding on their behalf.[14] According to Professor Judith Resnik, who has examined the records of the Committee's deliberations and correspondence with its members, the Committee was responding to judges' and lawyers' "impatience" with the confusing tripartite classification of class actions as true, spurious, or hybrid.[15]

While revising Rule 23, the Advisory Committee considered doing away with the tripartite classification and adopting a unitary standard for class actions instead. But it ultimately decided to maintain the idea of separate grounds for

class actions, albeit in different form.[16] Like its predecessors, Rule 23, as revised in 1966, begins with a specification of the requirements for maintaining a class action: large numbers of parties (often termed the “numerosity” requirement), brought together by common issues of law or fact (“commonality”), represented by individuals or entities whose claims or defenses are typical of those they represent (“typicality”), and who may be relied on to protect the interests of the latter (“representativeness”). Section (a) of the rule, which sets forth these requirements, echoes the text of Equity Rule 38, adopted at the beginning of the twentieth century.

Although it maintained the tripartite structure of the 1938 Rule, the committee rewrote the requirements for each type of class action (and thankfully did away with the old language of true, spurious, and hybrid classes). Section (b) of the revised Rule 23 provided for four situations in which litigation would be permitted to proceed in class form:

(1)(a) when requiring claims to proceed individually would yield outcomes that might impose inconsistent obligations or standards of conduct on defendants;

(1)(b) when requiring claims to proceed individually would allow plaintiffs who get to court first to take all the funds available for compensating losses, leaving nothing for other meritorious plaintiffs who might appear subsequently (often called a “limited fund” class action);

(2) when the defendant has behaved in a manner that affects an entire group (by commission or omission), and the plaintiffs seek an order to prevent such behavior or to require the defendant to act in a particular matter (often called an “injunctive class action”); or,

(3) when, as a practical matter, it would be more efficient for litigants with similar interests (usually in securing money damages) to proceed collectively, led by representative parties.

Examples of category (1)(a) are lawsuits whose outcomes define statutory rights or obligations that affect large groups of people, such as taxpayers or welfare recipients—what are sometimes termed “indivisible” rights, because all members of the group share the rights and would be affected by their denial. An example of category (1)(b) might be a lawsuit brought by a few representative victims of a hotel fire, on behalf of all individuals who were injured, when the hotel owners had extremely limited resources. Examples of category (2) are lawsuits brought by prisoners to require the prison authorities to improve conditions, or by female employees to require a corporation to cease discrimination in promotion and salary decisions.

In all of these circumstances, group litigation seems to pose clear benefits when compared with individual litigation. Hence, if representative plaintiffs come forward in such situations seeking to bring a class action, judges are empowered to grant class action status (i.e., "certify a class") *without consulting the wishes of the absent parties,* and the outcomes of the litigation are *binding on all class members.* Absent parties' rights, under the rule, are protected by ensuring that the plaintiffs who bring the class action are truly representative of those who are absent—a responsibility given to the judge, who must agree that the plaintiffs who have come forward may act on behalf of the class.

In situation (3), where—absent a class action—litigants might be able to proceed individually without affecting the rights of other plaintiffs or creating problems for defendants, certifying a class seemed like a trickier matter to the committee. In such situations, the committee thought, judges should not have unlimited discretion to take away the rights of individuals to proceed independently. Hence, Rule 23(b)(3) sets forth two additional requirements in this situation: (1) that common issues must "predominate" over individual differences, and (2) that collective litigation must be "superior" to individual litigation in the given circumstances. This provision of the rule also lists a set of factors that judges should weigh in making their decision, including the potential interest of class members in proceeding individually, the existence of related individual litigation (which a class action might interfere with), and how difficult it might be to manage the litigation in a class format.

In order to further protect the absent plaintiffs in a (b)(3) action, Rule 23 permits potential class members to exclude themselves from the action (usually termed "opting out") and pursue an individual action on their own. To inform them of this choice, Rule 23 requires that all potential (b)(3) class members receive some form of notice of the pending class action. (The rule does not specify who should pay for this notice, or exactly what it needs to say.[17]) If a plaintiff remains silent, then he is deemed to have chosen to be a member of the class, and the outcome of the class action (whether in favor of plaintiffs or defendants) is binding on him. This provision is a significant departure from the rule governing the old spurious class action, which (b)(3) class actions most resemble; under the old Rule 23, litigants were required to *opt in* to a spurious class action, in order to secure the benefits of its outcome.[18]

As in (b)(1) and (b)(2) class actions, in a (b)(3) class action, the judge is responsible for ensuring that the absent class members (i.e., those who did not opt out) are adequately represented by the named plaintiffs. Moreover, if the representative plaintiffs and defendants settle the lawsuit, the judges must review and approve the settlement agreement. This requirement is notable because, as a matter of public policy, parties to other private civil lawsuits generally are free to decide to settle it at any time, and on any terms that they desire (as long

as they do not violate the law), without judicial approval. In class actions, the rule-drafters were worried that representative parties might be tempted to make agreements that would not serve absent class members well, in exchange for personal gain. They therefore instructed judges to interpose their judgment in the settlement process, to assure that the settlement agreement would be in the interests of absent as well as present class members.[19]

C. THE "HOLY WAR" AGAINST CLASS ACTIONS[20]

From the earliest stage of its drafting, the revised Rule 23 was enmeshed in controversy. The deliberations of the Advisory Committee were not then open to the public, but its records include written testimonials about the potential uses and abuses of class actions. When the rule took effect, the controversy sprang into public view.

Some critics were reacting primarily to the use of Rule 23(b)(2) to clarify and extend the reach of the new civil rights legislation.[21] But much of the controversy centered on (b)(3) suits for monetary damages. Under the revised rule, the scope of such suits—and therefore their potential financial worth—increased dramatically: Whereas, previously, individuals desiring to share in the benefits of such a class had to come forward and declare themselves class members (i.e., "opt in"), now *all* those who shared a particular characteristic—for example, all purchasers of a particular product—were automatically considered members of the class unless they came forward and asked to be *excluded* (i.e., "opt out"). Because the incentives for so excluding oneself were often modest or nil, classes certified under the revised Rule 23(b)(3) were almost certain to be larger—and the sum of their potential damages, therefore, much larger—than classes certified under the old rule.[22]

Moreover, judicial decisions in cases brought soon after the adoption of the revised Rule 23 came down on the side of a liberal application of the class action rule. "If there is to be an error made, let it be in favor of and not against the maintenance of the class action," seemed to be the catchword of the day.[23]

The popular and business presses were soon replete with complaints of excessive litigation under Rule 23(b)(3) imposing unreasonable burdens on courts and corporations (and therefore, on taxpayers, shareholders, and consumers). Critics charged that attorneys were creating litigation where no reasonable grounds for it existed in order to generate generous fees for themselves. They claimed that too many lawsuits resulted in too few benefits for class members, certainly not enough to justify the public and private expense of the litigation. They called for judges to apply the requirements for class action certification more strictly. Ultimately, they called for the Advisory Committee to reconsider and revise Rule 23.

An article in the April 1973 *Fortune* magazine illustrates the tone of the commentary. "There was a time," the article began,

> . . . and it was not so very long ago, when the legal departments of many sizable corporations led relatively low-pressure lives. The chores they handled were remote from the major decisions of policy, and the legal staff was, accordingly, somewhat remote from the chief executive. That was, of course, before the great legal explosion—before class-action suits became a kind of popular sport, before consumerism, environmentalism, and other forms of Naderism, before Americans in general became so litigious.[24]

Quoting Joseph Weiner, identified as a law professor and consultant, the article continued: "Corporations in the early Thirties may have felt that they were living through the French and Russian revolutions combined, but that wasn't a patch on what is going on now."[25] And quoting William May, the chairman of American Can Company: "We are fighting for our lives."[26]

The *Fortune* journalist pointed to 1966, and the revision of Rule 23, as the beginning this new era. For support, she turned to Abraham Pomerantz, then dean of the plaintiff class action bar, who said:

> Everyone who deals with the public today is open to brand-new areas of litigation. This is driving many corporations to something bordering on hysteria. The big problem for them today is not so much increasing legal expenses—it's the enormously increased legal *exposure*. That class suit really strikes at the pocketbook. In some cases, the corporation's very existence is at stake.[27]

Although most of the journalist's sources saw Rule 23 itself as the source of their problems, one focused on the role of the judge in administering the rule:

> A class action lawsuit is much like a game of Russian roulette. It depends almost entirely on the philosophy of the judge trying the lawsuit. If he thinks class action suits serve a useful social purpose, then he will find grounds for continuing the action. If, on the other hand, he thinks the particular case deals with a nit-picking problem of no social consequence, and if he joins that with a view that class action lawsuits unnecessarily clog court calendars, then he will probably dismiss the action.[28]

But it was Congress—as much as, or in addition to, the 1966 Advisory Committee and the federal judges who implemented its ideas—that was responsible for much of the increase in litigation that corporate representatives were railing against. In 1969, the Supreme Court held that members of a prospective consumer or other (b)(3) class could not add together their monetary losses to satisfy the dollar requirement for federal court jurisdiction for cases brought under state law (then $10,000)—a move widely perceived to preclude many types of suits that the 1966 Rule had newly enabled.[29] Congress responded by proposing a new federal cause of action (i.e., basis for a lawsuit) for consumers alleging

unfair trade practices, with a minimum dollar threshold for individual class members in such suits of ten dollars.[30] Support for strengthening the statutory basis for consumer class actions was bipartisan. A package of consumer legislation including class action provisions was sent to Congress by Attorney General John Mitchell "in pursuance of President Nixon's consumer message of February 24, 1971." Wrote the Republican Attorney General: "The enactment of this legislation will constitute a significant step in protecting American consumers from fraud and deception."[31] Senate hearings on the legislation, held later that spring, were chaired by Democratic Sen. Frank E. Moss. Summarizing the critical testimony at hearings on consumer class actions held during the previous congressional session, Sen. Moss said,

> Even the most vigorous opponents to class action [sic] last year did not dispute the basic premise of the bill—that the deceived or defrauded consumer has no effective legal remedy. Despite his many rights in the law, the consumer is shut out of the courthouse by economic realities.
>
> Neither was it disputed that consumers are cheated out of tremendous sums of money nor that they should have a remedy. Nonetheless, opponents of class action argue that the doors of the courthouse in the main should remain closed. Staunch defenders of the right to make a profit worry about profits for consumers' attorneys.
>
> They argue that the legal system cannot bear the burden of handling consumer claims. Ever solicitous to ease the burdens of administering justice, they would summarily deny even the possibility of justice to consumers.[32]

To counter claims that class actions were already placing excessive burdens on the courts, Sen. Moss quoted District Court Judge Gus Solomon:

> Rule 23 of the Federal Rules of Civil Procedure gives ample authority to the trial judge to direct a flow of class actions efficiently and expeditiously and to police actual and incipient abuses of the class action mechanism. I have experienced no substantial difficulty in managing such cases.[33]

Within a few years of the adoption of the new Rule 23, Congress had created statutory bases for (b)(3) consumer class actions alleging violations of standards for "truth in lending," "fair credit reporting," and warranties.[34] By 1973, *Fortune* was citing five types of class actions as targets of corporate critics—antitrust, securities, consumer, environment, and fair-employment[35]—all of which resounded in "Great Society" concerns.[36]

State courts responded to the U.S. Supreme Court's decisions limiting individuals' ability to bring federal class actions for small monetary damages by opening their doors to consumer class actions brought under state statutes and common law, and conducted according to state class action rules.[37] In 1976, the National Conference of Commissioners on Uniform State Laws adopted a

model class action rule, which dropped some of the more restrictive features of the federal rule. Although most states did not adopt the model rule promulgated by the National Conference, the rule provided a touchstone for state courts that wished to interpret their own class action rules more liberally than the federal courts of the 1970s had interpreted Rule 23.

The 1970s controversy over class actions generated a significant amount of empirical research.[38] Some of this research was commissioned by congressional committees, some by interested professional associations, and some was performed by academic researchers, apparently at their own behest. All of the research dealt only with federal class actions. Some studies focused exclusively on securities class actions (and derivative suits) or antitrust litigation, and others were more comprehensive. The research focused on the principal charges against class actions: that they were too numerous, too burdensome for courts, and that they too often benefited plaintiff attorneys more than class members. The research was hampered by the lack of any registry of class actions, and by the fact that many of the data of interest—particularly information on case outcomes—were not readily available, since cases were usually resolved privately, by settlement.

The quality of the 1970s research varied, and the authors of research reports differed in their willingness to draw strong conclusions from incomplete data. But, considered together, the empirical studies generally did not support claims that federal courts were deluged with class actions in the decade following the revision of Rule 23. For example, one study found that about five percent of civil cases filed in the Southern District of New York from 1966 through 1971 included class allegations.[39] Another study found that about 2 percent of civil cases filed in the District of Columbia over roughly the same period were class actions, of which about 40 percent were (b)(3) damage classes.[40] But some of the reported data suggest that the numbers of class action filings *were* increasing at a dramatic rate. From 1966 through 1973, the number of class action filings in the District of Columbia grew at an average annual rate of 46 percent.[41] This rapid rate of growth, coupled with the much increased financial exposure associated with (b)(3) damage suits, probably explains the urgency of the corporate community's cries for reform.

The 1970s research also did not support the assertion that class actions imposed especially high burdens on court administration. The additional costs associated with class actions, the researchers found, were a result of the factual and legal complexity of the cases, and of the number of parties. Whether such cases moved forward as class actions or in some other form, the researchers argued, made little difference. Only some of this research noted that at least some of the litigation would not be in court at all, were it not for class actions.[42]

The 1970s empirical research was inconclusive with regard to the outcomes of cases. Researchers found cases that yielded substantial financial rewards for class members, as well as substantial fees for plaintiff attorneys. Some found cases in which fees appeared quite disproportionate to remedies, including some cases where it appeared that little had been gained by the litigation except for fees. Because so much of the relevant data was missing, drawing conclusions about the net benefits of class litigation generally was difficult.[43]

Throughout the 1970s, controversy over class actions continued to mount. Articles on class actions appearing in the *New York Times* and *Wall Street Journal* suggest a peaking of interest mid-decade (see Figure 2.1). The records of the 1974 Advisory Committee meeting include an unsigned typed memorandum raising the question of whether the committee should revise Rule 23 yet again. The memo summarized the now familiar criticisms of Rule 23(b)(3), saying damage class actions "place an intolerable burden on the federal courts; . . . force defendants into settlement regardless of the merits of the claims because the cost of defense and the size of potential recovery is intimidating; . . . result in procedural unfairness and change the substantive law that is applicable to individual actions; [and]. . . do not benefit the claimant class, but benefit only [the] lawyers who represent it."[44]

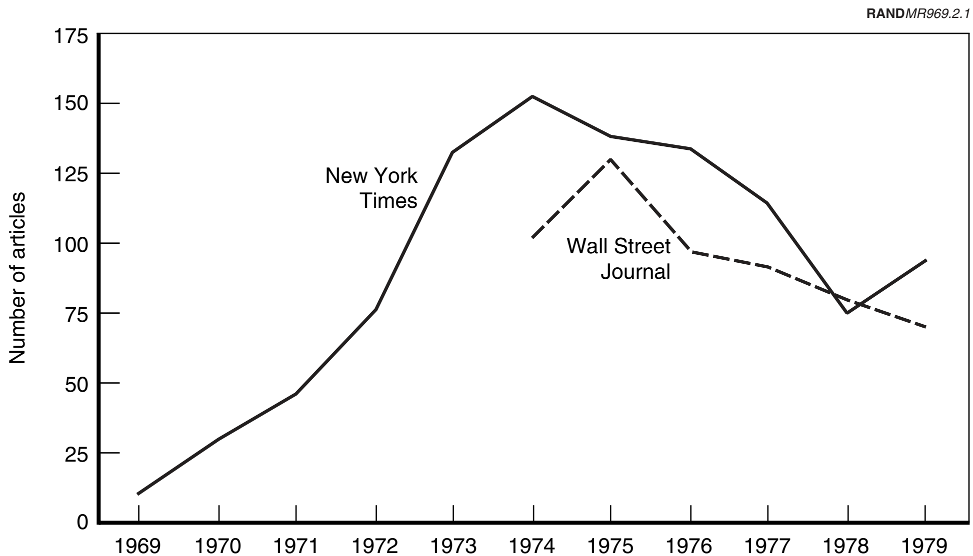


Figure 2.1—Tracking the Controversy over Class Actions (Number of Articles on Class Actions, 1969–1979)

The Advisory Committee declined to act. However, in that same year, the U.S. Supreme Court handed down an opinion that was widely seen as putting brakes on the expansion of class actions over small monetary damages. In *Eisen v. Carlisle & Jacquelin*, the Court ruled that plaintiff attorneys had to bear the costs of providing *individual* notice to *all* prospective (b)(3) class members who can be identified with reasonable effort, which under a strict interpretation of the rule must be done early in the litigation—before the attorneys have realized any financial gain from the lawsuit. The huge cost of mailing notices to many class members was expected to sharply reduce the number of large class actions that could be brought because few law firms were likely to have the resources to invest up front, especially when they ran the risk of not recovering these expenditures if the suit were unsuccessful.[45]

Predictably, the *Eisen* decision produced new controversy; to some it appeared that the Supreme Court had undone the work of the 1966 rule-makers. In 1979, acting on the advice of the Advisory Committee, the Judicial Conference called on Congress to decide whether and how to respond to small damage claims brought by individuals and small businesses.[46] In his 1979 address to Congress on civil justice reform, President Carter also urged that Congress:

> give serious consideration to improving procedures for litigating class actions, especially for those cases where the alleged economic injury is widespread and large in the aggregate, yet small in its impact on each individual. The Justice Department will continue to have my support in working with Congress to devise class action procedures which will. . . [enable the] courts to handle these complex cases more effectively and at less cost to the taxpayers and the parties involved.[47]

In fact, the Carter administration had been considering alternative statutory approaches to small damage class actions for at least two years, in an attempt to respond not only to the business community's opposition to Rule 23(b)(3) but to the complaints of consumer advocates and judges. Businesses were concerned that Rule 23(b)(3), as implemented, was cumbersome, expensive, and dilatory.[48] Consumer advocates and judges objected to the new tasks assigned to judges which were not accompanied by new appropriations for additional staff or equipment. In the words of Judge Walter Mansfield, then Chair of the Advisory Committee on the Civil Rules:

> The average judge is not suited to perform the gamut of new and unusual administrative duties thrust upon him by Rule 23. His function is to decide rights between individual claimants rather than acting as a repository of time-consuming nonjudicial tasks. There is hardly anything judicial or adversarial involved in determining the contents of notices, maintaining communication with individual class members, scrutinizing and classifying notices of claims filed by members, processing such claims, supervising distribution, inquiring into fraudulent claims, and rendering an accounting. These activities require

> staffs, resources, equipment, and facilities not possessed by the Federal courts.[49]

Reflecting on the diverse views they heard, Justice Department staffers concluded that "Current procedure, which appears to defendants to encourage overdeterrence, tends ultimately to create pervasive underdeterrence."[50]

The remedy proposed by the Carter administration was to provide a new statutory basis for consumer class actions brought under federal law, and to do away with Rule 23(b)(3) entirely.[51] The proposed legislation granted the federal courts exclusive jurisdiction over claims alleging financial damages due to a manufacturer or service provider's violation of federal statutes. It provided for two new kinds of civil actions: one a public suit, intended for situations in which individual damages were small and the primary objective was to deter illegal behavior; the other a private suit, intended for situations in which individual damages were larger and compensation was an important objective.

The public action could be brought either by the Attorney General, or, if the Attorney General declined to act, by an individual acting on behalf of the government, when individual damages were less than $300. The individual who stepped forward to play this role could obtain attorney fees and expenses and a monetary incentive that was capped at $10,000. If the government prevailed, damages would be paid into a public fund that the Administrative Office of the Court would administer.

The private action, dubbed a "class compensatory action," was limited to situations involving 40 or more individuals or entities (the act specified "small businesses") with individual damages of $300 or more, resulting from the same transaction or event. A judge would determine whether these prerequisites were met and would decide whether the class would be defined on an "opt-in" or "opt-out" basis. As in a Rule 23(b)(3) action, any settlement would require judicial approval.

Notwithstanding Judge Mansfield's exhortations, the Carter administration proposed that judges, under the new scheme, take on a wide range of responsibilities concerning notice and damage estimation. The Department of Justice called for heightened scrutiny of the fairness of any settlement, including discovery on the merits and hearings in which "dissatisfied parties should be encouraged to participate." The department noted that, because of concerns about conflicts of interest between class members and the class action attorney, the bill "does not follow current law which accords a settlement a favorable presumption. Parties favoring the settlement must demonstrate its fairness."[52]

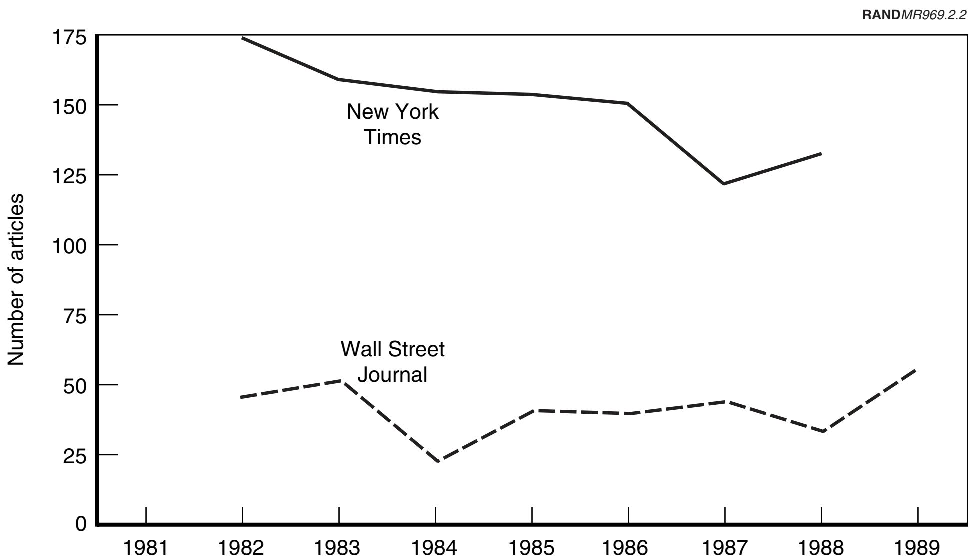
The central question about the administration's bill was, of course, whether it would fix the problems perceived to flow from Rule 23(b)(3) without sacrificing

its perceived benefits. "But that will probably turn out to be a purely academic question," said the author of an analysis prepared for *Class Action Reports,* noting the failure of other legislative reform efforts.[53]

The newsletter's analyst was prescient: Less than two years later, Ronald Reagan was elected President. As the new conservative era got underway, the idea of providing a statutory basis for consumer class actions was put aside. But Rule 23(b)(3) remained in force.

D. A NEW CONTROVERSY

During the next decade, the controversy over class actions seemed to die down. Although the business community remained attentive to the issue, reports of class actions in the general press declined (see Figure 2.2). As artfully depicted by Arthur Miller, class actions under the new rule had proved to be neither the "shining knights" that their champions hoped for nor the "Frankenstein monsters" that their critics feared. Class action practice, as Miller had predicted, entered a period of relative tranquillity.[54] Like it or not, parties, practitioners, and judges had learned to live with Rule 23. By the mid-1980s, the business community, which had led the charge against class actions, had turned its attention



NOTE: Number of mentions of "class action(s)" in online full-text articles from the *New York Times* and abstracts from the *Wall Street Journal.*

Figure 2.2—Tracking the Controversy over Class Actions (Number of Articles on Class Actions, 1981–1989)

to substantive legal reform—the package of proposed limitations on jury awards, including punitive damages, that has come to be known as "tort reform."[55]

But a new controversy over Rule 23 was brewing. The 1980s saw the rise of a new form of litigation, the mass tort suit. Consumers of drugs and medical devices, and workers and others exposed to toxic substances, sued manufacturers for injuries allegedly associated with these products. Typically, these cases were brought against one manufacturer that produced a particular device or a group of manufacturers that produced products containing a particular substance. Because these products were widely marketed, they had been used by thousands of people—or sometimes hundreds of thousands—many of whom came forward once litigation began, claiming injury to themselves or their children. In some instances, thousands of lawsuits alleging the same facts and legal violations were brought in a single jurisdiction, where the exposure had taken place. For example, tens of thousands of asbestos lawsuits were filed during the 1970s and 1980s, many of them in a few jurisdictions where the workers who had been exposed to asbestos had worked. Courts found it difficult to handle this rapid increase in their caseloads, which was rarely accompanied by proportionate increases in judicial resources to manage the cases. In other instances, the lawsuits were dispersed because the product's consumers were spread across the country, and the companies that were sued were forced to respond to large numbers of claims in many different state and federal courts.[56]

The federal court system has a device for collecting cases in such instances called "multidistricting." Under the multidistrict rules, a panel of judges appointed for this purpose can order that similar cases that have been filed in different federal courts be collected together and transferred to a single federal judge. But under the statute that authorizes the transfer, the transferee judge is supposed to manage the cases only through the pretrial period; if the cases are not settled, they are to be sent back to their original districts for trial, and plaintiff and defense attorneys must bear the burden of trying them in multiple, dispersed locations. Moreover—and more important, since multidistricted cases are usually settled and therefore *not* dispersed again—this federal law cannot be used to collect cases that are filed in state courts. As a result, multidistricting does not bring together all mass tort cases, but only those filed in federal courts.[57]

Even if a federal judge to whom cases have been transferred under the multidistricting rules could try them,[58] she might find herself trying the issues that the cases have in common over and over again in individual trials. For example, asbestos litigation has issues that are common to every case, such as whether exposure to asbestos causes certain diseases and when manufacturers knew or should have known that such causal links exist. But if these cases are

tried, evidence on those issues must be presented to each jury, in each case, so that it can decide whether the manufacturer should be held responsible for the plaintiff's injuries.[59] The Federal Rules of Civil Procedure include a provision—Rule 42—for consolidating cases for trial, but the rule drafters did not anticipate using it to try hundreds or thousands of cases together.[60]

The class action seems to offer a mechanism for resolving this problem. Under Rule 23(b)(3) and its state law counterparts, a plaintiff could bring a class action against a manufacturer on behalf of all other users of the product (or those exposed to it), seeking damages for all members of the class. Then common issues, such as whether the product can cause the diseases claimed, could be tried by a single jury. Those who did not want to be bound by the outcome of a single class action could opt out after receiving notice of certification.

But the drafters of the 1966 rule believed that class actions would generally not be appropriate for mass tort litigation because any common issues of fact and law in these cases would be outweighed by differences in the victims' injuries and injury circumstances. Moreover, because there is no federal tort law, victims' claims might be subject to different state tort doctrines. The rule drafters did not expressly forbid class actions for mass torts, but they included an advisory note that said,

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[61]

If the Advisory Committee could imagine such disparity of fact and law in a "mass accident"—typically a single catastrophic event, such as an airline crash or a building collapse, occurring in a single legal jurisdiction—then it seemed probable that it would have rejected class action status for the far more variegated situation of individuals who had used or been exposed to a product in different circumstances at different times, and to whom different state laws might apply. For almost two decades following the rule's adoption, virtually no mass tort cases were successfully certified as class actions.[62]

By the mid-1980s, however, as the number of mass tort cases mounted, trial and appellate courts had begun to reconsider the wisdom of the Advisory Committee's admonition. It was the Agent Orange case, brought by Vietnam veterans alleging injuries resulting from their exposure to dioxin during the war, that proved to be the watershed event in the use of Rule 23 for mass personal injury litigation. For the first time, a trial judge certified, and an appellate court upheld, the certification of a huge class—potentially millions of individuals—

who alleged injuries of varying severity and types, incurred under similar but not identical circumstances.[63] The settlement of the veterans' claims in 1984, for $180 million, attracted widespread attention from the bench and bar.[64] In 1986, after more than a decade of asbestos litigation, the Fifth Circuit Court of Appeals for the first time upheld class certification of asbestos personal injury claims brought in Texas.[65] In 1988, the Sixth Circuit Court of Appeals, which had previously denied class certification for personal injury claims, upheld certification of a toxic tort case, saying,

> . . . the problem of individualization of issues is often cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or single course of conduct. . . [When] the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.[66]

As plaintiff attorneys filed for class certification in other asbestos cases[67] as well as other personal injury suits,[68] it appeared that the barrier to class certification presented by the 1966 Advisory Committee's Note was at last about to fall.[69]

E. THE ADVISORY COMMITTEE STEPS BACK IN

Throughout the years of controversy over the new Rule 23, the Advisory Committee had declined to act.[70] But late in 1990, the committee agreed to take up the question of whether Rule 23 needed revision, and, if so, what sorts of changes were in order.[71] The impetus for revision was the report of a special judicial committee on asbestos litigation, which had been appointed by Chief Justice Rehnquist to consider strategies for managing the rising tide of asbestos litigation in the federal courts.[72] Acting on the recommendation of this special committee, the Judicial Conference asked the Advisory Committee to "study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation."[73]

As a basis for its deliberations, the Advisory Committee turned to a report published in 1986 by the American Bar Association Litigation Section, which had recommended significant changes in the structure of Rule 23.[74] Although the Litigation Section explicitly rejected "radical revision" of class action procedure, its members believed that the requirements of the 1966 rule led to "unnecessarily time consuming and expensive" practices.[75] Believing that the tripartite structure of the rule, which required parties and lawyers to decide whether their proposed class was most appropriately labeled a (b)(1), (b)(2), or (b)(3) action, was a major source of problems in implementing it, the section proposed substituting a "unified standard governing all class actions."[76]

Taken up by the Advisory Committee, the ABA Litigation Section's proposal became the basis for an effort to revise the rule, directed primarily at facilitating class certification of mass torts. In place of the cumbersome tripartite structure, the proposal set forth circumstances under which judges could certify class actions.[77] The new structure seemed likely not only to facilitate class certification of mass torts, but also to make certification more widely available for a range of other civil litigation—which may have been attractive to the committee's new chair, Judge Samuel C. Pointer, who had presided over a number of controversial class actions seeking to desegregate public and private employers in his home state of Alabama.[78]

During 1991–1992, drafts were circulated for informal comment and discussed briefly at the regular periodic meetings of the Advisory Committee.[79] But the committee's attention during this period appears to have concentrated more on proposed revisions to other civil rules, which were then a source of considerable controversy.[80] At its November 1992 meeting, the Advisory Committee discussed the status of Rule 23 revision. Several members supported the substitution of a unitary standard for the old tripartite division, and the committee discussed a new provision for opt-in classes and more flexible notice requirements for all classes. The committee also discussed language contained in the then-current draft, emphasizing the "fiduciary duty" of class representatives, noting that this was a "first attempt to emphasize the nature of the representation responsibility." The proposed new language seems to have been a response to the concern that class representatives and their attorneys favor their own interests over those of class members. The discussion ended with committee members agreeing to circulate a draft of proposed revisions to law faculty members and practicing lawyers for informal comment.[81]

A year later, when the committee resumed its discussion of Rule 23 revision, its members seemed to have become wary of changing established practices. The informally circulated draft revisions had met with less than enthusiastic support. Although many of the law professors who had seen the draft were favorably inclined, neither plaintiff nor defense attorneys were sanguine about the outcome of Rule 23 revision. In his minutes, the committee reporter noted: "A very common reaction is that lawyers have learned to live with the present rule, and do not need to devote ten years to educating themselves and judges in a new rule."[82] With a new Chair, Judge Patrick Higginbotham, and several other new members, the committee decided that further deliberation was necessary before formally proposing revisions to the rule.[83]

As the Advisory Committee continued its slow, deliberative process, the world of class actions was changing once again, as was the political environment in which the committee's deliberations were taking place. In 1993, attorneys in the federal district courts in east Texas and eastern Pennsylvania filed a new

kind of (b)(3) class, comprising solely individuals who had been exposed to asbestos but who had not, to date, filed suit against the defendants targeted in these suits—so-called "future claimants," or "futures." Both courts certified the class actions at the time of settlement, rather than earlier in the litigation process, as seemed to be anticipated under the rule. Under the proposed settlements, future asbestos claimants would be precluded from suing these defendants except under certain restrictive conditions. In return, they would have access to compensation through administrative facilities.[84] Although some viewed these settlements as salutary examples of judges and lawyers rising to the procedural challenges posed by mass torts, the cases soon were embroiled in controversy. Critics charged that binding future claimants—who arguably were not even aware at the time of notice that they might some day have a legal claim—to the terms of the settlement would be a violation of due process. Some legal ethicists argued that the plaintiff attorneys who negotiated the "futures settlements" had discounted the value of the claims of future asbestos litigants in return for more generous payments to current asbestos litigants, whom these attorneys also represented. That the classes were certified at the time of settlement heightened concerns about possible collusion between the plaintiff attorneys and defendants, because it suggested to some that the defendants had agreed to the certifications only because they had been able to find plaintiff attorneys who were willing to negotiate attractive deals with them.[85]

Meanwhile, mass personal injury class actions seemed to be growing in number and scope. In 1994, Judge Pointer, sitting in the federal district court in Alabama, conditionally certified a nationwide class of women claiming compensation for injuries associated with silicone gel breast implants. Soon more than 400,000 women had stepped forward to claim damages.[86] In that same year, Judge John Grady of the Federal District Court for Northern Illinois conditionally certified a class of hemophiliacs who alleged that their HIV infection resulted from contaminated blood products.[87] Other trial judges followed suit, certifying classes in personal injury cases involving pharmaceutical products and medical devices.[88] Still other class actions, in which consumers were promised coupons in compensation for their claimed losses, received widespread attention from critics who argued either that such coupons were inadequate compensation for the alleged wrongdoing of defendants, or that the acceptance of "coupon settlements" by plaintiff attorneys indicated that the underlying litigation was nonmeritorious.[89] And, in February 1995, a district court judge in Louisiana certified a nationwide class action on behalf of smokers seeking damages for addiction.[90] The *Castano* class action, raising the specter of massive damages against the tobacco industry, electrified Wall Street.[91]

By 1995, the political environment had also changed dramatically. For the first time in 40 years, both houses of Congress were in the hands of the Republican Party. Civil justice reform was a key provision of the House Republicans' congressional platform, dubbed the "Contract with America."[92] H.R. 10, the Common Sense Legal Reforms Act of 1995 that was introduced early in the new congressional session, contained a provision aimed at restricting securities class actions.[93] Although most of the proposals included in the Common Sense Legal Reforms Act were not enacted into law, Congress overrode a presidential veto in 1995 to pass the Private Securities Litigation Reform Act.[94] U.S. Senate hearings on securities litigation, held in 1993, provided a high-profile forum for charges and countercharges regarding the costs and benefits of class litigation.[95]

From 1994 through 1995, the Advisory Committee continued to debate Rule 23 revision. To assist in its deliberations, the Committee invited leading practitioners to address its members[96] and provided the impetus for three law school conferences at which scholars and practitioners discussed the evolution of Rule 23 practice and its consequences. As the reform clock continued to tick, the mood of the committee and those it invited to join in its deliberations shifted away from interest in facilitating mass tort class actions toward interest in curbing perceived class action abuses, particularly in the consumer domain.[97] The old ABA Litigation Section proposal to substitute a unitary standard for the (b)(1), (b)(2), and (b)(3) categories looked less attractive.[98] The desire to facilitate mass personal injury class actions was diminished if not extinguished.[99] Some even questioned whether any revision to Rule 23 was appropriate at that time.[100]

In late 1995, with its chairman seemingly concerned about moving the revision process to some sort of conclusion before the end of his tenure, the Advisory Committee turned its attention at last to formal consideration of proposed changes in the language of Rule 23. At a meeting at the University of Alabama at Tuscaloosa, the members tentatively approved three changes: adding a requirement that certification of a (b)(3) class be "necessary" (instead of merely "superior") for "fair and efficient adjudication" of the case; adding a requirement that judges in certifying (b)(3) classes consider both the "probable success" of the case if it went forward as a class action and the "significance" of this success; and adding a provision for interlocutory (i.e., interim) appeal of class certification.[101]

Although the three proposed changes appear narrow and technical, they all had significant potential to make bringing and winning (b)(3) class actions less likely. A *necessity* standard for certification surely would be harder for plaintiffs to meet than the original superiority standard, thereby promising to reduce the number of lawsuits that would be certified as class actions. Considering the

likely success and *significance* of a proposed class action would require trial judges to determine, in a preliminary way, the merits of the underlying allegations.[102] For defendants who believed that many class actions were nonmeritorious, this proposed change also held promise of reducing the number of certifications.[103]

The import of adding a provision for interlocutory appeal is more complicated to explain. The traditional legal rule holds—in the interests of economy—that parties cannot appeal any decision that a judge makes during the course of litigation until the litigation has reached a conclusion.[104] Under this rule, a class action had to proceed all the way to verdict before a defendant could argue against the initial certification, or a plaintiff against its denial. Defendants' representatives had told the committee that not knowing whether an appellate court would overturn the certification decision was sufficient to drive them to settle a class action even when they thought it was certified in error. By the time of the Advisory Committee's deliberations in Tuscaloosa, defendants believed that federal appellate courts were beginning to turn against class actions, and they were anxious to expedite access to the appellate process. Allowing a party to appeal the class certification decision early in the litigation process—by creating a limited right to interlocutory appeal—would facilitate defendants' achieving this goal.

The Advisory Committee also discussed adding a provision to Rule 23 that would explicitly permit certification of classes for settlement purposes only, even in circumstances where collective adjudication might be difficult or improbable.[105] By the time of the committee's discussion, the alleged dangers of such "settlement classes" had become a central theme in the class action controversy. But, perhaps reflecting the divided views about settlement classes within the judiciary and the bar, the committee could not reach consensus on this issue.

In sum, in its first formal step towards Rule 23 revision—a process begun five years earlier in pursuit of *facilitating* (b)(3) class actions—the Advisory Committee proposed to heighten judicial scrutiny of requests for certification. Although this was not clear at the time, the tentative votes taken at the November Tuscaloosa meeting created the framework for the debate about class actions that would ensue over the next two years.

On April 18–19, 1996, the Advisory Committee met again in Washington, D.C., to decide whether to formally recommend these, or other, revisions in Rule 23 to the Judicial Conference Standing Committee on the Rules. Approval from the Standing Committee would initiate a formal comment period, including hearings before the Advisory Committee. Only after considering the comments received during this period, and deciding whether to stand by its proposed re-

visions or reconsider them, could the Advisory Committee launch the final stage of Rule 23 revision, which would require approval by the Standing Committee, the Judicial Conference (the executive body of the federal judiciary), the U.S. Supreme Court and, ultimately, Congress.[106]

For the Washington meeting, Professor Edward Cooper, who had served as Advisory Committee Reporter through all the gyrations of the rule revision process since 1991, prepared a package of alternative approaches to revising Rule 23 (b)(3). The starting point was a master draft that included virtually all the ideas that had been brought before the committee in the preceding five years. To explain the reasoning behind the proposed revisions, Cooper drafted 18 pages of notes.

The master draft had the familiar tripartite approach to class certification, and most of the proposed changes addressed (b)(3) damage classes. It would have required that class certification be "necessary" as well as "superior." It instructed judges, when making certification decisions, to take into account the probable success on the merits of the plaintiffs' claims, and to weigh the likely costs and benefits of allowing the litigation to proceed in class form. It provided for settlement classes, for "opt in" as well as "opt out" classes, and for interlocutory appeal. Unlike the 1966 version of the rule, the rule envisaged in the master draft would have explicitly recognized the fiduciary duties of representative parties and their attorneys to protect the interests of the class members they represent. It included more detailed notice provisions and—in contrast to the U.S. Supreme Court's decision in *Eisen*[107]— would have allowed judges to order defendants to advance all or part of the costs of notice. In the accompanying Notes, the draft also appeared to sanction the use of class actions for "futures" claims in mass torts.[108]

The alternative drafts variously excluded different elements of the master draft, apparently in response to concerns expressed by some Advisory Committee members and to critical comments received from outsiders.[109] Finally, Cooper prepared a "minimum changes" draft, which, as the name suggests, made relatively few, seemingly modest, changes in the rule.

The Washington debate over the proposed revisions echoed the concerns raised in previous committee meetings, in the scholarly conferences that the committee had stimulated, and in the halls of Congress over the decades following the 1966 amendments to Rule 23. Perhaps predictably, given the controversy already boiling around the Advisory Committee's proceedings, the committee adopted the minimalist approach.

After two days of lively discussion, interspersed with occasional informal testimony from practitioners and others attending as observers (including some on-the-spot drafting in response to suggestions from the latter),[110] the Advisory

Committee recommended eight revisions to Rule 23. One of the proposed revisions created a basis for interlocutory appeal, as discussed in Tuscaloosa. Two other proposed changes spoke to the twin controversies about contemporary use of class actions: that too many cases for very small monetary losses were being brought, and that too many larger personal injury claims were being aggregated in mass tort class actions. To remedy the first, the committee proposed a new factor (F) for judges to consider when deciding whether to certify a Rule 23(b)(3) class action: *"Whether the probable relief to individual class members justifies the costs and burdens of class litigation."* To remedy the second, the committee proposed to revise factor (A), instructing judges to take into account: *"The practical ability of individual class members to pursue their claims without class certification."* A third change, proposed to respond to uncertainty about the application of Rule 23 to settlement classes, added a new category (b)(4) that explicitly mentioned settlement classes and provided authority for judges to certify such classes in response to *the parties' joint request.* In addition, the committee proposed four other minor changes in wording.[111]

The proposed revisions were sent on to the Standing Committee, with the recommendation that they be approved for formal circulation and public comment. The chair of the Advisory Committee and its reporter characterized the proposed changes as "modest."[112] "Rule change should proceed with caution, in increments," they wrote. "We think it unwise to attempt broad changes in Rule 23, given the large uncertainty of cause and effect, laced throughout this subject."[113]

F. A RETURN TO WARFARE?

The Advisory Committee may have believed that its recommendations were modest, but others in the legal community disagreed. The committee's proposals unleashed a storm of controversy. The first volley was fired, within weeks, by a group of 129 law professors who wrote to the Standing Committee urging that it reject, without further circulation and review, both (b)(4), the proposed settlement class provision, and factor (F), which was quickly dubbed the "cost-benefit" or "it just ain't worth it" test.[114] The law professors' initiative was spearheaded by Professor Susan Koniak, whose passionate critique of asbestos futures settlement classes had attracted widespread attention in the legal academic community.[115] The law professors opposed settlement classes because they believed them to be highly susceptible to conflicts of interest between plaintiff attorneys and class members, and to collusion between defendants and plaintiff attorneys. They opposed the new factor (F) because they believed it would raise the barrier for class actions involving small individual damage claims, which they viewed as essential to deterring corporate misbehavior.[116]

Apparently concerned that this initial controversy might derail the Advisory Committee's proposals even before they had been circulated for formal public comment, Judge Higginbotham submitted a letter to the Standing Committee urging that it release the Advisory Committee's proposals for review and comment. At its June 1996 meeting, the Standing Committee voted to take the proposed changes public.

Like the Advisory Committee's own deliberations, public commentary on the proposed revisions, delivered in writing and at three public hearings held in different parts of the country, was largely a replay of the 1970s debate. But there were two notable differences: First, securities class actions played a secondary role in this controversy because Congress had passed legislation in 1995 to restrict federal securities litigation.[117] Second, mass tort class actions, including the futures settlements, played a role that would have been inconceivable during the 1970s, when the Advisory Committee's note warning against certification of personal injury suits still held sway.

About 140 individuals submitted written testimony and almost half of these appeared at one or more of the hearings.[118] Many of these individuals formally represented corporations, bar associations, plaintiff or defense trial lawyers' associations, trade associations, or consumer or other advocacy groups; others who came forward were informally aligned with one or another of these interest groups. Many of the law faculty members who have contributed to the scholarly debate on class actions in recent years also testified. The committee now had a new chair, Judge Paul Niemeyer from the Fourth Circuit Court of Appeals.

Much of the testimony before the Advisory Committee was strident in tone. Proponents of class actions, who generally argued against *any* rule revision, hailed the (b)(3) class action as a mechanism for compensating individuals for modest but significant losses, and for protecting consumers, employees, and the general public from corporate malfeasance. They strongly opposed factor (F), as illustrated by these excerpts from hearing testimony:

> The proposed cost-benefit analysis runs directly afoul of the bedrock of class litigation, the ability of individuals or business entities with relatively small claims to band together to seek redress. Without class actions, nearly all individuals and most small business could not afford or attempt the intimidating task of litigating complex antitrust or securities or other commercial cases involving widespread activity, multiple wrongdoers and large corporate defendants. It is the history of class actions to 'take care of the smaller guy.'[119]

> The assumption that recoveries of one hundred or several hundred dollars are 'trivial' is entirely unwarranted. For many low income class members. . . recoveries of such amounts can make an enormous difference in the quality of their lives, while also providing them with a sense that justice has been done and that our system of justice works.[120]

> Few can dispute that class actions generally deter corporate misconduct so that honest business can compete. As a result, class actions also foster the confidence that is so necessary for a capitalist economy to function. By ensuring both accessibility and the intangible benefits of contractual trust required for efficient transactions, class actions provide concrete and specific deterrents to commercial abuses without the threat of broadened criminal enforcement or the need for expanded regulatory bureaucracies.[121]

Opponents of class actions focused on perceived excesses of class litigation that they hoped factor (F) might remedy:

> What critics of [factor F] miss, when they invoke social policy, is that lawyers' lawsuits (which the present Rule tends to encourage) are themselves a social evil. Such lawsuits result in expenditure for litigation costs of large sums of money that could be better spent on product or pricing improvements beneficial to consumers.[122]

> The class action has become "an opportunity for a kind of legalized blackmail." The courts have described class actions as "judicial blackmail" and inducements to "blackmail settlements". . . [The class action] "has become a racket—that is the simple truth of it". . . "The use has gone miles beyond what was anticipated."[123]

> The unpredictability of trial in the face of the claimed aggregate damages, as well as the cost of defense, ordinarily makes litigating to the end an imprudent alternative. The class action device provides disproportionate leverage in favor of the plaintiffs' attorney, which is why almost no class actions ever get tried.[124]

The critics inveighed against settlements in which lawyers obtained multi-million dollar fees, while class members on whose behalf the cases were purportedly brought received little or nothing in recompense:

> In many instances, the value of recovery to the individual class member is so negligible that it fails to offset the associated cost imposed on the defendants and the judicial system. Those types of claims only enrich the few counsel whose fees are based on the total aggregation with little or no benefit for the individual class member.[125]

But the battle lines in the holy war against class actions were not as clear as they had once been. True, corporate counsel generally opposed consumer class actions, while consumer organizations and consumer class action attorneys championed them. But consumer advocates had also emerged as the leading critics of certain class action settlements:

> The primary problem with coupon settlements is that it [sic] flies in the face of the sound precepts upon which our capitalist economy is based. Rather than punishing a wrongdoer for its wrongful actions, it instead rewards that wrongdoer with additional business from the very persons it caused harm.[126]

Such critics rejected the proposed provision for settlement classes and called for increased judicial scrutiny of settlement agreements and attorney fee requests:

> There have been too many settlements made where the attorneys took far too much of the proceeds, and the aggrieved consumers received but a pittance. . . We urge the committee [to withdraw the settlement class provision and engage in] further study of how collusive settlement can be avoided and how the interests of absentee class members can be adequately represented.[127]

The battle lines with regard to mass tort class actions were even harder to discern. Some corporations and defense attorneys who represent them argued against certifying mass torts, echoing the concerns of the 1966 Advisory Committee:

> The proposed revisions, although encouraging, do not go far enough to eliminate many of the most problematic applications of the class action device. Most importantly. . . disparate mass tort litigation should not be permitted at all under (b)(3).[128]

> There is an unavoidable constitutional difficulty in using (b)(3) class certification in the mass tort context, particularly where punitive damages are an issue . . . In the mass tort context, there are uniquely individual issues essential to each proposed class member's claim.[129]

> Most importantly, we maintain that mass tort litigation class actions should not be permitted under Rule 23(b)(3) at all. Indeed, in many such cases there is no actual injury or loss, with the result that in far too many cases the litigation no longer serves the litigants, the courts, or the ends of justice.[130]

But other defense attorneys, particularly those who had represented defendants in the now notorious asbestos futures class actions, defended the use of class actions to settle mass torts:

> *Georgine* [the asbestos futures class action brought in the Eastern District of Pennsylvania] in fact is a compelling example of the virtues of settlement classes. . . The concerns about the supposed lack of perfect structural protections for absent class members in connection with settlement classes pale in comparison to the demonstrated structural failings of the tort system. . . in handling certain types of multi-claimant disputes.[131]

Some *plaintiff* attorneys railed against class certification of mass torts:

> [S]ettlement classes constitute the single greatest existing threat to the due process rights of tort victims unfortunate enough to be harmed in large numbers.[132]

But other plaintiff attorneys defended it:

> . . . the equitable relief obtained through the settlement [of litigation over defective heart valves], such as diagnostic research, was extremely important to the class members and could not be accomplished through individual litigation.[133]

Moreover, many of those with experience litigating class actions gave conflicting testimony, attesting both to the uses and abuses of class actions.

Although the experiences of the 1980s and 1990s had brought new ingredients to the debate over damage class actions, the thousands of pages of comment and testimony on the Advisory Committee's proposals echo the three decades of controversy that preceded its efforts to revise Rule 23. Over the years, much had been learned about the consequences of using Rule 23. The new rule had been stretched to cover an ever increasing range of civil litigation. But the debate over class actions had only become more complicated and the way out of the controversy was no clearer. Reflecting on the Advisory Committee's seven-year effort at revision, John Frank, a member of the 1966 Advisory Committee, aptly summed up the class action dilemma:

> [F]or all our efforts, we do not know whether [the (b)(3)class action] is a good or a bad thing. The great big question is whether the social utility of the large class action outweighs the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court system.
>
> On this ultimate question, we are no wiser than we were in the beginning. We know that the defendants think that they have been blighted, that the plaintiffs' bar thinks it has done much good and not charged a nickel too much, and that courts have been busy. We know an important negative: the wit of man has not devised a better method for compensating large dispersed losses.[134]

In May 1997, the Advisory Committee reassembled to assess the import of the hearings and written submissions. The committee members were divided and uncertain about moving forward with the proposed revisions. In a memorandum prepared as background for this meeting, the committee chair wrote,

> I sense . . . that we may not be finished; rather we find ourselves at a crossroad . . . [W]e have reached the point anticipated earlier by Professor Ben Kaplan, the Committee's reporter in 1966—"it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of new Rule 23"—I think we must now discuss the broader issues.[135]

Criticism of so-called settlement class actions had been a persistent theme of the hearings, and the committee had received many unfavorable comments on the proposal to add a specific provision for such classes. But in the previous year, the U.S. Supreme Court had taken up the question of the legality of such classes and had not yet handed down its decision. It was clear that the committee should not act on the settlement class provision before hearing from the

Court, and as the committee's meetings progressed with a lack of consensus about what actions, if any, were necessary, the pending Court decision became a rationale for postponing action on the other proposed revisions as well. After two days of meetings, the committee had approved only two revisions: the provision for interlocutory appeal, and a small change in the wording of Rule 23(c)(1) indicating that the judge may certify a class "when practicable" (instead of "as soon as practicable") in the course of litigation. The following month, the Standing Committee voted to recommend the interlocutory appeal provision to the Judicial Conference,[136] but postponed the "when practicable" recommendation.[137]

In July 1997, the U.S. Supreme Court handed down its decision on settlement classes. The issue was presented to the Court in the asbestos futures class action that had originated in the federal district court in eastern Pennsylvania.[138] Now named *Amchem v. Windsor,* the case provided the Supreme Court with its first look at a vast mass tort personal injury class action, in what many believed to be the most problematic context for review: a class solely comprising *prospective* plaintiffs with currently unknowable future injuries and losses, represented by plaintiff attorneys who were widely perceived to have interests conflicting with those of the class. The Court dealt briskly with the question of whether it is possible to certify a class for settlement when a class *trial* might not seem feasible—as long as other prerequisites are met, a judge may certify a class for settlement. But the certification of settlement cannot by itself satisfy Rule 23's requirement that common issues of fact and law predominate. The Court took strong exception to the shape of the futures settlement, questioning the feasibility of finding representative plaintiffs for any such class and providing adequate notice. It therefore upheld the rejection of the settlement by the Third Circuit Court of Appeals and remanded the case to the trial court.

The Supreme Court's decision striking down *Amchem* heightened perception of sharp controversy over the very purposes of Rule 23(b)(3) and took the wind out of the Advisory Committee's sails in its long effort to reform the rule. In October 1997 it agreed to table Rule 23 revision.

And what of the issue that had begun the long process of reviewing Rule 23(b)(3), the need to find some means of handling mass torts? The committee proposed that the Judicial Conference appoint a special committee to develop recommendations for improving the management of mass personal injury litigation; months later a new committee, appointed by the Chief Justice, began deliberations. The debate over Rule 23 revision had come full circle.[139]

But the proponents of Rule 23(b)(3) revision had not given up. At its first public meeting, the new mass torts committee was presented with some proposals incorporating ideas for reforming consumer class actions that had been tabled by

the Advisory Committee less than a year before.[140] And, in the waning days of the 109th Congress, proposals for reforming class action procedures were said to be high on the Republican Speaker of the House's list of priorities. As the decade drew to close, the battle over the uses of damage class actions continued.

NOTES

[1]In the Anglo-American common law tradition, the adversaries themselves are responsible for developing the facts and the law; the judge serves as umpire; and the judge or jury decides the case, unless the parties are able to negotiate a compromise among themselves. In other legal systems, the judge plays a more prominent role in shaping the case.

[2]This point was forcefully made by Judge Jack B. Weinstein more than 25 years ago, and a decade before he presided over the Agent Orange class action brought by Vietnam veterans. See Jack B. Weinstein, "The Class Action Is Not Abusive," *New York Law Journal*, May 1–2, 1972, 2, 4.

[3]This depiction of the origins of class actions is usually traced to Zechariah Chafee, *Some Problems of Equity* (Ann Arbor, Mich.: University of Michigan Press, 1950).

[4]Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven, Conn.: Yale University Press, 1987).

[5]42 U.S. (1 How.) LVI (1843).

[6]In *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), a group of Southern preachers pressed suit against an organization of Methodist preachers to recover their pension funds. Northern preachers had refused to administer pensions for Southern preachers after the country became divided over the use of slavery in the South. The court held that the group of Southern preachers could sue on behalf of all Southern preachers, present and absent.

[7]226 U.S. 659 (1912).

[8]Comment, "The Class Action Device in Antisegregation Cases," 201 *University of Chicago Law Review* 577, 577 n.1 (1953).

[9]The Chief Justice proceeded under the authority of the Rules Enabling Act of 1934, which authorized the federal courts to adopt uniform rules of procedure. See Judith Resnik, "From 'Cases' To 'Litigation,'" 54 *Law and Contemporary Problems* 5, 7 (1991).

[10]Curiously, the import of the three categories was not spelled out in the rule, but rather was set forth in the leading text of the day, *Moore's Federal Practice*. The courts tended to follow Professor Moore's interpretation of the categories. See "Developments in the Law: Multi-Party Litigation in the Federal Courts," 71 *Harvard Law Review* 874, 930 (1958).

[11]Minor technical changes to the rules were made in 1939 and 1948. Resnik, *supra* note 9, at 7 n.5.

[12]*Id.* at 8–9.

[13]John P. Frank, "Response to 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee," (Dec. 20, 1996), in Administrative Office of the U.S. Courts, 2 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23* 266 (1997) (hereinafter *Working Papers of the Advisory Committee*). Another member of the 1966 Committee, William T. Coleman, rejects the implication that the 1966 Committee intended to facilitate "private attorneys general" class actions for the purposes of regulatory enforcement: "I respectfully submit that back in 1966, that was not an intended purpose of Rule 23(b)(3). If there is interest in deputizing all attorneys everywhere to enforce our laws, that's a matter that should be decided by Congress, not through the class action provisions in the Federal Rules of Civil Procedure." 4 *Working Papers of the Advisory Committee*, at 456. The use of private class actions for regulatory enforcement is discussed further in Chapter Three.

[14]Arthur Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem,'" 92 *Harvard Law Review* 664, 669 (1979). In legal practice, committee and task force "reporters" are not only responsible for recording a group's deliberations and polishing its output, but also may play a critical role in shaping its thinking and guiding its deliberative process.

Professor Benjamin Kaplan, reporter of the 1960s Advisory Committee, was a leading procedural scholar and is widely cited as the moving force behind that committee's endeavors.

[15]Resnik, *supra* note 9, at 8. See also Comment, *supra* note 8, at 588–91 (discussing import of different categorizations of civil rights class actions).

[16]The Advisory Committee was concerned that the unitary standard articulated in former Equity Rule 38 was too vague, and would require judges to determine which cases should go forward as class actions on a case-by-case basis. Committee members decided, instead, to use the already large body of class action case law as a basis for drafting a more specific rule. They reviewed the many cases that had been treated as class actions, considering which of those cases had been appropriate circumstances for class treatment and which would have been better handled in another manner. See Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 *Harvard Law Review* 356, 386 (1967).

[17]John Frank says that the committee was not thinking of the problem of notifying potential members of a very large class when it drafted that rule: "The concept of thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future." See Frank, *supra* note 13.

[18]According to Professor Kaplan, the committee considered requiring prospective class members to opt in to the new Rule 23(b)(3) damage classes. It rejected the opt-in strategy, in part, in recognition of the fact that judges, in practice, were already using an opt-out approach for some class actions, notwithstanding the language of the old rule. See Kaplan, *supra* note 16, at 397.

[19]See Appendix A for the full text of Rule 23.

[20]In an influential article reflecting on public controversy over class actions, Professor Arthur Miller wrote: "For more than a decade segments of the bench and bar have been waging a holy war over Rule 23 of the Federal Rules of Civil Procedure." Miller, *supra* note 14, at 669.

[21]See, e.g., Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement* (New Haven, Conn.: Yale University Press, 1993).

[22]No one has done an empirical analysis of the relationship between the size of a b(3) class and whether class members are required to opt *in* or *out*. But social scientists have found that requiring individuals to consent to a procedure—for example, participation in a research project—is markedly higher when consent is measured *passively*, by failure to file an objection, rather than *actively*, by explicitly registering agreement to participate. See, e.g., Phyllis Ellickson, "Getting and Keeping Schools and Kids for Evaluation Studies," Special Issue, *Journal of Community Psychology* 102 (1994).

[23]*Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968). The mood of the courts concerning class actions is summarized in Miller, *supra* note 14, at 678. Prof. Miller notes that some cases anticipated the adoption of revised Rule 23, which had circulated in the legal community for several years before formal action by the committee.

[24]Eleanore Carruth, "The 'Legal Explosion' Has Left Business Shell-Shocked," *Fortune*, Apr. 1973, at 65.

[25]*Id.*

[26]*Id.*

[27]*Id.* at 66 (emphasis in original).

[28]G. Edward Fitzgerald, identified as a partner at Gibson, Dunn & Crutcher, in Los Angeles. *Id.*

[29]*Snyder v. Harris*, 394 U.S. 332 (1969). Four years later, the Court reiterated its holding in an environmental damage class action, *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The applicability of *Snyder* and *Zahn* has been questioned in the light of the supplemental jurisdiction provision of the Judicial Improvements Act of 1990, codified as amended at 28 U.S.C. § 1367(a) 1999. Some circuits have held that the amendment to § 1367 effectively overruled *Zahn*; others disagree. See, e.g., *Daniels v. Philip Morris Companies*, 18 F. Supp. 2d 1110 (S.D. Cal. 1998). See also Thomas Rowe, "1367 and All That: Recodifying Federal Supplemental Jurisdiction," 74 *Indiana Law Journal* 53 (1998).

[30]S. 1378, S. 1222, S. 984, 92d Cong., 1st Sess. (1971).

[31]*Consumer Class Action: Hearings Before the Consumer Subcommittee of the Senate Committee on Commerce*, 92d Cong., 1st Sess. 38 (1971).

[32]*Id.*

[33]*Id.*

[34]Miller, *supra* note 14, at 674–75 & nn.51–54.

[35]Carruth, *supra* note 24, at 68.

[36]See note 13, *supra*.

[37]Thomas Dickerson, *Class Actions: The Law of 50 States* (New York: Law Journal Seminars-Press, 1997) at 1–7, 1–8, 1–23, A–4 *et seq.*

[38]See American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972); Barbara Banoff and Benjamin DuVal, "The Class Action as a Mechanism for Enforcing the Federal Securities Laws: An Empirical Study of the Burdens Imposed," 31 *Wayne Law Review* 1 (1984) (reporting data from 1967–1973); Thomas Jones, "An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits 1971–1978," 60 *Boston University Law Review* 306 (1980); Benjamin DuVal, "The Class Action as an Antitrust Enforcement Device: The Chicago Experience," 1976 *American Bar Foundation Research Journal* 1021, 1273 (hereinafter DuVal, "The Chicago Experience"); Benjamin DuVal, "The Class Action as an Antitrust Enforcement Device: The Chicago Study Revisited," 1979 *American Bar Foundation Research Journal* 449 (hereinafter DuVal, "The Chicago Study Revisited"); Thomas Jones, "An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits," 60 *Boston University Law Review* 542 (1980); John Kennedy, "Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study," 14 *Houston Law Review* 769 (1977); Bruce Bertelsen et al., Note, "The Rule 23(b)(3) Class Action: An Empirical Study," 62 *Georgetown Law Journal* 1123 (1974); Andrew Rosenfield, "An Empirical Test of Class Action Settlement," 5 *Journal of Legal Studies* 113 (1976).

[39]American College of Trial Lawyers, *supra* note 38.

[40]Bertelson et al., *supra* note 38. The largest proportion of suits were seeking declaratory or injunctive relief under Rule 23(b)(2).

[41]*Id.* Calculated from data presented in unnumbered chart at 1129.

[42]Banoff and DuVal, *supra* note 38; DuVal, "The Chicago Experience," *supra* note 38; DuVal, "The Chicago Study Revisited," *supra* note 38.

[43]DuVal, "The Chicago Experience," *supra* note 38; DuVal, "The Chicago Study Revisited," *supra* note 38; Kennedy, *supra* note 38; Bertelsen et al., *supra* note 38; Rosenfield, *supra* note 38.

[44]Quoted in Resnik, *supra* note 9, at 17 & n.44.

[45]*Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

[46]Miller, *supra* note 14, at 684 & n.86.

[47]U.S. Department of Justice, "Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure," 6 *Class Action Reports* 9 (1979).

[48]*Id.* at 10 nn.5–7.

[49]*Id.* at 19.

[50]*Id.* at 13.

[51]H.R. 5103, 96th Cong., 1st Sess. (1979). See also Patricia Wells, "Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal," 16 *Harvard Journal on Legislation* 543 (1979).

[52]U.S. Department of Justice, *supra* note 47, at 24–25.

[53]*Id.* at 27. *Class Action Reports* is a newsletter primarily supported by and directed to the plaintiff class action bar.

[54]Miller, *supra* note 14, at 665, 682.

[55]As early as 1978, a *U.S. News and World Report* special report on litigiousness did not even mention class actions. See "Special Report: Why Everybody is Suing Everybody," *U.S. News and World Report*, Dec. 4, 1978, at 50–54.

For discussions of the tort reform debate, see, e.g., Steve Brill and James Lyons, "The Not-So-Simple Crisis," *American Lawyer*, May 1, 1986, at 1; Marc Galanter, "The Tort Panic and After: A

Commentary," 16 *Justice System Journal* 1 (1993); Deborah Hensler et al., *Trends in Tort Litigation: The Story Behind the Statistics* (Santa Monica, Calif.: RAND, 1987); Joseph Sanders and Craig Joyce, "'Off to the Races': The 1980s Tort Crisis and the Law Reform Process," 27 *Houston Law Review* 207 (1990).

[56]For a discussion of the rise of mass tort litigation, see Deborah Hensler and Mark Peterson, "Understanding Mass Personal Injury Litigation," 59 *Brooklyn Law Review* 961 (1993). The Dalkon Shield litigation is described in Ronald Bacigal, *The Limits of Litigation: The Dalkon Shield Controversy* (Durham, N.C.: Carolina Academic Press, 1990), and Richard Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* (Chicago: University of Chicago Press, 1991). The evolution of asbestos litigation is described in Deborah Hensler et al., *Asbestos in the Courts: The Challenge of Mass Toxic Torts* (Santa Monica, Calif.: RAND, 1985) (hereinafter Hensler et al., *Asbestos in the Courts*), and Deborah Hensler, "Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman," 13 *Cardozo Law Review* 1697 (1992) (hereinafter Hensler, "Fashioning a National Resolution").

[57]The federal multidistrict litigation statute was adopted in 1968 and is codified at 28 U.S.C. § 1407 (1997). For a discussion of events leading up to the adoption of this statute and its relationship to Rule 23, see Resnik, *supra* note 9, at 5–68. Many states have procedures for collecting similar lawsuits filed in different courts within a state and transferring them to a single state court judge. See Mark Weber, "The Federal Civil Rules Amendments of 1992 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases," 14 *Review of Litigation* 113 (1994).

[58]In some instances, federal transferee judges kept cases for trial. See Blake Rhodes, "The Judicial Panel on Multidistrict Litigation: Time for Rethinking," 140 *University of Pennsylvania Law Review* 711 (1991). However, in a 1998 decision, the U.S. Supreme Court held that a transferee judge must return cases to their original courts after pretrial proceedings are complete. *Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes and Lerach*, 523 U.S. 26 (1998).

[59]Under the doctrine of issue preclusion, retrying the same issue against the same defendant might not be necessary. But in asbestos litigation, appellate courts circumscribed the application of issue preclusion. See Deborah Hensler et al., *Asbestos in the Courts, supra* note 56.

[60]Notwithstanding this, some judges have consolidated thousands of cases for trial. See Deborah Hensler, "A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation," 73 *Texas Law Review* 1587 (1995).

[61]*Advisory Committee's Notes to Proposed Rule of Civil Procedure,* 39 F.R.D. 69, 103 (1966).

[62]See, e.g., *Yandle v. PPG Industries,* 65 F.R.D. 566 (E.D. Tex. 1974) (denying certification in asbestos worker injury suit); *Ryan v. Eli Lilly & Co.,* 84 F.R.D. 230 (D.S.C. 1979) (denying certification of class of DES users' children); *In re Dalkon Shield IUD Products Liability Litigation,* 693 F.2d 847 (9th Cir. 1982) (reversing class certification of Dalkon Shield claims); *Thompson v. Procter & Gamble Co.*, No. C-80-3711 EFL, 1982 WL 114 (N.D. Cal. Dec. 8, 1982) (denying certification of class to tampon users claiming injuries due to toxic shock syndrome); *In re Federal Skywalk Cases,* 680 F.2d 1175 (8th Cir. 1982) (reversing certification of punitive damage claims in Hyatt Hotel skywalk collapse); *Payton v. Abbott Labs,* 100 F.R.D. 336 (D. Mass. 1983) (denying certification of class of DES users' children); *In re Bendectin Products Liability Litigation,* 749 F.2d 300 (6th Cir. 1984) (rejecting certification of Bendectin users' claims, on mandamus); *In re Zomax Drug Litigation,* No. 83-106 (E.D. Ky. June 11, 1984) (denying certification); *In re Tetracycline Cases,* 107 F.R.D. 719 (W.D. Mo. 1985) (denying certification to users of tetracycline); *Davenport v. Gerber Products,* 125 F.R.D. 116 (E.D. Pa. 1989) (denying certification of class claiming injuries to infants).

[63]*In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying the class), *aff'd,* 818 F.2d 145 (2d Cir. 1987) (upholding the certification and rejecting other grounds for appeal). Defendants attempted to overturn Judge Weinstein's certification immediately after he issued it, using a special review procedure known as *mandamus,* in which parties claim abuse of discretion by the trial judge, but the appellate court rejected this request. *In re "Agent Orange,"* 725 F.2d 858 (2d Cir. 1984). The Agent Orange case was not the first mass tort certified as a class action. After a fire killed 162 people and injured 100 more at the Beverly Hills Supper Club in Kentucky in 1977, federal district court judge Carl Rubin certified a class of injured plaintiffs. See Hensler & Peterson, *supra* note 56, at 970–72.

[64]The story of Agent Orange litigation is told in Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Cambridge, Mass.: Belknap Press, 1987). Judge Jack B. Weinstein, who presided over the class action, has played a leading role in mass tort litigation. Judge Weinstein's

many essays on the issues associated with aggregate litigation are collected in *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations and Other Multiparty Devices* (Evanston, Ill.: Northwestern University Press, 1995).

[65]*Jenkins v. Raymark Industries,* 782 F.2d 468 (5th Cir. 1986).

[66]*Sterling v. Velsicol Chemical Corp.,* 855 F.2d 1188 (6th Cir. 1988).

[67]In 1990, a class of asbestos workers was certified in the Eastern District of Texas, *Cimino v. Raymark Industries,* 751 F. Supp. 649 (E.D. Tex. 1990), which had certified the first asbestos class action, *Jenkins v. Raymark Industries,* 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd,* 782 F.2d 468 (5th Cir. 1986), five years earlier. The Fifth Circuit ultimately rejected the trial plan in *Cimino*, although not the class certification. *Cimino v. Raymark Industries,* 151 F.3d 297 (5th Cir. 1998). Four years after *Cimino* was certified, plaintiff attorneys filed a 23(b)(3) class action in eastern Pennsylvania against a different group of asbestos defendants, on behalf of all future asbestos personal injury claimants. *Georgine v. Amchem Products,* 157 F.R.D. 246 (E.D. Pa. 1994). A year later, the same attorneys filed a Rule 23(b)(1)(B) class action in east Texas, against yet another defendant, on behalf of all present *and* future asbestos personal injury claimants. *Ahearn v. Fibreboard Corp.,* 162 F.R.D. 505 (E.D. Tex. 1995). Subsequently, the class was redefined to exclude previously filed claims. The history of these cases is discussed in Chapter Three.

[68]In 1988, a mass tort class action alleging property damages due to a Shell Oil company explosion was filed in state court in Louisiana. Removed to federal court, it was certified in 1991. *In re Shell Oil Refinery,* 136 F.R.D. 588 (E.D. La. 1991). The Fifth Circuit Court of Appeals upheld the certification. *Watson v. Shell Oil Co.,* 979 F.2d 1014 (5th Cir. 1992). Noting difficulties in organizing other mass tort cases for a class trial, the circuit court wrote: "We express our admiration for the manner in which [federal district court] Judge Mentz. . . has woven our mass tort case law into an acceptable and workable trial plan." This was the same circuit that had denied aggregative status to asbestos cases throughout the 1980s. See Hensler et al., *Asbestos in the Courts, supra* note 56. On November 19, 1991, a class action brought by plaintiffs alleging injuries associated with defective heart valves was conditionally certified in Ohio. See *Bowling v. Pfizer,* 143 F.R.D. 141 (S.D. Ohio 1992) (approving class settlement).

During this period, some courts continued to reject certification of mass torts. See, e.g., *Davenport v. Gerber Products,* 125 F.R.D. 116 (E.D. Pa. 1989).

[69]During this period, articles also began to appear in law reviews, urging reconsideration of the stricture against class actions in mass tort cases. See, e.g., Bruce Neilson, Note, "Was the 1966 Advisory Committee Right? Suggested Revisions of Rule 23 to Allow for More Frequent Use of Class Actions in Mass Tort Litigation," 25 *Harvard Journal on Legislation* 393 (1988).

[70]Miller, *supra* note 14, at 684.

[71]Most references cite 1991 as the beginning of the contemporary Rule 23 revision process. However, the minutes for the Advisory Committee's meeting of November 30 and December 1, 1990, read, "It was agreed to take up Rule 23, to enlarge the opportunity for mass tort litigation, to provide for defendant class actions, perhaps to specify the fiduciary duties of the class representative, and to consider the ABA Litigation Section report." 1 *Working Papers of the Advisory Committee, supra* note 13, at 162 (minutes of May 1997).

[72]In the early 1980s, about 10,000 asbestos personal injury suits were filed in the federal courts. In the latter half of the decade, the number of annual filings nearly quadrupled. In 1990, the filings for a single year topped 10,000. See Hensler, "Fashioning a National Resolution," *supra* note 56, at 1971. See also *Ahearn v. Fibreboard,* 162 F.R.D. 505, 509 (E.D. Tex. 1995) ("By 1990, the [asbestos litigation] situation had reached critical proportions").

[73]Judicial Conference of the United States, *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* (Mar. 1991). The committee wrote, "There is no reason to conclude that current Rule 23 exhausts potential procedural techniques for appropriately facilitating class actions. And. . . there may be other mass tort situations in which the use of an enlarged class action device would be desirable. . . The informal moratorium declared many years ago on possible revision of Rule 23 should be lifted, with serious study given to some modification." *Id.* at 38–39.

The Judicial Conference serves as the governance body for the federal courts. Its committee structure includes the Advisory Committee on the Civil Rules, which reports to a Standing Committee on the Rules, which reports to an Executive Committee, which is chaired by the Chief Justice.

Although the Ad Hoc Committee's report was dated 1991, it must have been circulating before that, because the Advisory Committee agreed to take up Rule 23 revision at its meeting on November 29–December 30, 1990. See note 71, *supra.*

[74]The Litigation Section's report was prepared in response to the legislative revisions to Rule 23 proposed by the Carter administration in the late 1970s. See American Bar Association Section of Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements* (1986). The ABA committee began its work in 1981. Its report was never adopted as a formal position of the ABA, but rather was transmitted to the Advisory Committee on the Civil Rules on behalf of the Litigation Section.

[75]*Id.* at 199.

[76]*Id.*

[77]The proposal also bore some resemblance to the Uniform Class Action Rule proposed in 1976 by the National Conference of Commissioners on Uniform State Laws, which adopted a unitary set of criteria for class certification.

[78]See, e.g., *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977) (affirming J. Pointer's approval of a settlement of a class action on behalf of black employees at United States Iron Pipe and Foundry Company); *Martin v. Wilks,* 490 U.S. 755 (1988) (reversing J. Pointer's decision preventing white firefighters from challenging the settlement agreement in a class action on behalf of black firefighters; J. Pointer had approved the settlement in *United States v. Jefferson County,* 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981) *aff'd,* 720 F.2d 1511 (11th Cir. 1983)).

[79]The goal of facilitating mass tort class actions and providing for increased flexibility in the administration of the rule was frequently mentioned at these meetings. 1 *Working Papers of the Advisory Committee*, *supra* note 13, at 164–72 (minutes of Nov. 22, 1991, and Nov. 12–14, 1992).

[80]*Id*. For example, the Advisory Committee was considering changes to Rule 11, regarding sanctions for frivolous pleadings and motions, and Rule 26, regarding discovery.

[81]*Id.* at 170–72.

[82]*Id.* at 175 (Minutes of Oct. 21–23, 1993).

[83]*Id.* at 177.

[84]Both class actions were filed subsequent to the settlement of pending asbestos claims in each district. See note 67, *supra*. Judge Robert Parker appointed a plaintiffs' steering committee to organize the futures class in 1993, and approved the settlement in 1995. *Ahearn v. Fibreboard,* 162 F.R.D. 505 (E.D. Tex. 1995). A futures asbestos personal injury class against a different set of defendants was filed in 1993, and was conditionally certified two weeks later. *Carlough v. Amchem Products,* 834 F. Supp. 1437 (E.D. Pa. 1993). Subsequently another individual was substituted as the representative plaintiff and the case became known as *Georgine v. Amchem Products.*

[85]See, e.g., Susan Koniak, "Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc." 90 *Cornell Law Review* 1045 (1995); Brian Wolfman and Alan Morrison, "Representing the Unrepresented in Class Actions Seeking Monetary Relief," 71 *New York University Law Review* 439 (1996). The conflicting views of legal ethicists who testified as experts in the *Georgine* case are summarized in Judge Reed's Memorandum Opinion, *Georgine v. Amchem Products,* No. 93-0215 (E.D. Pa. filed Aug. 16, 1994). Conflicting views about the settlement among legal practitioners are described in Roger Parloff, "The Tort That Ate the Constitution," *American Lawyer*, July/Aug. 1994, at 75, 79.

[86]*In re Silicone Gel Breast Implant Products Liability Litigation,* No. CV 92-P-10000-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). All federal silicone gel breast implant cases had been transferred to Judge Pointer by the Judicial Panel on Multidistricting. The settlement subsequently collapsed when more than 400,000 women applied for current or future benefits. The silicone gel breast implant settlement is discussed further in Chapter Three.

[87]*Wadleigh v. Rhone-Poulenc Rorer,* 157 F.R.D. 410 (N.D. Ill. 1994). All federal hemophiliac HIV-infection cases had been transferred to Judge Grady by the Judicial Panel on Multidistricting. Class certification was subsequently rejected by the appellate court on a writ of mandamus. *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293 (7th Cir. 1995).

[88]See, e.g., *Valentino v. Carter-Wallace,* No. CV-94-02867-EFL (N.D. Cal. 1994) (certifying class of individuals alleging injuries associated with Felbatol, a drug used to treat epilepsy), *vacated,* 97 F.3d 1227 (9th Cir. 1996); *In re Copley Pharmaceutical,* 158 F.R.D. 485 (D. Wyo. 1994) (certifying class of

individuals claiming injury associated with Albuterol, a drug used to treat asthma); *Dante v. Dow Corning*, 143 F.R.D. 135 (S.D. Ohio 1992) (certifying class of silicone gel breast implant users); *Day v. NLO, Inc.*, 144 F.R.D. 330 (S.D. Ohio 1992) (certifying class of individuals alleging injuries associated with exposure to radiation and hazardous materials); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (approving settlement of the Shiley heart valve class action); *Vorhis v. American Medical Systems, Inc.*, C-1-94-824, (S.D. Ohio 1995) (certifying class of individuals alleging injuries associated with penile implants). The *Valentino* and *Vorhis* certifications were subsequently reversed on appeal. *Valentino v. Wallace Laboratories, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996).

See also *Haley v. Medtronic, Inc.*, 169 F.R.D. 643 (C.D. Cal. 1996) (denying class certification in case alleging injuries associated with the wire lead component of pacemakers). The California trial court's denial of certification to claims associated with pacemaker leads was consistent with previous denials in other jurisdictions. See *Linkus v. Medtronic, Inc.*, No. Civ.A. 84-1909 1985 WL 2602 (E.D. Pa. Sept. 4, 1985); *Rall v. Medtronic, Inc.*, No. CV-S-84-741-LDG, 1986 WL 22271 (D. Nev. Oct. 15, 1986); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273 (D. Minn. 1988).

[89]The case that received the most attention involved G.M. pickup trucks, which were alleged to have faulty fuel tanks. In the settlement of a class action brought by pickup truck owners who had not sustained physical injuries but who claimed that the value of their trucks had been diminished by the allegedly faulty design, consumers were offered coupons to buy new G.M. trucks. *In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liability Litigation*, 846 F. Supp. 330 (E.D. Pa. 1993). The Third Circuit rejected the settlement on appeal. 55 F.3d 768 (3d Cir. 1995). See Wolfman and Morrison, *supra* note 85, at 439–513. But a similar nationwide class settlement was later approved by a Louisiana state trial court. *White v. General Motors Corp.*, No. 42,865 (La. Dist. Ct. 1996). Chapter Three discusses the issue of competing state and federal class actions.

[90]*Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995). Plaintiff attorneys filed the class action in March 1993. The trial court's certification was overturned on interlocutory appeal by the Fifth Circuit. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

[91]On Wall Street's interest in the course of tobacco class action litigation, see, e.g., Glen Collins, "Group Wins Right to Sue Over Tobacco," *New York Times*, Jan. 5, 1996, at A6 (discussing appellate court upholding certification of a nationwide class action brought by flight attendants alleging injuries associated with second-hand smoke); Glenn Collins, "Panel is Named for Tobacco Class Action," *New York Times*, Mar. 26, 1996, at D2 (discussing reaction to selection of judicial panel to hear appeal of *Castano* certification).

[92]Ed Gillespie and Bob Schellhas, *Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey and the House Republicans to Change the Nation* 143–55 (New York: Random House, 1994).

[93]For evidence that the Advisory Committee was attentive to the legislative process during this period, see 1 *Working Papers of the Advisory Committee, supra* note 13, at 196–98, 222 (minutes of Feb. 16–17, 1995, and Apr. 20, 1995).

[94]Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.). The act amended the Securities Act of 1933 and the Securities Exchange Act of 1934 with regard to private securities class actions. In addition to redefining the substantive criteria for securities fraud actions, the new act imposed additional procedural requirements, including establishing a preference for institutional shareholders to serve as lead representative plaintiffs; setting limits on individual shareholders' eligibility to serve as representative plaintiffs and on their compensation therefrom; establishing new notice provisions; and mandating disclosure of settlement terms to class members and prohibiting sealed settlements in most circumstances. Subsequent to the act's passage, in response to charges that plaintiff class action attorneys had begun filing securities fraud cases in state courts to evade the act, Congress passed the Securities Litigation Uniform Standards Act of 1998, Pub. L. 105–353, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.) to further amend the Securities Acts of 1933 and 1934 to limit the conduct of securities class actions brought under state law. That act provided for removal of state class actions to the federal courts except in certain specified circumstances.

[95]*Hearings Before the Subcommittee on Securities of the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. 1 (1993). Predictably, those who appeared at the hearing had widely differing views about the value of securities class actions; more surprisingly, perhaps, they presented vastly different assessments of the facts. In his opening statement at the second day of the hearing, after the committee had received written and oral testimony and written

responses to questions from committee members, Sen. Dodd said: "After a long hearing that lasted well into the afternoon, we found no agreement on whether there is in fact a problem, the extent of the problem, or the solution to the problem. In my experience with this subcommittee, I've never encountered an issue where there is such disagreement over the basic facts. We often argue about policy, we argue about ideology, we often argue about politics, but it is rare that we spend so much time arguing about basic facts." *Id*. at 280.

[96]1 *Working Papers of the Advisory Committee*, *supra* note 13, at 182–92 (minutes of Apr. 28–29, 1994).

[97]For example, the minutes of the April 1994 meeting summarizes comments by John Frank (a member of the 1966 Advisory Committee) as follows: "Subsequent history [after 1966] has been a story of expansion and excesses. . . The fear that defendants would rig plaintiffs classes has not materialized. They have not had to. The 'take-a-dive' class has been arranged by plaintiff attorneys who settle out class claims for liberal fee recovery. . . Abuses of Rule 23 are rising." *Id.* at 187, 189.

[98]See, e.g., *id.* at 204 (minutes of Feb. 16–17, 1995): "It was noted that the distinctions between b(1), (2), and (3) class need not be dissolved to pursue changes in notice and opt-out requirements. . . . Some participants believed that it is better to maintain the now 'traditional' division among different forms of classes, in part because the different classes have markedly different histories and purposes. The (b)(1) class has an ancient lineage that helps to legitimate class practice in general. . . " The last draft revisions to include the unitary standard date from April 1995. 1 *Working Papers of the Advisory Committee*, *supra* note 13, at 43–53.

[99]Summarizing the February 1995 discussion at the University of Pennsylvania Law School conference and meeting of the Advisory Committee, the reporter notes: "A topic that recurred repeatedly throughout the day [was] whether problems of mass tort actions are so distinctive that a separate rule should be developed. One advantage might be to address the problem of 'futures' claimants that seem to be unique to this setting. . . Doubts were raised in response. A specific mass torts rule may seem so laden with substantive overtones as to raise legitimate doubts about the wisdom of invoking regular rulemaking procedures." *Id.* at 206. After a discussion of mass torts that are certified for settlement, but not trial, the minutes note, ". . . it was suggested that it is premature to deal with these settlement questions in Rule 23, that settlement classes should be dealt with in the Manual for Complex Litigation [a judge's bench book that does not carry the authority of the Rules of Civil Procedure]." *Id*. at 213.

[100]See, e.g., the minutes for February 1995: "Whether Rule 23 changes are needed at all remains uncertain. The mass tort phenomenon seems to be driving the process. If that is so, it must be asked whether asbestos and breast implant litigation are an isolated phenomenon—and, perhaps, when more is known, may be quite different from each other. . . is all of this discussion an attempt to design a system for asbestos? And isn't that foolish, in part because too late?" *Id.* at 214.

[101]*Id.* at 223 (minutes for Nov. 9–10, 1995). Deborah Hensler attended this meeting and made a brief presentation to committee members.

[102]A preliminary merits determination in class actions was explicitly rejected by the U.S. Supreme Court in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974). For a discussion of the applicability of *Eisen* to class certification, see *Castano v. American Tobacco Co.,* 84 F.3d 734, 744 (5th Cir. 1996).

[103]Defendants were torn between the attraction of drawing trial judges' attention to the merits of proposed class actions and the possibility that such an early merits determination would simply provide more opportunity for adversarial procedure at a time when the record had not yet been sufficiently developed to support a sound judicial assessment. Defendants' disagreement among themselves on the issue of a preliminary merits determination subsequently led the Advisory Committee to abandon this proposal.

[104]28 U.S.C. § 1291. Some state courts do not follow federal final judgment doctrine. For example, New York state has an active interlocutory appeal practice.

Controversy over class actions during the 1990s led to a spate of interim appeals in the federal courts, some of which were allowed to go forward under the procedure of mandamus. See, e.g., *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir. 1995).

[105]1*Working Papers of the Advisory Committee*, *supra* note 13, at 261–66. Certification of settlement classes had become controversial after the trial courts' approval of settlements in such cases as *Georgine, Ahearn, and G.M. Pick-Up Trucks.* See notes 85, 89, *supra*. After the Third Circuit Court of Appeals' rulings in *G.M. Pick-Up Trucks* and *Georgine* that such certification was not allowed under

the then-current wording of Rule 23, some mass tort practitioners, on both the plaintiff and defense sides, sought to settle the issue through rule revision.

[106]If Congress chooses not to act on a rule that has been adopted by the U.S. Supreme Court, the rule takes effect. But in recent years, Congress has become more assertive in exerting its authority to reject rules proposed through this rulemaking process. Because of the high profile of the class action controversy, few involved in the rule revision process expected Congress to adopt a passive stance in the event that amendments to Rule 23 were proposed.

[107]*Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

[108]1 *Working Papers of the Advisory Committee, supra* note 13, at 55–83.

[109]The alternatives variously excluded the "necessity" element; diminished the extent to which judges would be asked to assess the probable success of the class action; deleted references to the "public interest" from the proposed new requirement that the judge balance the costs and benefits of certifying a class; deleted references to defendants paying for notice; and deleted references to settlement classes. *Id*.

[110]This description of the April 1996 meeting is based, in part, on the observations of Deborah Hensler, who attended as an observer.

[111]The complete list of changes included:

- A provision for interlocutory appeal
- Two new factors to be considered by the judge in deciding whether to certify a class: (A) "The practical ability of individual class members to pursue their claims without class certification; (F) "Whether the probable relief to individual class members justifies the costs and burdens of class litigation."
- Modifying the language of a third factor to read: "class members' interests in maintaining or defending separate actions."
- An admonition that the judge also consider the *maturity* of any related litigation
- A new category (b)(4) of settlement classes which a judge could certify in response to the parties' joint request
- A formal requirement of notice and hearing before judicial approval of any settlement
- A small change in the instructions to the judge on when class certification should be decided, increasing judicial discretion with regard to timing.

[112]Memorandum from Judge Patrick Higginbotham and Prof. Edward Cooper to the Standing Committee on the Rules (Aug. 7, 1996) in 1 *Working Papers of the Advisory Committee, supra* note 13, at 297.

[113]*Id.* at 299.

[114]Letter from Steering Committee to Oppose Proposed Rule 23 to Judge Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure (May 28, 1996) (on file with authors). The steering committee circulated drafts of the May 28 letter by Internet, beginning within days of the April meeting in Washington, D.C.

[115] See note 85, *supra*.

[116]Several other noted law professors, including Janet Alexander, Robert Bone, Paul Carrington, Samuel Estreicher, Arthur Miller, Judith Resnik, and David Shapiro, wrote separately to the Standing Committee variously expressing concerns about both settlement classes and Factor (F). Some felt that the Advisory Committee's proposals overstepped the boundaries of the procedural rulemaking process, because the proposed revision would have the effect of changing substantive law. Public Citizen, a consumer advocacy organization, submitted a letter in opposition to the changes (June 3, 1996), and Sheila Birnbaum, a noted defense attorney, submitted a letter in support (June 14, 1996). Both Public Citizen and Birnbaum had extensive experience litigating class actions; Public Citizens' lawyers had appeared as objectors to some of the most widely criticized class settlement agreements. 2 *Working Papers of the Advisory Committee, supra* note 13 *passim.*

[117]See note 94, *supra*.

[118]Written testimony was submitted on behalf of 135 law school professors and on behalf of 18 state attorneys general. Counting these multiple signatories to written testimony, more than two hundred people made their views known to the committee. 2, 4 *Working Papers of the Advisory Committee, supra* note 13, *passim.*

[119]Richard A. Lockridge, Schatz Paquin Lockridge Grindal & Holstein L.L.P., 4 *Working Papers of the Advisory Committee*, *supra* note 13, at 267. Mr. Lockridge's quote was taken from a case decided in 1968, *Dolgow v. Anderson,* 43 F.R.D. 472, 485 (E.D.N.Y. 1968).

[120]Patricia Sturdevant, National Association of Consumer Advocates. 4 *Working Papers of the Advisory Committee*, *supra* note 13, at 156.

[121]Michael D. Donovan, Vice Chair, National Association of Consumer Advocates, *id.* at 433–34.

[122]Theodore J. Fischkin, Chair, Litigation Committee, American Corporate Counsel Association, 2 *Working Papers of the Advisory Committee*, *supra* note 13, at 584.

[123]Nicholas J. Wittner, Assistant General Counsel, Nissan North America, 4 *Working Papers of the Advisory Committee*, *supra* note 13, at 755 (citing various sources for the views quoted).

[124]William A. Montgomery, Vice President and General Counsel, State Farm Insurance Companies, 2 *Working Papers of the Advisory Committee*, *supra* note 13, at 559.

[125]D. Dudley Oldham, Lawyers for Civil Justice, 4 *Working Papers of the Advisory Committee*, *supra* note 13, at 505.

[126]Stephen Gardner, Law Offices of Stephen Gardner, *id.* at 79.

[127]Howard Metzenbaum, Chair, Consumer Federation of America, 2 *Working Papers of the Advisory Committee*, *supra* note 13, at 91.

[128]Oldham, *supra* note 125.

[129]G. Luke Ashley, 4 *Working Papers of the Advisory Committee*, *supra* note 13, at 548–49. Mr. Ashley was the lead appellate counsel in the *Cimino* asbestos class action, which is discussed in Chapter Three. *Cimino v. Raymark Industries,* 751 F. Supp 649 (E.D. Tex. 1990).

[130]Barry Bauman, Executive Director, Lawyers for Civil Justice, 2 *Working Papers of the Advisory Committee*, *supra* note 13, at 181–82. Mr. Bauman noted that mass tort class actions might be appropriate in a single catastrophic accident, such as an airplane crash.

[131]John D. Aldock, National Counsel for the Center for Claims Resolution, 4 *Working Papers of the Advisory Committee*, *supra* note 13, at 329, 349. The Center was the defendant in the *Georgine* asbestos class action. See also comments supporting the use of settlement classes in mass torts by defense counsel Steven Glickstein and David Klingsberg, *id.* at 480 *et seq*., and defense counsel Robert Dale Klein, *id.* at 808, 810.

[132]Frederick Baron, Baron & Budd, *id.* at 507. Mr. Baron is a leading asbestos plaintiff attorney.

[133]Stanley M. Chesley, Waite Schneider Bayless & Chesley Co., L.P.A., *id*. at 823. Mr. Chesley is a leading plaintiff class action attorney.

[134]John P. Frank, Whither Rule 23: Memorandum to the Honorable Patrick E. Higginbotham (Apr. 28, 1995) (on file with the Advisory Committee).

[135]Memorandum from Judge Paul V. Niemeyer to the Standing Committee and Civil Rules Advisory Committee (Mar. 15, 1997) (on file with the authors).

[136]New Civil Rule 23(f), allowing discretionary interlocutory appeals from orders granting or denying class action certification became effective December 1, 1998. See 66 U.S.L.W. 4323–44 (1998).

[137]In introducing the "when practicable" revision, Judge Niemeyer noted that its adoption would conform to current practice. But some Standing Committee members argued that it would cause judges to delay certification, and others worried more generally about the impact of certification on absent parties. With many members assuming the Advisory Committee would present an additional package of recommendations for changes in Rule 23 the following fall, the Standing Committee voted against sending that recommendation on to the Judicial Conference at that time. See Advisory Committee on Civil Rules, *Standing Committee Meeting and Report to the Judicial Conference* (minutes of June 19–20, 1997).

[138]*Amchem Products v. Windsor,* 521 U.S. 591 (1997).

[139]In a preface to the Advisory Committee's and Working Group on Mass Torts' report to the Chief Justice and Judicial Conference, issued in February 1999, the Advisory Committee Chair Judge Paul Niemeyer wrote: "In August 1996, the Committee published proposed changes to Rule 23. The public hearings and comments persuaded the Committee that the proposals would not solve the most serious of the identified problems and might raise troubling collateral issues. It also became

apparent that rulemaking might not be adequate to solve some of the more serious problems. During this same period, Congress. . . began to conduct its own hearings. This activity increased to the point that the House was prepared to pass a bill to address some of the perceived problems before time ran out. Many believe that some final action may be taken by the current Congress." Administrative Office of the U.S. Courts, *Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States* iv (Feb. 15, 1999).

[140]The working group on mass torts completed its work and issued its report and recommendations in early 1999. See note 139, *supra.* The working group and Advisory Committee recommended that the Chief Justice appoint a *new* Ad Hoc Committee on Mass Torts, charged with recommending legislation, rule revision, changes in case management and practice, and judicial education. *Id.* at v.

Chapter Three

VIRTUES AND VICES

> It will take a generation or so before we can fully appreciate the scope, the virtues and the vices of new Rule 23.
>
> *Professor Benjamin Kaplan*
> *Reporter, Advisory Committee on the Civil Rules, 1966*

After more than 30 years of controversy, the U.S. legal system seems to have reached an uneasy accommodation with class actions seeking affirmation of rights—of children, taxpayers, prisoners, and other groups in society. There is political disagreement about which and whose rights we should honor, and Congress has enacted legislation forbidding the federally funded Legal Services Corporation to assist in bringing rights-based (or any other) class actions.[1] But these actions reflect fundamental arguments about individual and group rights more than disagreement about the appropriateness of providing a vehicle, such as the class action, for collective litigation of these issues.

The history of the debate over Rule 23 shows that we have not reached a similar consensus on the appropriate uses of Rule 23(b)(3) damage class actions. Is the Rule 23(b)(3) class action primarily an administrative efficiency mechanism, a means for courts and parties to manage a large number of similar legal claims, without requiring each litigant to come forward and have his or her claim considered individually? Or is it primarily a means of enabling litigation that could not be brought on an individual basis, in pursuit of larger social goals such as enforcing government regulations and deterring unsafe or unfair business practices? As we have seen, clashing views on the objective of Rule 23(b)(3) are at the heart of past and present controversy over revising the class action rule.[2]

But the distinction in the public debate between the *efficiency* and *enabling* goals of class actions for money damages is illusory. In practice, any change in court processes that provides more efficient means of litigating is likely to enable more litigation. Greater efficiency can lower the costs of bringing lawsuits, making it more attractive for litigants to sue and for lawyers to take their cases. Moreover, because Rule 23(b)(3) requires telling people that they may have a claim of which they were previously unaware, but does not require them to take

any initial action to join in the litigation, virtually every damage class action has the potential to expand the pool of litigants beyond what it would have been without class litigation.[3] In other words, whatever efficiencies it may achieve, Rule 23 is inherently an enabling mechanism.

When we take a closer look at the controversy over damage class actions, we can see that it is, in fact, a dispute about what kinds of lawsuits and what kinds of resolutions of lawsuits *the legal system should enable.*

Business representatives from diverse sectors of the economy argue that Rule 23(b)(3), in practice, enables large numbers of lawsuits about trivial or nonexistent violations of statutes and regulations that govern advertising, marketing, pricing and other business practices, and about trivial losses to individual consumers. They claim that such suits, in reality, are vehicles for enriching plaintiff class action attorneys, not mechanisms for ensuring that important legal rules are enforced or for compensating consumers. In the end, they say, consumers pay for this litigation in the form of increased product and service costs without receiving commensurate benefits.

Manufacturers argue, as well, that Rule 23(b)(3) enables massive product defect suits that rest on dubious scientific and technical evidence. Because of the huge financial exposure associated with these mega-lawsuits, manufacturers say they feel forced to settle damage class actions, rather than contest them. The end result, they claim, is to drive good products from the market and to deter investment in developing other beneficial products.

Consumer advocates counter that a prime purpose of Rule 23(b)(3) is to enable just the kind of regulatory enforcement suits—sometimes termed "private attorneys general suits"—that businesses complain about. They say that the public cannot rely on regulatory agencies to adequately enforce consumer protection statutes, because these agencies are often underfunded and sometimes subject to influence by the businesses that they regulate. They also believe that consumers ought to have a vehicle for obtaining compensation for losses that result from corporate wrong-doing, even when these losses are small. In addition, they support mass product defect litigation, which they believe provides a powerful incentive for businesses to invest in designing safer products.

But some consumer advocates and other public interest lawyers worry that, in practice, Rule 23(b)(3) enables otherwise good cases to produce bad *outcomes*—settlements that they say serve plaintiff class action attorneys and business defendants better than they serve consumers and the general public.[4] As a result, these advocates argue, injured consumers get less compensation than they deserve and corporations do not pay enough in damages to deter future misconduct.

All these arguments revolve around questions of what injuries ought to be compensated and what behaviors ought to be deterred. A different argument about the enabling effects of Rule 23(b)(3) concerns the right to individualized consideration of one's legal claims. When class members' claims involve such small losses that they could not realistically be pursued through individual litigation, few people worry that class actions abrogate class members' rights to individual treatment of those claims. But legal scholars and some personal injury lawyers believe that creating a single product liability class action, by combining individual cases claiming significant damages, results in lawyers and courts running roughshod over individual litigants' rights.

A. THE SCOPE OF CLASS ACTIONS

The public debate about the sorts of class actions that should and should not be enabled by Rule 23(b)(3) generally takes the form of a critical discussion of specific cases. The hundreds of pages of testimony before the Advisory Committee on Civil Rules in 1996 and 1997 are peppered with references to *Georgine*[5] and *Ahearn*,[6] the two controversial settlements of asbestos workers' future claims; to the *GM Pick-Up*[7] and *Ford Bronco*[8] cases, where discount certificates for new vehicle purchases were offered to settle claims that truck-owners had suffered a monetary loss because of allegations of defective design; to the airline price-fixing case, where ticket purchasers were offered discounts on future travel; and to more esoteric cases, even including one class action over catfish processing![9] It is not surprising that lawyers and judges, whose professional lives are devoted to specific cases, would rely on their case-based experience when assessing claims about class action litigation. But if each decisionmaker is thinking about a different type of case when he or she decides about a proposed rule change, and if no one of those cases is representative of the broad scope of class action activity, then rule reform could bring unanticipated results because *any rule change will apply across all class actions brought under that provision.*[10]

What kinds of class actions would be affected by any rule change? Public policymakers and those who testify before them have little data available to answer that question. For various reasons (which we discuss in Appendix B), there is no national registry of class action activity. In the 1990s, at the request of the Advisory Committee, the Federal Judicial Center (the research arm of the federal judiciary) conducted an empirical analysis of class actions in the federal district courts. But that study was limited to four federal district courts (out of 94 in the federal system) and dealt with cases terminated in 1992–1994.[11] Some observers thought that those data were too limited to use as a basis for policy reform. Although the Advisory Committee could propose revisions only to the *federal* class action rule, many participants in the debate over rule revision be-

lieved that any federal revisions would inevitably lead to similar revisions in state class action rules; hence, these individuals wanted to bring information about state class actions to the Committee's attention as well.

Can we develop a better picture of the scope of class actions? In the absence of comprehensive court record data on class actions, we conducted a series of searches of electronic databases to find evidence of class action activity—case filings and settlements reported by the general and specialized news media, judicial decisions in state and federal courts, virtually any news that could be specifically traced to a class action lawsuit in the past several years. More precisely, we turned to LEXIS, an authoritative source of all published federal and state court appellate opinions and selected federal trial court opinions; NEXIS, a database comprising general newspapers for virtually every metropolitan area in the United States, as well as news magazines; and a subset of NEXIS, comprising all major *business* news media, and the *Wall Street Journal* database, which together form what we term our "business" database.[12] We developed a method for searching these databases to find reports of class action lawsuits, eliminating duplicate reports of the same lawsuit, and recording information about the lawsuits, which we describe in detail in Appendix B. None of the databases provides a comprehensive report of all class action activity in the United States, and each reflects the preferences of its creators—reporters who choose to report only certain news, judicial opinion archivists who report only some decisions. Together, however, these data help us to paint a broad-brush picture of the class action landscape thirty years after the adoption of Rule 23.

The data tell us that *the world of class actions in 1995–1996 was primarily a world of Rule 23(b)(3) damage class actions*, not the world of civil rights and other social policy reform litigation that John Frank tells us the 1966 rule drafters had in mind.[13] The data also tell us that the landscape of class actions probably looked different to judges who were deciding cases, ordinary newspaper readers, and business persons (see Figure 3.1). Civil rights cases accounted for 14 percent of reported judicial opinions and 12 percent of the cases reported by the general media, and only 4 percent of cases reported by the business press (which we might expect to be less interested in this type of litigation). Other rights-based suits accounted for 11 percent of the reported judicial opinions and the general press, and 1 percent of the business press database. Securities class actions were a major preoccupation of the business community in 1995–1996, accounting for close to 40 percent of cases reported by that press—not surprising at this time, when Congress had just adopted legislation to rein in securities cases. Securities cases figured less prominently in the general press and in reported judicial opinions, accounting for about one-fifth of the cases in each. Tort cases accounted for only 9 percent of reported judicial opinions, but accounted for 14 percent of cases reported by the general press and almost 20

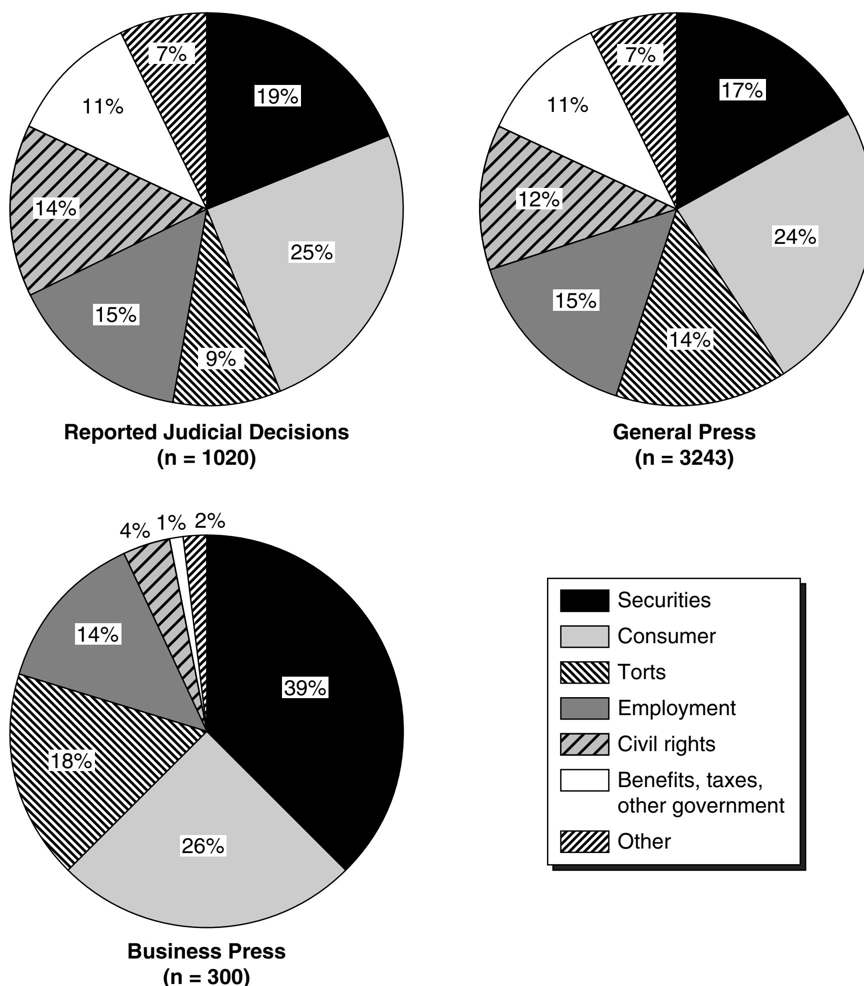


Figure 3.1—Surveying the Class Action Landscape (1995–1996)

percent of the cases reported by the business press. Consumer cases accounted for about 25 percent of each of the three databases.

Rule 23(b)(3) cases are generally brought against corporations, and it is the business community that has been the source of the lion's share of criticism of class actions over the years. To more precisely discern the contours of the class action landscape as it appears to America's businesses, we next look solely at cases brought against business defendants (see Figure 3.2). When we exclude cases with other types of defendants, the numerical significance of consumer class actions is underscored. Roughly one-third of cases with business defen-

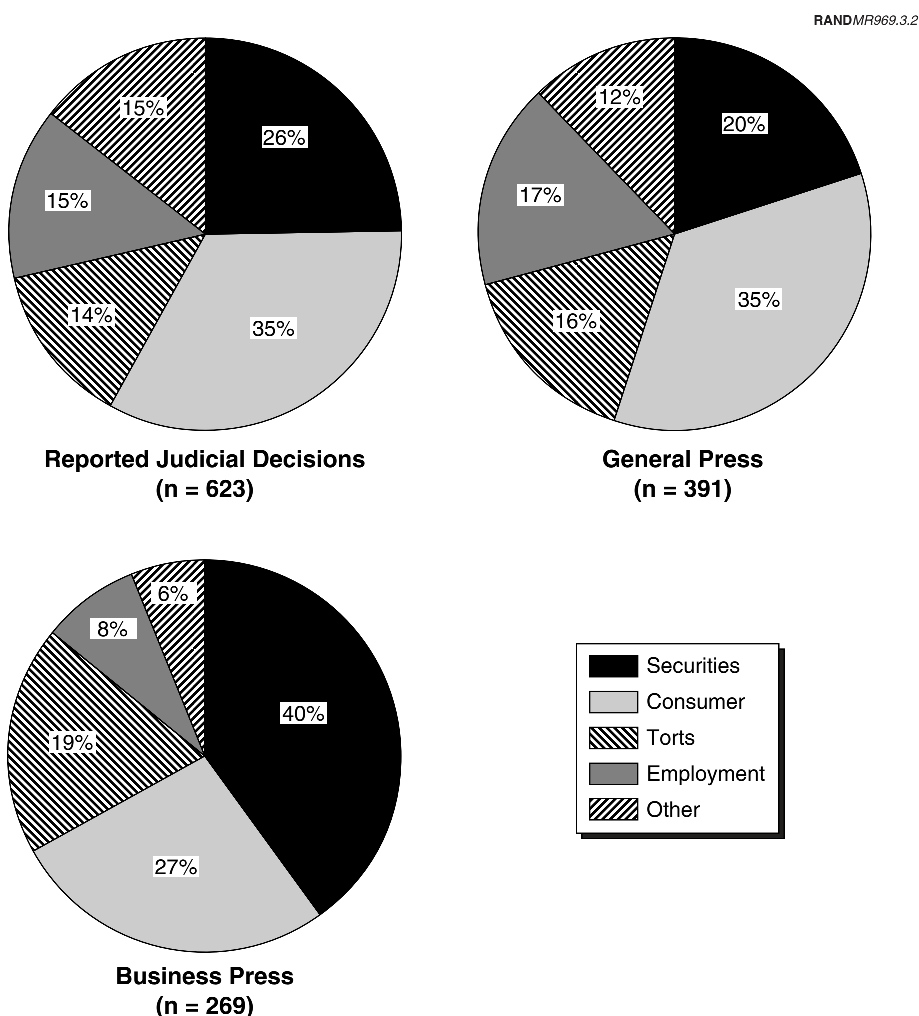


Figure 3.2—Distribution of Cases Against Corporate Defendants (1995–1996)

dants that were reported in all three databases arose out of consumer transactions outside the securities domain.

Figure 3.3 provides detail on the kinds of transactions that give rise to consumer class actions. Two-thirds of the consumer cases resulting in reported judicial opinions involved either allegations of improperly calculated or excessive fees or more general allegations of "fraudulent business practices." A much smaller fraction (13 percent) involved charges of antitrust violations. "Fee cases" comprise claims concerning charges by service providers, including disputes over computer services' billing and television cable company late fees; ATM, credit

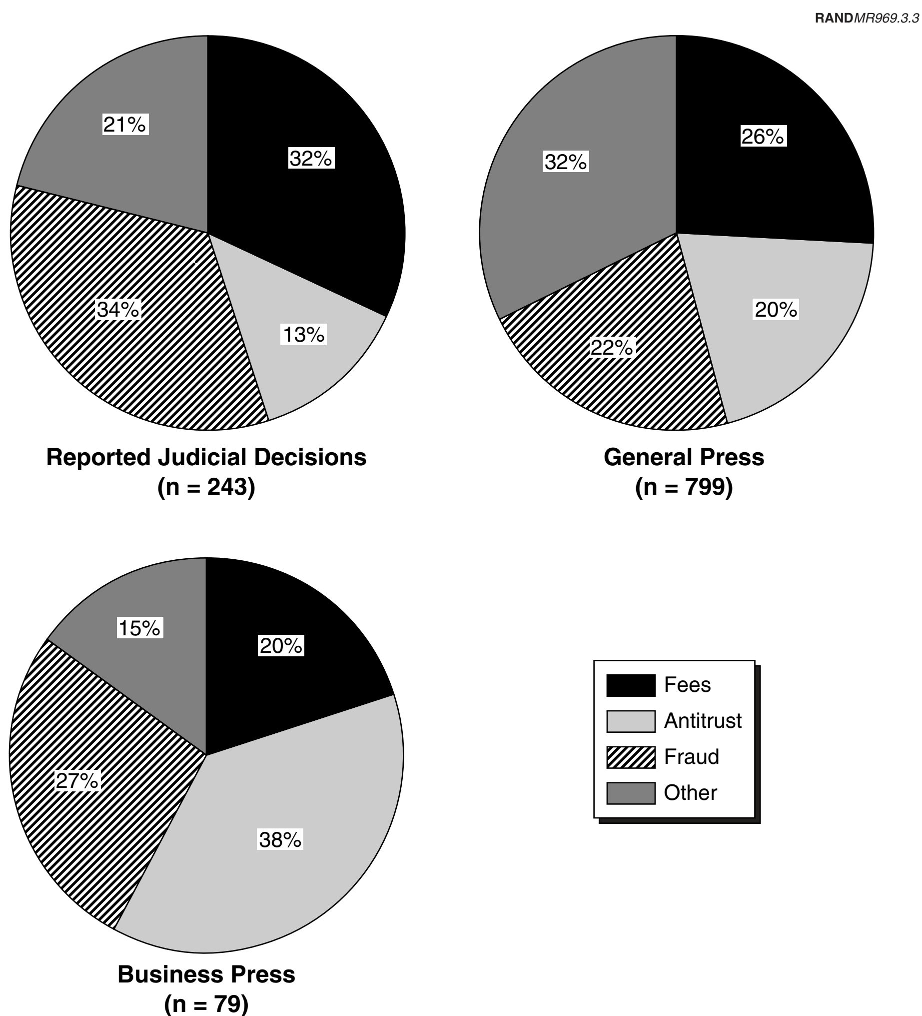


Figure 3.3—Consumer Class Action Cases (1995–1996)

card, and other banking fees; insurance premium calculations (for everything from automobile accident insurance to insurance tied to mortgages and installment credit purchases); and airline and other travel industry charges. These cases are generally brought on behalf of individual consumers. "Fraud" cases comprise claims alleging deceptive sales practices, false advertising, and deceptive labeling. The "antitrust suits" we identified were primarily private class action suits. However, there is often public involvement in these suits, because some follow on the heels of state attorneys' general investigations and legal actions, and others attract the attention of attorneys general, who may then pursue public actions. These cases may be brought on behalf of individual

consumers, professional service providers, or small businesses or corporations. (The "other" cases shown in the figures are a miscellany of suits alleging unfair trade practices and other contract-based claims, brought mainly by professional service providers and businesses rather than individual consumers.)

The general and business press present a somewhat more divided picture of consumer class action litigation. Antitrust cases are prominent in business reporting, followed by cases alleging fraud and improper or excessive fees. Consumer class actions reported by the general press are fairly evenly divided among antitrust, fraud, fee, and other cases (see Figure 3.3).

Consumer class action activity does not show up as prominently in the Federal Judicial Center's 1995 report on class actions.[14] Although the fact that the FJC relied on court records while we used other sources might be expected to produce some differences in results, we think that another important explanatory factor is that our data include class actions filed in state courts as well as federal courts. Newspapers and news magazines did not consistently report the jurisdictions where class actions were filed, so we could not use those databases to determine the division of class action activity in 1995–1996 between state and federal courts. LEXIS reports federal court decisions more comprehensively than it reports state court decisions. By adjusting for these reporting differences, however, we could get a rough approximation of the division of state and federal class action activity; as shown in Figure 3.4, we found that almost 60 percent of reported decisions in 1995–1996 arose in state courts.

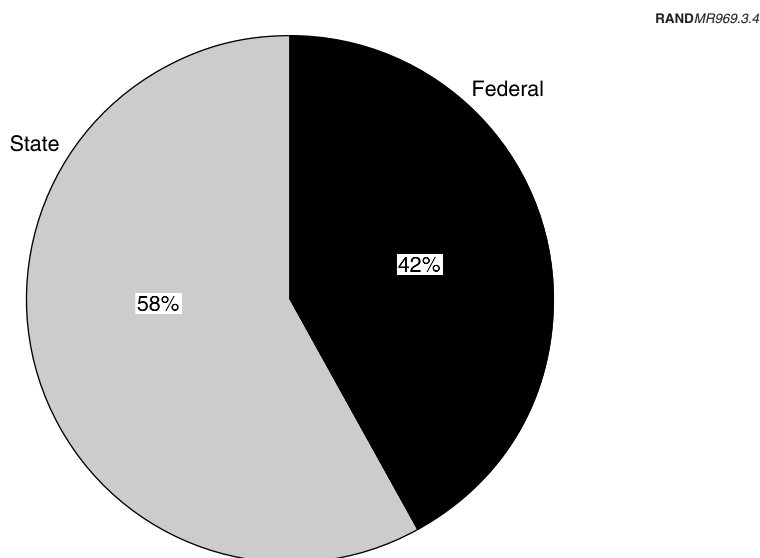


Figure 3.4—Federal and State Division of Class Action Activity (1995–1996)

A comparison of the state and federal judicial decisions reported in LEXIS in 1995–1996 suggests some important differences in the types of class actions brought in federal and state courts (see Figure 3.5). Consumer cases, citizens' rights cases, and tort cases accounted for larger fractions of reported state court decisions; securities lawsuits, employment, and civil rights cases accounted for larger fractions of the reported federal court decisions. Consumer cases accounted for half of all reported state judicial decisions in class actions against business defendants, and less than one-third of the reported federal judicial decisions. Fee cases comprised almost half of all reported state court consumer cases; fraud cases comprised the largest fraction of reported federal judicial decisions. Hence, the federal judge- and lawyer-members of the Advisory Committee may have had a distorted picture of the universe of class actions that

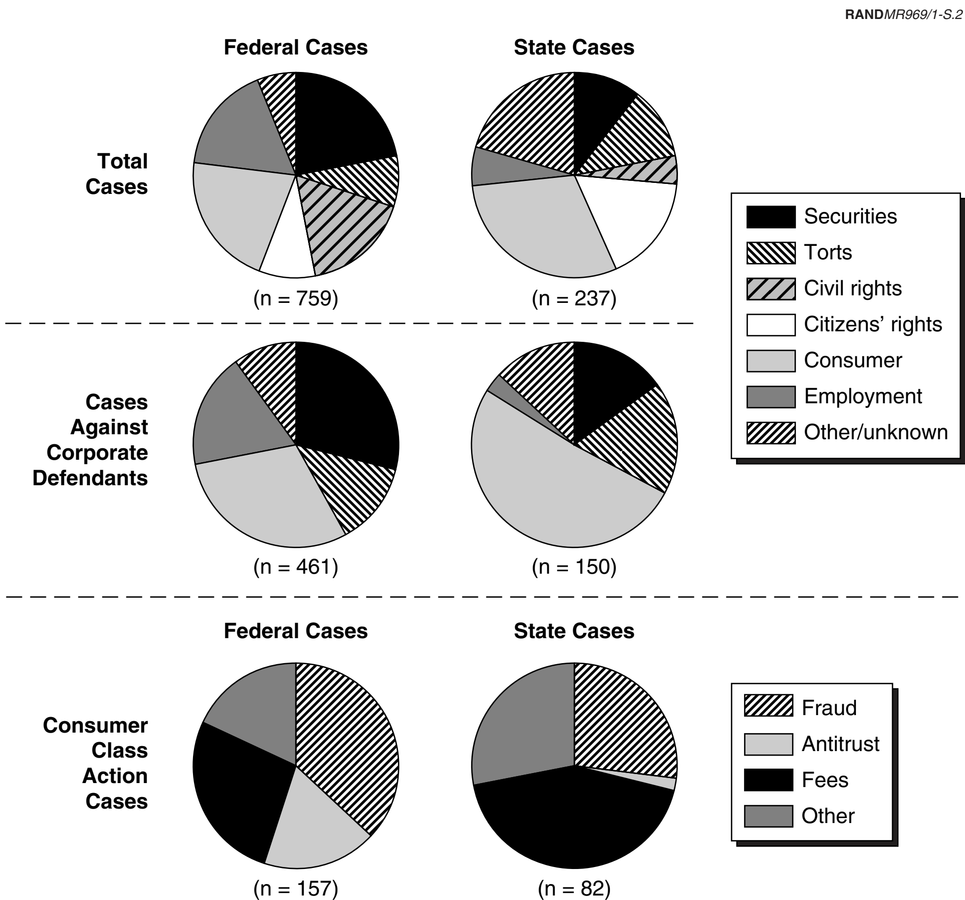


Figure 3.5—Distribution of Cases Within Federal and State Courts (Reported Judicial Decisions)

would be affected directly (federal cases) or indirectly (state cases) by any rule changes.

To test the consistency of our findings over time, we replicated our database compilation and analysis for 1996–1997. (Because of resource constraints, we collected less detailed information about this period.) We found a larger number of class actions resulting in reported judicial opinions and covered by the general press, compared to the previous year. Consumer cases accounted for a somewhat larger fraction of class actions in all three databases than they did in the previous period; the data also suggest that the proportion of employment cases increased from the previous year (see Figure 3.6). Among consumer cases, it appears that a larger fraction involved allegations concerning fees in the more recent year (see Figure 3.7). The reported judicial decisions suggest that the increase in proportion of fees cases occurred in both federal and state courts (see Figure 3.8). Because the reported decisions shown here are by the *appellate* courts, year-to-year differences may reflect changes that took place at the trial court level some time earlier. Differences in press reports may reflect shifts in the interest of reporters rather than real changes in the pattern of class action activity.

A persistent claim among class action critics is that plaintiff attorneys “shop” for judges who are more favorable to class actions, and therefore more likely to certify cases; the anecdotal wisdom is that state judges in the Gulf States are more favorable towards class actions. We ordered states according to the number and rate (i.e., number per 100,000 population) of class actions we found among reported judicial decisions and covered by the general press (see Figures 3.9 and 3.10). As we would expect, states with larger populations—California, Florida, Illinois, New York, Ohio, Pennsylvania, and Texas—were among the highest-ranked states by total number of class actions. (Rankings also differ depending on whether we use reported judicial decisions or the general press database, probably reflecting both differences in reporting criteria and differences in press coverage across states.) But when we consider the *rate* of reported class actions some surprises appear: Alaska, the District of Columbia, and Delaware appear among the top five in the reported judicial decisions, and Alabama makes it onto the 1996–1997 top five list in the general press database.

Tables 3.1 and 3.2 provide explanation for these rankings. Some types of cases are particularly prevalent in certain jurisdictions. For example, Delaware leads in the rate of securities class actions in both databases, because it is the place of incorporation for many businesses and has long been a popular venue for business litigation. Louisiana leads, by number *and* rate, in tort class actions

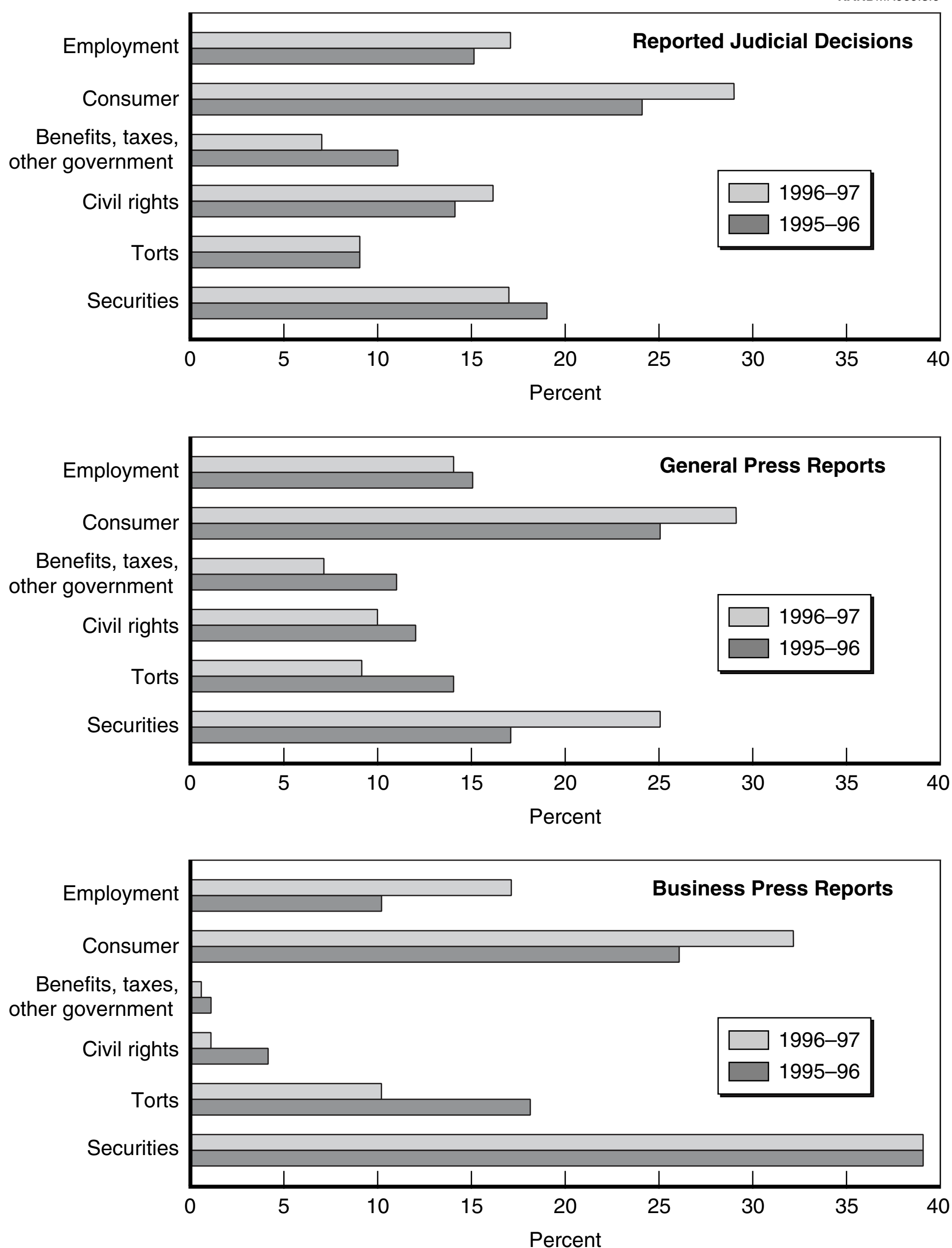


Figure 3.6—Class Action Activity from Year to Year (1995–96; 1996–97)

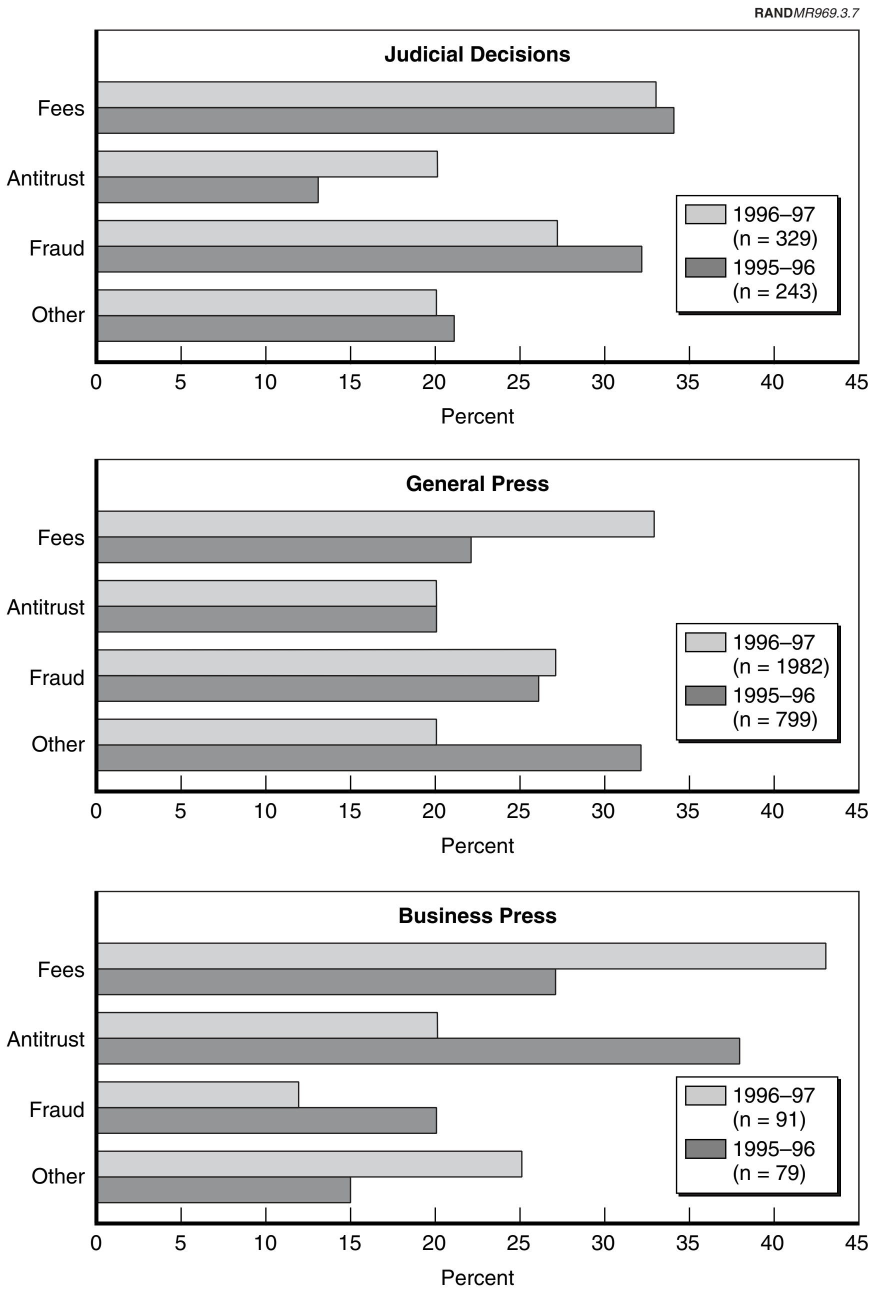


Figure 3.7—Consumer Cases from Year to Year (1995–96; 1996–97)

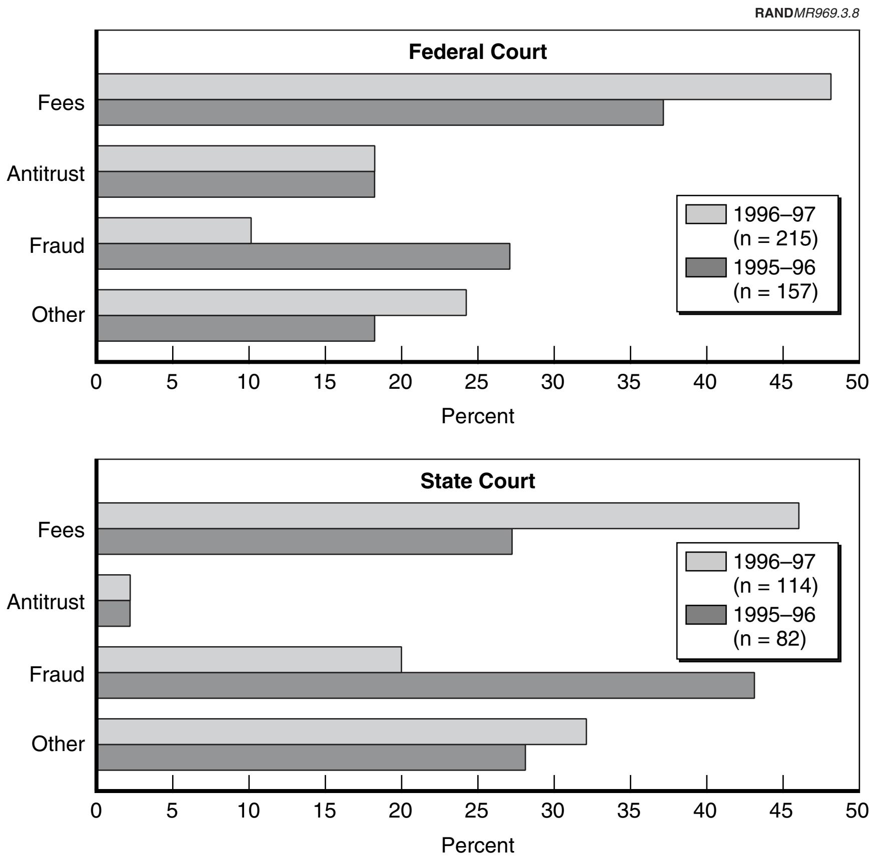
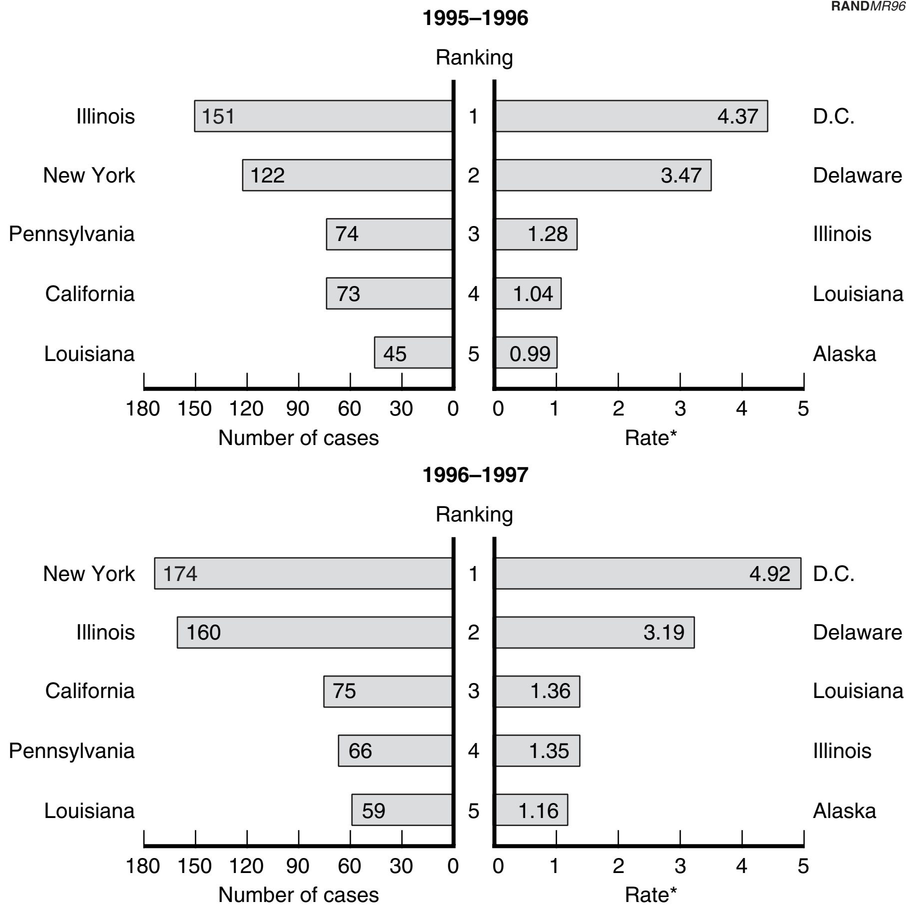


Figure 3.8—Reported Judicial Decisions (1995–96; 1996–97)

that resulted in reported judicial decisions and is among the top five in the tort area, by number and rate, in the general press database. The fact that many petrochemical factories are located in that state, stimulating considerable toxic exposure litigation, probably helps explain these rankings. Other rankings are less easily explained: Alabama was among the top three states, by number and rate, in consumer class actions that led to reported judicial decisions in both time periods and among the top five, by number and rate, in consumer class actions covered by the general press in 1996–1997.[15] Later in this chapter, we discuss how lawyers' choices of where to file cases affect class action litigation dynamics.



NOTE: *Number of cases per 100,000 population.

Figure 3.9—Hot States for Class Action Cases (Reported Judicial Decisions)

B. IS THE NUMBER OF CLASS ACTIONS GROWING?

Contemporary critics of class actions claim that the number of class actions has grown significantly in the past few years. An increase in class action litigation, by itself, might not justify reforming Rule 23, since more class action lawsuits could simply reflect a surge of legitimate suits. But some policymakers might regard a constant level of class action litigation as demonstrating that reform was unnecessary—the familiar "if it ain't broke, don't fix it" rule—and arguments about trends in the number of class actions have been a feature of the controversy over class actions for the past three decades. Hence, the question

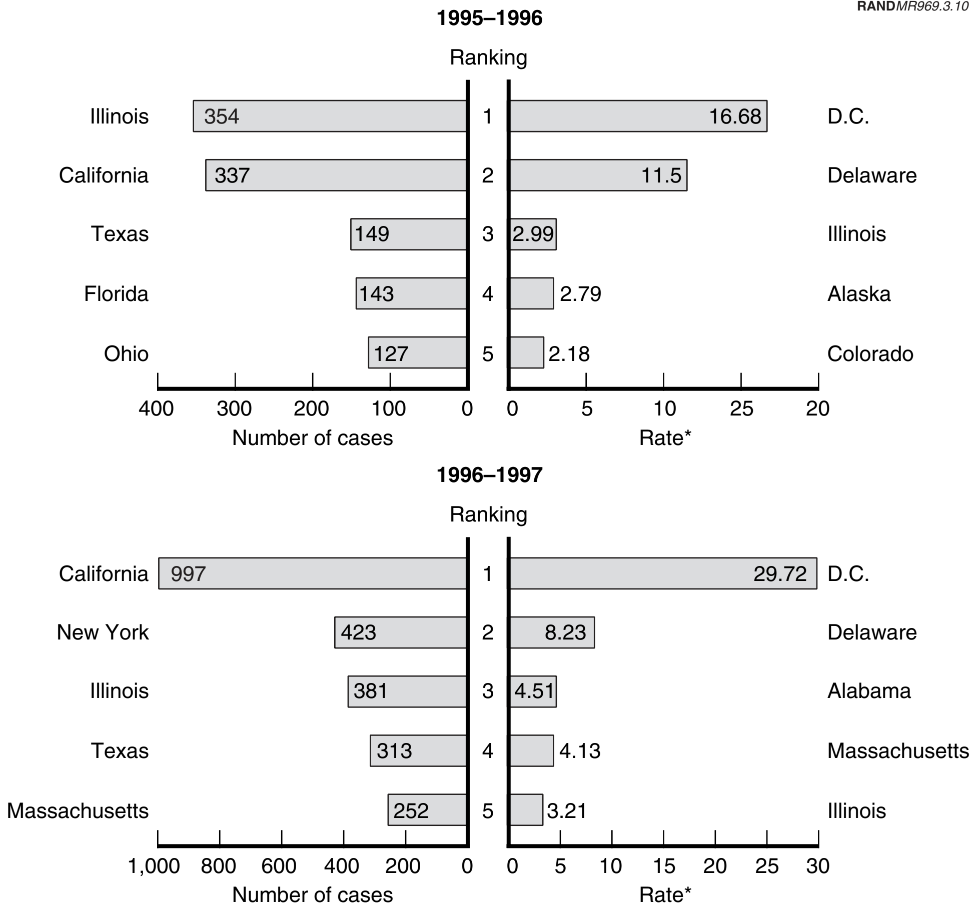


Figure 3.10—Hot States for Class Action Cases (General Press)

of whether there has been a surge of class action activity recently is of some interest.

Our data search did not provide quantitative data for determining whether class actions are growing in number or whether the distribution of class actions by case type has changed in recent years, because we only compiled data for two years. Our best information on litigation trends is *qualitative,* and is based on the interviews we conducted at 15 major corporations (mostly *Fortune* 100 companies) and a dozen plaintiff law firms with nationwide practices.[16]

We conducted interviews at automotive, chemical, financial service (banks, life insurance, personal and commercial property and casualty insurance), petro-

chemical, and pharmaceutical corporations. In all but one of these interviews, corporate representatives claimed that their caseloads of "putative" class actions (cases where plaintiffs had requested or were expected to request class action certification) had risen significantly over the past three to five years. Most of these corporate representatives told us that, while five years ago they might have expected to defend themselves in at most a couple or a half-dozen class action lawsuits, they were now defending one or two dozen. A few large corporations reported as many as 60 pending putative class actions in 1997; one reported as many as 100 in 1998.[17] The largest numbers of class action lawsuits were reported by those in the financial services industry.

Table 3.1

Hot States for Class Action Cases by Case Type (Reported Judicial Decisions)

1995–1996

Consumer		Torts		Securities	
Number	Rate*	Number	Rate*	Number	Rate*
Illinois 61	D.C. 0.73	Louisiana 15	Louisiana 0.35	New York 53	Delaware 2.22
Pennsylvania 24	Illinois 0.52	Texas 12	D.C. 0.18	Illinois 21	D.C. 0.36
Alabama 15	Alabama 0.35	Illinois 7	Alaska 0.17	Pennsylvania 21	New York 0.29
New York 14	Connecticut 0.21	New York 7	Delaware 0.14	California 18	New Hampshire 0.26
California 13	Rhode Island 0.2	Pennsylvania 6	Alabama 0.09	Delaware 16	Illinois 0.18

1996–1997

Consumer		Torts		Securities	
Number	Rate*	Number	Rate*	Number	Rate*
Illinois 74	D.C. 0.73	Louisiana 20	Louisiana 0.46	New York 59	Delaware 2.36
New York 46	Alabama 0.63	Illinois 8	Hawaii 0.17	California 20	D.C. 0.36
Alabama 27	Illinois 0.63	California 8	Alaska 0.17	Delaware 17	New York 0.32
Florida 25	Delaware 0.55	Pennsylvania 7	West Virginia 0.16	Pennsylvania 13	Rhode Island 0.2
Louisiana 18	Louisiana 0.41	Ohio 6	Rhode Island 0.1	Illinois 12	New Hampshire 0.17

RANDMR969.T3.1

NOTE: *Number of cases per 100,000 population.

Table 3.2

Hot States for Class Action Cases by Case Type (General Press)

1995–1996

Consumer		Torts		Securities	
Number	Rate*	Number	Rate*	Number	Rate*
Florida 76	Alaska 1.4	California 49	D.C. 1.72	California 74	Delaware 10.19
Illinois 74	Delaware 1.32	Illinois 45	Colorado 1.01	Delaware 73	D.C. 0.51
California 67	New Mexico 0.99	Colorado 38	Wyoming 0.75	Texas 60	Massachusetts 0.45
Ohio 43	D.C. 0.91	Louisiana 20	Oregon 0.62	Massachusetts 27	Texas 0.32
New York 30	Hawaii 0.71	Oregon 20	Louisiana 0.46	Georgia 15	Connecticut 0.29

1996–1997

Consumer		Torts		Securities	
Number	Rate*	Number	Rate*	Number	Rate*
Massachusetts 178	Delaware 2.97	California 79	Louisiana 1.69	California 354	Delaware 5.26
California 148	Massachusetts 2.91	Louisiana 74	Indiana 0.57	Illinois 116	Nevada 1.25
New York 124	D.C. 2.88	Illinois 41	Georgia 0.55	New York 86	California 1.11
Illinois 121	South Dakota 2.78	Georgia 41	Alabama 0.5	Pennsylvania 64	Oregon 1.06
Alabama 116	Alabama 2.7	Indiana 33	Illinois 0.35	Georgia 51	Utah 1.06

RAND*MR969.T3.2*

NOTE: *Number of cases per 100,000 population.

Because of the financial stakes of these suits and the legal expenses associated with such litigation, the corporate representatives whom we interviewed regard this growth as highly significant; in some instances, the corporations perceive the need to be so great that they have established special "class action defense practice groups" within their corporate legal departments. (Similarly, some law firms that serve corporate clients now advertise that they have specialized class action practice groups.) The representatives of chemical and pharmaceutical manufacturers reported fewer class action lawsuits, but reported instead hundreds and thousands of product defect claims, brought in large consolidated litigations—what one corporate lawyer graphically termed a "Bataan death march."

Corporate representatives told us that they were now being sued more frequently in state courts than in federal courts. They said that many of the class action lawsuits brought against them were filed by plaintiff class action firms that had previously concentrated on securities litigation. These corporate representatives believed that the recent federal statute that restricted federal securities class actions had encouraged class action practitioners to broaden their practices to include more diverse consumer and product defect class action litigation.

Because claims of increasing litigation figure in the policy debate over class actions, we were mindful of the fact that corporate representatives had an interest in depicting their caseloads as growing. Hence, we would have been reluctant to place too much weight in these qualitative reports of growth had not they been confirmed by plaintiff class action attorneys. We interviewed attorneys at eight leading national class action firms, including those that are most widely known. Generally these attorneys did not share information on the number of class actions they had pending, but most said that their caseloads were growing. One attorney noted that the number of lawyers in his firm had increased about 60 percent in the last four years. Another told us that he was "turning away" ten potential lawsuits per month. ("They go elsewhere," he said.) Another said he could take only "one-tenth" of the cases that were referred to the firm by state attorneys general offices and consumer groups.[18]

Several of the plaintiff class action attorneys whom we interviewed noted that they were filing more state than federal class actions, in response to perceived animus toward class actions on the part of federal judges. Several class action attorneys whose firms had previously focused on securities class actions told us that they were now turning their attention to other consumer lawsuits. Some of these attorneys cited the recent federal securities class action reform legislation as the incentive for them to broaden their practices; others said they had simply come to recognize that the skills they had learned in prosecuting securities class actions could be put to use on behalf of other consumers.[19] A number of interviewees observed that more firms were moving into the class action field, increasing competition.

We also interviewed four personal injury attorneys with national practices who have not historically been associated with class action litigation. All told us that they are increasingly involved in class action or other aggregative litigation. Many of the plaintiff attorneys whom we interviewed said they believe that the trends in their own practices were representative of trends in plaintiff class action and mass tort practices nationwide.

We discussed the evolution of class actions with attorneys in myriad practice settings. In addition to the corporate counsel and plaintiff attorneys noted

above, we talked to outside defense counsel, public interest lawyers, and staff in offices of attorneys general. Although these lawyers had different perspectives on class action litigation, they had a shared sense that class action practice is changing rapidly, and that class actions are at "the cutting edge" of civil litigation. As one practitioner told us: "The ground is moving under us as we speak."

The qualitative data we collected in our interviews suggest that damage class actions are growing in number and diversity. Moreover, the perception of growth is widely shared among representatives of large corporations in different sectors of the economy and among lawyers in different practice areas. However, there are not sufficient caseload data available publicly to validate the qualitative evidence or the perception.

But the policy controversy over class actions is not just a controversy over numbers and growth. The business community argues that what is growing is the number of nonmeritorious suits that are filed. Others dispute this. But many—on all sides of the controversy over class actions—worry that the *outcomes* of class action lawsuits do not serve class members and the public well. To understand these twin concerns, we must look at how Rule 23(b)(3) shapes plaintiff attorneys' incentives to file class actions, how it influences plaintiffs' and defendants' decisions to settle cases and the amount of money paid out by defendants, and how, in turn, the likelihood of settlement and the financial rewards to class action attorneys drive filing practices. As we shall see, both the "virtues" and the "vices" of class action practice derive from the incentives created by the rule as it is implemented in federal and state courts around the country.

In analyzing incentives, it is helpful to distinguish between cases that arise initially as *representative* actions, brought on behalf of a large, undifferentiated group of individuals, and cases that arise initially as individual litigation and are subsequently *aggregated.* The former are what were traditionally seen as damage class actions, and are epitomized by securities fraud suits and consumer class actions. The latter are what the 1966 Advisory Committee warned against certifying as damage class actions; they are epitomized by mass personal injury and property damage suits—so-called "mass torts." While these two types of damage class actions share many features, they are distinguishable by the nature of the claims underlying them, the organization of the lawsuits themselves, and—to some extent—by the characteristics of the practices of the plaintiff attorneys who bring them.[20] Too often, protagonists in the class action debate assume that what is true of the first type of class action is necessarily true of the second. As we shall see, this is not the case. Whatever social policy problems

are raised by damage class actions, solutions to them may differ for these different types of lawsuits.

Our discussion of how procedural rules shape litigants' and lawyers' incentives—and how those incentives, in turn, shape damage class action practices and outcomes—draws on the interviews we conducted with more than 70 corporate representatives, outside defense counsel, class action and mass tort plaintiff attorneys, and public interest and government attorneys. (Appendix C describes how we selected individuals for these interviews.) The discussion also draws on the vast scholarly and practitioner commentary on damage class actions and on our own previous research on mass tort litigation.

C. THE TRADITIONAL PARADIGM: REPRESENTATIVE ACTIONS FOR MONEY DAMAGES

Typically, representative class actions for money damages arise when someone believes that a violation of statutory, regulatory, or case law has caused economic harm to a large number of individuals or entities. This person could be a stockholder who finds herself with a suddenly less valuable portfolio, or a consumer who believes that he has been overcharged for a transaction or service, or a small business that believes that a competitor has engaged in unfair practices. If the loss is large and apparent to the individual consumer or business, that party may seek legal advice and, eventually, bring an individual lawsuit. But if the loss is small, it is less likely to be recognized by those affected, and it is less likely that anyone will come forward to claim compensation even if many individuals or businesses are affected by it. Most individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business. Even if they believe that there is something inappropriate about a transaction, individuals are likely just to "lump it," rather than expend the time and energy necessary to remedy a perceived wrong.[21]

Moreover, in some circumstances, courts have recognized grounds for claims that are inherently collective, rather than individual. For example, in securities law, the "fraud on the market" theory asserts that when a publicly traded corporation engages in behavior that artificially inflates or deflates the value of its stock, it can be held liable for the excess costs or losses incurred by those who purchased or sold stocks during the period after the corporation engaged in this behavior and before the behavior was brought to a halt.[22] This sort of collective harm is unlikely to be detected by an individual stockholder, whose involvement in actual purchases and sales may be minimal.

1. The Class Action as a Tool for Compensating Small Losses and Enforcing Regulations

In theory, individual consumers and small businesses should be able to rely on public agencies charged with enforcing statutory law, such as the Securities and Exchange Commission (SEC), Federal Trade Commission (FTC), and state attorneys general, to take action against businesses that violate legal rules.[23] But, in practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations.

A series of articles on outbreaks of illness due to *salmonella*, *cyclospora*, and *E. coli* contamination of food products, published by the *New York Times* in 1998, illustrates this problem.[24] Wrote the *Times* reporter:

> Federal officials acknowledge they have paid little attention to farms and many small-scale processors because they have been overwhelmed by their responsibilities. The Food and Drug Administration has only 700 inspectors for 53,000 processors of everything from canned soup and [sic] frozen seafood, meaning, on average, only one inspection every 10 years.[25]

The reporters quoted one California food processing company representative—whose facility had been found wanting—as saying state regulators had been "pretty lenient with us." And they quoted the responsible state regulator as saying "there's a lot out there we haven't seen."[26] The head of the consumer division in a state attorney general's office whom we interviewed echoed this observation, saying "no government agency has resources to bring [all] the cases that should be brought."

Regulatory agencies' decisions may be constrained also by political influence. The same government attorney who complained of scarce resources for enforcement also told us that his office's decisions on enforcement were influenced by the political priorities of its head, who was an elected public official.

In addition, public officials generally do not bring actions that secure compensation for those who are affected by such wrongdoing. For example, SEC Chair Arthur Levitt has noted that private litigation is "the primary vehicle for compensating defrauded investors."[27]

As a consequence of all these factors, many believe that private class actions add an important dimension to regulatory enforcement. As Levitt put it when testifying before the U.S. House subcommittee considering securities class action reform in 1995:

> Private actions. . . provide a necessary supplement to the commission's own enforcement activities by serving to deter securities law violations. Private ac-

> tions are crucial to the integrity of our disclosure system because they provide a direct incentive for issuers and other market participants to meet their obligations under the securities laws.[28]

But the notion that Rule 23(b)(3) was intended to be used for regulatory enforcement was sharply contested in the 1990s debate over damage class actions. Two members of the 1966 Advisory Committee that drafted current Rule 23(b)(3) have disputed this publicly. In testimony before the Advisory Committee in 1996, William T. Coleman, Jr. said:

> I respectfully submit that back in 1966, [regulatory enforcement] was not an intended purpose of Rule 23(b)(3). If there is interest in deputizing all attorneys everywhere to enforce our laws, that's a matter that should be decided by Congress, not through the class action provisions in the Federal Rules of Civil Procedure. The courts' tolerance for this vigilante-style use of class actions is a root cause of the abuses that must be corrected.[29]

Similarly, in testimony before Congress in 1998, John Frank said:

> . . . the class action rule, *wholly without regard to its original purpose,* has become something of a device for social administration, which should never have been the product of the rules at all. These are matters which should be handled by the Congress and by the administrative agencies, and not by attempted efforts to govern various parts of the economy by lawsuits. . . (Italics added.) [30]

Nonetheless, there is evidence that at least some of those involved in the 1966 process had inklings that the rule sometimes might be used as a substitute for administrative process. For example, Benjamin Kaplan, the Advisory Committee's reporter (writing about whether individuals with small claims ought to be required to opt in affirmatively to class actions) observed:

> [Requiring an opt-in procedure] would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. *For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government.*[31] (Italics added.)

Moreover, scholarly commentary on class action litigation suggests that the notion of using collective litigation for regulatory enforcement arose long before the 1966 Advisory Committee's deliberations. Writing in 1941, Harry Kalven and Maurice Rosenfield said:

> Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This re-

> sult is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.[32]

Kalven and Rosenfield went on to note that administrative law is one answer to this problem:

> Administrative law removes the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation.[33]

But administrative law and private class actions each had weaknesses, as well as strengths, the authors concluded. Hence, "The best solution . . . is to draw upon both systems of enforcement, permitting both to develop side by side to check and complement each other."[34]

In sum, the historical record includes evidence for and against the notion that regulatory enforcement is an appropriate objective of damage class actions.

2. The Class Action Attorney as "Private Attorney General"

If regulatory enforcement *is* a goal of damage class actions, then the question is: Who will bring this litigation? If each individual or entity is harmed only a small amount—even though the aggregate harm is large—or if individuals are not aware of what corporations may and may not do under the law, none is likely to come forward.

One alternative is to turn to nonprofit consumer advocacy groups and other public interest lawyers to monitor corporate behavior, and ask them to identify legal violations, locate individuals who have been harmed by these violations, and bring class actions on behalf of all those consumers or businesses affected by the behavior. And, indeed, organizations such as the American Civil Liberties Union (ACLU), NAACP, and the National Organization for Women (NOW) do bring class actions. But, in practice, most public interest organizations also have insufficient resources to engage in systematic monitoring of corporate behavior and extensive class action litigation.

As a result, over the years, private attorneys have taken on the role of spotting potential legal violations, identifying individuals or businesses to serve as representative plaintiffs, and filing class actions on behalf of a group of similarly situated individuals or businesses. These attorneys' incentive is the fee that they will earn if their suit is successful and, perhaps, a desire to assist the wronged and deter future wrongdoing. As a result of judicial rulings (and, in some instances, statutory provisions), plaintiff attorneys who win class actions can

expect to obtain either a percentage of the total sum paid by defendants or their actual hours and expenses, sometimes multiplied by a number intended to reflect special features of the litigation.[35] If they lose, however, these attorneys have to cover their expenses out of their own pockets, and will receive no compensation for their time.

Public interest lawyers who are successful in winning class actions can earn these same fees, but they too have to incur the risk of going uncompensated—and having to find some other means of paying expenses—if they lose. Generally supported by limited private contributions, most nonprofit public interest organizations do not have the financial wherewithal to incur such risks frequently. Unlike public interest attorneys, private class action lawyers who have amassed some financial capital are able and willing to assume the risk of losing.

Relying on private attorneys to bring litigation on the public's behalf has important consequences. Unlike other attorneys, who expect clients to come to *them,* class action attorneys must identify potential lawsuits. Hence, it is advantageous for them to specialize in particular types of litigation, for which different kinds of marketplace monitoring are appropriate, and to develop monitoring routines. As a result, some firms specialize in securities class actions, which requires understanding and following stock market dynamics,[36] while others specialize in employment litigation or other areas of the law. Increasingly, these attorneys use regulatory, media, and other electronic databases to identify instances of possible corporate wrongdoing. Specialization and ever-more-available information on financial markets, business transactions, and corporate decisions improve class action attorneys' ability to detect situations that might be attractive grounds for litigation. The attorneys may be spurred on, as well, by a desire to spread the costs of developing a particular line of litigation by finding opportunities to litigate multiple class action lawsuits alleging the same type of harm by different defendants or in different jurisdictions. Success in previous suits provides the wherewithal for exploring the potential for new suits, so the most successful firms are in the forefront of identifying new opportunities for litigation. They are also most able to accept the risks of litigating new issues, by testing the boundaries of existing law. In sum, the financial incentives provided by damage class actions to private attorneys tend to drive the frequency and variety of class action litigation upwards.

The key public policy question is whether the entrepreneurial behavior of private attorneys produces litigation that is socially beneficial. Whereas *public* attorneys general may be reluctant to bring meritorious suits because of financial or political constraints, *private* attorneys general may be too willing to bring *non*meritorious suits, if these suits produce generous financial rewards for them. The goal of class action law is getting the balance right between attorneys' private incentives and the public purposes of class actions.

3. The Legal Framework for Damage Class Actions

A. Filing Suit

Plaintiffs alleging violations of federal statutes, such as the Securities and Exchange Act, the Magnuson-Moss Warranty Act,[37] and the Federal Fair Debt Collection Practices Act,[38] have a right to bring their class actions in federal as well as state courts. Generally, however, plaintiffs alleging violations of state law may bring suit in federal court only if they are citizens of different states than the defendants.[39] In order to protect the federal courts from being inundated by lawsuits that could otherwise be brought in state courts, Congress also sets a monetary threshold for such "diversity" suits, which is increased over time to keep pace with inflation. Currently, a plaintiff must claim over $75,000.[40] The U.S. Supreme Court has long held that *each plaintiff* in a damage class action must satisfy the monetary jurisdictional limit to file in federal court.[41] This holding has effectively precluded most class actions comprising small dollar claims from being filed in the federal courts, even when the claims add up to more than the legislated threshold.[42]

However, consumers can bring state court class actions for violations of state law. In the 1970s, as states adopted class action rules modeled after Rule 23, and state legislatures and courts articulated pro-consumer class action doctrines, state class actions began to proliferate.[43]

But what happens when a corporation that markets its goods and services nationwide allegedly violates state law in multiple jurisdictions? In an important decision in 1986, the U.S. Supreme Court held that individual states may have jurisdiction over plaintiffs from other states who are joined in a class action brought in a single state.[44] The results of this holding are that California and New York consumers may—to their surprise—find themselves members of class actions brought in Alabama and Mississippi, and that a state judge or jury in Alabama or Mississippi may be asked to interpret California and New York law.

The availability of state courts for nationwide class actions also means that different plaintiff attorneys may file duplicative nationwide suits, naming different representative plaintiffs in different states at the same time. Since state judges normally manage their cases without regard to whether or how similar cases are being filed elsewhere, the potential for duplicative parallel class actions can create a "race to the courthouse." Whichever plaintiff attorney is able to settle a nationwide class suit first will obtain the fees associated with that case; only those who opt out of the class (usually only a small number) may bring suit against the defendant for the same alleged wrongdoing and harms.[45] Plaintiff

and defense attorneys whom we interviewed frequently cited such duplicative class actions as a source of complexity and expense. They also said that duplicative lawsuits create an incentive for a plaintiff class action attorney to step forward to negotiate a settlement with the defendants that may not be in class members' best interests, in order to be the one who claims the fees.

Once plaintiff attorneys identify potential wrongdoing and appropriate representative plaintiffs and file class actions in appropriate jurisdictions, they must conduct investigations to develop more fully the factual basis for the suit. The defendant may seek to have the court dismiss the case out of hand—for example, by arguing that even if the facts alleged by the plaintiff were correct, the defendant would prevail on the law. The defendant may contest the class certification itself, the definition of the class (e.g., its breadth) or other features of the suit, such as the representativeness of the prospective class plaintiffs.[46] When plaintiff attorneys seek certification of a nationwide class action, whether in federal or state court, the defendant may argue that the suit does not satisfy the "commonality requirement" of the rule, because class members' transactions were governed by diverse state laws, or that certification should be denied on the grounds that it will be impossible to manage at trial, because the jury will—in effect—have to assess the liability of the defendant under multiple legal standards.[47]

B. Notifying Class Members

Under Rule 23(c)(2), potential (b)(3) class members must be notified that the litigation is proceeding and be given an opportunity to opt out. In an important 1974 ruling, the U.S. Supreme Court held that *individual* notices must be sent to all individuals who might be members of the class who could be identified with "reasonable effort," and that the costs of the notices must be borne by the representative plaintiff(s), even where this requirement would effectively prevent the class action from going forward.[48] As a practical matter, it is the plaintiff law firm, rather than the representative plaintiff(s), that must front these expenditures—which can total hundreds of thousands of dollars—and assume the risk of not recovering the expense if the defendant prevails. So, strictly applied, this interpretation of the Rule 23(c)(2) notice requirement has the effect of providing an advantage to the well-capitalized, risk-seeking plaintiff class action law firms that have the greatest capacity and the greatest incentive to increase the frequency and variety of damage class actions.[49]

The rule does not specify *when* notice of the pendency of a class action should take place, but the wording of the rule suggests that this should follow soon after certification. The *Manual for Complex Litigation,* the leading reference

book for federal judges, encourages early notice.[50] Such early notice means that at the time they learn of the case, potential class members cannot know how it will be resolved and whether, or how much, they might be recompensed for the alleged harms. If they do not opt out at this stage, they will be bound by the outcome. If prospective class members' claims are very small they are not put at any real risk by this procedure, since without the class litigation they would not be able to gain anything. And, by agreeing to be bound—i.e., *not* opting out—they secure an opportunity to share in any monetary award. On the other hand, in securities and other class action litigation where recoveries might be substantial, early notice requires prospective class members to decide whether to opt out or remain in the class without knowing what the consequences of either strategy will be. Early notice may also pose risks for defendants. Informing the public of a pending class action—for example, if notices are published or broadcast, as well as sent through the mails—may attract media publicity, which may in turn affect stock prices or sales (if a product or service is involved), and attract regulatory attention. Early notice is also likely to lead to duplicative class action lawsuits, filed by other law firms seeking financial opportunities.[51]

C. Resolution

If the judge certifies the class and defendants cannot win a dismissal, they will mount a defense on the facts and law and the case will proceed to a resolution by settlement or verdict. Most of the time, class actions—like other civil lawsuits—do not go to verdict.[52]

When the number of class members can, in theory, be estimated—because it is known, for example, how many shares were traded during the period of the alleged fraud on the market, or how many ATM transactions took place, or how many insurance policies were sold—the plaintiff attorney and defendant can negotiate a settlement of the class action by arriving at a formula to calculate the total damages. Typically, when parties negotiate a compromise resolution of a civil case, the defendant does not admit to any liability but agrees to pay some amount to avoid additional litigation costs and the risk of a large verdict; the plaintiff agrees to accept less than the maximum amount she thinks she might win at trial in order to avoid the possibility of losing entirely or winning less than the defendant was prepared to offer before trial. So, too, when the plaintiff attorney and defendant agree to settle a class action, they arrive at a compromise value for the class members' claims. For example, they may agree that the defendant should pay a specified number of cents per dollar of claimed loss.

In principle, the settlement value of a civil case reflects the strength of the factual and legal claims underlying it, adjusted by such factors as the attorneys' beliefs about the propensities of judges in a particular jurisdiction to rule in favor of civil plaintiffs or defendants, and the sympathy a plaintiff might elicit from a jury, and by the parties' risk preferences. In practice, plaintiff and defense attorneys who are well versed in a particular area of the law frequently settle cases according to "rules of thumb"—for example, in an automobile accident case, the plaintiff will get two to three times the amount of his medical bills, work loss and other documented damages—without too much differentiation on account of the characteristics of the claim.[53] In a widely noted article, Professor Janet Alexander has suggested that plaintiff attorneys and defendants settle securities class actions in a similarly formulaic fashion.[54] Although her analysis has been questioned because of its slim empirical base,[55] her notion that experienced class action litigators, just like other experienced civil litigators would, over time, develop "rules of thumb" for settling financial injury cases seems sound.[56] We might expect that different types of rules would emerge for settling deceptive advertising cases, transaction fee cases, and sales practice cases, but within a "family" of cases we might see similar strategies applied to different class action suits. Such strategies would have the effect of reducing transaction costs for plaintiff attorneys and defendants, but might also result, over time, in increasing divergence between the merits of individual cases and their outcomes. The emergence of easily applied and generally accepted "rules of thumb" might also have the effect of encouraging litigation, since plaintiff attorneys would anticipate that they could reach settlements relatively easily without substantial discovery or pretrial negotiation. This is an example of how the efficiency gains from damage class actions may have enabling consequences.

D. Judicial Approval

In most civil litigation, settlement between the parties is a private affair. But because class actions have the power to *bind class members who are not present in court*—precluding them from coming forward on another occasion to claim a remedy for the harms alleged in the class action lawsuit—Rule 23(e) requires the judge to approve agreements between the plaintiff attorney and defendants to settle the case. Although the rule does not state either the criteria for assessing the settlement or the procedure that the judge should use, standards have been articulated in case law.[57] Settlements must be "fair, adequate and reasonable,"[58] and judges are expected to hold hearings on the fairness of the settlement.

Rule 23(e) requires that class members receive notice of a proposed settlement of the litigation; the notice allows class members (and possibly others) to come

forward to object to the settlement's terms if they so desire. Rule 23(d)(2) also permits judges to require notices of other key steps in the litigation process. Courts have interpreted these rules liberally to allow for combining notice of the certification of a class action with notice of the provisions of a proposed settlement of that class action.[59] In such instances, at the time they decide whether to opt out, class members know the features of the overall settlement, although they may not know precisely how it would affect them.

E. Attorney Fees

In ordinary litigation, we expect the parties themselves to negotiate fee arrangements with their attorneys. But in damage class actions, class members typically do not have an agreement with the class attorney. Under long-established legal doctrine concerning the creation of a "common fund" through litigation, judges decide what fees the plaintiff attorneys will receive.[60] (Some statutes also call for judges to award fees to prevailing plaintiff attorneys.) The underlying principle is that all who share in the fund should share in paying the class attorney, even though they have not entered into any prior agreement to hire and pay this attorney. In deciding what fees should be paid, the court assumes a fiduciary role on behalf of class members. Their interests concerning the amount of fees are adverse to the class attorney's, since the size of the fees will often affect the amount of money available for class members themselves, but they have little ability, as a practical matter, to make those interests known.[61]

Historically, courts have adopted one of two methods for calculating attorney fees in class actions. The "percentage of fund" (POF) method, as its name implies, calls for the judge to set aside a percentage of the dollars paid by defendants for the class attorney. (The judge may make a separate award to cover the attorney's expenses, based on records submitted by the attorney to the court.) For many years, this was the standard method for judges to award fees in common fund cases.

In the 1970s, in response to criticism that the POF method led to excessive fees that were unrelated to the actual effort expended by plaintiff class attorneys, courts turned increasingly to the "lodestar" method, which calls for the judge to award fees that are the product of "reasonable" hours expended and "reasonable" hourly fees.[62] However, in the belief that hours would not always accurately reflect effort, courts often applied a "multiplier" to the product of hours times fees (e.g., twice the product) to reflect the riskiness of the case when the attorney took it on or the quality of the attorney's efforts.[63] Hence, the lodestar method required a higher level of judicial effort than the straightforward application of the POF rule. The judge had to review voluminous

lawyers' records, assess the risk the lawyers faced in taking the case, evaluate the quality of the lawyers' work, and take into account any other factors that should enter into setting a multiplier. Faced with the difficulties of implementing the lodestar approach, courts began in the 1990s to turn back to the POF method for awarding fees in damage class actions.[64]

But the POF method is also subject to interpretation: In deciding what percentage of the fund to award to plaintiff class attorneys, a judge may take into account the effort expended by the attorney (for example, was this groundbreaking litigation or one of a long line of suits, requiring only modest new effort?), the absolute size of the fund (even 10 percent of a large fund amounts to a substantial fee), and other value created by the suit, such as forcing the defendant to change its business practices or provoking regulatory or legislative action. In practice, then, the lodestar and POF methods may converge, as judges rely on both the lawyers' hourly records and their subjective evaluation of the outcome of the class action—sometimes termed the "hybrid" approach. Whatever the approach, it is not uncommon for lawyers to challenge judges' fee awards.[65]

Looking to something other than the monetary fund created by the resolution of a class action as a guide for setting fees may be normatively attractive,[66] but it raises knotty questions for the judge. Assessing the additional value of a consumer class action—where plaintiff class attorneys may assert that the litigation changed defendant practices in important, but hard-to-monetize, ways—may be difficult. In practice, it is simpler for judges to award a standard percentage of the monetary fund created by the class action. The most widely cited standard is 25–30 percent,[67] a figure that most likely derives from the practice of tort attorneys who charge one-third contingency fees. But both plaintiff and defense attorneys whom we interviewed said that the percentage awarded is often much smaller when the settlement fund is large.[68]

Assigning the judge responsibility for awarding fees suggests that the size of the fees should not be a part of any settlement negotiations between the plaintiff attorney and the defendant, and that the fee decision should come *after* a settlement is reached, rather than before. Some scholars have argued, and some judges have held,[69] that allowing the plaintiff attorney to negotiate fees in the course of settlement negotiations would inevitably place the attorney in the position of having to choose between her own financial interests and those of her clients. Defendants could use their ability to determine the size of the fee, the scholars argue, to drive a better overall bargain for themselves, one that would not necessarily be in the interests of class members. But, in 1985, the U.S. Supreme Court upheld the right of parties to include a fee stipulation in settlement agreements, seemingly paving the way for plaintiff attorneys and defendants to include understandings about fees in settlement agreements. If a

judge does not approve such a fee understanding, the Court held, he can refuse to approve the entire settlement agreement under Rule 23(e).[70]

4. The Temptation to Collude

The role of plaintiff attorneys in damage class actions has long attracted scrutiny. The central fear of critics is that these attorneys, unregulated in any real way by clients, and subject to the attractions of large fee awards, will fail to prosecute claims fully and will agree to settlements that better serve their own interests—and the defendants who should be their adversaries—than those of class members. A related fear is that if plaintiff attorneys secure settlements that are financially attractive without having to engage in serious investigation and vigorous prosecution of their claims, then, over the long run, they will bring increasing numbers of nonmeritorious suits, knowing they are likely to benefit from them. Over the long run, a process that encourages and rewards filing nonmeritorious suits and that permits settlement of meritorious suits for less than their true value will undercut the potential deterrence value of litigation and bring the legal system into disrepute.

To understand the fear of collusion, we need to take a closer look at how class action settlement dynamics may tempt plaintiff attorneys and defendants to collude in cases involving small individual losses. If a plaintiff attorney were to take on only one class action lawsuit, it would clearly be in his interest to pursue that case to its maximum advantage, taking into account the costs and risks of litigating, thereby simultaneously serving his own and the class members' interests. Similarly, the defendant contesting such a class action would have every reason to properly assess its liability exposure and to base its decisions concerning how much to invest in litigating the case, and whether and when to settle it, on a rational cost-benefit analysis. (The defendant's attorney, typically charging on an hourly basis, might have an incentive to overinvest in the case and prolong it. But because the typical defendant to a damage class action is a large corporation—small businesses being unattractive financial targets—the defendant has incentives to monitor its attorneys to minimize the likelihood of overinvestment occurring, and it also has access to the expertise necessary to carry out such monitoring, if it chooses to do so.)

But, as we have seen, the successful plaintiff class action firm will have an inventory comprising many class actions, not just one. The costs and risks of litigating these suits may be such that it is more attractive to the firm to achieve a less-than-optimal resolution for class members in each of these suits, and take on a larger number of suits, than to pursue each suit to the maximum and take on a smaller number. This same pressure exists in ordinary civil litigation, such as automobile accident personal injury cases, where there are economies of

scale associated with maintaining a high-volume practice. But in auto accident cases, we expect individual clients to exert pressure to prevent their attorneys from settling for less than full value (although experiential and research data suggest that few clients assert this control[71]). In damage class actions involving small value claims, there are usually no real clients to make demands.

The defendant in a class action suit, facing a plaintiff class action attorney who is pursuing an inventory-oriented litigation investment strategy, might expect to pay less than it would to resolve a similar class lawsuit brought by a plaintiff firm pursuing a single-lawsuit-at-a-time investment strategy. If the defendant and the plaintiff attorney can reach an agreement to settle the case early, they both can save significant amounts of money—for example, by not undertaking full discovery and not engaging in time-consuming pretrial motion practice. As a result, significant wrongdoing on the part of the defendant—the sort of thing discovery is intended to ferret out—may never come to light. In this instance, the defendant will pay less to settle the case than it would if the information had been discovered, but it will pay enough for the plaintiff attorney to derive a satisfactory amount in fees. Conversely, without discovery, the fact that the defendant did *not* do anything for which it may be held accountable under law will not come to light. In this instance, the defendant will actually pay *more* to settle the case than it might have if exculpatory information had been discovered, but it believes that settling early is still cheaper than moving forward, because doing so saves litigation costs. Neither outcome is in the interest of consumers, who only benefit when defendants pay for real harms imposed by defendants' illegal behavior.

Suppose that a plaintiff law firm decides that it can do well financially by bringing class actions against "deep-pocket" corporations and offering to settle them *very* early in the litigation process—perhaps before *any* discovery has taken place—for an attractive price to the defendant. The defendant obviously would prefer not to be sued, but if it *is* going to be sued, this plaintiff firm is a better one to deal with than other plaintiff class action firms that have a policy of investing more in the litigation to better determine the merits of the case and obtain commensurate settlements. In fact, the preemptive settlement might be such an attractive proposition that if a corporation knew that it had done something that could attract class action litigation, it might take the initiative itself and contact a plaintiff firm willing to engage in such practices and offer to settle a lawsuit, if the plaintiff firm would bring it. If it were sued, even a corporation that believed it had done *nothing* that could reasonably result in liability for class damages might decide it was cheaper to settle *all* class action lawsuits against it early in the litigation process, for negligible amounts, rather than incur the direct and indirect costs of litigation, including lost executive time and negative publicity. In all these instances, consumers ultimately lose, as the

costs of litigation are passed on to them in the form of higher prices without commensurate benefits.

Independent of their timing, settlement negotiations offer additional opportunities for plaintiff attorneys and defendants in class actions involving small claims to collaborate in ways that may not be in the interests of class members. At the time they negotiate, the plaintiff and defense attorneys may not know exactly how large the class is—e.g., how many shareholders bought shares during the period of the alleged fraud, how many individuals accessed the ATM machine, how many consumers bought orange juice with misleading labels. In consumer class actions, the class is often gigantic: for example, under the terms of a widely reported settlement of a 1980s class action lawsuit against Levi Strauss & Co., an estimated 7 million households were eligible to collect a maximum of $2.00 per pair of blue jeans purchased. Almost 9 million individual and commercial checking account holders were eligible to collect refunds under the terms of a 1988 settlement of a consumer class action against Bank of America.[72]

Even if plaintiff attorneys and defendants know how many individuals will satisfy the criteria for class membership, they still do not know precisely how many will come forward to claim their share of the settlement. It was estimated that somewhere between 14 and 33 percent of all eligible consumers filed claims in the Levi Strauss suit. But, in a 1988 suit against Wells Fargo, less than 5 percent of eligible account holders came forward to claim refunds. Because there is no public registry of claiming rates in class action settlements, there are no universally accepted benchmarks for estimating the proportion of claimants who will come forward to claim their share of a settlement under different circumstances.

A significant issue in reaching agreement on a monetary amount to settle the case is whether that amount should be based on the (estimated) number of *eligible* class members—e.g., all mortgage holders or all insurance policy holders—or only on the much smaller number of class members who probably will come forward to claim their settlement. Assuming a constant value per class member, calculating the settlement on the basis of the total number of eligible class members will yield a larger dollar settlement. Under the POF rule, a larger settlement will likely result in a larger fee award to the plaintiff attorney.

Suppose the plaintiff attorney and the defendant both know (or believe) that the total class size is one million consumers, but based on previous experience with class action litigation, they believe that only 20 percent of the consumers will come forward to claim their share of the settlement. If the attorneys agree to a per-consumer share of $1.00, the value of the settlement based on total class size is $1 million, even though class members will claim only $200,000.

Suppose further that the plaintiff and defense attorneys agree to present the settlement to the judge as worth $1 million; that the defendant agrees, informally, not to dispute a plaintiff attorney fee request to the judge for a contingency fee of 30 percent, based on the $1 million value; and that the plaintiff attorney agrees to settlement terms that provide for any money not collected in claims payments to revert to the defendant (sometimes called a "claims-made" settlement). In this scenario, the class members collect $200,000, the plaintiff attorney pockets $300,000, and the defendant's total cost to settle the suit is $500,000. If the defendant were to insist on valuing the settlement at $200,000, the plaintiff attorney likely would not settle the case, since the fee (calculated at 30 percent) would be only $60,000. If the plaintiff attorney insisted on settlement terms that required the defendant to pay the difference between the total value, based on class size, and the actual amount claimed, to a trust fund (that could donate the residual to a worthy cause),[73] the defendant might not settle the case, since its total cost would now be $1 million (or even $1.3 million, if the lawyer fees were added on to the total settlement value, as they sometimes are).

What the *right* settlement amount is in these circumstances is not clear. Recall that, in both scenarios, the threshold question of whether the defendant has broken the law is not answered because the case has not been decided by a judge or jury, and the defendant has not admitted liability. Moreover, there may have been little discovery, so both the deterrence value of the litigation and the class members' entitlement to compensation are unknown. In the first scenario—where the class members collect $200,000, plaintiff attorneys collect $300,000, and defendants pay $500,000—those consumers who choose to come forward receive reimbursement for the economic harms they have allegedly incurred, and the defendant incurs the risk of having to pay an amount that arguably equals the total cost of its alleged legal violation (which is the theoretically correct amount to deter it and others from future misbehavior) although it ultimately pays only half that amount. In 1980, in *Boeing v. Van Gemert,* the U.S. Supreme Court held that plaintiff attorney fees can properly be calculated based on the total fund created by a class settlement, notwithstanding the fact that some of the monies may go unclaimed by class members.[74] In the second scenario, where there is no settlement, class members might ultimately get nothing (the plaintiffs could lose at trial or the class action attorney might drop the case, for lack of funds to prosecute further), and the defendant might pay only its litigation expenses, which could be considerably less than the amount necessary to deter future misbehavior. Whether this is a good or bad outcome depends on whether the defendant has actually broken the law.

Should we care how the amounts defendants pay to settle class actions are divided between the class action attorney and the class members? If, in fact, the defendant should not be held liable (for example, when it has agreed to settle

just to avoid bad publicity, transaction costs, etc.), then the class members and their attorney are sharing what might be regarded as ill-gotten gains, and it is not clear who has the greater entitlement to those gains. If the defendant should be held liable, and a primary goal of the class action is regulatory enforcement, then, from the perspective of economic theory, the distribution of that payment is not important as long as the defendant pays a sufficient amount to deter bad behavior.

But, to some observers, it seems inappropriate in most, if not all, circumstances for the plaintiff attorneys to pocket more in fees than the class members receive in the aggregate. Moreover, when—as is the case in small damage class actions—the attorneys pocket much more than any one individual class member receives as a result of the suit, many feel that it is a clear indication that something has gone awry in the process. John Frank, who describes himself as a "blatant 'liberal' and old New Dealer," has written:

> The disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of this victory.[75]

Others have even more scathing responses to such settlements, as illustrated in Figure 3.11, a cartoon depicting plaintiff attorneys, which appeared in an opinion column of the *San Francisco Daily Journal* (a legal publication), under the title "class clown."

Plaintiff attorneys are not insensitive to such attacks. One plaintiff attorney told us that his firm had just decided *not* to take on a consumer class action on the grounds that, while the case appeared to be meritorious, it would inevitably yield large fees to the attorneys, and small dollar awards to class members—and, in the process, make the firm "look bad."

The propriety of large fees for settlements is even more susceptible to question, many feel, when plaintiff attorneys agree to terms that offer class members nonmonetary rewards, such as coupons to purchase products and services at a discount. Valuing these nonmonetary offers is even more difficult than simply estimating the number of class members who will come forward to claim shares of a monetary settlement, because some coupons have restrictions on their use and are designed not to be easily transferable. As a result, "coupon settlements" offer greater opportunity for plaintiff attorneys and defendants to collaborate in inflating the true value of the settlement when they present it to the judge for his approval.[76] Moreover, some critics are offended by the notion of remedying alleged harms to consumers by offering them discounts to buy *more*

Credit to: Paul Kolsti/pen tip

Figure 3.11—"Class Clown"

products or services from the alleged harm-doers. Some plaintiff lawyers whom we interviewed pointed to settlements for what one dismissed as "scrip" as a primary source of public opprobrium concerning class actions. However, some plaintiff and defense attorneys whom we interviewed argued that coupons are sometimes an appropriate vehicle for compensating class members—for example, when the class is so large and the agreed-upon remedies so small that the costs of administering a cash payment program would dwarf the amount paid to class members.

Others whom we interviewed said that all nonmonetary components of settlements, such as promises to invest in public information campaigns and alleged changes in defendant business practices, ought to be viewed skeptically by judges charged with approving such settlements. Such qualitative aspects of

settlements, these critics charged, are highly subject to manipulation; defendants may agree to perform something as part of the settlement that they have already done or promised to do in response to previous regulatory action.

For those who look to damage class actions for regulatory enforcement, the key issue posed by coupon settlements is whether they permit culpable defendants to pay less than the amount necessary to deter improper practices. In principle, the value of coupons could be set high enough, and the procedures for distribution and redemption could be designed, to maximize the probability that culpable defendants pay the theoretically optimal penalty. The question is how well the value of coupon settlements matches this theoretical value in practice. If coupon settlements simply provide an easy means of settling damage class actions, without regard to underlying merit and with few—if any—gains to class members or consumers generally, then such settlements tilt the scales on the side of private gain, rather than public good.

Less visible to the public than coupon settlements are settlements of proposed damage class actions in which the plaintiff attorney agrees to drop a suit filed as a class action for settling the representative plaintiffs' claims and for larger fees than the attorney would have obtained by filing and settling the representative plaintiffs' claims as individual lawsuits. (A variant of this strategy is to threaten to file a class action suit, unless the defendant settles the individual claim(s) expeditiously and for an attractive amount.) If the proposed class action appeared at first to have merit, and the attorney only subsequently discovered through investigation that the case was too weak to prosecute, then settling the individual claims is better than investing additional private and public resources in pursuing the class action. From a regulatory enforcement perspective, allowing the plaintiff attorney larger fees in this case might be viewed as a proper incentive for attorneys to investigate potential wrongdoing. But if the plaintiff attorney filed or threatened a class action merely to leverage a higher settlement for nonmeritorious individual claims and higher fees, then rewarding the attorney encourages frivolous litigation and imposes costs on the defendants that ultimately will be passed on to consumers. On the other hand, if there *were* a reasonable basis for a class action lawsuit, and the plaintiff attorney dropped the claim in return for a higher settlement and higher fees for meritorious individual cases, then, from a regulatory enforcement perspective, settling the individual cases might result in underdeterrence.[77]

Collusion between plaintiff attorneys and defendants—when it occurs—offends the sensibilities of many observers. Its importance from a societal point of view is that it dilutes the regulatory enforcement effect that is often claimed as a chief benefit of class actions for small-dollar losses.

5. Barriers to Collusion and Self-Dealing—and Weaknesses Therein

Notice requirements, fairness hearings, provisions for class members to object to a proposed settlement and for non–class members to intervene in the litigation for the purpose of objecting, and—most importantly—assigning judges the responsibility for approving settlements and fees, are all intended to counteract the incentives for plaintiff attorneys and defendants to collaborate in negotiating inappropriate settlements. But there are many reasons for believing that these rules and practices do not provide sufficient obstacles to self-dealing by those who want to engage in it.

In consumer class actions, where individual damages are small, class members are unlikely to avail themselves of the proffered opportunities to influence the litigation. Notices that require prospective class members to decide whether to opt out or not without knowing what the outcome of the case might be, and notices that indicate the aggregate terms of a settlement without indicating what an average class member might receive, do not offer strong incentives for absentee plaintiffs to come forward and state their preferences. Fairness hearings may be held at a time and place that make it unlikely that an average class member could appear. In any event, class members have little to gain from participating when the individual damages are small.

Figure 3.12 reproduces a typical published notice informing consumers of a scheduled fairness hearing on the settlement of a statewide class action in California. The hearing is scheduled for the morning of a workday in the county courthouse in downtown Los Angeles—not easily accessible to many in far-flung Los Angeles County, much less to residents of other parts of California. Of course, it is not expected that individual class members will want to attend the hearing themselves. If they are distressed by the proposed settlement, they should secure counsel to represent them, or so the theory goes. But what would motivate an individual to do this? From the notice, it is uncertain whether the defendant actually violated a law, the import of the alleged violation is unclear, and what individual class members have to gain from the settlement cannot be precisely calculated from the information given.

In securities class actions and some antitrust actions, some class members have incentives to participate in the litigation, and may attempt to do so by forming committees that prod plaintiff attorneys to negotiate more vigorously on their behalf. Class members sometimes appear at fairness hearings to object to the terms of proposed class action settlements. But objecting class members may not hold sway; on occasion, district courts have approved settlements to which even the representative plaintiff—in theory, the class attorney's client—objects.[78]

NOTICE OF PENDENCY OF CLASS ACTION AND SETTLEMENT HEARING

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
MEYER SCHWARTZ, DECEASED, ETC., PLAINTIFF, ROCHELLE C. LINDER, PLAINTIFF IN INTERVENTION VS. UNITED STATES SHOE CORPORATION, ET AL.
CASE NO. BC095615

If you made a credit card purchase in California between December 23, 1992, and the present, at any of the following retail stores, your rights may be affected by this lawsuit and you should read this notice. The stores are those doing business in California under the trade names "August Max," "August Max Woman," "Casual Corner," "Casual Corner Outlet," "Casual Corner Woman Outlet," "Petite Sophisticate," "Petite Sophisticate Outlet," "Casual Corner & Company" and "Caren Charles."

Description of the Lawsuit. A lawsuit is pending against United States Shoe Corporation ("U. S. Shoe"), which has operated various stores named above in California. The suit claims U. S. Shoe has violated California law by requesting that its customers in credit card transactions provide personal identification information, the telephone number of the cardholder, as a condition of the customer making a credit card purchase. Plaintiff alleges that this conduct violated California Civil Code Section 1747.8. U. S. Shoe denies liability. The court has not ruled on the merits of plaintiff's claims or U. S. Shoe's defenses.

Class Definition. Unless you opt out of the Plaintiff Class in the manner described below, you are a member of the Plaintiff Class if you are a person included within the following definition:

> All issuees of a VISA, MasterCard, American Express, Discover Card or any non-U. S. Shoe credit card who, using one of the aforesaid non-U. S. Shoe credit cards, made a credit card purchase at any U. S. Shoe store located in the State of California during the period commencing December 23, 1992, through and including the effective date of the Settlement Agreement in this action.

Description of the Proposed Settlement. The parties have entered into a Settlement Agreement, which provides in substance that: U. S. Shoe agrees not to utilize in any U. S. Shoe store located in the State of California, as referenced above, credit card sales forms containing preprinted spaces specifically designated or indicating a place on the form for filling in any "personal identification information" (as defined in California Civil Code § 1747.8) of the cardholder; U. S. Shoe agrees not to request or require, in any of the above-described U. S. Shoe stores in California, as a condition to accepting credit cards as payment in full or in part for goods or services, that the cardholder write or provide any personal identification information, except upon making reasonable disclosure that the information solicited is not required as a condition of use of the credit card, unless otherwise permitted by law; U. S. Shoe agrees not to utilize in any way, unless required by contract or law, any personal identification information pertaining to any cardholder which was acquired in any U. S. Shoe store located in the State of California and which was entered into records maintained by U. S. Shoe, including computer memory, through use of credit card sales forms containing preprinted spaces specifically designated or indicating a place on the form for filling in any personal identification information of the cardholder; U. S. Shoe will mail by first class mail one Discount Coupon each to approximately three hundred forty thousand (340,000) California residents, based on a random selection process from the current customer list or lists of U. S. Shoe, and honor every valid Discount Coupon so issued; the Discount Coupon will entitle the bearer to a twenty-five (25%) percent discount on all regular price items purchased during a single transaction, before taxes, at any U. S. Shoe store located in the State of California; the Discount Coupons are not redeemable for store credit or cash, are not valid with other discount offers or promotions, or on a purchase

Figure 3.12—Notice of Pendency of Class Action and Settlement Hearing

of gift certificates, previous purchases or layaways. The Discount Coupons will expire ninety (90) days from the Date of Issue as indicated on the face of the Discount Coupon.

Subject to Court approval, the plaintiff's counsel will apply for attorneys' fees and expenses in an amount not to exceed $100,000. The Court will determine and set the amount of such fees and expenses to be allowed. Any party may comment on the application for fees made by class counsel.

TO BE INCLUDED IN THE CLASS YOU NEED NOT DO ANYTHING. IF YOU ARE WITHIN THE DEFINED CLASS, YOU WILL AUTOMATICALLY BE INCLUDED IN ANY JUDGMENT ON SETTLEMENT.

If You Wish to Object to the Proposed Settlement. If you object to the proposed settlement or the proposed Plaintiff Class, you must object in writing. Written objections must be filed with the Court not later than March 10, 1998, at the following address: Clerk of the Superior Court (United States Shoe Class Action), Los Angeles Superior Court, Department 59, 111 North Hill Street, Los Angeles, California 90012, and a copy of the objections must be served on David Daar of Daar & Newman, P.L.C., at the following address: 865 South Figueroa Street, Suite 2500, Los Angeles, California 90017, by no later than March 10, 1998. Class members who desire to be heard orally in opposition to the proposed settlement must indicate in their written objection their intention to appear at the Settlement Hearing.

If You Wish To Opt Out of the Class. You may request that the Court exclude you from the Plaintiff Class provided that such request is made in writing. All written requests to be excluded must be filed with the Court by March 10, 1998, at the above-described address of the Clerk of the Superior Court, and a copy of the request must be served on David Daar of Daar & Newman at the above address by no later than March 10, 1998. If the settlement is approved, the judgment will bind all class members who have not asked to be excluded.

Settlement Approval Hearing. A Hearing will be held on March 30, 1998, at 10:00 A.M., in Department 59 of the Los Angeles Superior Court, located at 111 North Hill Street, Los Angeles, California, for the purpose of determining (1) whether the proposed settlement should be approved by the Court as fair, reasonable and adequate, and in the best interest of the Class; (2) whether the Class defined above should be certified; and (3) whether the application of Class counsel for the payment of attorneys' fees and for the reimbursement of costs and expenses should be approved.

How to Obtain Further Information. Additional information regarding this Notice may be obtained by communicating with the attorneys representing the Plaintiff Class, to the attention of David Daar of Daar & Newman, P.L.C., 865 South Figueroa Street, Suite 2500, Los Angeles, California 90017.

You may inspect the pleadings and other papers filed in this action, which are public records, during regular hours at the office of the Clerk of the Los Angeles County Superior Court, 111 North Hill Street, Los Angeles, California. DO NOT OTHERWISE CONTACT THE CLERK OF THE COURT.

Dated: December 16, 1997

/S/ Bruce E. Mitchell
Judge Pro Tem, Los Angeles Superior Court

Figure 3.12—(continued)

The judge's ability to assess the value of the settlement is constrained because a case that settles before trial has, by definition, not been the subject of a full-fledged, comprehensive evidentiary hearing involving fact and expert witnesses, cross-examination, and documentary evidence. Rule 23 does not instruct judges as to how they should go about assuring a fair and reasonable settlement in the absence of trial. Drawing on case law and experience, the *Manual on Complex Litigation* suggests that the judge consider whether the *lawyers* had enough information to arrive at an "informed evaluation" (for example, how much discovery did they conduct?), the likelihood that plaintiffs would succeed at trial, and the "range of possible recovery."[79] In assessing the latter two fac-

tors, judges must rely on the information presented by the lawyers, plus their own experience in trying cases. Some judges have had extensive experience presiding over complex cases, including class actions, but because class actions arise relatively infrequently in most jurisdictions and are usually settled, a judge may not have had previous experience trying a similar case. And, because—in sharp contrast to their usual roles—the plaintiff attorney and defendant are united in wishing to persuade the judge to approve the settlement, the attorneys' assessment may be a slim reed upon which to rely.

To help judges make an assessment, the *Manual* notes that they may wish to request further discovery or expert testimony, particularly where "settlement is proposed early in the litigation."[80] But the language of the *Manual* captures the dilemma facing the judge: On the one hand, it tells the judge

> [C]ourt review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties—even those with the best intentions—to give insufficient weight to the interests of at least some class members.[81]

On the other hand, requiring further discovery "will increase attorneys' fees and expenses—the avoidance of which was an inducement for settlement."[82] And because the parties bringing the information before the judge have a shared interest in persuading the judge of the reasonableness of the settlement, discovery "may produce evidence whose trustworthiness is suspect."[83] Hence, "[discovery] should be kept to a minimum."[84]

Independent parties, who request permission to "intervene" in the litigation so that they may register objections to a settlement, provide one possible means of bringing information that is contrary to the information offered by the settling parties before the judge. Public Citizen and Trial Lawyers for Public Justice are two nonprofit organizations that have objected to a number of proposed class action settlements in recent years. From 1990 to 1997, Public Citizen appeared on behalf of objectors or as an amicus curiae ("friend of the court") in about 20 damage class actions, more than half of which were consumer cases.[85] Some individuals have also appeared on the class action scene, representing themselves as independent objectors.[86] Objectors may petition the courts for fees separate from the fees paid to class counsel.[87] But objecting requires a substantial expenditure of resources, and sometimes judges presiding over class actions do not provide enough time or access to case information to facilitate objectors' involvement. Describing their involvement in a case in which plaintiffs sought damages from Ford Motor Corporation for allegedly faulty Mustang construction and accepted coupons in settlement, Public Citizen's attorneys noted: "The judge was not hospitable to our objections at the fairness hearing, *which lasted less than 30 minutes.*"[88] In another class action, this one dealing

with toxic exposure, the federal magistrate judge who approved the settlement "denied [Public Citizen's] clients the right to take discovery."[89]

Moreover, objectors are not disinterested parties. Public Citizen is a consumer advocacy group; Trial Lawyers for Public Justice is supported by contributions from the plaintiff trial bar. And other objectors are not nonprofit organizations. In our interviews, we heard from defense and plaintiff counsel about individual lawyers who appear as objectors to a settlement, in pursuit of fees for themselves; we also were told of attorneys who threaten to appear as objectors unless class counsel agree to share some portion of the fees that will be awarded to them. Some of these objectors may be plaintiff attorneys who have filed duplicative class actions in other jurisdictions. By threatening action in those jurisdictions, which might impair the ability of attorneys in other jurisdictions to secure acceptance and approval of a proposed settlement, these "objecting" attorneys may be able to secure significant fees.

Judicial control over plaintiff attorney fees offers a means of promoting faithful adherence to class members' interests by plaintiff attorneys. But judges' ability to assess the value of the plaintiff attorney's effort is constrained in the same way as their ability to assess the fairness and reasonableness of settlements. Although defendants need not be part of the fee decision—and some have argued that they *should not* be part of it—our interviews with plaintiff and defense counsel suggest that understandings about plaintiff fees are often part of the settlement negotiations. In any event, settling defendants, along with the plaintiff class attorney, have promoted the value of the settlement to the judge in order to gain approval of the deal, and are therefore not in the best position to dispute plaintiff attorney fee requests.

Plaintiff attorney fees have been a source of contention in some class actions, and the particular target of public interest objectors.[90] But, as in the case of objections to settlements generally, the process for objecting to fees is itself rife with conflicts. Intensive scrutiny of attorney fee requests, particularly submissions of hours and expenses, is an expensive and time-consuming business for objectors as well as judges. A further complication is that some courts have held that plaintiff attorneys are not required to disclose fee arrangements among themselves, once the settlement has been approved by the judge.[91] Some objectors believe that these arrangements contain information that is germane to assessing the merits of the settlement, as well as the reasonableness of the fee requests.[92]

Many of these obstacles to judicial control over settlements of damage class actions have been the subject of scholarly commentary, particularly concerning securities class actions.[93] Another constraint on judicial control has received less attention: Plaintiff attorneys and defendants who cannot obtain judicial

approval for settlements from one judge may be able to secure approval from another, simply by filing the same or a similar lawsuit in a different jurisdiction.

The history of litigation over alleged deficiencies in the G.M. pick-up truck fuel tank design illustrates this problem. In the early 1990s, numerous truck owners filed lawsuits in state courts alleging that the value of their vehicles had been diminished by alleged defects in fuel tank design, which had received widespread publicity as a result of a high-profile personal injury lawsuit[94] and subsequent television coverage. General Motors removed the cases to federal court, and then successfully moved to collect them in a single federal district court under the multidistricting rules. Subsequently, plaintiff attorneys and defendants sought and obtained certification of a settlement class, and judicial approval of a settlement under which the main benefit provided to truck owners would have been a certificate (or "coupon") offering a discount on specified future G.M. truck purchases.[95] The settlement (and proposed attorney fees) proved controversial, and was eventually rejected by the Third Circuit Court of Appeals.[96] Although the basis for the Third Circuit's rejection of the settlement was that the district court had not established that the proposed class met Rule 23(b)(3) requirements for certification, the court also identified numerous deficiencies in the proposed settlement.

Instead of attempting to renegotiate the settlement in the federal district court, the plaintiff attorneys and defendants shifted their attention to a state court in Louisiana, where a similar nationwide class action was pending. They modified some of the features of the proposed settlement, including extending the period during which the discount certificates could be used, allowing for the certificates to be transferred to other potential purchasers of trucks (so that a secondary market could be established), and creating a fund for "auto safety." The original objectors to the federal class action settlement, with some reluctance, agreed to support the new settlement,[97] and the state trial court in Louisiana certified the class and ultimately approved the settlement.

Following the conditional certification of the nationwide class in Louisiana, a new set of objectors sought both to intervene in the state proceedings and to mount a challenge to them in the federal district court to which the federal lawsuits had earlier been transferred. The federal district court rejected their efforts, and they appealed to the same federal circuit court that had rejected the initial settlement proposal three years before. This time, noting various legal doctrines that constrain federal courts from interfering with state courts—and noting, as well, that the settlement had already secured final approval from the Louisiana state court—the Third Circuit rejected the appeal.[98]

Finally, in addition to these class action-specific factors, other features of the judicial environment militate against judges aggressively investigating the fair-

ness and reasonableness of settlements. Over the past three decades, in response to perceived increases in the judicial workload and decreases in court funding, judges have moved away from their traditional role as adjudicators toward a more management-oriented perspective. As managers, judges are exhorted to "clear their dockets" expeditiously, and the rate at which they dispose of cases is monitored. Promoting settlement is widely viewed as an effective means of clearing dockets,[99] and judges are now schooled in methods of persuading parties to settle, rather than adjudicate, their disputes. In the rhetoric of settlement, legal cases are not about wrongs and rights and legal remedies, but are rather problems to be solved by the parties in a businesslike fashion. In this environment, some judges may feel that closely questioning parties who have agreed to settle a class action expeditiously is out of step with the times.

To distance themselves somewhat from the settlement process—and thereby preserve their ability to independently assess the value of the deal that the attorneys have struck—some judges ask other judges to preside over settlement negotiations, or appoint "special masters" (independent experts) to assist the attorneys.[100] Some attorneys are widely known for their negotiation skills and have served in the special-master role in numerous large-scale litigations,[101] and some judges have long experience working with particular special masters. But we were told by one plaintiff attorney that even special master appointments are subject to manipulation; attorneys and parties who want room to negotiate certain deals may propose to the judge that she appoint a special master whom they expect will support their preferred settlement strategy.

As an alternative to judicial scrutiny of class action settlements, Professors Jonathan Macey and Geoffrey Miller have proposed that judges "auction" off class action lawsuits to the highest bidder *as soon as litigation is initiated.* Under their proposal, once a judge was satisfied that the essential elements for a class action were present, she would request financial bids from attorneys and others who were willing to pay for the right to litigate against the defendant. The winning bid would be paid into court, which would promptly distribute the funds to class members. Receipt of the funds would extinguish the class members' claims against the defendant. The successful bidder would then be free to litigate as aggressively as he saw fit, and to pocket whatever amount he was able to obtain from the defendant through settlement or trial. Macey and Miller argue that competitive bidding will lead to class members' receiving maximum financial rewards, and that assigning the case to the winning bidder will eliminate defendants' and plaintiff attorneys' ability to collude in negotiating a settlement that enriches the latter at the expense of class members.[102] To our knowledge, no judge has adopted this auction idea, but Judge Vaughn Walker has adopted a less radical version of Macey and Miller's proposal, and used

competitive bidding to determine the appointment of lead counsel in a major securities class action.[103]

6. Is There a Basis for the Fears About Collusion?

How often are representative damage class actions filed indiscriminately? How often do plaintiff attorneys engage in self-dealing? How often do defendants ward off more aggressive litigation with "sweetheart deals"? Are plaintiff attorney fees excessive? Do judges vigorously exercise their authority to review and approve settlements and fees?

In the securities litigation arena, plaintiff attorneys have sharply disputed the notion that they file cases whenever a stock drops in value, settle without regard to the merits, and obtain disproportionate fees.[104] But some defense and in-house corporate counsel whom we interviewed asserted that what John Frank has called the "take a dive" plaintiff attorney[105] typifies damage class action practice. One attorney claimed that in 75 percent of the cases in which he was involved, there was no discovery and plaintiff attorneys offered to settle immediately after filing the class action; other defendant attorneys did not put a number on the proportion of cases involving what they termed "quickie settlements," but said they were common. Still other defendants, however, said that, in their experience, there was always some discovery, if only to ensure that judges ultimately would approve the proposed settlement and fee requests.

No corporate counsel whom we interviewed said that he or she had ever searched out a plaintiff attorney with whom to negotiate a cheap and easy settlement. But some corporate counsel said they had negotiated settlements with plaintiff attorneys who approached them with such offers in return for agreements not to challenge the latter's fee requests; in those cases the corporate counsel said they were simply behaving as "intelligent litigants." One defendant reviewed with us records of settlements in which some class action lawsuits had been dropped in exchange for settlements of the representative plaintiffs' claims and higher-than-average fees for the plaintiff attorney. One consumer class action attorney with a small rural practice in the southwest said that a majority of class lawsuits that he had filed in the previous year or two had ended in individual case settlements. In some instances, this attorney said, he had agreed not to pursue further class litigation; in others, the class representatives had simply decided to settle on their own.

No plaintiff class action attorney whom we interviewed said that he or she adopted an early classwide settlement strategy, but some claimed that other plaintiff class action attorneys do engage in such practices. One plaintiff attor-

ney related how he had been approached by a defendant offering an early settlement, who told him, when he demurred—saying he would not settle without engaging in discovery to determine the merits of the case—that he did not understand "how the game is played." Public Citizen's lawyers described one case in which "[plaintiff lawyers] employed no experts, took no discovery, and put in no affidavits about the value of the settlement."[106] A corporate counsel told us that he had been involved in a case in which the plaintiff attorney claimed that he had an expert ready to testify that the product was dangerously faulty if the litigation moved forward—but who was prepared to testify, conversely, that the product was *not* dangerous if the defendant would agree to a modest settlement. Public interest lawyers and state attorneys general staff claimed that plaintiff attorneys and defendants often collaborate on settlements that do not serve the class members' or the larger public's interests.

No one we interviewed provided an objective basis for quantifying the relative frequency of practices that all said they regarded as inappropriate: knowingly bringing frivolous cases in the hope of achieving quick and easy settlements; negotiating larger class counsel fees in exchange for less favorable terms for class members; using coupons and other noncash factors to inflate the perceived value of settlements; joining forces to persuade judges that settlements will yield more benefits to class members and others than either plaintiff or defense attorneys believe to be true; objecting to settlements simply to secure fees; and so on. The corporate representatives we interviewed believed that a large proportion of cases involve such practices, whereas plaintiff class action attorneys more frequently said that the proportion of such cases is small. But there was a consensus that such practices characterize some fraction of damage class action lawsuits.

There are no comprehensive data that permit us to determine the overall ratio of dollars collected by class action claimants to settlement value claimed in submissions to judges. The data assembled on recovery ratios in securities class actions are inconsistent,[107] some studies showing relatively high ratios, and others showing negligible recovery rates. There are no comparable published data for other consumer class actions.[108]

A memorandum from Public Citizen describing cases in which it appeared on behalf of objectors to settlements or fees illustrates the kinds of settlements that attract criticism. Many of these involve auto manufacturers, but financial organizations and other industries are also represented among the defendants of suits in which Public Citizen has intervened. Brief glances at these cases and their proposed (and sometimes accepted) settlements suggest that some proportion of class actions are resolved with little benefit to class members and large fees for class counsel.

One such case—brought in federal district court in northern California—was settled with an agreement that an auto manufacturer would replace a faulty part and mount an advertising campaign concerning the replacement; the defendant also agreed to pay up to $5 million in fees to the class counsel.[109] Public Citizen charged that the defendant had already promised the National Highway and Traffic Safety Administration (NHTSA) to replace the part and fund the advertising in response to a regulatory investigation. Moreover, Public Citizen said, at the time of settlement, the retrofit had not yet been designed. Hence, "class counsel apparently agreed to something it could not have properly assessed and which the government had already obtained."[110] Public Citizen lawyers said that the judge approved the settlement on the grounds that it was enforceable in court, whereas the manufacturers' agreement with NHTSA was not, and approved the fees on the grounds that they were negotiated with the help of a retired-judge mediator. On appeal, the Ninth Circuit upheld the settlement and fee award.[111]

Public Citizen also objected in another case seeking repair costs or retrofit of a different vehicle. In this instance the settlement offered a $1000 coupon, good for 15 months, towards purchase of a new vehicle. The coupon was transferable, but only at a reduced value.[112] The federal district court for eastern Pennsylvania approved the settlement, and awarded $9.5 million in fees and another $500,000 in expenses—without holding any hearing on the fee award—according to Public Citizen.[113] That settlement was subsequently rejected by the Third Circuit.[114] Later, the same plaintiff attorneys filed a nationwide class action based on the same facts in a Louisiana state court, where they negotiated a settlement that offered coupons that could be used to purchase a wider range of vehicles for a longer period of time, plus contributions to a fund for auto safety.[115]

Later, a case described by Public Citizen as a duplicate of the original eastern Pennsylvania case was brought in state court in Texas, and applied only to consumers there (whereas the former applied to all consumers in the U.S. *except* for Texans).[116] Two law firms that were not involved in the eastern Pennsylvania case negotiated the same deal for Texas consumers as was offered in the nationwide settlement, and then asked for the same amount of fees and expenses—$10 million—that more than a dozen firms involved in the earlier case had planned to share.[117] This settlement was ultimately rejected by the Texas Supreme Court, in part, on the grounds that class members had not been informed about the amount of fees attorneys had requested.[118]

Yet another settlement described by Public Citizen involved a case brought in California state court on behalf of a different nationwide class of automobile owners.[119] The judge asked a retired judge to help mediate a settlement, which was reached about eight months after the judge certified the class. The

settlement offered class members a nontransferable $400 coupon towards the purchase of a new vehicle, good for 12 months, and—over the defendant's objection—up to $1.5 million for plaintiff class action attorneys' fees and expenses.[120] The trial judge approved the settlement, but reduced attorney fees to just under $1 million, over objections. The settlement was upheld by a California appellate court despite its expressed reservations about coupon settlements, but the appellate court ordered the trial court to reconsider its fee award, taking into account the attorneys' actual hours and expenses.[121]

In another case brought against an auto manufacturer, this time in federal court in the Eastern District of Louisiana, plaintiff attorneys negotiated a settlement of claims alleging that a vehicle was dangerously defective for what Public Citizen described as an inspection, a warning sticker, and safety information—and $4 million in attorney fees. The district court judge twice rejected the settlements to which Public Citizen objected,[122] and subsequently denied class certification and dismissed the plaintiffs' claims on summary judgment.[123]

Auto manufacturers were the defendants in all these class actions. In another suit in which Public Citizen appeared, plaintiffs sued a financial corporation in the federal district court in northern Illinois, alleging that the firm misled consumers about auto leasing fees, and negotiated a settlement that provided a $75 discount towards a new car lease from the same firm. Class counsel and the defendant asked the court to certify a settlement class and approve the settlement and attorney fees of $75,000. The district court denied certification.[124]

In yet another case, plaintiffs brought a Rule 23(b)(2) *non-opt-out* class action in state court in Minnesota against a mortgage company, alleging that the company was withholding more money in mortgage escrow accounts for taxes and insurance than is permitted under federal law. The case was removed to federal court, where it was settled on a nationwide basis for a total of $105,000—which Public Citizen estimated amounted to 35 cents per class member—plus $290,000 in attorney fees.[125] The basis for granting non-opt-out status to the action was apparently the defendant's agreement to comply with the federal statute, which the district court treated as injunctive relief. On appeal, the Eighth Circuit upheld the non-opt-out class and the settlement.[126]

Another settlement Public Citizen objected to attracted nationwide press attention as well. In 1995, the California attorney general, along with a number of county district attorneys, negotiated a settlement with computer companies in which the companies agreed to disclose the actual viewable size of their monitors, rather than the somewhat larger size that companies had historically advertised. An uproar arose when a group of private class action attorneys subsequently filed a nationwide lawsuit in state court and negotiated a settlement with 58 computer makers and retailers. The controversial settlement terms of-

fered consumers a $13 rebate off their next purchase of a computer or $6 if consumers had not made such a purchase by September 2000. For their efforts, the attorneys requested $5.8 million in fees and $300,000 for expenses.[127] The judge approved the settlement and cut the fees to $5.075 million.[128]

The settlement of a class action lawsuit against a cereal manufacturer, alleging that the cereal contained trace amounts of a pesticide,[129] also drew the fire of the nation's press.[130] Filed in state court in Cook County, Illinois, this case was settled with an offer of coupons to class members to buy more of the same cereal, plus an opportunity for those who had saved the box tops of cereal purchased more than a year prior to the settlement's announcement to obtain a refund. Defendants agreed to pay $1.75 million to class counsel in fees and expenses. The judge approved the settlement and fees as negotiated.[131]

Of course, the settlements to which Public Citizen objected had features that caught its attention and motivated its lawyers to intervene, and its memorandum reflects its own perspective on the settlements. We do not know how representative or unrepresentative these settlements are, and since we did not interview parties in these cases, we do not have the benefit of others' perspectives on their outcomes.

The only empirical analysis of "coupon settlements" conducted to date concerns 127 class actions for which notices of settlement were published in the *New York Times* from 1993 to 1997.[132] Geoffrey Miller and Lori Singer categorized these class actions by case type (securities, consumer, antitrust, employment, tort, and other), and categorized the settlements according to whether they principally promised cash, coupons, or other nonmonetary awards (such as stock warrants in securities cases, or "monitoring" in consumer and personal injury cases). About 60 percent of the cases Miller and Singer identified were securities suits; the next largest number were consumer actions. Among securities settlements for which the researchers could obtain information, the overwhelming majority were principally for cash. Among the consumer class settlements for which they obtained information, about half were principally for cash and half involved coupons or the monitoring of defendants' future practices.

There is no registry of attorney fee requests in class actions, no comprehensive record of judges' decisions regarding fees, and no systematic documentation of contention around fees. Public Citizen described cases in which fees were arguably disproportionate to the settlement value and largely unsupported by documentation. In one case, they wrote, "The fee application was wholly inadequate—no time records, no expense record, and much of the work for which compensation was sought was from another case, not the class action."[133] In another case they reported challenging the fee request "on the grounds that it

was excessive and that it was unsupported by any fee and expense records."[134] In a third, their request to appear in opposition to a fee request was not granted, "since there was no hearing on fees and [they] were never served with the fee application."[135] In the case where plaintiff attorneys negotiated a settlement comprising warning stickers and a safety campaign, "in a one-page fee request, class counsel asked for a $4 million fee to be paid by [the defendant]. No time records or expense records were submitted."[136]

The issue of inappropriate fees arose in virtually every interview we conducted. For corporate and defense counsel, plaintiff attorney fees are the prime source of cynicism about the value of class actions. For plaintiff class action attorneys, the fees of other attorneys (sometimes including those of the partners in their own firms, or co-counsel) are a worrisome source of public disrepute, with the potential to bring damage class actions to a halt, thereby closing off access to the courts for what they believe are meritorious cases.

The failure of judges to vigorously exercise their responsibility to monitor settlements and lawyer fees was a theme in a number of interviews. "If judges would do their job," said one plaintiff attorney, "we could solve the problems that exist with class action practices. We do not need rule changes to do this." Another plaintiff attorney drew a triangle (see Figure 3.13) to represent the confluence of interests among plaintiff attorneys, defendants, and judges in allowing some settlements to go forward that should not. The plaintiff attorney, he said, settles too early or too cheaply in order to obtain fees; the defendant profits from the plaintiff attorney's greediness by settling a case for less than it is arguably worth; and the judge goes along with the plaintiff attorney and defendant, to remove the case from his calendar. The class members' interests—and the public's—lie outside the triangle.

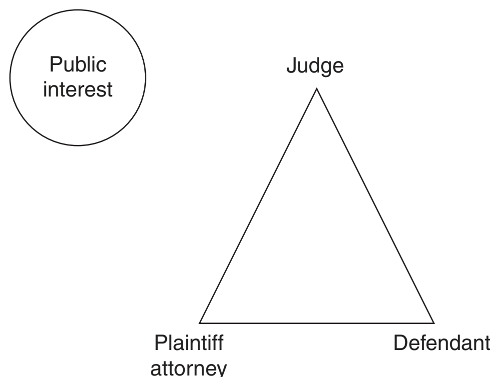


Figure 3.13—The Triangle of Interests in Damage Class Action Litigation

The challenge of damage class actions, this attorney said, is how to "break the triangle," and bring the public's interest back into the process.

In the final chapter of this book we propose some strategies for breaking the triangle of interests that present barriers to achieving the public goals of damage class actions. We now turn to a discussion of another aspect of the controversy over class actions: suits arising out of mass product use or exposure.

D. THE NEW PARADIGM: AGGREGATIVE ACTIONS FOR PERSONAL INJURY AND PROPERTY DAMAGE

The potential for self-dealing and collusion posed by traditional damage class actions is often attributed to their "headless" nature and the fact that in many such actions, individual class members have little to gain or lose, in an immediate sense, from the case. It is only when there are "real" plaintiffs, with "real" losses, some critics charge, that incentives for abuse are curbed. Moreover, those are the cases, say critics of consumer class actions, where Rule 23(b)(3) can best serve its *efficiency* objective. But other class action critics say that situations where individuals could successfully pursue individual claims—such as personal injury lawsuits—are exactly those that should *not* be certified as class actions. Although collecting such cases might be more efficient than litigating them individually, say the critics, it will deny these individuals the right to decide whether and when to litigate, to control the course of their litigation, and to obtain individually crafted case outcomes. If both sets of critics were correct, then, arguably, there would be *no* role for Rule 23(b)(3) damage class actions.

Much has been written about the problems associated with mass personal injury class actions—so-called "mass torts"—over the past several years.[137] To understand the challenges posed by this type of class action lawsuit, we need to consider the history of mass tort litigation during the past several decades.

1. The Evolution of Mass Torts

Historically, mass tort litigation has begun as individual litigation, and has grown only when individual lawyers, representing individual plaintiffs, were able to win substantial awards against defendants. Until the 1980s, the instances of mass litigation were relatively few.

The early years of tobacco litigation and asbestos worker injury litigation provide two apposite examples, albeit with different outcomes. Plaintiff attorneys' early lawsuits against tobacco manufacturers, on behalf of sick smokers, were unsuccessful. The manufacturers were willing to spend virtually any amount to defend themselves, and absolutely refused to settle claims brought against

them. Plaintiff attorneys could not match their resources, and could not afford the risk associated with taking such expensive lawsuits to trial and losing. Over time, plaintiff personal injury attorneys came to see this litigation as futile. Although individual suits were brought from time to time, a massive wave of smoker personal injury litigation did not appear.[138]

Asbestos personal injury litigation also began with a small number of plaintiff attorneys pursuing individual claims against asbestos manufacturers.[139] For years, these attorneys were unable to breach the legal barriers to winning these lawsuits. Then, in 1973, the Fifth Circuit Court of Appeals held that asbestos manufacturers could be held liable for injuries associated with asbestos exposure.[140] Because workers who were heavily exposed to asbestos tended to be concentrated in a few industries, which, in turn, were concentrated in a few regions of the country, the plaintiff attorneys who were successful in bringing these individual lawsuits soon found themselves representing other asbestos workers. In each of these regions a handful of firms emerged, comprising the plaintiffs' asbestos bar. In the early phase of the litigation, these law firms faced little competition from other firms for asbestos cases, which continued to be regarded as risky and expensive to litigate.[141]

Proving that the workers' injuries were caused by asbestos exposure, and that particular corporations had manufactured the asbestos products to which the workers were exposed, required considerable investment of attorney resources, but the results of researching these issues could be used in every case the attorney represented. So, as time passed, it became clear that the litigation could be pursued more efficiently by plaintiff attorneys who had large numbers of asbestos worker clients, and hence, could spread the costs of litigating across all of them. Unions referred large numbers of their members to successful plaintiff attorneys; workers already represented by the attorneys referred their friends; and some attorneys held mass meetings and advertised to attract new clients. Even when clients were directed to attorneys en masse, the attorney signed a separate agreement with each individual worker to represent him or her.[142]

Although some of these workers had diseases that were clearly linked to asbestos exposure (so-called "signature diseases"), others had diseases—such as lung cancer—that have multiple causes. Some workers were dying of their diseases at the time that they sought legal representation; others retained lawyers when they had only minor impairments, or no impairment at all. Under the statutes of limitations in most jurisdictions, workers needed to file their lawsuits expeditiously once they knew they might have been injured by asbestos exposure. As time passed, attorneys with large asbestos caseloads came to represent workers with vastly different degrees of injury whose legal claims to damages from asbestos companies were of varying strength.

Asbestos worker injury suits usually were brought against multiple corporations that had supplied differing amounts of their products to different markets. As a result, in a single geographical area, some manufacturers arguably were responsible for greater amounts of worker exposure than others. Plaintiff attorneys sometimes negotiated settlements with corporations that had contributed lesser amounts to the asbestos product supply, under whose terms each of the attorney's clients would get a specified (usually modest) amount of damages. For administrative efficiency, these damages might not vary significantly from worker to worker. Payments from these peripheral defendants provided resources for these plaintiff attorneys to pursue full-blown litigation against major suppliers, whose shares of damages were arguably much greater.

In time, judges in jurisdictions where many asbestos-worker injury cases were filed began to encourage plaintiff attorneys and defendants to enter into similarly formulaic agreements. Sometimes judges helped the plaintiff attorneys and defendants settle large numbers of cases at a single time for an aggregate amount of money, which the plaintiff attorney would then allocate among his clients. Whether and how plaintiff attorneys kept their clients informed about the progress of settlement discussions, and what they told them about the details of the overall settlement that they had negotiated with defendants, were not subject to judicial review. Sometimes the judge oversaw the development of an allocation plan, and sometimes not. How payments to workers with differing degrees of injury and differing legal claims to damages varied was not a matter of public record.

After a decade of asbestos-worker injury litigation, most asbestos lawsuits were pursued in these aggregative fashions. But attorneys representing asbestos workers continued to view themselves as traditional personal injury attorneys. They signed individual representation agreements with their clients and continued to charge these clients a contingency fee, taking their traditional fraction of the amount of money each client received in settlement.

The pattern of individual plaintiff attorneys representing a large number of clients in formally individual (but practically aggregative) litigation was soon replicated in other mass tort litigation.[143] Plaintiff attorneys pursued different strategies in deciding whom to represent in these litigations. Some attorneys were highly selective; they only agreed to represent plaintiffs with serious injuries and with reasonably strong proof that those injuries were associated with their use of or exposure to the defendant's product. These plaintiff attorneys invested substantial resources in developing those cases and made it clear to defendants that they were willing to pursue the cases all the way through trial. Because they were careful in selecting cases and clients to represent, they were often successful at trial. Once they were successful, defendants were likely to be

eager to settle their other cases—which the defendants expected to be equally meritorious—for goodly amounts of money.

Other plaintiff attorneys, however, were less selective. They advertised widely in the press and on television and radio, agreeing to represent many individuals who had used the same product—some of whom had much less serious injuries and weaker legal claims than others. These attorneys' strategy was to leverage the value of the individual claims by the number of claims they represented. Because it cost defendants less to litigate when they settled a large number of claims all together (rather than defending each individually), they were often willing to pay more, in total settlement value, than they would have paid had they settled the cases individually. From the plaintiff attorney's perspective as well, it was cheaper to resolve cases in large numbers than to litigate each individually, meaning that each case's profit margin was higher. Defendants who offered aggregate settlements demanded that strong cases, which would have likely been settled for large amounts individually, be included in the aggregate. Plaintiff attorneys, in turn, demanded that weak cases, which might have been settled for very modest sums, if at all, be included in the aggregate. As a result, some plaintiffs got more than they would have received had their cases been pursued individually, and some got less—possibly considerably less—than if they had been represented by one of the more selective attorneys.

Sometimes trial judges actively encouraged such aggregate settlements, and helped to shape their substantive details. Some judges felt that they should take responsibility for assuring the fairness of settlements in these aggregative situations,[144] but no special rules were adopted—such as those that apply to class actions—to require informing plaintiffs that their cases were being handled collectively, to invite objections to aggregative settlements, or to subject attorney fees to judicial scrutiny. As in the case of asbestos litigation, the plaintiffs signed individual representation agreements with their attorneys, and the plaintiff attorneys charged each of them a standard contingency fee. In theory, if not in reality, mass personal injury litigation was individualized, regulated by private agreements between plaintiffs and their individual attorneys.[145]

As time passed, many plaintiff attorneys acquired reputations as mass tort specialists. They took on series of cases that had similar characteristics—for example, cases arising out of the use of different contraceptives, or out of the use of different implantable medical devices. Their chances of success in each successive litigation increased, because, having reaped large fees in previous cases, they could invest more money in developing new cases—finding evidence, hiring medical experts, funding scientific research to try to prove that the product caused the relevant diseases.[146] They found clients not only through client references and advertising, but also through other attorneys, who referred cases to them and, in return, took a percentage of the specialist's fee. Judges also ac-

quired reputations as mass tort specialists, and when cases were collected through the federal multidistricting procedure, these judges were viewed as prime candidates to manage the litigation.[147] Some judges also developed long-term relationships with attorneys whom they appointed as special masters in case after case, to help them manage these large litigations and fashion settlement plans.[148]

Increasingly, all of the litigation against a manufacturer or set of manufacturers arising out of the same product use or exposure came to be viewed as interdependent. A trial verdict in a case in one jurisdiction increased or decreased the value of other cases in other jurisdictions: Within the community of plaintiff and defense attorneys specializing in this litigation, the verdict was taken as a signal of the likely success of other cases. A trial judge's decision to admit or not to admit key evidence in a particular case—for example, a disputed document concerning corporate liability, or a controversial research study on the link between the targeted product and the plaintiffs' alleged injuries—was viewed as a sign that other judges would rule likewise, hence increasing or decreasing the value of all of the cases. Experts moved from case to case, and their statements in one case influenced whether and how they would be used in another case. A million-dollar or higher award of punitive damages would dramatically increase the value of each case, and hence of all of the cases in an attorney's caseload, because punitive damages can be awarded in each case and (depending on the jurisdiction) may not have any cap. *Any* award for the plaintiff that attracted great media attention would raise the value of the litigation inventory, because defendants are naturally averse to negative publicity about their products and brands. Discussing mass personal injury litigation, one plaintiff attorney told us, "These really aren't independent cases anymore."

Because of these interdependencies, the fate of a large-scale litigation could be determined by one or a few significant litigation events. Litigation related to Bendectin, an anti-nausea drug prescribed for pregnant women that allegedly caused birth defects, first increased dramatically when a trial court judge ordered a consolidated trial (which promised reduced litigation costs for plaintiff attorneys), and then collapsed when the jury that heard the consolidated case decided that plaintiffs had failed to prove that the drug caused the birth defects.[149] Litigation related to Copper 7, an intrauterine device that allegedly caused pelvic inflammatory disease, collapsed when the defendant settled a large number of lawsuits with the leading plaintiff attorney in the case. Without his leadership, other plaintiff attorneys could make little headway against a determined defense.[150] Conversely, when a couple of plaintiffs won large verdicts, including punitive damage awards, in separate silicone gel breast implant cases tried in California and Texas, the number of breast implant case filings soared. [151]

The interconnectedness of mass personal injury claims, and the aggregative nature of procedures for managing and resolving them, were further enhanced by assigning all claims arising from use of or exposure to a particular product—as well as catastrophic accident claims—to a single judge, under the federal multidistricting rules.[152] Although this procedure could not also collect claims filed in state courts, the latter *could* be collected within single states under formal and informal state court procedures. And, over time, federal and state court judges who presided over such groups of cases began to coordinate among themselves. They held joint pretrial conferences, established centralized discovery depositories, jointly set trial schedules (sometimes in an effort to ratchet up settlement pressure), and sometimes even sat together in a single courtroom.[153]

The bankruptcies of major asbestos defendants and A. H. Robins, the manufacturer of the Dalkon Shield intrauterine device, also contributed to the aggregative trend of mass personal injury litigation. Under Chapter 11 of the bankruptcy code, all claims against a bankrupt defendant must be collected in a single court. Under the aegis of the bankruptcy courts, many mass personal injury lawyers learned how to design large-scale aggregative settlements and administrative processes for allocating damages to hundreds of thousands of claimants.[154]

In sum, although federal and state personal injury cases could not easily be collected together as a matter of law, the informal practices of defendants, plaintiff attorneys, and judges produced huge nationwide networks of litigation in mass product liability and toxic exposure cases. In effect, the separate and coordinated practices of plaintiff attorneys, defendants, and judges created *virtual* class actions, without any of the procedural safeguards—or hurdles—required by Rule 23(b)(3).

Judges who presided over these large-scale litigations were advised to appoint "lead counsel" or "steering committees" on the plaintiffs' side, so that they would not have to deal with large numbers of plaintiff attorneys making potentially inconsistent requests.[155] Putting one or a few plaintiff attorneys in charge of key aspects of the litigation held the promise of reducing total lawyer fees and expenses and expediting the litigation process. Although these attorneys did not have the formal status of "class counsel" accorded to plaintiff class attorneys in securities, antitrust, and consumer litigation, their role was much the same. The lawyers appointed to lead counsel positions or membership on steering committees stood to earn additional fees beyond those they realized from representing their own clients. These additional fees could be negotiated with the lawyers who represented individual plaintiffs, in return for the services that lead counsel provided. Or the judge—under the "common fund" doctrine—would decide how to distribute the fees among the various attorneys.

For example, the judge might order that each attorney representing individuals in a multidistrict litigation pay half of her contingency fee to the lead counsel. Then, rather than receive one-third of the amount received by the client, the personal injury attorney would receive one-sixth of the amount, and pay one-sixth to the lead counsel. As a result, attorneys involved in cases in which judges awarded fees to lead counsel and steering committees not only faced the risk of losing the case to the defendant, but also faced the risk of making little or no profit on their investment in their individual cases when they won. Not surprisingly, once the litigation was resolved, there were often battles over fees and expenses, which sometimes erupted into new litigation, this time among the lawyers.[156]

As long as litigation was aggregated only *within* jurisdictions, competition among lawyers for cases was moderate. A mass tort practice was accurately perceived to be high-risk, and the costs of entry also high. Mass tort attorneys nurtured metropolitan or regional practices—in which they competed with but a handful of other local firms—and did not compete on a nationwide basis. But as the agglomerations of individual claims grew, partly as a result of multidistricting and partly as a result of major bankruptcies, the mass tort bar became more competitive. Competition for lead counsel positions was often fierce. Lawyers generally believed that the more clients they represented, the more likely they were to receive other lawyers' backing—and, ultimately, the judge's assent—for their appointment as lead counsel in multidistrict litigation. As a result, lawyers vied to see who could sign up the most clients. In normal circumstances, the pool of possible injury claims is substantially larger than the number of individuals who come forward on their own to claim compensation. In mass tort litigation, when attorneys publicized the possibility of securing compensation for possible injuries, a larger fraction of claimants stepped forward.[157] Hence, aggregation not only changed the shape of personal injury litigation, but increased its scale, often enormously.

2. Enter the Class Action Attorneys

Over time, the scale of mass tort litigation grew[158] in response to lawyers' aggregative litigation practices and judges' aggregative management practices. Still, this litigation was regarded as *individual*. Then, in the mid-1980s, Stanley Chesley, a personal injury attorney, began to promote the use of Rule 23 as a tool for resolving mass torts.[159] Chesley had served as lead counsel in the Beverly Hills Supper Club fire case, the first mass tort litigation where class action status was granted and sustained. As lead or cocounsel in the most widely known mass product defect cases, including the Agent Orange, Bendectin, and Shiley heart valve litigations, as well as a number of high-profile mass accident cases, Chesley advocated a strategy of early certification, expeditious settle-

ment, and formulaic allocation of compensation among class members—a strategy similar to that of some securities and consumer class action attorneys. Soon, other tort attorneys, including some asbestos plaintiff attorneys, were participating in class actions to resolve large numbers of product defect claims. When federal silicone gel breast implant cases were transferred to Judge Samuel C. Pointer by the Judicial Panel on Multidistrict Litigation in 1992, individual and class action tort attorneys were joined by class action attorneys who previously had confined their practice to securities and consumer cases.

The advent of class actions changed the dynamics of already-aggregated mass tort litigation, exacerbated old controversies, and created new ones. Mass tort practitioners had already learned that large numbers of cases, collected together, create intense pressure for settlement, and many had adopted strategies for finding substantial numbers of clients. But individual practitioners expected to invest in developing the facts underlying the litigation, as they had in asbestos and Dalkon Shield litigation. In their experience, plaintiffs needed to win some cases at trial—as in the litigation over the Copper 7 intrauterine contraceptive device, the Shiley heart valve, and the silicone gel breast implant—in order to demonstrate that mass tort cases had real monetary value. In contrast, class action specialists were accustomed to filing class actions soon after they detected possible wrongdoing; they did not expect to invest several years in developing individual lawsuits before moving into an aggregative mode. The arrival of class action practitioners on the mass personal injury scene meant that some attorneys—the class action specialists—were initiating lawsuits and sometimes even talking settlement soon after news of a defective product or a catastrophic event appeared, while other attorneys were still in the process of initiating relationships with individual clients and developing their cases.[160]

Speedy class certification led to charges that cases were being aggregated before their time. The idea that mass torts “mature” as they are litigated in different jurisdictions by different practitioners, to a point where the monetary values of claims with varying characteristics become clear to practitioners on both sides, was first articulated by Professor Francis McGovern. McGovern, who has served as a special master in numerous mass torts, argued that maturity was a necessary precondition for fair settlement of mass litigation.[161] The indicia of maturity, however, are not clear. McGovern’s notion was that, after some amount of litigation, the settlement value of cases would stabilize as the facts and application of law became clear to parties and lawyers. During the decades of asbestos mass tort litigation, however, values of similar cases have risen and fallen, more in response to changes in the configuration and strategies of defendants than from any shift in the nature of the cases. Despite the ambiguity of the concept and uncertainty over its application, whether cases were mature enough to aggregate became a subject of controversy in certain cases. In some

instances, trial courts declined to certify mass torts; in others, appellate courts reversed class certification of mass torts, partly on the grounds that the litigation was not yet "mature."[162]

Mass tort class actions also fed an already lively controversy over the use of scientific evidence in courts. One reason mass torts exist is that problems associated with product use and exposure may take a considerable time to manifest themselves. These injuries are referred to as "latent." Unlike immediate injuries, such as food poisoning—which almost invariably lead to quick removal of injurious products from the marketplace—latent injuries often go long undetected. As a result, a product may be used by thousands or even millions before warning signs appear and the product is withdrawn. Even when the injuries are detected, there may be controversy over whether a particular product is the culprit, or whether the population of users simply includes many people with a variety of unrelated injuries. Some lawyers and scientists have argued that courts too often base decisions in such cases on "junk science"—unsubstantiated claims of causal links between products and injuries.[163]

The validity of the scientific research underlying specific mass torts is a question that is beyond the scope of our study. But the question of whether class certification increases the likelihood that defendants will settle cases based on so-called junk science is a key aspect of the controversy over the use of class actions for mass torts.

Defendants say that, whereas they might be willing to assume the risk of trying an individual case where the science is weak—and take the chance that a jury will decide that there is sufficient evidence to support the plaintiff's claim—they cannot afford to take the risk of losing a class action trial verdict, which would determine the outcomes of thousands or even hundreds of thousands of claims. Even in aggregated cases, where an individual verdict will affect the settlement value of thousands of claims, the risk of going to trial is less than in a class action (according to defendants) because the verdict does not conclusively determine the fate of those aggregated claims.

Defendants' behavior in past cases is consistent with these claims. The science underlying the Agent Orange class action was so weak in the eyes of Judge Jack B. Weinstein that he dismissed the claims of veterans who opted out of the class action. But the class action itself had already been settled for $180 million.[164] In the litigation over Bendectin, a case in which the scientific controversy loomed so large that it led to a landmark U.S. Supreme Court decision, defendant Merrill-Dow placed a $120 million settlement on the table for a proposed class of victims, notwithstanding its strongly held views that there was no scientific basis for their injury claims. When the appellate court reversed the class certification, the judge tried some 1200 claims in a single "consolidated" trial.

The jury's decision that Bendectin did *not* cause the plaintiffs' injuries effectively ended the mass litigation.[165] Corporate counsel whom we interviewed for this study pointed to the $4.2 billion settlement placed on the table by Dow Corning and other defendants in the silicone gel breast implant litigation—at a time when the scientific evidence of a link between most of the alleged injuries and the implants was generally viewed as weak—as another example of how class certification creates pressures to settle cases with a weak or uncertain scientific basis.

Of course, the risks of trial for plaintiff class counsel—and class members—are also huge. As a result of the single consolidated (but nonclass) trial of Bendectin claims, hundreds of Bendectin users lost their lawsuits.

The argument about the validity and strength of the scientific evidence underlying mass torts is often intertwined with the argument about the lack of maturity of mass tort litigation—and hence, its inappropriateness for class certification. For example, because the scientific record concerning silicone gel breast implants was still being developed, some argued that class certification of the breast implant suits was improvidently granted.

3. The Lure of "Global Settlements"

Class certification also complicated the management tasks of judges presiding over mass tort litigation. Now, a judge assigned to handle all federal cases associated with a particular litigation, or a state court judge assigned to handle all cases in that litigation brought in a single state, found herself dealing with a mix of cases, all arising out of the same circumstances. Some plaintiffs were represented by more selective tort attorneys whose clients numbered in the scores or hundreds; some were represented by more inclusive tort attorneys whose clients numbered in the thousands; and some were represented only by class action practitioners who sought a resolution that would cover *all* individuals claiming injury from that product or substance. In certain cases, some attorneys formed alliances, but others were fiercely competitive. In contrast to a "headless" class action lawsuit, the judge found herself dealing with a multiheaded hydra of a litigation.

Most important, though, class certification changed the nature of the mass tort *settlement* process. Certification created opportunities for "global settlements," settlements that could end the litigation once and for all, for defendants and for courts. It also raised questions, however, about how to handle, in a class action context, the claims of individuals whose latent injuries might not yet have become apparent. Over time, plaintiffs and defendants came to recognize as well the expansionary powers of class actions in mass tort situations—powers that

had been only dimly perceived before and that proved threatening to defendants' and plaintiffs' interests alike.

To defendants facing nationwide mass tort litigation, the opportunity to settle all litigation against them is enormously attractive. Prior to the advent of mass tort class actions, the only vehicle available to defendants for achieving such overall settlements was bankruptcy. During the 1980s, the Manville Corporation and about a dozen other asbestos manufacturers chose that vehicle over continuing to defend multiple lawsuits in multiple jurisdictions;[166] the Dalkon Shield litigation also ultimately landed in the bankruptcy courts.[167]

But bankruptcy has significant costs for defendants, who stand to lose control over their companies during the bankruptcy process. Class actions not only provided a possible vehicle for achieving global settlements outside the bankruptcy courts, they also provided practitioners who were skilled at designing such settlements.

Both defendants and plaintiffs faced numerous challenges in negotiating global settlements.[168] First, in all but a few instances, if an argument were to be made for class certification, it had to be made on the grounds relevant to Rule 23(b)(3), and the (b)(3) notice and opt-out provisions would apply. Whether defendants and attorneys were able to negotiate a global settlement, using the class action as a vehicle, would depend critically on two questions: How many prospective class members would opt out?[169] How many of those who did *not* opt out would come forward to claim their share of the settlement? In small damage consumer class actions, the number of opt-outs is likely to be negligible, and the number of class members who come forward to claim damages is likely to be smaller than the estimated total class size. Hence, class counsel and defendants often can negotiate settlements before class members either opt out or file claims for compensation, knowing approximately how many class members will ultimately come forward. In contrast, in mass tort class actions, there is a significant likelihood that either the number of opt-outs or the number of claimants could be so large as to scuttle the settlement.

Opt-outs are an obvious threat to global settlements; if large numbers of individuals exclude themselves from a settlement and proceed individually, the defendants will not secure global peace. Defendants may then not be willing to settle at all. If they *are* willing to settle on less-than-global terms, they will not be willing to put as much money on the table as they would to achieve global peace. A cheaper settlement proposal diminishes the attractiveness of settling for plaintiff personal injury attorneys, who therefore may prefer to continue litigating informally aggregated cases.

In mass tort litigation involving many represented individual plaintiffs with claims of sizable value, the threat of opt-outs is substantial. Personal injury

attorneys who fear that a class settlement will not serve their clients or themselves well may advise their clients to opt out;[170] they may even attempt to scuttle the settlement altogether by mounting large-scale print or broadcast advertising campaigns urging prospective class members to opt out. To minimize opt-outs, it is essential that class action attorneys and defendants gain substantial support from personal injury attorneys.

The threat posed by opt-ins may be less obvious to students and practitioners of small damage class actions, where total settlement amounts are typically negotiated on a formulaic basis (*x* number of claims at so many dollars per claim). In mass tort class actions comprising claims of varying injury severity and legal strength—and often, an injured population whose size is unknown—settlement amounts may be negotiated on an aggregate basis. Essentially, what plaintiff attorneys and defendants negotiate is the *price of global peace*. For example, when Judge Weinstein successfully persuaded defendants to offer—and plaintiff attorneys to accept—$180 million to settle the Agent Orange class action, no one knew just how many veterans were in the class, much less what their injuries were and how many would ultimately come forward to claim compensation.[171] When defendants tentatively placed $4.2 billion on the table to settle the silicone gel breast implant litigation, their estimates of the size of the class were reportedly about 100,000; subsequently, more than 400,000 women sought to share in the settlements.[172]

If defendants set an aggregate price on global peace, the amount that each individual class member gets, and, therefore, the amount of fees that each personal injury attorney who represents an individual claimant gets, will depend on how many individuals come forward to claim a share of the settlement. If the notice of a possible settlement is widespread, and relatively easy for lay persons to grasp, many *unrepresented* claimants may come forward to share in the settlement. The larger their numbers, the less money available for represented claimants, and the less money available for the latter's attorneys. (Recall that personal injury attorneys, having signed fee contracts with their client-class members, will receive a percentage of each client's award, which they will likely be required to split with class counsel.) Just as defendants may not be willing to settle a mass tort class action if too many prospective class members opt *out*, individual plaintiff attorneys may be unwilling to settle if too many claimants opt *in*. Class counsel, who expect to be paid a percentage of the total settlement, may be less concerned about the ultimate number of opt-ins.

Wrestling with these uncertainties, plaintiff attorneys and defendants who were attempting to craft global settlements of mass torts proposed to judges that they *conditionally* certify classes *for settlement purposes only,* and notify the class of certification and the terms of the tentative settlement in a single announcement. Class members could then be asked both whether they wanted to opt out

and whether they wanted to opt in. Defendants agreed to settle a class action on the proposed settlement terms, but reserved the right to contest certification if the judge ultimately declined to approve the settlement, and, sometimes, if other conditions were not met. For example, defendants might withdraw agreement if the number of opt-outs was excessive (sometimes termed a "back end opt-out"). Plaintiff attorneys, in turn, might withdraw agreement if the number of opt-ins was so numerous that the value of individual claims would be diluted. For the judge, this approach to the opt-out process might also be attractive, since the number of opt-outs could be taken as an indicator of the perceived fairness of the settlement.

Conditional class certification was not a new idea. The Advisory Committee Notes to Rule 23 refer to the possibility of conditioning the "maintenance" of a class action on attorneys' satisfying various judicial concerns. [173] Settlements conditional on the number of opt-outs and opt-ins are sometimes negotiated in consumer class actions as well. But the idea of conditional certification for settlement purposes only raised new issues for mass tort class actions. If judges were only certifying a class for settlement, did this mean that they did not need to decide whether it would be possible to try the litigation as a class? Rule 23 instructs judges to take into account the "difficulties likely to be encountered in the management of a class action" in deciding whether to certify a case.

Trying mass tort class actions raises a host of problems. Consumer class actions brought under a single state statute have arguably common liability and damage issues. Conversely, in mass tort class actions, the claims may present common liability issues, but almost always present different damages issues because claimants' injuries are typically diverse and vary in severity. In response to this configuration of claims, judges who have certified mass tort cases for trial typically propose to try the common issues (often including punitive damages) first, and then hold separate trials for individual damage claims or groups of damage claims. For example, in the first asbestos worker injury class action, *Jenkins v. Raymark Industries*,[174] Judge Robert Parker proposed to hold a single trial on the common issues of liability and punitive damages, followed by multiple individual trials on damages in which juries would hear the cases of seven to ten plaintiffs at a time and determine damages for each.

In practice, most judges anticipate that parties to a mass tort class action will settle the individual damage claims without trial—as happened in *Jenkins*, where defendants settled the claims of class members five weeks into the common issues trial.[175] But suppose the parties do not settle? For a subsequent asbestos worker injury class, Judge Parker devised a plan for trying damages using a statistical sampling approach. The plan required three juries whose decisions were to determine the outcomes of 2000 class members' claims. The first jury heard the liability evidence and decided against the defendants; it also

decided to award punitive damages and determined how those damages would be computed. Then, two different juries heard the evidence concerning nine class representatives and 160 additional class members, who had different exposure history and injury severity, and who had been selected to represent the variations in damages within the class. The two juries sat jointly to hear some of the evidence and separately to hear evidence specific to plaintiffs' individual damages. After the juries decided whether and how much to award the 160 individual plaintiffs, the judge extrapolated these awards to the entire 2000-member class, according to a formula that the parties had agreed to before the trial.[176] Defendants appealed the results on the grounds, *inter alia,* that they had been denied their due process rights to jury trial of each individual claim, and the Fifth Circuit ultimately agreed with the defendants, reversed the individual outcomes, and returned the case to the district court for retrial.[177]

In the east Texas asbestos class action trial, all of the class members' cases were subject to Texas tort law. But if judges certify *nationwide* class actions of mass tort claims, the problems of trying a class action multiply dramatically. What law should apply to these cases? Unlike securities cases and some consumer class actions, which are brought under specific federal or state statutes, mass tort claims are brought under the so-called common law—that is, the case law that has developed over time, as judges decide specific cases. No *federal* tort law exists for cases that are filed in federal court under the diversity jurisdiction. Therefore, even if the cases are brought in a federal court, the law of the separate states in which the claims arise may be deemed to apply, and these laws may imply very different trial or settlement values for factually similar claims. How to address what lawyers term the "choice of law" problem is one of the most difficult issues for class actions brought under common law theories, and—more generally—for nationwide class actions that involve different states' laws.[178] Numerous law professors and task forces[179] have issued recommendations addressing choice of law problems, and congressional legislation has been introduced in the past to provide a special forum for nationwide mass tort litigation to remedy choice of law problems.[180] So far, no solution to this problem has been found. Indeed, some attorneys and parties believe that when claims implicate different states' laws, certification should not be an option, because the requirement that common issues predominate is not met.

To some judges presiding over mass tort cases, it seemed that certifying classes for settlement only provided a means of postponing these difficult choices of law and other trial problems—and, if the class action settled, a means of avoiding them altogether. However, other judges disagreed.[181]

As controversy over mass tort class actions mounted in the 1990s, some critics focused on settlement classes—cases certified for settlement only. Critics argued that judicial certification of a class immensely strengthened the plaintiffs'

bargaining position by raising the potential cost of resolution dramatically. By agreeing to negotiate a settlement in the shadow of a possible denial of class certification, these critics asserted, plaintiffs were throwing away their most powerful weapon.[182] In our interviews, several plaintiff attorneys rejected this contention. They argued that, in some instances in which certification was far from a sure thing, defendants were willing to negotiate settlements favorable to plaintiffs because they feared the possibility of certification. Uncertainty about certification, these attorneys said, was a double-edged sword: when the likelihood of certification, absent a settlement, was modest, uncertainty helped plaintiffs negotiate settlements that might not be possible at all if the judge were to rule on certification *before* the parties began negotiation. If, however, the likelihood of certification were high, negotiating a settlement in the absence of a certification decision should strengthen the defendant's hand at the expense of plaintiffs. The net effect of certifying settlement classes, across "all" class actions, would depend on the balance of strong and weak cases.

Controversy within the bench, bar, and legal academy over whether settlement classes are allowable under Rule 23 contributed to the effort to revise Rule 23 in the late 1990s, and ultimately led to a U.S. Supreme Court decision. The Court ruled that class actions could be certified for settlement only.[183] But its decision raised other questions about the viability of mass tort class actions, to which we will return below.

The silicone gel breast implant class action illustrates how judges and lawyers have tried to manage mass torts within the class action framework. In the breast implant litigation, Judge Pointer—who had been assigned all federal breast implant cases under the multidistricting rules—conditionally certified a class for settlement purposes only. To deal with the twin problems of opt-outs and opt-ins, the attorneys devised a procedure that they dubbed the "double opt out." The broad terms of the conditional settlement would be advertised worldwide and women would be given the opportunity to opt out (the first opt out). If too many women opted out, the class would not be officially certified and the defendants could walk away from the settlement. If the defendants decided to stay in, those women who did not opt out in the first round would be asked to register themselves either as "current" or "future" claimants (current claimants were seeking compensation for current illness). Depending on the characteristics of their disease and other aspects of their claims, the women who registered would be assigned to categories in a matrix that assigned different monetary values to each category. After the opt-in period was over, the attorneys and defendant would calculate whether the total $4.2 billion would suffice to cover all claims. If not, the values of *all* of the categories of injury/claim would be reduced proportionately. Women would then be given *another* opportunity to opt out (the second opt-out) if they were unsatisfied with the new

amount. Defendants would then get *their* second chance to walk away from the class action and the settlement, if opt-outs were too numerous.[184]

All proceeded smoothly through the first opt-out stage: About 8,000 women filed requests to opt out (including many represented by the individual personal injury attorneys who had been most successful in winning jury verdicts and generous settlements), and defendants decided to stick by the settlement. But in a staged process for registering claims, more than 400,000 women came forward, including approximately 100,000 who declared themselves current claimants. Although some were unrepresented, about 30,000 plaintiff law firms filed claims on behalf of one or more clients. With defendants unwilling to increase their settlement offer significantly, the settlement value of each claim would have had to be reduced by 90 percent. Long before the bureaucratic process of categorizing claims was complete, it was clear that the proposed settlement plan was dead.

4. The Question of "Future" Claimants

The silicone gel breast implant settlement had one ingredient that distinguished it from other mass tort settlements: it sought to bind *all* women who had used breast implants, whether or not they had been injured or had filed lawsuits prior to the notice of the conditional $4.2 billion offer by defendants. In mass torts that are settled outside a class action, there is no way to scoop up claims that have not yet been filed; the attorneys can only negotiate a deal on behalf of those individuals who have filed lawsuits that are before a particular court—for example, the court to which the Judicial Panel on Multidistrict Litigation has transferred cases. If defendants want to settle more cases, they have to negotiate with other attorneys, or they have to negotiate another settlement with these same attorneys some time in the future, when the attorneys have taken on more cases. In effect, mass tort settlements outside the class action framework can offer only *regional and temporary*—rather than global and eternal—peace. In practice, a settlement in a multidistrict litigation may end the litigation with regard to all attorneys who are currently interested in this particular litigation, thereby buying global peace, albeit not guaranteeing it.

Only two procedural mechanisms—bankruptcy and class actions—arguably permit attorneys and defendants to broaden the embrace of their proposed settlement to incorporate the claims of individuals who have not previously come forward. Bankruptcy provides for informing individuals with personal injury claims against a bankrupt defendant (whether or not they have already filed lawsuits) that they must come forward to state their claim, because the objective of the bankruptcy proceeding is to assess the total value of all claims of all creditors against the bankrupt debtor, in order to devise a plan to liquidate or

restructure the bankrupt entity.[185] Bankruptcy courts have treated as "creditors" individuals who—absent bankruptcy—would have had a viable claim against the entity in the future, and required that bankruptcy plans take these future claimants' interests into account. Class action notice required under Rule 23 informs individuals who have not previously filed lawsuits, but who have a viable claim, that they need to take action—namely, opt out—to retain the right to pursue the claim outside the class action. The rule is silent on the question of whether those who might have a claim *in the future* are regarded as prospective class members.

Defendants seeking global peace would like to bind all those who do not opt out from *ever* suing them individually for the injuries associated with a particular product. By quantifying and capping their risk, defendant corporations can send a signal to the stock market that the company's financial viability is not at risk. Hence, defendants have sought the protection of the bankruptcy courts in several instances of mass litigation, including asbestos (which has led to a dozen or so bankruptcies of major defendants), the Dalkon Shield litigation (which led A. H. Robins to the bankruptcy court), and the silicone gel breast implant litigation (in which Dow Corning declared bankruptcy after the class action settlement collapsed). Defendants have also attempted to include potential future claimants under the umbrella of class action settlements in some mass torts.

The 1984 class action settlement of Vietnam veterans' Agent Orange claims successfully precluded all future litigation against the manufacturers of Agent Orange, even though at the time of the settlement many veterans had not initiated lawsuits and may not have regarded themselves as injured.[186] But binding future asbestos personal injury claimants proved highly controversial when attorneys negotiated settlements with two different sets of asbestos defendants on behalf of *all* workers (and their family members) who had not previously filed lawsuits against these defendants.[187] Legal scholars who had not previously concerned themselves with mass torts, and who seemingly assumed that asbestos suits were being considered individually by the courts, worried that future claimants would be denied due process.[188] Asbestos plaintiff attorneys who were not party to the negotiations, including some who—absent the settlement—might well have expected to represent many of the individual workers included in the proposed "futures classes," also objected vigorously to the proposed settlements.[189]

Several features of the proposed settlements contributed to the scholarly and practitioner attack upon them. The plans established ranges of recovery for different types of injury, and tightly restricted access to the courts for those who wished to challenge what would essentially be administrative decisions. The

terms of the plans were far less generous, critics argued, than the terms of settlements that these same defendants had just recently agreed to for "current" claimants. What made this evolution of plan terms particularly troubling was that the same attorneys who represented those current claimants had negotiated on behalf of the futures classes with these same defendants. The chronological proximity of the current and future settlements raised questions about whether the attorneys had bargained away the rights of future unknown clients in favor of current clients and current fees. Moreover, the fact that the judges had certified these suits as settlement classes only—and that it seemed unlikely that the cases would have been certified for trial[190]—suggested to some critics that plaintiffs' attorneys had bargained from a position of weakness, further diminishing the merits of the settlements.

Additionally, in one of the cases, the trial court certified a non-opt-out class on the arguable presumption that the nonbankrupt defendant was capable of financing only a limited fund. The U.S. Supreme Court ultimately agreed to review both cases. In *Amchem v. Windsor*[191] (the case previously known as *Georgine*), the Court ruled that settlement classes are allowable under Rule 23(b)(3). But the Court firmly rejected *this* class. Siding with the critics, the Court found that there were too many differences in fact and law within the class to satisfy Rule 23's "commonality" requirement; the mere fact of settlement could not, in itself, satisfy this requirement. The Court held that the class representatives could not credibly represent the interests of such a diverse class, and questioned whether notice can ever be adequate when a class seeks to embrace future claimants—and hence whether class actions including future claimants could ever be sustained. Subsequently, in *Ortiz v. Fibreboard Corp.,*[192] the Court rejected the limited fund non-opt-out class as well.

Although the controversy over futures class actions focused on concerns about the rights of individuals who might not yet realize that they are injured—and hence might ignore notices of the pendency of a class action and their need to opt out if they wish to retain the right to sue—there was a larger question underlying the controversy: Can and should a mass tort class be defined to include currently nonimpaired product users? In any suit over mass product injuries there is likely to be a mix of class members who are currently injured and class members who know or believe that they have been injured (exposed), but who are not currently impaired. By defining a class to include all those who have *used* a product during a specified time period, plaintiff attorneys and defendants can sweep into the class those who are currently impaired and those who are not. This broad class definition is attractive to defendants, because they gain protection against any possibility of suits from individuals who become ill in the future as a result of their past product use. It is also attractive to class action attorneys because a broad definition vastly increases the size of the class,

which will usually result in higher class counsel fees. It may *not* be attractive to individual personal injury attorneys, who may worry that increasing the class size will mean that there will be less money for their clients and for themselves.

Whether and how to compensate currently unimpaired individuals is a hotly contested question in mass tort settlement negotiations. When all class members allege that they have a current injury, the monetary settlement will usually be structured so as to compensate class members—to a greater or lesser degree—for their medical and other economic losses. But when the class includes individuals who have no current injury, settlements may include noncash components as well, such as regular medical check-ups ("medical monitoring"). In mass toxic exposure cases where significant numbers of class members are unimpaired, the community in which such exposure took place may be offered a new community facility or service, in lieu of or in addition to other compensation.

In some instances, such nonmonetary or groupwide benefits have attracted the same criticism as the use of coupons to settle consumer class action lawsuits. From our interviews, it appears that class action practitioners are more comfortable with these sorts of case outcomes than individually retained mass tort practitioners who traditionally take and shape cases to secure individual cash compensation for their clients. The failure of the original silicone gel breast implant class action settlement, and the obstacles encountered by the futures settlements of asbestos worker class actions, reflect the difficulties of bringing together formula-minded consumer class action lawyers and individual compensation–oriented tort lawyers.

5. Absent Parties

In consumer class actions for small money damages, we do not expect the class members themselves to appear on the scene, at least until notice of class certification is provided and, more likely, only when a notice of settlement and instructions for securing compensation are published or appear in the mailbox. But what of the mass tort class members who know or believe they were exposed or injured? Unlike the consumer who may have lost a modest amount in a transaction or series of transactions, injured individuals are likely to have received medical diagnoses; at a minimum, they are likely to have been exposed to worrisome information about future illnesses due to their product use or exposure.

Mass tort litigants who have retained individual attorneys have varying degrees of interaction with those attorneys and receive differing levels of attention from them. For example, mass tort litigants may find attorneys through mass advertisements, receive information from automated telephone call-in systems, and

communicate with the law firm by mail. They may talk to paralegals but never meet their lawyer. Mass tort litigants who are represented by class action attorneys do not come forward until notice of class certification or settlement is published. Their identities are unknown to the lawyers who represent them—as the lawyers may be unknown to the class members.

Mass tort litigants generally lack adequate information to monitor individual or class action attorneys' behavior. Some firms disseminate newsletters about the progress of the litigation. Sometimes litigants form victims' groups that disseminate information. But in most mass tort litigation, whether or not a class is certified, plaintiffs are absent from the rooms in which settlements are discussed and negotiated.

In most class actions, class members' first and best opportunity to voice their aspirations for the litigation is at the "fairness hearing," held by the judge prior to approving the settlement. In the Agent Orange class action, Judge Weinstein held fairness hearings in five cities to provide opportunities to Vietnam veterans residing in different parts of the country to express their views. By the time of a fairness hearing, however, the shape of the settlement is set. Judge Weinstein apparently viewed the role of the fairness hearings as catharsis—an opportunity for individuals to have at least a vestige of their "day in court"—rather than a real opportunity to learn from class members what they wanted from the litigation.

Judges rarely turn to mass tort litigants for help in monitoring lawyers' behaviors. Some have suggested that judges should appoint party representatives who could play this role, but others argue that it is the lawyers' responsibility to properly represent the interests of class members and individual clients.

6. Back to the Drawing Board?

In the wake of the Supreme Court's rejection of the *Amchem* settlement, practitioners whom we interviewed questioned the viability of mass tort class actions for latent injury claims. Echoing the recommendations of the 1991 report of the Ad Hoc Committee on Asbestos Litigation,[193] Justice Ruth Bader Ginsburg's opinion for the Court suggested that Congress should take up the question of developing a compensation process for asbestos worker injury suits. (Recall that this was the report that—in lieu of congressional action—recommended that the Advisory Committee on Civil Rules consider revising Rule 23 to facilitate mass tort class actions.) The *Ortiz* Court repeated this call.[194]

But the Court's decisions in the asbestos cases did not spell the end of aggregation. Class actions have been filed in the "fen-phen" diet pill litigation, and all of the federal lawsuits on behalf of fen-phen users have been collected in a sin-

gle federal court, under the multidistrict rules.[195] Informal coordination of state court cases continues apace.[196] Plaintiff personal injury lawyers who were not appointed to the plaintiff steering committee by multidistrict Judge Louis Bechtle have organized the state court cases so that they can proceed through the pretrial process in a coordinated fashion, but outside of the federal multidistrict litigation.

Once litigation erupts over mass marketed products, it inevitably is pursued in an aggregative fashion.

E. DILEMMAS FOR PUBLIC POLICY

Traditional representative class actions over money, particularly lawsuits involving small dollar claims, pose multiple dilemmas for public policy. Many believe that these lawsuits serve an important regulatory function, especially in an era of limited governmental resources and limited appetites for bureaucratic process. Despite their distaste for class litigation and their dismay about rising numbers of lawsuits, many corporate representatives whom we interviewed said that the burst of new class litigation had caused them to review financial and employment practices. Likewise, some manufacturers noted that heightened concerns about potential class action suits sometimes have a positive influence on product design decisions.

But, in a large, complex, and highly regulated economy—comprising hundreds of thousands of firms and individual entrepreneurs, with diverse opportunities and predilections for small and large violations of legal rules—the private financial incentives for class actions also create a litigation system that tends toward expansion. As long as the legal system rewards success with substantial fees, private law firms that are expert at selecting and pursuing cases that have a high potential for financial reward will flourish, enhancing their risk-taking capacity. Over the long run, we should expect these successful firms to seek increasingly risky opportunities for litigation, testing whether various types of class action suits are viable.

For those who believe that a key objective of damage class actions is regulatory enforcement, a central dilemma is how to keep these expansionary forces from producing significant amounts of nonmeritorious litigation. For whenever the justice system rewards litigation without regard to its legal or factual merit, the deterrent potential of litigation is squandered.[197]

Largely clientless consumer class action litigation holds within itself the seeds for questionable practices. The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the

least publicity. Procedural rules, such as the requirements for notice and judicial approval of settlements, provide only a weak bulwark against self-dealing and collusion. Notices may obscure more than they reveal to class members whose immediate gain or loss from a proposed settlement is modest. Individuals who step forward to challenge a less-than-optimal resolution or a larger-than-appropriate fee award often have a price at which they will agree to go away or join forces with the settling attorneys. Judges who are constantly urged to clear their dockets and are schooled to believe that the justice system is better served by settlement than adjudication may find it difficult to switch gears and turn a cold eye toward deals that—from a public policy perspective—may be better left undone.

Over time, we would expect that predatory class action filings and collusive settlement practices would produce increasing numbers of cases whose merits are either dubious or not well known, because they were not prosecuted to the fullest. They would also create a climate of cynicism about the objectives of plaintiff attorneys and the value of class actions generally.

Rather than solving the incentive problems posed by "headless" consumer class actions, multiheaded mass tort class actions bring an additional set of problems to class action practice. The multiplicity of lawyers of different types—class action practitioners, aggregative individual practitioners, more selective tort lawyers—provides additional opportunities for deal-making among practitioners, which may or may not benefit class members. The need to satisfy so many legal representatives may also drive up the total transaction costs for the litigation. The size of individual class members' claims—tens or hundreds of thousands of dollars, rather than the small dollars and cents of consumer class actions—means that the financial stakes of the litigation are enormous, measured in hundreds of millions, or billions, of dollars. Defendants' drive to make their ultimate financial exposure certain leads them to put huge amounts of money on the table in order to settle class litigation, an investment of resources that serves society's interests only when the class members' injuries are, in fact, caused by the defendants' product. Plaintiff attorneys are hard put to reject the largess that flows from fees calculated as a percentage of such enormous sums, even when the deals that defendants offer are not necessarily the best that they could obtain for injured class members if they were to invest further effort and resources in the litigation. Defendants' incentives to settle mass tort class actions—even when scientific evidence of causation is weak—and plaintiff attorneys' incentives to settle for less than the individual claims taken together are worth, diminish the deterrence value of product litigation, leading to both over- and underdeterrence.

Controversy over the role of "junk science" in class actions is another aspect of the controversy over whether class actions, in practice, achieve regulatory en-

forcement objectives. We want manufacturers to take the costs of injury into account when they design and market products. Exposure to liability (combined with market forces and regulation) should cause manufacturers to invest in making safer products, the cost of which will be passed on in the form of higher prices to the consumers who benefit from the improvements. If defendants pay large amounts to settle claims of individuals whose injuries were most likely *not* caused by the defendants' products, then these costs as well are passed on to consumers who end up paying higher prices for products than they should. If the manufacturer cannot design a product whose benefits to consumers outweigh the risks, or that cannot be properly labeled so that consumers can decide whether to use it, then consumers do not want that product on the market. But if defendants come to believe that certain products are likely to lead to expensive litigation, without regard to scientific evidence indicating whether plaintiffs' injuries were caused by their use of that product, then good products may be kept off the market and consumers lose again. Ultimately, if the legal system does not properly distinguish between safe and unsafe products, the legal system's ability to deter bad products and practices is also lost.[198]

The expansionary effect of class actions has special consequences for mass torts. In consumer class actions, a successful notice campaign will increase the cost of litigation for defendants, but often will have little impact on the amount that class members collect, since the economic losses that led to the class action were modest and the remedies are usually commensurately small. But in mass tort litigation, the expansion of the claimant population as a result of class certification affects both defendants *and* plaintiffs. Defendants will likely pay more to settle a class action than they would absent the class action because more claimants come forward in response to notices and the media attention that class actions often receive, and some of those who secure payment might not have been able to win individual lawsuits. What attracts defendants to mass tort class actions nonetheless is saving litigation costs and capping their risk—both necessary to reassure stock market analysts who closely follow the progress of such high-stakes litigation. Individual class members whose claims have merit are likely to get *less* than if they sued individually, because the money will have to be shared with many other claimants—including those with less serious or questionable injuries. Those with the most serious injuries and strongest legal claims are likely to lose the most.

Moreover, allocating damages to mass tort class members raises special questions. In consumer classes, if the primary goal is regulatory enforcement, carefully matching damages to losses is not a great concern. As long as defendants pay enough to deter bad behavior, economic theorists tell us, it does not matter how their payment is distributed. In mass torts, there are twin goals: compen-

sating injured class members, and deterring unsafe products and practices.[199] Tort damages are intended to make the victim whole. Where class members' injuries vary in nature and severity, finding a means of allocating damages proportional to loss without expending huge amounts of money on administration is a tall challenge. The need to save transaction costs drives attorneys toward formulaic allocation schemes. But resolutions that lack individualization challenge a fundamental reason for dealing with mass injuries through the tort liability system, rather than a public administrative scheme.

Finally, mass tort class actions may exacerbate the problems that courts have dealing with evolving scientific evidence of causation. Scientific questions are rarely resolved forever. Today, scientific research may suggest that there is no link between exposure to a certain substance and certain diseases. Next year—or a decade from now—scientists may discover one. Courts, in contrast, need to make decisions in the short term; they need to decide whether there is *now* enough information to indicate that the defendant's product caused the plaintiff's injury (and that the defendant should have known it). When cases are decided individually, some plaintiffs may not receive compensation for an injury this year because they cannot demonstrate that the product caused their injury. Years from now, other plaintiffs may be able to receive compensation for the same type of injury because they *can* demonstrate causation. We accept this outcome, in return for the knowledge that the legal system will provide a remedy for provable wrongs within a reasonable period of time. However, when huge numbers of cases are collected and litigated on the basis of current scientific knowledge we run the risk of making the "wrong" decision in the light of future knowledge for many individuals, including some whose injury has not yet even manifested itself. Whether this risk is worth the benefits to class action plaintiffs and defendants is an important public policy question.

Although eliminating Rule 23(b)(3) might eliminate small damage consumer class actions, mass personal injury litigation is not a creature of Rule 23. Mass litigation is a creature of a modern global economy, a cultural belief that those who impose harms upon others should pay for them, and a litigation system that is driven by information technology and entrepreneurship. Absent class actions, mass tort litigation proceeds in aggregative form, albeit perhaps in multiple jurisdictions and on a smaller scale. Class action rules and practice offer a structure for considering troubling questions of representation and fairness, for regulating attorney fees, and for achieving more efficient resolution of the central causation and liability questions that lie at the heart of most mass torts—a structure that is much less developed outside the class action domain. Whether the current Rule 23 is well-crafted to fit the features of mass tort litigation—or whether it might be better to devise a special version of the rule for these cases—is a question deserving further consideration. But no one con-

templating the appropriateness of class treatment for mass torts should do so in the belief that truly individual litigation is the alternative.

Whether there are legal rules and practices that could better harness the incentives created by collective litigation, to assure that its public goals are not outweighed by the private gains, is the key question for public policy. In the final chapter, we will return to this question.

NOTES

[1]Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504(a)(7), 110 Stat. 1321 (1996) ("None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity. . . that initiates or participates in a class action suit"), and Omnibus Consolidated Appropriations Act of Fiscal Year 1997, Pub. L. No. 104–208, § 502(b), 110 Stat. 3009 (1996), forbid Legal Services Corporation grantees to participate as counsel in a class action or to engage in any litigation concerning welfare, abortion or redistricting, or on behalf of aliens (with some exceptions) or prisoners. Commenting on the appropriation for the Legal Services Corporation on September 29, 1995, Senator Peter Domenici (R) emphasized: "No class action lawsuits—no class action lawsuits—can be filed. . . [The appropriation provides for] [i]ndividual legal services for individual Americans in need, for their case and their cause and only that." And Senator Ernest Hollings (D) commented: "There are plenty of moneys [sic] for class actions for these other groups [from other sources]. You have to keep [LSC] couched and carefully controlled. . . So I welcome the restrictions that have been put on by Senator Gramm and others here with respect to class action and illegals and otherwise. Let us make sure that we maintain the integrity of the program." 141 Cong. Rec. S14,607 (Sept. 29, 1995).

[2]Administrative Office of the U.S. Courts, 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23* xii (1997) (hereinafter *Working Papers of the Advisory Committee).*

[3]Social scientists have found that requiring individuals to consent to a procedure—for example, participation in a research project—is markedly higher when consent is measured *passively*, by failure to file an objection, rather than *actively*, by explicitly registering agreement to participate. See, e.g., Phyllis Ellickson, "Getting and Keeping Schools and Kids for Evaluation Studies," Special Issue, *Journal of Community Psychology* 102 (1994).

[4]See, e.g., Bob Van Voris, "Plaintiff Bar Divided By Settlements: Tiny Payouts, Big Fees Hit By Public Interest Lawyers," *National Law Journal*, Feb. 23, 1998, at A1, A22.

[5]157 F.R.D. 246 (E.D. Pa. 1994).

[6]162 F.R.D. 505 (E.D. Tex. 1995).

[7]*In re General Motors Pick-Up Truck Fuel Tank Litigation,* 55 F.3d 768 (3d Cir. 1995).

[8]*In re Ford Motor Company Bronco II Products Liability Litigation,* 177 F.R.D. 360 (E.D. La. 1997).

[9]3 *Working Papers of the Advisory Committee, supra* note 2, public hearing, Dec. 16, 1996, at 25.

[10]The legal term of art for this is that civil procedure rules are "trans-substantive."

[11]Thomas Willging, Laural Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Washington, D.C.: Federal Judicial Center, 1996).

[12]We also compiled data from the Bureau of National Affairs (BNA) litigation reporters, which we presented in a briefing on the preliminary results of the study. See Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* (Santa Monica, Calif.: RAND, 1997). Because those data reflect trends in some litigation areas but not others, we have not included them in the analysis here.

[13]See *supra* Chapter Two at p. 12.

[14]Willging et al., *supra* note 11. In Appendix B we compare the results of our database search with the Federal Judicial Center data.

[15]Business critics of class actions have complained that Alabama state court judges have been too ready to entertain damage class actions and hence that Alabama has become a "hotbed" of such litigation. Plaintiff class action attorneys whom we interviewed agreed that Alabama was an attractive place to file certain kinds of class action lawsuits. None of our interviewees shared detailed information on the distribution of their pending class action cases by state. A study conducted for a corporate consortium by Stateside Associates found 91 putative class actions filed in six rural Alabama counties from 1995–1997. In half of these cases, the court had yet to act on certification. Virtually all of the cases in which certification had been decided were certified, often on an ex parte basis (that is, without defendants having a chance to argue against certification)—a practice then permitted in Alabama as well as some other states. More than half of the certified cases involved nationwide classes. See Martin Connor, *Class Actions in State Courts A Case Study: Alabama* (Arlington, Va.: Stateside Associates).

[16]Appendix C describes our qualitative interview methodology.

[17]No one we interviewed gave us access to their files so that we could independently count their pending or past class action lawsuits. Some shared rough estimates of the size of their pending caseload, and compared it to cases pending three to five years ago. Others consulted lists of cases during our interviews but would not share those lists with us. A few reviewed their lists with us during the interview, but we were not allowed to copy them. Some described the cases in detail, although they would not allow us to identify the cases in our writing.

[18]Caseloads of the leading national class action attorney firms could grow as a result of the shifting of class action suits from smaller regional or local firms, rather than as a result of growth in the total number of class actions nationwide. Our interviews provided no evidence of such a shift, however.

[19]We conducted the majority of interviews when securities lawyers were still trying to determine how to respond to the new federal legislation. More recent conversations with securities lawyers and those who monitor securities litigation suggest that the number of federal securities suits may have increased since the reforms were enacted into law.

[20]In the past, some class action practitioners specialized in securities class actions, while others were primarily engaged in consumer law. Few of either set of attorneys had anything to do with mass product litigation. In the past several years, securities lawyers have ventured first into the broader consumer domain and then, increasingly, into mass personal injury and property damage litigation. Section D describes this evolution.

[21]There is considerable theoretical and empirical research showing that Americans are generally unlikely to pursue legal claims. See, e.g., Michael Saks, "Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?" 149 *University of Pennsylvania Law Review* 1147 (1992); William Felstiner et al., "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . . " 15 *Law and Society Review* 629 (1981); Deborah Hensler et al., *Costs and Compensation for Accidental Injury in the United States* (Santa Monica, Calif.: RAND, 1991).

[22]See *Basic v. Levinson,* 485 U.S. 224 (1988). For a discussion of how damages are calculated under this theory, see Janet Alexander, "The Value of Bad News in Securities Class Actions," 41 *UCLA Law Review* 1421 (1994).

[23]Public officials can prosecute on behalf of the government or they may bring class actions on behalf of all consumers or all residents within their state.

[24]Christopher Drew and Pam Belluck, "Fresh Hazards," *New York Times*, Jan. 4–6, 1998.

[25]*Id.*, "Tracing Bout of Illness to Small Lettuce Farm," *New York Times*, Jan. 5, 1998, at A14.

[26]*Id.*

[27]Prepared Testimony of Arthur Levitt, Chairman of the U.S. Securities and Exchange Commission, before the Subcommittee on Telecommunications and Finance, House Committee on Commerce (Feb. 10, 1995) (transcript available from Federal News Service).

[28]*Id.*

[29]4 *Working Papers of the Advisory Committee, supra* note 2, at 456.

[30]Testimony of John Frank before the Subcommittee on the Courts and Intellectual Property, House Judiciary Committee 12 (Mar. 5, 1998) (transcript available from Federal News Service).

[31]Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 *Harvard Law Review* 356, 397–98 (1967). In the same article, Professor Kaplan wrote: "The Advisory Committee forecast that cases of fraudulent mis-

representations or antitrust violations affecting numerous persons would be likely, although not by any means sure candidates for class treatment under subdivision (b)(3)." *Id.* at 393.

[32]Harry Kalven, Jr., and Maurice Rosenfield, 8 *University of Chicago Law Review* 684, 686 (1941).

[33]*Id.*

[34]*Id.* at 721. Writing about 30 years later, Judge Jack B. Weinstein echoed the views of Kalven and Rosenfield: "Where the public authorities are remiss for a variety of reasons—inadequate legal authority, too heavy workload, or what have you—the class action does furnish a desirable remedy . . . When the organization of a modern society, such as ours, affords the possibility of illegal behavior, accompanied by widespread diffuse consequences, some procedural means should exist to remedy or at least deter that conduct. . . . That is not to say that we can solve all social ills or even that justiciable controversies of broad public concern merit class action status. . . . The solution, it seems to me, will have to come from a case by case interpretation of subtle doctrines and standards . . . " Jack B. Weinstein, "Some Reflections on the 'Abusiveness' of Class Actions," 58 F.R.D. 299, 305 (1973).

[35]The evolution of legal doctrine concerning attorney fees in class actions is discussed later in this chapter.

[36]Corporate representatives have asserted that securities class action attorneys file suit whenever a stock price drops, an assertion that the latter reject. Relying, in part, on a study commissioned by plaintiff attorneys, Professor John Coffee, a noted critic of class action abuses, concludes that this assertion "has to be an overstatement." He suggests, instead, that there are three criteria for filing such a suit: (1) a significant stock drop following a material adverse disclosure (2) a preceding sell-off by insiders, and (3) a sufficient turnover to generate potential damages in the $20 million range." He notes that these might be the right criteria from a public policy perspective. John Coffee, "Securities Class Actions: Myth, Reality and Reform," *New York Law Journal*, July 28, 1994, at 1, 7.

[37]15 U.S.C. §§ 2301–2312.

[38]15 U.S.C. § 1692.

[39]Procedural law dealing with jurisdictional issues is complex, and there are various ways plaintiffs can structure a lawsuit so as to seek federal or state jurisdiction; similarly, defendants who are unhappy with the initial jurisdiction may ask to have the case "removed" to the alternate (i.e., state or federal) system. In *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921), the U.S. Supreme Court held that, for purposes of diversity jurisdiction, it is only necessary for the named (representative) plaintiffs' jurisdiction to be diverse from the defendant's. Plaintiff class action attorneys who prefer federal court jurisdiction could select only representative plaintiffs who are diverse from the defendant; plaintiff class action attorneys who prefer state court jurisdiction could select only representative plaintiffs who are *non*diverse, so as to thwart any defendant action to seek federal diversity jurisdiction.

[40]28 U.S.C. §1332(b). The threshold was last increased by Congress on October 19, 1996, effective 90 days after that date.

[41]This interpretation of the application of the jurisdictional threshold to class actions dates back to the period before the adoption of the 1966 amendments to Rule 23. After 1966, some proponents of damage class actions argued that the jurisdictional requirement could be met by aggregating individual class members' claims. The Supreme Court rejected this interpretation first in *Snyder v. Harris,* 394 U.S. 332 (1969), and then again in *Zahn v. International Paper,* 414 U.S. 291 (1973). At the time *Zahn* was decided, the jurisdictional threshold was $10,000.

[42]After *Zahn*, plaintiff attorneys preferring federal jurisdiction sometimes sought to meet the individual threshold by claiming punitive damages for each class member; defendants who preferred state court jurisdiction would contest this and seek removal to state court. More recently, plaintiff class action attorneys who view federal judges as disinclined to certify damage class actions have filed in state courts, and have abjured punitive damages so as not to provide defendants with grounds for removal to federal court.

Since 1990, the applicability of *Snyder* and *Zahn* has been questioned in the light of the supplemental jurisdiction provision of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367(a). Some circuits have held that the amendment to § 1367 effectively overruled *Zahn*; others disagree. See, e.g., *Daniels et al. v. Philip Morris Companies, Inc., et al.,* 18 F. Supp. 2d 1110 (S.D. Cal. 1998).

[43]Thomas Dickerson, *Class Actions: The Law of 50 States* 1–7 to 1–12 (New York: Law Journal Seminars-Press, 1997).

[44]*Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985). In *Shutts,* a Kansas court certified a nationwide class of 33,000 petroleum royalty owners and producers. Consistent with Rule 23(b)(3), the Supreme Court held that prospective class members must receive notice and the opportunity to opt out. It expressly rejected requiring that absent class members opt in. The Court held that the Kansas state court could not apply Kansas law to all of the claims, but left open the possibility that another state's law—for example, the law of the state where the defendant was headquartered—might be applied. On the import of *Shutts,* see Arthur Miller and David Crump, "Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*," 96 *Yale Law Journal* 1 (1986).

[45]The question of how the outcomes of parallel federal and state class actions affect each other can be complex. See *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997). For our purposes, such parallel actions raise the same issue as parallel nationwide class actions in multiple states: they create opportunities for bargaining that may lead to self-dealing and collusion.

[46]Rule 23(c)(1) states that the judge should decide whether or not to certify a class "as soon as practicable" after it has been filed. Whether a court can dismiss a case on the merits before certifying it is currently unclear. See *Manual for Complex Litigation* 214–15 (3d ed. 1995). In its study of class action litigation in four federal district courts, the Federal Judicial Center found that court rulings on dismissal preceded decisions on certification about three-quarters of the time when dismissal was considered. Rulings on motions for summary judgment occurred prior to decisions on certification in about 60 percent of the cases in which such motions were considered. See Willging et al., *supra* note 11, at 169, 171, tables 20 & 23.

[47]In some instances, damage class actions implicating multiple state standards have been tried, at least partially. For example, in *Naef v. Masonite Corp.,* No. CV-94-4033 (Ala. Cir. Ct. Mobile County 1994), the jury was asked to decide whether the defendant was liable for an allegedly defective wood siding product, applying a variety of state standards. The case ultimately settled. Judges in other jurisdictions have declined to certify nationwide classes implicating different state laws, citing *Naef* as an example to avoid. See, e.g., *In re Masonite Corp. Hardboard Siding Products Liability Litigation*, 170 F.R.D. 417 (E.D. La. 1997); *In re Ford Motor Co. Ignition Switch Products Liability Litigation*, 174 F.R.D. 332 (D.N.J. 1997).

[48]*Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974). The district court in the *Eisen* case found that out of a prospective class of six million individuals and institutions, about 2,250,000 could be identified by name and address. However, concluding that the cost of mailing notices to all of these would be prohibitive, it sanctioned a combination of individual notices to some prospective class members and publication of notice in the *Wall Street Journal* and other newspapers. Finding that the plaintiffs were likely to prevail in the case, the district court further held that most of the notice costs should be paid by the defendants. The Supreme Court held that the combination of individual and public notice did not satisfy the rule's notice requirements and that there was no basis in law for the district court's making a preliminary decision on the merits and imposing costs on the defendant. In 1979, an announcement by the "Fund for Class Action Costs" appeared in *Class Action Reports*, offering to subsidize notice costs for plaintiffs and attorneys in class and derivative suits who were unable to shoulder these costs themselves. Applications for support were to be vetted by a "disinterested expert panel," and attorneys who accepted assistance had to promise to reimburse the fund if they were successful. 6 *Class Action Reports* 77 (1979).

[49]Not all states follow *Eisen* in interpreting their own class action rules. For example, California consumer legislation provides for judges to impose the costs of notice on defendants. Cal. Civ. Code § 1781(d).

[50]The *Manual for Complex Litigation* recommends that "notice should ordinarily be given promptly after the certification order is issued." *Id.* at 224. The *Manual for Complex Litigation* has no force of law, but is generally relied on by federal judges. There is no comparable reference manual for state trial court judges; as a result, they too, turn to the *Manual for Complex Litigation* for advice.

[51]Under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (Supp. II 1996)), plaintiff attorneys must publish notice of the filing of class actions. Practitioners claim that this provision of the statute has contributed to a rise in duplicative class action filings.

[52]From 1985 to 1995, about 72 percent of all federal civil suits were terminated by settlement, about 23 percent were terminated by pretrial judgment, and about 5 percent were terminated by verdict. The settlement rate rose somewhat, and the trial verdict and pretrial judgment rates declined

somewhat, over the decade. (Calculations performed by RAND on data reported in the federal statistical database.) Similar statistics are reported for state courts. See, e.g., James Kakalik et al., *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court* (Santa Monica, Calif.: RAND, 1990) (finding 4 percent of civil cases filed in 1980–82 were disposed of at or after trial).

There has been a good deal of controversy concerning the question of whether the rate of settlement in class actions is the same as or higher than in ordinary civil litigation. In its study of class actions terminated from 1992 to 1994 in four federal district courts, the Federal Judicial Center found trial rates for class actions ranging from 3 to 5 percent, and settlement rates ranging from 53 to 64 percent. Willging et al., *supra* note 11, at 115, 167.

Protagonists in the securities class action reform debate offered conflicting data on settlement rates. See *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities, U. S. Senate Committee on Banking, Housing, and Urban Affairs,* 103d Cong., 1st Sess. (1993) (hereinafter *Senate Securities Litigation Hearings)* (proceedings of June 17 and July 21, 1993). In the absence of comprehensive data on class actions in federal and state courts, it is not possible to determine conclusively whether class action settlement patterns differ significantly from those of other cases.

[53]See, e.g., Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford: Clarendon Press, 1987); and H. Laurence Ross, *Settled Out of Court* (Chicago: Aldine, 1970).

[54]Janet Alexander, "Do the Merits Matter? A Study of Settlement in Securities Class Actions," 43 *Stanford Law Review* 497 (1991).

[55]See, e.g., Coffee, *supra* note 36; Joel Seligman, "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 *Harvard Law Review* 438 (1994); Elliott Weiss and John Beckerman, "Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions," 104 *Yale Law Journal* 2053 (1995).

[56]The rules for calculating damages in securities fraud cases are complex, and plaintiff and defendant assessments of class members' damages can differ sharply. See Janet Alexander, "The Value of Bad News in Securities Class Actions," 41 *UCLA Law Review* 1421 (1994); *Senate Securities Litigation Hearings, supra* note 52, at 465–71 (response of Melvyn I. Weiss to written questions of Senator Domenici, dated Oct. 12, 1993).

[57]*Protective Committee v. Anderson,* 390 U.S. 414 (1968); *Young v. Katz,* 447 F.2d 431 (5th Cir. 1971); *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977).

[58]*Id.*

[59]Rule 23(c)(2) says ". . . The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion. . . " This seems to imply that notice would occur prior to any resolution. The practice of certifying settlement classes has proved highly controversial, as discussed in Chapter Two and later in this chapter.

[60]*Boeing v. Van Gemert,* 444 U.S. 472 (1980), citing *Trustees v. Greenough,* 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885). For a discussion of legal doctrine on attorney fees relevant to mass litigation, see "Court Awarded Attorney Fees Report of the Third Circuit Task Force," 108 F.R.D. 237 (1985) (hereinafter "Report of the Third Circuit") (identifying issues and recommending policies and practices in statutory fee and common fund cases); and Judith Resnik et al., "Individuals Within the Aggregate: Relationships, Representation and Fees," 71 *New York University Law Review* 296 (1996) (discussing attorney fee issues in mass torts).

[61]*Bowling v. Pfizer,* 922 F. Supp. 1261 (S.D. Ohio 1996).

[62]"Report of the Third Circuit," *supra* note 60.

[63]922 F. Supp. at 1278.

[64]*Id*. at 1278–79. See also "Report of the Third Circuit," *supra* note 60, at 16–25 (discussing problems associated with lodestar approach).

[65]See, e.g., *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 226 (2d Cir. 1987) (appeal of attorney fee awards).

[66]Resnik et al., *supra* note 60, at 355–81, discuss other factors that judges might take into account when awarding fees in aggregate litigation, including lawyer-client relations and attention to process values.

[67]Herbert Newberg and Alba Conte, *Newberg On Class Actions* 14–4 to 14–5 (Colorado Springs, Colo.: Shepard's/McGraw-Hill, 3d ed. 1992). See also *In re Activision Securities Litigation,* 723 F. Supp. 1373 (N.D. Cal. 1989) (observing that the fee award "almost always hovers around 30 percent of the fund created by the settlement").

[68]In its report on attorney fees, the Third Circuit recommended using a sliding scale dependent upon the ultimate recovery, "the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases." "Report of the Third Circuit," *supra* note 60, at 43.

[69]For example, in *Prandini v. National Tea Co.,* 557 F.2d 1015 (3d Cir. 1977), the Third Circuit upheld a district court's disapproval of negotiation of fees contemporaneously with settlement of damages because this may create a conflict of interest and because "the potential for impropriety gives rise to possible misunderstanding by the public." *Id.* at 1017. The *Prandini* class brought suit under Title VII; hence the fees were authorized statutorily, rather than under common fund doctrine. The court held that in statutory fee cases, negotiation over fees could not begin until *after* the trial court had approved settlement. The court also noted that in common fund cases "the adverse interests [between class members and class counsel] are patent and the necessity for a court to recognize the equities of the absent and passive members of a class is obvious." *Id.* at 1020. The Third Circuit returned the case to the trial court for reconsideration of the fee amount on other grounds. On a second appeal, it reiterated its support for separating settlement and fee negotiations. *Prandini v. National Tea Company,* 585 F.2d 47 (1978).

The Third Circuit study group proposed that judges negotiate a percentage fee arrangement with class counsel at the *outset* of the case or "as early as practicable." "Report of the Third Circuit," *supra* note 60, at 42. In complex cases, the study group further recommended that the judge appoint an attorney other than class counsel to negotiate the fee arrangement on behalf of the class; the attorney would then submit a fee recommendation to the judge for her approval. *Id.* at 45–47.

[70]*Evans v. Jeff D.,* 475 U.S. 717 (1985). A fee in the *Jeff D.* case would have been awarded to the prevailing party under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. The defendant offered the plaintiff attorney an optimal settlement for class members, conditioned on the plaintiff attorney's waiver of fees. The attorney accepted the settlement, saying he was ethically bound to do so, and subsequently sought to overturn the fee waiver.

[71]See Deborah Hensler, "The Real World of Tort Litigation," in Austin Sarat et al., eds., *Everyday Practices and Trouble Cases* 155–176 (Evanston, Ill.: Northwestern University Press, 1998).

[72]Gail Hillebrand and Daniel Torrence, "Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits," 28 *Santa Clara Law Review* 747 (1988).

[73]The notion of creating a trust to hold settlement funds, with the understanding that any amount of money remaining after distribution to claimants will be put to some other good use, derives from the law of charitable trusts where it is termed a "cy pres" remedy. In class action litigation, cy pres remedies are frequently termed "fluid recovery." See Note, "The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions," 38 *Hastings Law Journal* 729 (1987).

[74]*Boeing v. Van Gemert,* 444 U.S. 472 (1980). After settlement of a class action against it, Boeing appealed a court order awarding fees against the total value of the fund, arguing that it had a colorable claim for the return of the unclaimed money. At the time of Boeing's appeal 47 percent of the fund had been claimed. 444 U.S. at 477 n.4.

[75]John Frank, "Response to the 1996 Circulation of Proposed Rule 23 on Class Actions: Memorandum to My Friends on the Civil Rules Committee" (Dec. 20, 1996), in 2 *Working Papers of the Advisory Committee, supra* note 2, at 277.

[76]See Geoffrey Miller and Lori Singer, "Nonpecuniary Class Action Settlements," 60 *Law & Contemporary Problems* 97 (1997); Brian Wolfman and Alan Morrison, "Representing the Unrepresented," 71 *New York University Law Review* 472–76, 501–03 (1996); Van Voris, *supra* note 4.

[77]Agreeing to settle the individual lawsuits, in return for the plaintiff attorney dropping the class claim, could be a dangerous defense strategy. If the class action is dropped, the defendant has no assurance that it will not face another class action in the future alleging the same facts and harms. In order to guard against this turn of events, some plaintiff attorneys and defense counsel told us, the defendant may require the plaintiff attorney to enter into a contract not to bring another such

suit against this defendant. Of course, this does not protect the defendant against class actions brought by other plaintiff attorneys.

[78]In a complex securities suit, a district court judge approved a settlement notwithstanding objections from the class plaintiff. The Second Circuit Court of Appeals reversed the trial court's decision but noted that, "despite the seeming incongruity. . . the assent of the plaintiff [who brought the action] is not essential to the settlement." The court explained that a contrary holding "would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interests of the [class members]." *Saylor v. Lindsey,* 456 F.2d 896, 899–900 (2d Cir. 1972).

[79]*Manual for Complex Litigation* at 238.

[80]*Id.*

[81]*Id.*

[82]*Id.* at 238–39.

[83]*Id.* at 239.

[84]*Id.*

[85]Public Citizen Litigation Group, "Public Citizen's Involvement in Class Action Settlements" (June 12, 1997) (on file with the authors). Since 1997, Public Citizen lawyers have appeared in about another dozen class actions.

[86]See, e.g., Christian Parenti and Nina Schuyler, "A Lonely Voice," *California Lawyer*, Mar. 1997, at 29–31, describing the activities of Lawrence Schonbrun, a lawyer who has established a line of practice as an objector. But see also John Roemer, "Class Action Gadfly is Getting Swatted by Opponents, Courts," *Los Angeles Daily Journal*, Oct. 17, 1997, at 1, 24 (reporting ethical charges brought against Schonbrun).

[87]See, e.g., *Bowling v. Pfizer, Inc.* 922 F. Supp. 1261 (S.D. Ohio 1996). In *Bowling*, objectors included Public Citizen as well as private law firms. Some of the latter subsequently joined with class counsel as "special counsel," and applied for attorney fees in that role.

[88]*Dunk v. Ford Motor Co.,* 48 Cal. App. 4th 1794 (1996); Public Citizen Litigation Group, *supra* note 85, at 12 (emphasis added).

[89]*Hayden v. Atochem North America, Inc.,* No. H-92-1054 (Tex. Ct. App. 1992); Public Citizen Litigation Group, *supra* note 85, at 10. Settlement dynamics in mass tort class actions are discussed below.

[90]See Van Voris, *supra* note 4. In virtually all of the consumer class actions which it participated in as an objector through 1997, Public Citizen took issue with fees as well as settlements. See Public Citizen Litigation Group, *supra* note 85.

[91]*Bowling v. Pfizer,* 102 F.3d 777 (6th Cir. 1996).

[92]Public Citizen Litigation Group, *supra* note 85, at 1.

[93]See, e.g., John Coffee, "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions," 86 *Columbia Law Review* 669 (1986); John Coffee, "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action," 54 *University of Chicago Law Review* 877 (1987); Jonathan Macey and Geoffrey Miller, "The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform," 58 *University of Chicago Law Review* 1 (1991).

[94]*Moseley v. General Motors,* 213 Ga. App. 875 (1994).

[95]*In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 846 F. Supp. 330 (E.D. Pa. 1993).

[96]*In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768 (3d Cir. 1995). For a discussion of objections to the settlement, see Wolfman and Morrison, *supra* note 76.

[97]See Public Citizen Litigation Group, *supra* note 85, at 19–20.

[98]*In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 134 F.3d 133 (3d Cir. 1998). See also "State Court's National Settlement of GM Suit Given Full Faith and Credit in Third Circuit," U.S.L.W. BNA U.S. (Feb. 4, 1998).

[99]In a case affirming district court approval of a settlement of a Title VII class action in 1977, the court wrote: "Particularly in class action suits, there is an overriding public interest in favor of settlement. . . In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources." *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977). In response to an appeal of a class action settlement, the Ninth Circuit more recently noted that its role is limited, "especially. . . in light of the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Chemical Bank v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

[100]Rule 53 of the Federal Rules of Civil Procedures provides for the appointment of special masters, but cautions that such appointments should be rare.

[101]Rex Bossert, "When Judge Helpers Run the Show," *National Law Journal*, Feb. 16, 1998, at A1, A19.

[102]Macey and Miller, *supra* note 93.

[103]*In re Oracle Securities Litigation,* No. C-90-0931-VRW (N.D. Cal. 1990).

[104]See *Senate Securities Litigation Hearings, supra* note 52.

[105]Frank, *supra* note 75.

[106]*Dunk v. Ford Motor Co.,* 48 Cal. App. 4th 1794 (1996); Public Citizen Litigation Group, *supra* note 85, at 12.

[107]See *Senate Securities Litigation Hearings, supra* note 52. At the beginning of the second day of hearing, committee chairman Senator Christopher Dodd, summarizing the testimony to date, said: "We [have] found no agreement on whether there is in fact a problem, the extent of the problem, or the solution to the problem. In my experience. . . I've never encountered an issue where there is such disagreement over the basic facts." *Id.* at 280.

[108]*Newberg on Class Actions* reports the proportion of class members who have come forward to claim compensation in various consumer suits, but not the proportion of settlement value actually recovered by class members. Newberg and Conte, *supra* note 67, at 8–187 & app. 8–4 (Table 1).

[109]*Hanlon v. Chrysler Corp.*, No. CV-95-02010-CAL (N.D. Cal. 1995).

[110]Public Citizen Litigation Group, *supra* note 85, at 11.

[111]*Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

[112]*In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 846 F. Supp. 330 (E.D. Pa. 1993).

[113]Public Citizen Litigation Group, *supra* note 85, at 16–18.

[114]*In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768 (3d Cir. 1995).

[115]*White v. General Motors Corp.*, 718 So. 2d 480 (La. 1998). Public Citizen ultimately decided to support this settlement. Public Citizen Litigation Group, *supra* note 85, at 19–20. This settlement was challenged by individuals who had objected to the similar settlement that had been rejected by the Third Circuit, but, on appeal, the Third Circuit reluctantly rejected the challenge, in part, on the grounds that the state court in Louisiana had already affirmed the settlement. *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation,* 134 F.3d 133 (3d Cir. 1998).

[116]*Dollar v. General Motors*, 814 F. Supp. (E.D. Tex. 1993).

[117]Public Citizen Litigation Group, *supra* note 85, at 18.

[118]The Texas intermediate appellate court rejected the settlement. *Bloyed v. General Motors,* 991 S.W.2d 422 (Tex. Ct. App. 1994). The Texas Supreme Court disagreed with the appellate court's assessment of the settlement, but reversed and remanded on other grounds. Public Citizen Litigation Group, *supra* note 85, at 18–19.

[119]*Dale v. Ford Motor Co.,* No. 661492 (Cal. Super. Ct. Orange County 1991). Defendants removed the case to federal court, where it was ultimately remanded back to state court.

[120]Public Citizen Litigation Group, *supra* note 85, at 12.

[121]*Dunk v. Ford Motor Co.,* 48 Cal. App. 4th 1794 (1996).

[122]*In re Ford Motor Co. Bronco II Products Liability Litigation,* 1995 U.S. Dist. LEXIS 3507 (E.D. La. Mar. 20, 1995), 1997 U.S. Dist. LEXIS 104971 (E.D. La. Mar. 7, 1997); Public Citizen Litigation Group, *supra* note 85, at 21–22.

[123]*In re Ford Motor Co. Bronco II Products Liability Litigation*, 177 F.R.D. 360 (E.D. La. 1997), 982 F. Supp. 388 (E.D. La. 1997). The Fifth Circuit upheld the certification denial and summary judgment in a *per curiam* decision issued on February 26, 1999.

[124]*Laughman v. Wells Fargo Leasing Corp.,* No. 96 C 925 (N.D. Ill. 1997).

[125]Public Citizen Litigation Group, *supra* note 85, at 27.

[126]*DeBoer v. Mellon Mortgage Co.,* 64 F.3d 1171 (8th Cir. 1995). Public Citizen represented the objectors in their appeal to the U.S. Supreme Court, which declined to consider the case. *Crehan v. DeBoer,* 517 U.S. 1156 (1996).

[127]*In re Computer Monitor Cases,* No. 3158 (San Francisco Sup. Ct. 1995); *Public Citizen Memorandum,* at 22. See also Reynolds Holding, "Class Action Central—Hefty Costs, Slim Pickings," *San Francisco Chronicle*, May 25, 1997, at 7, 21; Marc Fisher, "Class Actions' Big Winners: The Lawyers," *Washington Post*, May 25, 1997, at A1.

[128]Paul Elias, "Judge Poised to Trim Settlement Fees," *The Recorder*, July 1, 1997, at 1; Rinat Fried, "Computer Screen Settlement OK'd," *The Recorder*, May 8, 1998, at 11.

[129]*In re General Mills Oat Cereal Litigation,* No. 94 CH 06208 (Ill. Cir. Ct. Cook County 1994).

[130]See, e.g., Saundra Torry, "Going to the Head of the Class Action Settlement," *Washington Post*, Apr. 8, 1996, at F7.

[131]Public Citizen Litigation Group, *supra* note 85, at 28.

[132]Miller and Singer, *supra* note 76, Table A5, at 135–42.

[133]*Dunk v. Ford Motor Co.,* 48 Cal. App. 4th 1794 (1996). Public Citizen Litigation Group, *supra* note 85, at 12.

[134]Public Citizen Litigation Group, *supra* note 85, at 11.

[135]*Id.* at 17.

[136]*Id.* at 21. In this case, as in others, defendants did not oppose the fee requests.

[137]See, e.g., Symposium, "Mass Tortes: Serving Up Just Desserts," 80 *Cornell University Law Review* (1995) (papers commenting on the implications of the asbestos futures class actions), and Symposium, "The Institute of Judicial Administration Research Conference on Class Actions," 71 *New York University Law Review* (1996) (papers commenting on class actions, almost all focusing on mass tort cases).

[138]See Richard Kluger, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris* (New York: Knopf, 1996); Robert Rabin, "Institutional and Historical Perspectives on Tobacco Tort Liability," in Robert Rabin and Stephen Sugarman, eds., *Smoking Policy: Law, Politics, and Culture* 110 (New York: Robert Rabin and Stephen Sugarman, eds., Oxford University Press, 1993); Gary Schwartz, "Tobacco Liability in the Courts," *id.* at 131.

[139]See Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York: Pantheon, 1985).

[140]*Borel v. Fibreboard Corp.,* 493 F.2d 1076 (5th Cir. 1973).

[141]The evolution of asbestos worker injury litigation is described in Deborah Hensler et al., *Asbestos in the Court: The Challenge of Mass Toxic Torts* (Santa Monica, Calif.: RAND, 1985).

[142]The large majority of asbestos personal injury claimants are male. See James Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* (Santa Monica, Calif.: RAND, 1984).

[143]The evolution of mass personal injury litigation is described in Deborah Hensler and Mark Peterson, "Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis," 59 *Brooklyn Law Review* 961 (1993).

[144]See Jack Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* 89–112 (Evanston, Ill.: Northwestern University Press, 1995).

[145]See Deborah Hensler, "Resolving Mass Toxic Torts: Myths and Realities," 1989 *University of Illinois Law Review* 89.

[146]For a discussion of plaintiffs lawyers' role in funding scientific research related to mass torts, see Joseph Sanders, "The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts," 43 *Hastings Law Journal* 301 (1992). See also Richard Schmitt, "Thinning the Ranks: Diet Pill Litigation Finds Courts Frowning on Mass Settlements," *Wall Street Journal*, Jan. 8, 1998, at A1, A4.

[147]See Mark Peterson and Molly Selvin, "Mass Justice: The Limited and Unlimited Power of Courts," 54 *Law and Contemporary Problems* 227 (1991).

[148]See Deborah Hensler, "A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation," 73 *Texas Law Review* 1587 (1995).

[149]See Michael Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation* (Philadelphia: University of Pennsylvania Press, 1996).

[150]Hensler and Peterson, *supra* note 143, at 988.

[151]*Id*. at 996.

[152]28 U.S.C. § 1407. From 1968 to 1996, the Judicial Panel on Multidistricting considered 278 motions to collect and transfer personal injury suits, and transferred 193 cases (69 percent). (Analysis of docket information provided by the clerk of the panel.)

[153]Francis McGovern, "Rethinking Cooperation Among Judges in Mass Tort Litigation," 44 *UCLA Law Review* 1851 (1997). Judicial cooperation was facilitated by the creation of the Mass Tort Litigation Committee under the aegis of the private, nonprofit National Center for State Courts. Each state was invited to send a representative to the meetings of this committee. In the silicone gel breast implant litigation, this committee of state judges met also with Judge Samuel C. Pointer, who presided over the federal multidistrict litigation.

[154]On the uses of bankruptcy in mass tort litigation, see Ronald Bacigal, *The Limits of Litigation: The Dalkon Shield Controversy* (Durham, N.C.: Carolina Academic Press, 1990) and Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* (Chicago: University of Chicago Press, 1991). Bankruptcy procedures provide some protections to tort claimants that are missing in nonclass, aggregative litigation.

[155]*Manual for Complex Litigation* 26–29.

[156]See, e.g., *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation,* 982 F.2d 603 (1st Cir. 1992) (sustaining individual tort lawyers' challenge of judge's award of fees to plaintiffs' management committee).

[157]Hensler and Peterson, *supra* note 143, at 1019–26.

[158]See Hensler, *supra* note 148, at 1601 (Figure 1).

[159]See Alison Frankel, "Et tu, Stan?" *American Lawyer*, Jan.–Feb. 1994, at 68.

[160]See, e.g., Peter Carbonara, "Taming a Mass Torts Monster," *American Lawyer*, Sept. 1989, at 107.

[161]See Francis McGovern, "Resolving Mature Mass Tort Litigation," 69 *Boston University Law Review* 659 (1989). The Advisory Committee on the Civil Rules included a provision that judges consider the "maturity" of mass torts in its recent proposal to revise Rule 23. See *supra* Chapter Two.

[162]See, e.g., *In re Norplant Contraceptive Products Liability Litigation,* 168 F.R.D. 577 (E.D. Tex. 1996); *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir. 1995); *Castano v. American Tobacco Co.,* 84 F.3d 734 (5th Cir. 1996). The concept of maturity as an important indicator of the readiness of mass tort cases for aggregation has also been endorsed by the Working Group on Mass Torts in *Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and the Judicial Conference of the United States* 5 (Feb. 15, 1999) (on file with the authors).

[163]See, e.g., Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (New York: Basic Books, 1991); Marcia Angell, *Science on Trial: The Class of Medical Evidence and the Law in the Breast Implant Case* (London: W.W. Norton & Co., 1997).

[164]Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 143–67, 226–44 (Cambridge, Mass.: Belknap Press, 1987).

[165]Green, *supra* note 149.

[166]Deborah Hensler, "Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman," 13 *Cardozo Law Review* 1967 (1992).

[167]See Sobol, *supra* note 154.

[168]On the application of Rule 23 to mass tort litigation, see Paul Rheingold, *Mass Tort Litigation* (Deerfield, Ill.: Clark Boardman Callaghan, 1996).

[169]Mass torts have rarely been certified as non-opt-out Rule 23(b)(2) class actions. In *In re Asbestos Litigation,* 90 F.3d 963 (5th Cir. 1996), the Fifth Circuit upheld certification of an asbestos settlement on a limited fund theory. The Supreme Court subsequently reversed. *Ortiz v. Fibreboard,* 1999 U.S. LEXIS 4373 (1999). In *In re Silicone Gel Breast Implant Products Liability Litigation*, No. CV 92-P-10000-S, MDL No. 926, 1993 WL 795477 (N.D. Ala. 1993), Judge Sam Pointer certified a (b)(2) class action against Mentor Corporation, an insolvent implant manufacturer. *Id.* at 5.

[170]In the Agent Orange litigation, for example, some plaintiff lawyers feared that the attorney who had begun the litigation and then been pushed aside, Victor Yannaconne, might urge his supporters in the Vietnam veterans community to opt out of the litigation. "He's well known and strongly identified with the litigation," one of the attorneys told a reporter, "If he becomes an open dissident, it's not going to help." Susan Milstein, "The Crusader Who Lost His Way," *American Lawyer*, Apr. 1984, at 97.

[171]Indeed, the details of the compensation scheme had yet to be devised. See Schuck, *supra* note 164, at 143–67.

[172]Angell, *supra* note 163, at 22.

[173]Fed. R. Civ. P. 23(d)(3) advisory committee's note.

[174]109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

[175]About 600 claims were settled within two weeks of the trial's start; the remaining 103 claims were settled three weeks later. The trial was not completed and the jury did not deliberate. See Mark Peterson and Molly Selvin, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures* 41 & n.93 (Santa Monica, Calif.: RAND, 1988).

[176]*Cimino v. Raymark Industries,* 751 F. Supp. 649 (E.D. Tex 1990). See Michael Saks and Peter Blanck, "Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts," 44 *Stanford Law Review* 815 (1992).

[177]Initially, Judge Parker proposed a somewhat different plan for the jury trial. On appeal, the Fifth Circuit upheld a classwide trial on common issues but rejected the plan for trying damages. *In re Fibreboard Corp.,* 893 F.2d 706 (5th Cir. 1990). Judge Parker's initial response was to adopt the plan intended for the *Jenkins* trial (which, as a result of the settlement, was never implemented). However, asserting that it would take 4-1/2 years to try all class members' claims under that plan, he then changed his mind and adopted the sampling plan, which was ultimately rejected by the Fifth Circuit. *Cimino v. Raymark Industries,* 151 F.3d 297 (5th Cir. 1998).

[178]For a concise summary of issues and commentary on choice of law questions in mass torts, see Jonathan Macey and Geoffrey Miller, "A Market Approach to Tort Reform Via Rule 23," 80 *Cornell Law Review* 101 (1995).

[179]See, e.g., American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (Philadelphia, Pa.: American Law Institute, 1994).

[180]Multiparty, Multiforum Jurisdiction Act of 1991, H.R. 2450, 102d Cong., 1st Sess. (1991); Multiparty, Multiforum Jurisdiction Act of 1998, H.R. 1252, 105th Cong., 2d Sess. (1998).

[181]*In re Pick-Up Truck Fuel Tank Litigation,* 55 F.3d 768 (3d Cir. 1995) (holding that if a class cannot be certified for trial, it cannot be certified for settlement).

[182]See Arthur Bryant, "Invitation to Collusion: Class Actions for Settlement Only," *Legal Times*, June 17, 1996, at 19, 22.

[183]*Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997).

[184]*In re Silicone Gel Breast Implant Products Liability Litigation,* No. CV 92-P-10000-S, MDL No. 926 (N.D. Ala. 1994).

[185]In most bankruptcies the court specifies a "bar date" by which all creditors, including tort claimants, must come forward. In the *Manville* and other asbestos bankruptcies, claimants did not have to file before the bankruptcy agreement was approved by the court.

[186]In 1989 and 1990, two new class actions were filed on behalf of plaintiffs who alleged that they had not been aware of any injuries at the time of the Agent Orange class action notice and settlement. Filed in state court in Texas, the suits were first removed to the federal courts in Texas (on defense motions) and then transferred to Judge Weinstein by the Judicial Panel on Multidistricting (the panel treated them as tag-along cases). Judge Weinstein held that the veteran plaintiffs were part of the 1984 class and therefore barred from litigation, a holding subsequently upheld by the Second Circuit. *In re Agent Orange Product Liability Litigation,* 996 F.2d 1425 (2d Cir. 1993).

[187]*Georgine v. Amchem Products, Inc.,* 157 F.R.D. 246 (E.D. Pa. 1994) and *Ahearn v. Fibreboard Corp.,* 162 F.R.D. 505 (E.D. Tex. 1995).

[188]At least one leading law school held a symposium devoted exclusively to the *Georgine* settlement. See Symposium, "Mass Tortes: Serving Up Just Desserts," 80 *Cornell Law Review* (1995). Many of those who wrote articles and appeared at this colloquium have appeared as experts on behalf of those who argued against judicial approval of the *Georgine* settlement.

[189]See Roger Parloff, "The Tort that Ate the Constitution," *American Lawyer*, July–Aug. 1994, at 74; Frederick Baron, "An Asbestos Settlement with a Hidden Agenda," *Wall Street Journal*, May 6, 1993, at A11. Baron is a leading asbestos plaintiff attorney who opposes class actions.

[190]Asbestos worker injury suits had been certified previously for trial in east Texas. *Jenkins v. Raymark Industries,* 109 F.R.D. 269 (E.D. Tex. 1985); *Cimino v. Raymark Industries,* 751 F. Supp. 649 (E.D. Tex. 1990). However, these classes comprised individuals who had filed lawsuits in Texas.

[191]521 U.S. 591 (1997).

[192]*Ortiz v. Fibreboard Corp.*, 1999 U.S. LEXIS 4373 (1999).

[193]Ad Hoc Committee on Asbestos Litigation, *Report to the Judicial Conference* (1991).

[194]*Ortiz v. Fibreboard Corp.*, 1999 U.S. LEXIS 4373 (1999).

[195]*In re Diet Drugs Products Liability Litigation,* MDL No. 1203 (1997).

[196]The Federal Judicial Center has published a reference book for federal and state judges to facilitate cooperation. *Manual for Cooperation Between State and Federal Courts* (1997).

[197]On problems associated with achieving deterrence through private litigation when defendants believe that standards are unclear and will be applied erratically, see Steven Garber, "Product Liability, Punitive Damages, Business Decisions and Economic Outcomes," 1998 *Wisconsin Law Review* 237.

[198]For a discussion of the deterrence effects of product liability litigation and how litigation can lead to over- and underdeterrence, see *id.*

[199]Some scholars have argued that mass tort litigation *ought* to be perceived as primarily regulatory. See, e.g., David Rosenberg, "The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System," 97 *Harvard Law Review* 851 (1984).

Section II

Chapter Four

INTO THE FISHBOWL

> That is why we have Rule 23. That's why lawyers can't just drop cases, settle cases, take payoffs. They have to go through a process. They have to send out notice, they have to make people aware of what they are doing, and they are subject to objections, to a hearing, to a judge's scrutiny, to a court awarding fees. It is a fishbowl litigation like no other in society.
>
> *Melvyn Weiss, a leading securities class action litigator, testifying before the Civil Rules Advisory Committee, November 22, 1996*

In litigation, as in other life events, protagonists often have very different stories to tell about what happened and what was achieved. One person's trivial damages, pursued out of greed or plain orneriness, is another person's noble cause, requiring rectification and compensation. One person's satisfactory compromise is another person's excessive—or inadequate—remedy, given the facts and the law. One person's reasonable reward for a job well done is another person's outrageous extortion. Because most civil lawsuits are negotiated in private and settled between the parties without needing judicial consent, our ability to determine for ourselves the merits of these lawsuits and the justness of their settlements is highly constrained.

Class actions, however, are creatures of the court system. Without the judge's decision to certify a class, the representative plaintiffs and their attorneys cannot proceed on behalf of the class members. Without the judge's approval, a class action settlement cannot bind class members. Without the judge's award of fees, the class counsel cannot be paid. Although most class actions—like most other civil lawsuits—are not tried to verdict, class actions are litigated in a fishbowl.

But the decisionmakers who are called upon to assess the virtues and vices of class actions generally cannot peer into the fishbowl themselves. Instead, they rely on stories about what transpired—what the plaintiffs alleged, what the defendants answered, what was gained, by whom, at what cost—told by the protagonists and, often, by their political allies. Inevitably, these stories are colored by the storytellers' interests and perspectives. Moreover, most of the stories the

decisionmakers hear concern the relatively small fraction of cases that have attracted media attention, or have been the subject of key appellate court decisions. As transcripts of congressional and Civil Rules Advisory Committee testimony illustrate, it is difficult for policymakers to know what to make of such stories.

To develop a better understanding of the issues that are central to the debate over damage class actions, we decided to peer into the class action fishbowl ourselves. We selected a small number of class action lawsuits for intensive analysis. By interviewing participants on all sides of a case and studying documents pertaining to the lawsuits, we hoped to discern the character of these lawsuits and their outcomes for ourselves, rather than through the prism of interested parties.

Our goals were to find out how these lawsuits arose, what they were about, how they proceeded through the court system, and what their outcomes were. Because critics claim that damage class actions are simply vehicles for entrepreneurial attorneys to obtain fees, we investigated the factors that contributed to the inception and organization of the lawsuits and their underlying substantive allegations. Because critics claim that damage class actions achieve little in the way of benefits for class members and society—while imposing significant costs on defendants, courts, and society—we examined the outcomes of the cases in detail. And because critics and supporters debate whether current class action rules, as implemented by judges, provide adequate protection for class members and the public interest, we studied the role of notices, fairness hearings, judicial approval of settlements, and fee awards.

Social scientists call this research approach the "case study method," and it is frequently used for collecting and analyzing information about complex institutional and individual behavior.[1] We describe our approach to selecting and conducting the case studies in detail in Appendix D. Here we summarize the most important features of our approach and preview the cases we selected for analysis.

CASE SELECTION

With the financial resources available to us, we could select only ten class action lawsuits for case studies. How to select these cases was a matter of great import. It was critical that we not select—or appear to select—cases in which we were sure to find out that class action practices and outcomes were absolutely good or absolutely bad. But without a complete specification of the universe of class actions—which no one could provide—and with only enough resources to conduct ten case studies, we could not select a statistically representative sample.

The data we had collected on the scope of class actions (described in Chapter Three) indicated that current class action activity is diverse. Ten cases would clearly not be sufficient to provide even one example of every type of case. Therefore, we decided to concentrate on the two types of cases that are central to the current controversy over class actions: *consumer* class actions, involving small individual losses, and *mass tort* class actions, involving personal injury and property damage. We excluded securities class actions from our study because the passage of the Private Securities Reform Act of 1995 destabilized practice in that domain, and it was not clear what the long-term consequences of the Act would be.

Because practitioners had told us that class action practice is in flux, we wanted to study *recently filed* class action lawsuits, which would best reflect current practices. Because so much of the controversy over damage class actions focuses on alleged shortcomings in their resolution, we wanted to study cases that were *certified* and *resolved* as class actions. This meant that our case study research would not tell us anything about an important segment of the class action universe: lawsuits that are filed and *not* certified. What happens to those cases remains a question for further research. Our interest in outcomes also meant that we needed to study substantially *terminated* cases. Had litigation still been under way, we would not have been able to answer questions about benefits and costs.

Because not all information we were interested in is a matter of public record (the fishbowl having some cloudy areas), we could study only cases in which at least some of the key participants were willing to talk to us. And because we wanted to talk about real cases—and to tell readers what these cases were—we could not promise informants that we would disguise the identity or key factual aspects of the litigation.

Finally, we wanted to study cases that had *not* been the subject of widespread controversy, cases that might reflect the mundane aspects of class actions rather than the notorious. It is through large numbers of mundane cases, rather than through a few notorious lawsuits, we reasoned, that class actions bring about broad social and economic effects.

Using these criteria, we ultimately selected six consumer class actions and four mass tort class actions for study.

Consumer Class Actions

Our six selected consumer class actions all arose as a result of business-consumer transactions that a consumer, private attorney, or regulator thought questionable (see Table 4.1). Three cases involved the calculation of fees for financial products and one involved the calculation of fees for cable TV service.

Table 4.1

Profile of Consumer Class Action Case Studies

Short Case Title	Subject	(Court) Jurisdiction, Filing Date	Scope
Roberts v. Bausch and Lomb	Contact lens pricing	(Federal) Northern District of Alabama, 1994	Nationwide
Pinney v. Great Western Bank	Brokerage product sales	(Federal) Central District of California, 1995	Statewide
Graham v. Security Pacific Housing Services, Inc.	Collateral protection insurance charges	(Federal) Southern District of Mississippi, 1996	Nationwide
Selnick v. Sacramento Cable	Cable TV late charges	(State) Sacramento County, California, 1994	Metropolitan area subscribers
Inman v. Heilig-Meyers	Credit life insurance premium charges	(State) Fayette County, Alabama, 1994	Statewide
Martinez v. Allstate Insurance; Sendejo v. Farmers Insurance	Automobile insurance premium charges	(State) Zavala County, Texas, 1995	Statewide

One case involved allegedly deceptive labeling and one involved the sale of mutual funds. Two of the fee cases were instances of "families" of cases—lawsuits brought against the same or similar defendants, alleging the same or similar improper business practice. Three cases were ultimately resolved in federal court, and three in state courts, although some spent time in both. Two cases were ultimately resolved on behalf of nationwide classes—that is, all consumers in the United States who had been party to a particular transaction during a particular moment in time. Three cases were settled on behalf of consumers in a single state, and one involved local (metropolitan area) customers of the defendant corporation. Some attorneys played a role in more than one of these cases, and some were identified with only a single case. All of the cases were filed between 1994 and 1996. One of the litigations involved the consolidation of two cases (*Martinez v. Allstate Insurance Company* and *Sendejo v. Farmers Insurance Company)*; this was the only litigation that had attracted significant attention outside of the jurisdiction in which it arose.

Mass Tort Class Actions

As a group, the four mass torts we studied were more diverse than the consumer class actions with regard to the substance and size of claims, which we think reflects the greater diversity of these class action lawsuits in the population (see Table 4.2). Two cases involved allegations of personal injury, and two arose out of allegations of property damage only. Class actions for property

Table 4.2

Profile of Mass Tort Class Action Case Studies

Short Case Title	Subject	(Court) Jurisdiction, Filing Date	Scope
In re Factor VIII or IX Blood Products	Personal injury, product defect, blood products	(Federal) Northern District of Illinois, 1996	Nationwide
Atkins v. Harcros	Personal injury and property damage, toxic exposure, chemical factory	(State) Orleans Parish, Louisiana, 1989	Current and former neighborhood residents
In re Louisiana-Pacific Siding Litigation	Property damage, product defect, manufactured wood siding	(Federal) District of Oregon, 1995	Nationwide
Cox et al. v. Shell et al.	Property damage, product defect, polybutylene pipes	(State) Obion County, Tennessee, 1995	Nationwide

damages have not figured in much of the scholarly controversy over mass tort class actions, but they raise many of the same legal issues as do the mass personal injury suits and enable us to examine these issues apart from the high emotions that often accompany cases of personal injury and death. One of the personal injury cases involved claims of certain, wrongful death; the other involved vague allegations of physical and emotional harm. One of the property damage cases involved an avowedly flawed product; in the other the performance of the product was disputed. Two of the four cases were ultimately resolved in federal court and two in state court, although two spent time in both systems. One case was filed in the late 1980s and the other three between 1993 and 1995. Three of the cases were settled on behalf of all product users in the United States who shared a particular experience, and one involved residents in a single neighborhood. One of the cases is part of a "family" of cases filed against similar defendants for similar alleged product defects; two of the cases involved competing class actions brought by different plaintiff firms or groups of firms. Plaintiff class action firms with nationwide practices played a leading role in three of the four cases; individual tort practitioners played significant roles in only one. One was the subject of a leading appellate court opinion; two others attracted comment in limited practitioner circles; and the fourth was largely unknown except to its parties.

DATA COLLECTION

In many respects, lawsuits are social dramas whose unfolding and resolution reflect both the "scripts" that are shaped by the rules of civil procedure and the

skills and character of the actor-participants. Complex lawsuits such as class actions are often richly textured. Deciding what features of these dramas to spotlight was a key research task. Previous research on class actions (e.g., in the 1970s) had focused on the burden class action lawsuits impose on the courts. But our analysis of recent controversy over damage class actions suggested that this issue was less significant than questions pertaining to the incentives of the key actors (particularly plaintiff class action attorneys), the merits of the cases, and the benefits and costs of the litigation. Specifically, we asked: How did this litigation arise—what were the roles of plaintiff class action attorneys, individual litigants, and defendants? How was the litigation organized, and in what jurisdiction(s) was it filed and ultimately resolved? What were the underlying claims regarding defendant behavior and class members' losses? How strong a case could be made for the utility of bringing a class action—for regulatory enforcement or for compensation—in these particular circumstances? What did the class action achieve for class members and society? What was the ratio of costs to benefits? How much did plaintiff class action attorneys earn for their efforts, and how did their earnings compare to the benefits produced? What procedures and practices, if any, appeared to contribute to a more positive benefit-cost ratio?

To answer these questions we examined key documents in the case as well as descriptions of the lawsuits by the mass media and other sources. We also interviewed, in person or by telephone, about 80 individuals, including outside defense and corporate counsel, plaintiff class counsel, judges, special masters, and in some cases objectors, regulators, and reporters. In some instances we conducted multiple interviews with a single individual. The actual number and variety of participants we interviewed in each case varied, depending on the complexity of the case and who agreed to participate. When there were divisions among plaintiff counsel we tried to interview representatives of key groups; when there were multiple defendants we tried to interview corporate or outside counsel for each. In some instances we were not able to gain cooperation from both plaintiff attorneys and defendants. When we were able to gather what we judged to be sufficient information about the noncooperating side's behavior and interests, we retained the case for analysis; had we not done so, we would have found it difficult, if not impossible, to complete ten case studies.

Each case study had a team of two persons assigned to it. This strategy helped to mitigate the effects of biases that individual researchers might bring to their investigations.

Throughout our investigation we came upon areas of litigation about which key participants were uncomfortable or unwilling to share information. We also found that some data that we expected to be part of the public record were not.

Hence, one finding of our study is that there are areas of the class action "fishbowl" that are not always subject to public scrutiny.

RESULTS

In Chapters Five through Fourteen we tell the story of each of the ten lawsuits, as we learned it from the participants and the documents. While our reports inevitably reflect our sifting and sorting of the data, we do not attempt to draw conclusions about the cases. Rather, we hope that readers will make their own judgments as to the motivations of the participants, the virtues and vices of their practices, and the merits and demerits of the case outcomes.

In Section III, we present our interpretive analyses of the case study data and discuss what they contribute to our understanding of class action dilemmas.

NOTE

[1]Robert Yin, *Case Study Research: Design and Methods,* 2d ed. (Thousand Oaks, Calif.: Sage Publications 1994).

Chapter Five

CONTACT LENS PRICING LITIGATION:[1] *ROBERTS v. BAUSCH & LOMB, INC.*[2]

PROLOGUE

In early 1993, *Business Week* reporter Mark Maremont was in Rochester, New York, to research a story on Kodak.[3] As an afterthought—to make the trip to western New York more worthwhile—he stopped by Bausch & Lomb, Incorporated, to see if he might learn about any recent developments. Bausch & Lomb is a Rochester-based manufacturer of optical, eye care, and other products, with $2 billion in global annual revenues.[4] During his visit, Maremont was taken on a tour of the company's soft contact lens manufacturing plant and noticed something curious at the end of the assembly line:

> A white-clad worker carefully inserts each tiny lens into a plastic blister pack filled with saline solution. Then, some lenses are sealed with a blue film and loaded into boxes marked SeeQuence 2. Another set gets covered with purple film and is stuffed into boxes marked Medalist. Soon, patients around the U.S. will be paying $7 to $9 per pair for the SeeQuence contacts and $15 to $25 for a pair of Medalists.
>
> What's the difference? None. Zilch. Zero. The two products contain precisely the same lens.[5]

Maremont wondered if he really understood what he was seeing and asked if the same lenses were actually going into two different boxes. The guide and other Bausch & Lomb representatives told him matter-of-factly that the lenses were indeed identical but that differences in the way the lenses were used justified the variation in packaging and prices. Maremont filed the information away for a future story.

Maremont's observations at the Rochester plant would not have been a surprise to Ventura, California, optometrist Dr. Robert Pazen. In late 1991, Pazen had wondered why his Bausch & Lomb sales representative had delivered only a single set of trial lenses to be used with the company's two new lines of soft contact lenses, the "SeeQuence2" and the "Medalist."[6] In response to Pazen's

question, the sales representative explained that while the lenses were technically the same, the two lines were to be prescribed for different wearing and disposal times and would be sold at different prices as well. When Pazen asked if he could sell his patients less expensive SeeQuence2 lenses for the same sort of use one might make of Medalist lenses, he was informed that such use would contradict the manufacturer's labeling on the boxes. Unhappy with this policy, Pazen informed his patients that the lenses were identical and allowed them to choose between the two differently labeled boxes. Not surprisingly, they preferred the less costly version.

Maremont and Pazen's discovery reflects the evolution of contact lenses and their use by American consumers. The first company to receive FDA approval to market soft contact lenses in the United States,[7] Bausch & Lomb introduced the product in 1971.[8] When originally developed, soft lenses were generally worn in a manner similar to their hard or rigid counterparts: they were worn only during waking hours; they were cleaned, rinsed, and disinfected after each use; and they were replaced only after loss, damage, irritation, or a change in vision requirements (typically this meant replacement on an annual basis). One of these traditional-wear soft contact lenses, Bausch & Lomb's "Optima" brand (introduced in 1984), eventually became one of the company's most popular models. However, the process of cleaning and disinfecting soft contacts was more complicated than that for rigid lenses, and these higher-maintenance requirements led many consumers to reject switching to the new lens.

In 1981, "extended wear" soft lenses first became available for commercial distribution.[9] These lenses could be worn continuously for up to seven days before removal, cleaning, and disinfecting, but they still were replaced only as needed. The less-frequent need to clean this type of lens—as well as simplified cleaning and disinfecting procedures generally—contributed to a rise in the overall popularity of soft contacts. In 1987, the first soft contacts marketed as "disposable" became available. These extended-wear lenses were, for some consumers, inexpensive enough to be thrown away after each use, thus eliminating the need for cleaning whatsoever. Soon, wearers had yet a fourth option: In 1991, soft contacts variously called "planned replacement," "frequent replacement," or "daily wear, two-week replacement lenses" came on the market.[10] These extended or daily-wear lenses were replaced not after each use or only as needed but rather according to a specified schedule. Consumers no longer needed to have a large supply of lenses on hand as they did with disposables. In addition, they ran less risk of a buildup of proteins or other contaminants on their lenses—problems common for wearers of traditional lenses that had been retained too long.[11] The decision to choose a particular style of soft lens was primarily based on users' disposition toward the cleaning process and their ability to afford a more-frequent rate of replacing lenses.

The multiplicity of soft contact regimens helped increase their popularity. By 1997, 82 percent of the 28 million U.S. contacts wearers were using some sort of soft lens.[12] Of those who wore soft contacts, less than half still replaced their lenses as needed in the conventional manner; 35 percent discarded them after each use and nearly a quarter routinely replaced them according to a specified schedule.[13] The growth in the market seemed to be centered on disposable and frequent-replacement lenses and was fueled by steady drops in the per-unit price that made the higher levels of consumption with these new regimens more affordable. By 1993, manufacturing costs in the contact lens industry had plummeted and lenses were being purchased by consumers more like a commodity than as a medical device.[14] Leaps in manufacturing efficiency in the early 1990s drove the average manufacturing cost down to less than $.50 per lens from $2 or more five years earlier.[15] But all was not rosy for the industry; although production costs and end-user prices had dropped, growth in the total number of lens wearers remained stagnant.[16] By promoting the use of less-expensive disposable and frequent-replacement lenses, manufacturers might generate a higher turnover of their products, thereby counteracting any decreased profit margins from market-driven price reductions.

Although Bausch & Lomb had been the first with traditional, daily-wear soft contacts in the United States, it was soon competing with Johnson & Johnson, which marketed the Vistakon line of extended-wear contact lenses. Eventually, Bausch & Lomb fell behind in the expanding planned-replacement and disposable lens fields. Johnson & Johnson entered the soft contact business in the mid-1980s; by August 1997 it controlled 40 percent of the $1 billion U.S. contact-lens market while Bausch & Lomb's share had dropped to 15 percent.[17] Competition from Johnson & Johnson, and the desire to sell more product, created incentives for Bausch & Lomb to move quickly into the frequent-replacement and disposable lens markets. And a means of doing this lay readily at hand: relabeling and repackaging existing products for these different uses.[18]

There was no medical reason why the lenses that had previously been marketed for use on a daily basis could not also be used for up to seven days as extended-wear contacts. So Bausch & Lomb repackaged its traditional daily-use OptimaFW lens as a Medalist extended-wear lens; later, it repackaged the same lens again as a SeeQuence2 disposable.[19] The new lenses—the Medalist and SeeQuence2—were to be prescribed when practitioners put their patients on either a "disposable program" or a "planned replacement program."[20] The original OptimaFW line was still the most expensive (with an expected life of a year or longer); the Medalist occupied the middle price range and had a planned replacement period of one to three months; and the relatively inexpensive SeeQuence2 line was labeled as either a single-use disposable lens or a planned replacement lens with a two-week cycle.[21] Although the wholesale and retail prices of the Medalist and SeeQuence2 lenses were less than that of the

OptimaFW lens, the company expected that the difference in price would be offset by increased frequency of purchase leading to an increase in revenues overall.

Bausch & Lomb sold its OptimaFW line for about $23 per lens wholesale; identical SeeQuence2 and Medalist brands were generally wholesaled at prices of about $2.50 and $4.00 per lens, respectively.[22] These prices were not what a contact wearer would actually pay, because the lenses were sold only through dispensing contact lens providers[23] and came in different pack sizes (single vial for the OptimaFW, four- or six-packs for the Medalist, and six-packs for the SeeQuence2). The retail price to the end-use consumer varied depending on the provider's markup. As an example, a pair of lenses might cost a consumer about $70 for the OptimaFW but just $8 for the SeeQuence2 or $15 for the Medalist.[24] Bausch & Lomb told providers to prescribe OptimaFWs for long wear if the patient had good cleaning and care habits, Medalists for moderate levels of care and cleaning, and multiday SeeQuence2 if only minimal contact lens care and cleaning could be given. Despite the differences between the three types in name, packaging, pricing, and instructions, the lenses were identical.[25]

For contact lens providers, part of the attractiveness of the arrangement was that they needed to carry only a single supply of trial contacts in various powers for the initial fitting regardless of which of the three lenses were actually prescribed. The providers knew that there was no difference (if for no reason other than the multiple uses for the trial contacts) but were told to prescribe the different lenses depending on the needs of the patient. Bausch & Lomb also told providers, through what was later described as an "aggressive marketing program," that they could increase the return rate of their patients, and their profits, by switching to a shorter-term lens such as the SeeQuence2 or Medalist.[26]

The strategy seems to have worked. By 1993, Bausch & Lomb's annual report announced that "*SeeQuence* and *Medalist* lenses continued to post excellent results, with sales rising over 60%."[27] The company's growth in contact lens revenues was attributed to better manufacturing capability, better marketing, and better instructions for the dispensing lens providers:

> Our ability to meet the surging demand for disposable and planned replacement lenses is greater than it was a few years ago thanks to major investments in new manufacturing capacity around the world. . . . Increased spending for marketing programs, research and development, and the training of eye care professionals has also been an important part of our success. Equally encouraging is the progress being made in significantly reducing operating and manufacturing costs, as productivity gains are realized.[28]

THE LITIGATION BEGINS

One of the eye care professionals Bausch & Lomb attempted to train chose not to adopt the company's recommended marketing strategy. Pazen continued to inform his patients that the lenses were identical and gave them a choice of brands despite the package labeling. Because the patients overwhelmingly opted for the less-expensive SeeQuence2, Pazen asked the sales representative if he would take back his stock of Medalists for a refund. When the sales representative declined, the optometrist took the matter to his supervisors. After being rebuffed by the area manager, he called Bausch & Lomb's toll-free 800 number to vent his frustrations and asked to speak to the senior vice president in charge of Bausch & Lomb's Contact Lens Division, Harold O. Johnson. Much to his surprise, Pazen received a personal phone call from Johnson within the hour. Johnson confirmed that the lenses were manufactured in the same way and had the same composition and design but argued that the difference was due to what he termed "simple economic theory." Johnson gave the example of a 10-pound box of soap powder being cheaper per pound than a one-pound box. Pazen was not convinced and responded that the products were not detergents but medical devices and that he thought Bausch & Lomb's instructions to practitioners raised ethical issues. When Pazen repeated his request to have the Medalist lenses removed from his office and a credit issued, Johnson agreed, but warned that should a problem arise from use of the lenses contrary to the label's instructions, Bausch & Lomb would be unable to support or defend him.

Although Pazen had no further problems with Bausch & Lomb over the matter, Johnson's warning and the company's marketing and pricing policies continued to bother him. During an automobile ride with a chief assistant district attorney for Ventura County—who was the scheduled speaker at one of the optometrist's Rotary Club meetings—Pazen related the story about the lenses and casually asked if it was something the district attorney's office might be interested in. The information was eventually passed to Deputy District Attorney Michael Schwartz in early 1993.

While the district attorney's office was interested in determining whether the practice violated any state consumer protection laws, the deputy district attorney was concerned about the possibility of federal preemption of matters relating to pharmaceuticals and health care devices for any investigation.[29] In April 1993, Schwartz contacted Robert H. Shaw III, Senior Counsel for Bausch & Lomb, and was told by Shaw, and later by Bausch & Lomb's legal representatives, that federal law would preempt any claims of violation of state law. At about the same time, Schwartz sent a letter to the FDA inquiring whether the agency was planning to order Bausch & Lomb to change its lens labels, and

whether the county would have the option of pursuing the matter on its own if the FDA declined to move forward.[30]

In July 1993, a sidebar article by Maremont in *Business Week* revealed "the contact-lens industry's little known secret" of marketing lenses under several trade names at different prices but with little material variation. The article broke the story for the first time on a national level, saying that the only difference between the SeeQuence2 and Medalist lenses was the color of the film used to seal the blister packs. Johnson's explanation of Bausch & Lomb's pricing policy was also presented: "It's simply a volume discount for the patient. . . . If you buy 104 lenses in a year, you should pay less per lens than somebody buying 20 or 30."[31]

In early August, Schwartz received a response from the FDA that said the agency was satisfied with the current product labeling and that the county would indeed be out of its jurisdiction if it took any independent action against the company. The Ventura County District Attorney's Office sent a second letter to the FDA asking it to reconsider the decision, and Schwartz related the details of the matter to a reporter for the *Los Angeles Times*. In early September, a *Times* story in the local Ventura County edition reported Pazen's dealings with Bausch & Lomb and the FDA's reluctance to address the issue.[32]

News began to spread about the allegations that the differently priced lenses were actually the same item. The March 1994 issue of *Kiplinger's Personal Finance Magazine* recounted Pazen's experiences and Schwartz's contacts with the FDA.[33] In response, the FDA explained why the pricing policy was not a matter of concern for them: "We don't regulate price. The lens must be safe and effective for the purpose it's being marketed for—which it is."[34]

Reporter Dawn Chmielewski, then on the staff of the *Boston Patriot Ledger*, saw the *Kiplinger* article and investigated further. In an article published on April 30, 1994, she reported that Bausch & Lomb marketed the lenses to contact lens dispensers with different directions for use despite their being identical.[35] She described some providers as incensed about Bausch & Lomb's practices and others who kept the lenses' identical composition secret from their patients. Bausch & Lomb defended its practices as benefiting those who replaced their lenses more frequently, saying, "Volume discounts are very common in the contact lens industry, as well as other industries."[36] Declining to get involved, the FDA responded that more than one trade name could indeed be used for the same product: "The bottom line here is safety and efficacy. . . . The product has got to be safe and effective as a device. As long as they adhere to that, and the labeling (is truthful), that's no problem."[37]

The next thing counsel at Bausch & Lomb heard was that it had been sued in Alabama.

The litigation began when a number of Boston-area residents who had learned of the allegations from the local media (possibly the *Patriot Ledger* article) contacted attorney Fredric "Rick" Ellis[38] and complained about the pricing disparity. After reviewing the potential for litigation, Ellis contacted Atlanta attorney Ralph Knowles[39] and asked him for help. The two attorneys had worked together on the silicone gel breast implant litigation, conducted primarily in Alabama. Though Alabama had only a small percentage of the sales of Bausch & Lomb contact lenses in the United States, the attorneys felt that an Alabama forum would be a good one both from a standpoint of jury selection and of judge assignment. Anticipating a nationwide class action, Knowles and Ellis contacted a geographically diverse set of plaintiff attorneys to assist in what they thought would develop into large-scale litigation, possibly involving claims of personal injury, and to help share in the costs of notice.[40]

Venue in Birmingham, Alabama, was attractive because Ellis and Knowles could use local attorneys who had significant experience both in class actions and in complex medical-device litigation such as that involving breast implants. Filing in federal court was attractive because they were uncertain whether a state court judge would certify a nationwide class based in part on federal statutory claims.[41] They knew a filing in the Northern District of Alabama—with two sitting judges—would yield either Judge U. W. Clemon or Judge Samuel C. Pointer as a trial judge, either of whom they felt would give them a fair shake. Representative plaintiffs were identified in the northern district, and the case was filed on May 10, 1994, in Birmingham federal district court and assigned to Judge Clemon.[42]

PRIMARY ISSUES IN THE LITIGATION

The complaint alleged that Bausch & Lomb had violated the federal Lanham Act,[43] the RICO Act,[44] and various state consumer protection acts. It included also common-law claims of misrepresentation, fraud, deceit, false statements and nondisclosures of material fact, breaches of express and implied warranties, and negligence. A number of Bausch & Lomb's top corporate officers were also individually named as defendants, although they were dropped from the litigation soon thereafter. The individual plaintiffs were identified as representatives of a proposed class of all U.S. purchasers of OptimaFW, Medalist, and SeeQuence2 lenses.

In essence, the plaintiffs alleged that Medalist and OptimaFW users were paying more than they needed to because a relatively cheap "disposable" SeeQuence2 lens would have worked as well for either a planned-replacement or traditional-wear schedule. As the plaintiffs viewed the situation, the defendants had fraudulently induced consumers to believe that the Medalist and SeeQuence2

lenses had to be replaced frequently, while only the higher-priced OptimaFW lens was suitable and safe for long-term use. Because the lenses were medical devices, the plaintiffs averred that consumers were more likely to accept without question any labeling or instructions issued by Bausch & Lomb.[45] The plaintiffs claimed that the company's plans were aided by its aggressive marketing programs with eye care practitioners, its seeking of FDA "approval" of the labeling, its insistence that lenses could be prescribed only for the purposes listed, and its practice of dropping practitioners from the soft contact lens program if they did not follow Bausch & Lomb's pricing system.[46] In the plaintiffs' view, the fact that the price on the "new" labels was reduced (rather than increased) made no difference to the core issue of deceptive practices because some consumers were induced to replace their lenses more often than necessary and others were essentially prevented from learning of the availability of a less-expensive alternative product. Though there were no allegations of safety or quality problems, the plaintiffs felt that the practices met the standards for fraud. The lawsuit sought punitive or exemplary damages as well as compensatory damages and equitable relief.[47]

In response, Bausch & Lomb conceded that the lenses were the same but argued that there were a number of reasons for the different prices.[48] It asserted that the different sales and marketing practices were justified on the basis that volume-discount purchases reduced the costs for those buying shorter-period lenses.[49] No sinister scheme was envisioned; rather, the pricing strategy was designed simply to encourage eyeglass wearers to adopt soft lenses by making the convenient disposable version more affordable.[50] Moreover, the longer the lens stayed in the eye or was used overall, the more supervision would be needed by the dispensing eye care practitioner; the higher prices for the nondisposable lenses reflected the increased time the eye care practitioner required to oversee planned-replacement and traditional-wear regimes.

The defendant argued that no material facts were withheld; the fact that the Medalist and SeeQuence2 lenses were identical to the OptimaFW was fully disclosed to the FDA in the premarket approval process,[51] and eye care practitioners all knew it was the same lens—and if they wanted to, the practitioners could have sold the lenses in any way and at any price they desired. Indeed, Bausch & Lomb never sold to consumers directly, only to eye care practitioners.[52] It also asserted that the packaging was subject to FDA review and approval,[53] and that because the litigation involved medical devices, federal law preempted state law, eliminating state-law claims from the complaint. Finally, Bausch & Lomb argued that a class action was inappropriate because to prove claims for common-law fraud, negligent misrepresentation, or violation of the RICO statute, each individual plaintiff would have to demonstrate that he or she consciously relied on Bausch & Lomb's representations. Such a need for individual

proof would, in the defendant's view, defeat the primary justification for class treatment. Moreover, because the contact lens users based their purchases solely upon their doctor's advice and prescriptions, Bausch & Lomb argued that they could not have relied on Bausch & Lomb's statements or advertising, a necessary element in a fraud action.[54]

THE LITIGATION PROGRESSES

After the initial allegations had come to light in the press in 1993–1994, state attorneys general began to take an interest in the pricing practices. At the time of the *Patriot Ledger* article, for example, the head of the consumer protection division of the Massachusetts Attorney General's office said that it planned to reexamine the labeling practices with an eye toward proceeding under the state's consumer protection act: "It clearly appears to be a troubling consumer practice, and one that we would want to look over very carefully."[55] Triggered by the articles in the press and a circulated copy of the correspondence between the Ventura County district attorney's office and the FDA, attorneys general in a number of states began a joint investigation in 1994 of the allegations of multiple pricing for the same product.[56] Craig Jordan of the Texas Attorney General's office led this multistate task force. However, the Alabama federal court case and the attorneys general investigations appear to have proceeded independently of one another. Much of the state agencies' work was done secretly and class counsel in the Alabama case was only tangentially aware of its nature. Similarly, the attorneys general thought that the matter's being litigated privately was of little relevance to the decision to pursue a formal public investigation.[57] A separate investigation, independent of the multistate task force, was also initiated by the attorney general's office of the state of Florida.[58]

While there was a flurry of general media and trade journal reports around the time of the filing of the class action, neither the plaintiffs or the defendants attempted to try the case in the court of public opinion. However, two national television shows (*Dateline* and *American Journal*) ran stories on the allegations early in the life of the Alabama litigation.[59]

The primary law firms prosecuting the plaintiffs' claims included a number of experienced class action attorneys. Formally, class counsel was James J. Thompson of Birmingham's Hare Wynn Newell & Newton,[60] but because Rick Ellis had initiated the litigation, the latter was primary coordinator of the case and determined the cost and fee-sharing arrangements. Beside Knowles' Atlanta office, other firms from San Francisco, San Jose, Portland (Oregon), Detroit, Birmingham, and Dothan (Alabama) joined in the action to represent the plaintiffs.[61] Many of these firms had worked together in the breast implant

arena, but with one exception—Lieff & Cabraser of San Francisco—most were not well known for pursuing financial injury class action litigation.

Initially, Patricia Hulley of Bausch & Lomb supervised the defense; in the final months of the litigation, that responsibility was turned over to Susan Roberts. Bausch & Lomb's outside litigation counsel consisted of four firms, two located in Birmingham and one each in New York and San Francisco.[62]

INITIAL CERTIFICATION AND NOTICE

From the beginning, the plaintiff firms intended to seek certification of a national class of Bausch & Lomb customers under the provisions of Rule 23(b)(3). In late September 1994—about four months after filing—a day-long evidentiary hearing was held on the issue of class certification.[63] While the matter was under consideration, the defendant filed a motion for summary judgment, but that was denied the very next day. On November 1, 1994, Judge Clemon certified a class of all consumer purchasers of OptimaFW and Medalist lenses with Myra Roberts as the representative plaintiff.[64] This class apparently included all U.S. resident or domiciliary consumer purchasers of OptimaFW and Medalist lenses from January 1, 1991, to November 1, 1994.[65]

At the time of the initial filing, the plaintiffs' attorneys believed that the lawsuit would include allegations against Bausch & Lomb for encouraging providers to switch to more-frequently purchased lenses, rather than sticking with the conventional-wear OptimaFWs. Class counsel thought that some purchasers would have incurred additional costs due to premature disposal of lenses in good repair.[66] As more information became available, plaintiffs' attorneys saw that such claims would require additional evidence about customers' reliance on the contact lens providers' representations, thus muddying the situation for a class action, and further realized that more frequent replacement might often be medically justified. Another possibility at the initiation of the suit was that the lawsuit would encompass claims of physical injuries associated with using a lens originally designed for daily removal and cleaning (the OptimaFW) continuously for up to a week (as some SeeQuence2 and Medalist lenses were prescribed). But investigation failed to turn up any such incidents; indeed, the lens design and composition turned out to be adequately and safely suited for use in any of the various regimens. As a result, plaintiffs' attorneys ultimately focused their case solely on the price difference between the identical lenses. SeeQuence2 customers were not included in the class certification request because they, as purchasers of the least expensive lenses, would have suffered no financial damages. Indeed, two of the originally named plaintiffs were dropped from the initial class certification order when it became apparent that they had purchased only the SeeQuence2 lenses.[67] The class definition's starting date was

chosen to be January 1, 1991, because it was the plaintiffs' best estimate of the initial introduction of the SeeQuence2 lens (and therefore, the availability of a less-expensive alternative to the Medalist and OptimaFW). Members of this initial class were given until May 1, 1995 (about seven months from certification), to exclude themselves.

Plaintiffs' attorney Michael L. Williams estimated that the value of the individual claims underlying the class could be $50–$500 and that the class could encompass three million people who had purchased the lenses. Williams described class certification as "the first big battle between consumers and the company, and the consumers won this first one."[68]

They won the second one as well. Bausch & Lomb's petition for a writ of mandamus to the 11th Circuit with the hope of overturning the certification decision was denied on December 1, 1994.

Details for the notice of the initial class certification were approved on January 27, 1995. The court had found that there was no practical means of identifying individual class members and ordered that notice be primarily achieved by publication. The court ordered that notice, at the plaintiffs' expense, was to be accomplished in three ways:

- publication of a summary notice of class certification in 23 newspapers across the country on a single Friday (plus a second publication in *USA Today*), in two national eye care industry magazines, and via a "PR Newswire" from a company that sends electronic press releases to targeted audiences across the nation
- a first-class mailing of a somewhat lengthier notice to all of those who requested it; and
- a package containing the notice by mail, the Notice Order, and a cover letter from the court to be sent to a list (provided by Bausch & Lomb) of all eye care practitioners who had purchased either the OptimaFW or Medalist lenses. The cover letter would request that the practitioners forward a copy of the mail notice, at class counsel's expense, to their patients.[69]

Plaintiff's attorneys began disseminating the notice in early 1995.[70] Plaintiffs' costs of publication were asserted to be nearly $118,000.[71] More than 13,000 letters were sent by class counsel to eye care practitioners; the cost of this mailing, including the reimbursement of the practitioners' forwarding expenses, has been estimated at slightly over $30,000.

During 1995, and while the litigation was pending, Bausch & Lomb notified practitioners of a number of modifications to its labeling. Medalist boxes were changed to indicate that the lenses inside were actually "OptimaFW—for use

with the Medalist replacement system" and similarly, SeeQuence2 boxes now read "OptimaFW—for use with the SeeQuence2 disposable system."[72]

OTHER RELATED LITIGATION

Two suits, styled by class counsel as "tag-alongs" because they were filed after the Alabama case had begun, eventually played a role in the lead litigation. A state case filed in October 1994 by the firm of Milberg Weiss in San Diego involved issues substantially similar to those in the Alabama case; the major difference was that the periods of purchase for its putative class members were slightly longer than those set forth in the initial certification order for *Roberts* on November 1, 1994. A state case filed in 1996 in New York City by the firm of Starr & Holman also replicated many of the allegations set out in the Alabama case with one addition: Bausch & Lomb's Criterion UltraFW soft lens was also said to be identical to the OptimaFW–Medalist–SeeQuence2 family. Nevertheless, the soft contact lens litigation being fought in Judge Clemon's courtroom was the predominant suit.

MOVEMENT TOWARDS SETTLEMENT

Settlement discussions began in February 1995 after the court ruled on the scope and details of the notice of the initial class certification,[73] but the case continued to more forward in the courtroom. Judge Clemon consistently kept up the pace of the litigation and set a firm trial date for August 1996. Bausch & Lomb aggressively defended itself and in March 1996 moved to decertify the class. In June, the motion to decertify was heard, but a ruling was not immediately issued. Both sides pressed onward and completed discovery. However, though both the plaintiffs and defendants were ready and willing to go to trial, the parties reached an agreement to settle the case just before the scheduled trial date.

The parties' reasons for acceding to settlement differed. The defendants felt that settlement was prudent, given the vague wording of the Alabama fraud statute with its prohibition of "any practice likely to deceive." In addition, similar issues had never been litigated elsewhere, thus offering no clue as to how the law might be interpreted on appeal. Moreover, trial might have been held in Tuscaloosa, an arguably more plaintiff-friendly venue than Birmingham, and there was a distinct possibility of an Alabama jury awarding punitive damages, attorney fees, and RICO penalties. In its press release concerning the settlement, Bausch & Lomb stated that the agreement was preferable to "diverting resources to lengthy litigation to establish the merits of labeling that is no longer in use."[74]

As the plaintiffs' attorneys saw it, Bausch & Lomb thought it might lose very big to an Alabama jury (though it might have hoped for an 11th Circuit reversal on the certification or fraud issues). The plaintiffs' attorneys also thought that because Bausch & Lomb had retired or shifted a number of corporate officers in 1996, including some in the contact lens division, the company wanted those in the new positions to start off with a clean slate. Bausch & Lomb was also wrestling with other corporate problems, including a Securities and Exchange Commission investigation of an unrelated 1993 marketing program involving sunglasses.[75] Plaintiffs' attorneys thought another motive for settlement was Bausch & Lomb's reluctance to go to trial and have its shareholders hear testimony of questionable business practices. Finally, plaintiffs felt the defendants could settle without "betting the company."

Plaintiffs' attorneys had their own reasons to settle. Given the likelihood of a pro-plaintiff jury and what they perceived to be the favorable facts of the case, plaintiffs' attorneys were confident of a huge punitive damage verdict. But they still preferred settlement to the uncertainties of trial. Though they believed liability was clear, plaintiffs' attorneys saw that there might be problems (albeit manageable ones) determining the size of the class and estimating damages (e.g., how to calculate them, what numbers to use). The only injuries to the class members were financial, and modest at that, and there were no questions of safety and quality. Plaintiffs concluded that a settlement before trial was the best way to stop Bausch & Lomb from packaging its products in such a way as to confuse consumers; prevent any similar future behavior; bring bad publicity to Bausch & Lomb and others who might attempt the same sort of marketing scheme; and—if nothing else—allow consumers the opportunity to get their money back.

Attorneys Jim Thompson and Ralph Knowles handled the settlement discussions on the plaintiffs' behalf; Fournier J. Gale, J. Mark White, and Harry Sacks were the defendant's negotiators. By several reports, the negotiations between the parties were intense and vociferous, but a stipulation of settlement was finally signed on July 25, 1996 (though some minor amendments were made in mid-August).[76] The deal was based upon the number of lenses in question sold and the difference in the wholesale profits between the lens purchased and the SeeQuence2, estimated to total at least $33.5 million.

DETAILS OF THE AGREEMENT

A critical aspect of the settlement was the agreed-to expansion of the class to include those who purchased Medalist and OptimaFW lens both before and after the originally specified cutoff dates, and those who purchased the Criterion UltraFW lens. The parties justified the expansion on the basis that the legal and

factual issues for these additional periods and trade names were substantially similar to those in the original certification order. But these changes had their genesis in the New York and California state court tag-along actions, both of which were eventually concluded by nominal settlements by Bausch & Lomb with the attorneys who had brought the suits. Bausch & Lomb declined to reveal to us the amount of those settlements, other than that they were for a small amount of attorney fees. (Attorneys in the Alabama case agreed that the tag-along-action attorneys were not generously paid.) With the folding-in of the tag-along claims, the parties agreed to a settlement-only class comprising residents or domiciliaries of the United States who were consumer purchasers of the following Bausch and Lomb lenses during these periods of time:

Medalist: January 1, 1991, to December 31, 1995

OptimaFW: November 1, 1990, to December 31, 1995

Criterion UltraFW: November 1, 1990, to April 30, 1996.

Bausch & Lomb agreed to pay the difference between the average wholesale price of the least expensive method of buying lenses (the SeeQuence2) and the more expensive methods (Medalist, OptimaFW, and Criterion UltraFW); it also would provide certificates (i.e., coupons) good for certain Bausch & Lomb products in an equal amount based upon the average wholesale price of those products.[77] The parties to the settlement believed that the total economic benefit to the class for the cash payments and the matching credit certificates might exceed $67 million.[78] According to a *Wall Street Journal* article, "Fredric Ellis, a Boston lawyer for the plaintiffs, estimated that between one million and 1.5 million consumers could receive from $25 to $50 in cash and $25 to $50 in coupons, costing the company as much as $68 million."[79] In return, class members would waive all claims arising out of the marketing and related activities of Bausch & Lomb as they pertained to the lenses, whether against Bausch & Lomb or against contact lens providers. Personal injury claims, however, were excluded from this release.[80]

A thorny issue for the plaintiffs' attorneys had been how to calculate what the defendant should pay. They initially tried to calculate the class benefit as the difference in the retail prices of the products, but surveys conducted by the plaintiffs and the defendant revealed a wide disparity in prices charged by contact lens providers nationwide. Further, it could be argued that Bausch & Lomb should not be held responsible for the end-user prices because the defendant only sold the products wholesale. Using wholesale price differences and the best available figures for the number and type of lenses actually sold, the $33.5 million cash figure was estimated on a calculation that assumed that 100 percent of the potential class would complete the claiming process. Because estimating retail price differences was deemed impractical, the attorneys added

matching credit certificates to the settlement in order to sweeten the pot for class members. There was no cap on the amount that the defendant would have to pay, but neither was there any provision for distributing unclaimed benefits; any amounts not claimed would be kept by the defendant. The plaintiffs also claimed that because Bausch & Lomb had "ceased the pricing practices which occasioned this lawsuit, [the settlement resulted] in economic benefits to millions of future purchasers."[81]

Shortly after the agreement was reached, the judge granted preliminary approval of the settlement on July 31, 1996. The court found that approximately $34 million in cash, about $34 million in product credit (i.e., the discount coupons), and up to $8 million in fees and expenses to be paid over and above the benefits to the class fulfilled the criteria for preliminary settlement approval.

At the time of the settlement, Bausch & Lomb said it "continue[d] to deny wrongdoing."[82] The settlement did not address the pricing policy *per se* and made no reference to any prohibition on Bausch & Lomb's ability to conduct similar marketing programs in the future. Class counsel indicated to us their belief that any wholesale price differences between SeeQuence2 lenses and either the Medalist or OptimaFW lenses had ended by December 31, 1995, and likewise had ended for Criterion UltraFW lenses by April 30, 1996 (hence the reason why the defendant had insisted on these dates for the settlement class definition). But the settlement did not instigate any change in Bausch & Lomb's pricing practices.

The effective date of the settlement was set at ten days past the expiration date of any possible appeal from the final order approving settlement. Bausch & Lomb would bear all costs of the notice and settlement administration. Pursuant to the agreement, the court appointed Arthur Andersen & Company as settlement administrator on August 16, 1996.

Notice

With the defendant bearing the costs, notice to the settlement class was to be achieved in a number of ways:

- by nationwide publication of the notice and claim form in major newspapers
- by posting of the notice and claim form on the internet until February 1, 1997
- press releases from both Bausch & Lomb and the plaintiffs on "PR Newswire" the day before the first publication notice

- a letter from Bausch & Lomb to all of its contact lens provider accounts informing them of the settlement and requesting cooperation in the settlement process, including forwarding a mailing notice to settlement class members[83]
- a toll-free phone number, P.O. box, and internet web site from which to obtain additional information or claim forms (maintained through June 30, 1997); and
- direct mailing of the notice and claim forms to the addresses of "known Class Members."[84]

The notice had two purposes: to inform all class members of the preliminary approval of the settlement (pending the fairness hearing) and to notify further the members of the expanded class of their new class status and any opt-out requirements that pertained just to them.

Additional Opt-Out Provisions

In addition to the class earlier certified on November 1, 1994, the preliminary approval had certified an expanded class of U.S. residents and domiciliaries who made consumer purchases of Criterion UltraFW lenses from November 1, 1990, through April 30, 1996, and extended the purchase period for OptimaFW and Medalist lenses. The purchase periods for both lenses were extended to include November 1, 1994–December 31, 1995, and for OptimaFW, the last two months of 1990 were also added. An opt-out deadline of November 1, 1996, was given for purchasers of these lenses during these extended periods, but those members of the original certified class who had failed to opt out by May 1, 1995, were already bound by the settlement.[85]

Claiming

The deadline for making an application for a refund was February 1, 1997. To make such a claim, one had to return a form with name, address, and phone number as well as number, type, and dates of lenses purchased to the settlement administrator, plus *one* of the following documents:

- A Verified Claim Form completed by the claimant's contact lens provider indicating the type and date of each lens purchased, and stating that the provider's records reflect such purchase (Bausch & Lomb provided these forms to the providers), or

- A letter from, and on the stationery of, the provider, indicating the type and date of each lens purchased and stating that the provider's records reflect such purchase, or
- An Alternative Claim Form (with any available documentation) if the claimant could not obtain either of the above two documents.[86]

While submission of the first two documents with lens-provider confirmation of the purchases was preferred, a claimant would be able to receive the agreed-to compensation simply by listing the dates, types, and sources of lens purchases by using the Alternative Claim Form. The schedule of cash payments was as follows: $5.33 for each OptimaFW lens; $8.04 for each six-pack of Medalist lenses (in other words, $1.34 per lens); $5.36 for each four-pack of Medalist lenses (also $1.34 per lens); and $3.43 for each Criterion UltraFW lens.[87] As additional compensation for every dollar paid to the claimants, Bausch & Lomb offered an equal amount of credit toward associated products. About 10 to 15 articles were available for the credit redemption, including eye care solution, sun screen, Ray-Ban sunglasses, and contact lens cases (but not lenses, because they would have to be dispensed by practitioners rather than directly by Bausch & Lomb).

Fees and Expenses

The plaintiffs' pleadings in support of the settlement asserted that the fees and costs negotiations with the defendant took place only after the settlement terms had been agreed to. They argued that, unlike many common fund settlements, these fees and costs would be paid over and above the cash and coupons made available to claiming class members. Bausch & Lomb agreed to pay the fees and costs of class counsel as long as the amount requested did not exceed $8 million in fees and $600,000 in expenses to date (plus $10,000 in additional post-settlement expenses).[88]

FINAL APPROVAL OF DISTRIBUTION AND FEES

Objectors

Those who wished to comment on the proposed settlement had to submit their written statements or their requests to appear at the fairness hearing by November 1, 1996. Plaintiffs claimed that as of November 1, 1996, no substantive written objections to the settlement had been filed. The potential for objection by those involved with the two tag-along cases was forestalled because of the settlement with those attorneys.

Opt-Outs

The initial deadline for opting out of the original class was May 1, 1995.[89] Sixty-nine opt-out requests were received by this deadline.[90] November 1, 1996, was set as the cutoff date for opting out of the expanded settlement class; to do so one had to submit a personally signed Exclusion Request.[91] As of that date, 34 members of the expanded class had also requested to be excluded from the settlement.[92] The two opt-out periods were independent of one another so that a class member could have opted out for purchases made under the original class definition but remained in the expanded class for the additional periods or trade names. In spite of the opt-outs' decision not to participate in the settlement, plaintiffs' attorneys indicated to us that potential class members who opted out never initiated any formal action.

Approval of the Settlement Distribution Provisions

In their request for final approval, plaintiffs asserted that

> . . . the proposed settlement falls at the high end of the range of reasonableness, and that settlements for lesser amounts and less advantageous terms could well have been approved as fair, adequate, and reasonable. Plaintiffs have obtained and submitted a settlement that is not merely sufficient, but is exceptional.[93]

The fairness hearing was held November 26, 1996, and reportedly lasted about an hour with no objectors present, though some letters from optometrists were received by the court arguing that their patients were fully aware that the lenses were the same. At the conclusion of the hearing, a final order was entered that defined the members of the Rule 23(b)(3) class, approved the settlement provisions, and dismissed the case. The final order found that the notice of the proposed settlement and fairness hearing was properly disseminated as required in the July 31, 1996 preliminary order. The court also found that no meritorious objections to the settlement had been made and that the terms of the settlement were fair, reasonable, and adequate.

All members of the class who did not file a timely opt-out were barred and enjoined from prosecuting any future action against Bausch & Lomb with respect to any claims released by settlement. The court expressly reserved its jurisdiction over the action to enforce and protect the settlement stipulation, the settlement administration, or the court's judgment, although the suit was dismissed with prejudice.[94] Like the settlement agreement and preliminary approval order, the final order was silent on the issue of whether Bausch & Lomb was free to repeat the practices that had sparked the litigation.

Approval of the Fee Provisions

According to the plaintiffs, the $8 million award requested would be "less than fifteen percent (15%) of the total monetary and certificate benefits available to class members in this settlement"[95] and less than 12 percent if the fees and costs themselves were included as part of the total settlement benefit package. The fee request claimed that either of these two percentages would be less than the 20–30 percent range used in the "majority of common fund fee awards" as well as under the 25 percent "benchmark percentage fee award."[96] Moreover, they asserted, the fees were reasonable in light of the time and labor required, the novelty and difficulty of the case, the skills needed, the experience and reputation of class counsel, the preclusion of other employment for the attorneys involved in prosecuting the matter, awards in similar cases, the need for a contingency fee, the pace of the litigation, the results obtained, and the fact that few other attorneys would have taken on a case of this magnitude. Using only the $33.5 million cash benefit estimate, the requested fees would have been less than 24 percent of the potential cash payment.

At the time of the application for final approval and fee award, plaintiffs asked for $545,000 in costs already incurred and an additional $5000 in costs anticipated from November 1, 1996, through final approval.[97] An affidavit was presented that described $546,065 in actual plaintiffs' expenditures.[98]

The final order set forth Judge Clemon's finding that the efforts of class counsel had "provided a substantial economic benefit to the Class of approximately $67 million made available in cash and product certificates"; thus he deemed the amount of requested fees and expenses to be reasonable.[99] The court awarded $8 million in fees as the parties had negotiated, and $500,000 in expenses.[100] No explanation was given why the expenses awarded were less than the amount requested.

ACTUAL DISTRIBUTION OF SETTLEMENT FUNDS

Neither the plaintiffs' attorneys nor the defendant were required to report the distribution of funds to the judge. As a result, we were dependent on the parties or attorneys to share information about the claiming process and distribution. As we went to press, we were unable to obtain such information. Bausch & Lomb declined to tell us any more than that Arthur Andersen was handling the distribution and that the totals had not been finally calculated. We contacted the settlement administrator appointed by the court, but he also declined to share distribution figures, suggesting that we talk to the attorneys involved with the case. We had hoped that the class counsel might be able to provide the figures, but they declined because of an agreement with the defense made at the

time of settlement not to discuss or divulge matters related to the settlement negotiations or the actual distribution to the class.

Without such figures, we can only estimate the claiming rate based on the defendant's reports to the SEC and mass media reports. From these sources it appears that the final distribution was substantially less than the highly publicized $68 million. At the close of 1995, Bausch & Lomb had set aside $21.7 million to cover the "costs and expenses reasonably estimable" of then-pending litigation, including not only this class action but also various unrelated securities suits, class actions pertaining to eye solution products, antitrust complaints, the settlements of two class actions involving hearing aids, and a related FTC action.[101] At the time of the settlement of this class action in August 1996, Bausch & Lomb took a charge of $16 million ($10 million after taxes or 18 cents a share) against its third quarter earnings "which, in addition to existing litigation reserves, is deemed adequate to satisfy the costs of the proposed settlement."[102] It was reported at the time that Bausch & Lomb expected the combined charge and reserves to be sufficient to cover the settlement because not all class members would make claims.[103] It appears, with this reserve and the charge, that Bausch & Lomb never expected to pay out more than $37.7 million in cash, matching retail credit, plaintiffs' attorney fees and costs, and administration costs (assuming that *none* of the 1995 year-end reserve would be used for any litigation other than the Birmingham lens settlement). Deducting the $8.5 million in fees and costs paid to class counsel leaves $29.2 million as an upper boundary for the combined amount of cash, retail credit, and administration and notice costs; thus, the defendant might have estimated its maximum future cash-payment exposure for class benefits to be under $14.6 million (subtracting costs for administration and notice). At the low end of the spectrum, full use of the 1995 year-end litigation reserve to satisfy only unrelated settlements and various pending matters would leave $7.5 million as the predicted total exposure for items other than class counsel's fees and costs (and $3.75 million as a maximum cash payout if administration and notice costs are ignored).[104]

We are also limited in our ability to determine the distribution of the settlement by the lack of consistent assessments of the size of the class and the estimated damages members incurred in the purchase of the three lenses in question. In May 1994, plaintiffs believed that the class included "millions of members";[105] in June 1994, the plaintiffs stated that "hundreds of thousands class members purchased" Optima, Medalist, and SeeQuence2 lenses;[106] in November 1994, the *Wall Street Journal* reported that there were about three million buyers of the lenses;[107] in February 1995, the parties jointly stated that there "may well be over one million class members";[108] in August 1996, a plaintiffs' attorney put the figure between one million and 1.5 million consumers;[109] and finally in

November 1996, plaintiffs estimated that the size of the settlement class was in the "hundreds of thousands."[110] Nowhere in the pleadings submitted to the court in support of the application for approval of the final settlement do either the plaintiffs or the defendant set forth their appraisals of the number of lenses of each type actually purchased by class members. How many people were actually members of this class, how many of these class members actually submitted a claim form, and how much they were actually paid appear to be closely held secrets between the class counsel and the defendant.

Was the settlement a good deal for class members? Table 5.1 presents some relevant data for this analysis. The core of the plaintiffs' complaint was that OptimaFW and Medalist users paid much more than they needed to because the less-expensive SeeQuence2 lens would have worked just as well. However, the settlement claim amounts were based on the difference in Bausch & Lomb's wholesale price, not the actual amounts spent by consumers. Based on published articles that reported on the controversy and subsequent litigation, we believe that Bausch & Lomb offered a pair of OptimaFW lens directly to contact lens providers for about $46, and the SeeQuence2 and Medalist brands were wholesaled at per-pair prices of about $5 and $8, respectively.[111] If a Medalist user successfully completed the claiming process, he or she would receive cash from Bausch & Lomb in the amount of $2.68 for each pair and an equivalent amount in credit towards the retail price of other Bausch & Lomb products (arguably a total compensation value of $5.36). Claiming Medalist users would be getting back 89 to 179 percent (depending on to what extent they took advantage of the product credit offer) of the money they might have saved at the wholesale rate had they originally been offered a pair of SeeQuence2s.[112]

Table 5.1

Price and Benefit Comparisons of Bausch & Lomb Contact Lenses

Lens	Wholesale Price per Pair[a]	Per Pair Difference Between SeeQuence2 Wholesale Price	Sample Retail Prices per Pair[b]	Per Pair Difference Between SeeQuence2 Retail Price	Class Cash Benefit per Pair[c]	Class Cash and Credit Benefit per Pair
OptimaFW	$46.00	$41.00	$70.00	$62.00	$10.66	$21.32
Medalist	$8.00	$3.00	$15.00	$7.00	$2.68	$5.36
SeeQuence2	$5.00	—	$8.00	—	—	—

[a]"Contact-Lens Prices Change in the Blink of an Eye," *Consumer Reports*, Aug. 1994, at 90.

[b]Jane Bennett Clark, "Bausch & Lomb: Pulling the Wool Over Its Customers' Eyes," *Kiplinger's Personal Finance Magazine*, Mar. 1994.

[c]Settlement Notice, Stipulation of Settlement and Compromise (July 25, 1996) at 11–12.

OptimaFW users would not have fared nearly as well. Their per-pair cash payment would be just $10.66, and even with some or all of the product credit included they would only get in the range of 26 to 52 cents on the dollar. Even so, when the certainties of settlement are compared to the uncertainties of an aggressively fought trial and the delay attendant on a possible appeal, the payment schedule might seem reasonable.

Class counsel disagreed with our calculations of how well the settlement compensated class members. They told us that, based upon their analysis of defendant's records performed as part of the settlement negotiation process, there were significant fluctuations in Bausch & Lomb's wholesale prices for the products in question over the class period. They argued that the *average* wholesale price of a pair of OptimaFW lenses was approximately $15.50 and thus the agreed-to class compensation of $10.66 equaled the difference between the average price of the OptimaFW and SeeQuence2 lenses. They also asserted that the $2.68 compensation for a pair of Medalists was equal to the difference in the average wholesale prices between that lens and the SeeQuence2 brand.

However, class counsel's calculations are based on wholesale prices. One could argue that the assessment of whether the claimants were adequately compensated should only be made using the end-user retail costs, because by definition class members never paid the wholesale price. Moreover, by failing to opt out in a timely fashion from the settlement, class members had waived their rights to proceed against "all optical stores, optometrists, ophthalmologists or opticians who sold Contact Lenses to Class Members during the Class Period,"[113] meaning they would have no opportunity to seek additional compensation from the providers to make up the difference in the retail price. While there certainly was wide variation in how contact lens providers priced Bausch & Lomb's products, we can get some idea of typical prices from published media reports.[114] From these sources it appears that a Medalist claimant who used all the available product credit would be getting a return fairly close to the actual difference in the lens purchase price, but an OptimaFW user would only be receiving about a third of the excess he or she had paid.

Looking at the cash benefit to the class in light of our estimated differences in the wholesale prices between the SeeQuence2 lens and the two other lenses, it appears that even if all of the class members made successful claims, so that Bausch & Lomb was required to pay out the projected $33.5 million total cash benefit, not all of the "losses" at wholesale would have been returned to the class if wholesale prices generally reflected the figures published in various media articles at the beginning of the litigation. If, on the other hand, class counsel's assertion that the amount of compensation accurately reflects the wholesale price differences is correct, then all wholesale losses would have been

recovered. Regardless of which figures are used as sample wholesale prices, it is clear that members of the class who did not redeem all of their product credit would have recovered only a fraction of the additional retail price paid for either the Medalist or OptimaFW lenses.

We can use wholesale and retail price estimates to estimate the average maximum loss per class member. Assuming a total class period of about five years; yearly replacement of OptimaFW lenses; replacement of Medalist lenses at a rate of six times per year (the midpoint of the one- to three-month range generally used for its frequent replacement schedule); complete replacement of a pair of lenses every time; and that a wearer continued to use a particular lens line for the entire class period, OptimaFW and Medalist users would have had a wholesale price loss of $205 and $90, respectively, compared to what they would have paid for SeeQuence2 lenses.[115] Using the retail price figures, the maximum losses would have been $310 and $210 for OptimaFW and Medalist users respectively. These figures demonstrate how small per-transaction losses to class members may result in sizable per-person losses over time.

EPILOGUE

In early 1997, the SeeQuence2 and Medalist labels were dropped entirely in favor of using the OptimaFW name for lenses distributed in the United States.[116] The plaintiffs' attorneys felt that this discontinuance of trade names cured the problem at the root of Bausch & Lomb's marketing practices. However, a residual market still existed for the lenses under the prior labels (though not through channels authorized by Bausch & Lomb). By early 1998, OptimaFW, SeeQuence2, and Medalist lenses could still be ordered, at per-lens retail price differences similar to those that existed before the start of the litigation, from so-called "gray market" distributors who sell directly to consumers (rather than to authorized eye care professionals) via telephone or internet sites.[117] It should be noted that the gray market supply of lenses with the discontinued labels and product names will eventually be exhausted.

In August 1997, Bausch & Lomb agreed to pay $100,000 in litigation costs each to 17 states (including California and Texas) to end the joint attorney general task force investigation started in 1994. While Bausch & Lomb agreed to cease selling identical soft contact lens under different brand names (which in fact it had already stopped doing), the attorneys general settlement did not address issues regarding differences in price.[118] As we went to press, a similar investigation conducted by the Florida Attorney General into contact lens marketing and sales practices was still ongoing.

The Assurance of Discontinuance included provisions that Bausch & Lomb would make the same wearing recommendations on the consumer labeling of

all its lenses and make certain disclosures in its advertising.[119] In reaching the settlement, the state attorneys general discounted the assertion that the marketing practices were approved by the FDA or were due to Bausch & Lomb's need to comply with FDA requirements for contact lens labeling.[120] They argued that the practice of selling identical products under different brand names and prices constituted misleading sales tactics. New York Attorney General Dennis C. Vacco explained his state's perspective:

> The difference in the cost of the various contact lenses clearly misled consumers into thinking that they were getting a better quality product. . . . Consumers are entitled to have all of the information about a product before making their purchase. . . . With this information in hand, consumers can better determine which product is most appropriate for their needs and avoid spending more money than they need to.[121]

Key Events	**Dates**
Ventura County, California, district attorney contacts Bausch & Lomb in regard to its pricing policy and also sends an inquiry letter to FDA	Early 1993
Business Week article is published revealing that lenses sold under different Bausch & Lomb trade names were actually the same	July 1993
Complaint filed	May 10, 1994
Certification hearing	September 22, 1994
Certification order	November 1, 1994
Notice of Certification	Early 1995
Deadline for opting out of original class	May 1, 1995
Settlement reached	July 25, 1996
Preliminary approval hearing	July 31, 1996
Preliminary approval order	July 31, 1996
Notice of preliminary settlement	August–October 1996
Deadline for opting out of expanded class	November 1, 1996
Deadline for objections	November 1, 1996
Fairness hearing	November 26, 1996
Final approval order	November 26, 1996
Notice of final approval	December 1996, January 1997

Notice of claiming procedures	December 1996, January 1997
End of claiming period	February 1, 1997
Bausch & Lomb settles an investigation by the attorneys general in 17 states and agrees to stop selling identical contact lenses under different brand names	August 20, 1997

NOTES

[1]As part of our research on this litigation, we interviewed key plaintiffs' attorneys, corporate counsel for the defendants, staff members of state attorneys general offices and local district attorneys, journalists, a settlement administrator, and others. The judge in this case declined to be interviewed. We also reviewed the pleadings and papers filed in the case as well as newspaper and magazine articles, correspondence, corporate documents, press releases, and internet web site postings.

[2]*Roberts v. Bausch & Lomb, Inc.,* No. CV-94-C-1144-W (N.D. Ala. 1996). Hereinafter referred to as *Roberts*. Unless otherwise noted, all pleadings referenced in these footnotes were part of the *Roberts* litigation.

[3]Interview with Mark Maremont, reporter for the *Wall Street Journal* (formerly with *Business Week*).

[4]*Bausch & Lomb—About Us,* available on the internet at http://www.bausch.com/About/about.html (Jan. 28, 1998).

[5]Mark Maremont, "The Only Difference Is When You Throw Them Away," *Business Week*, July 12, 1993, at 29.

[6]Interview with Dr. Robert Pazen, O.D.

[7]Soft lenses are made from HydroxyEthylMethAcrylate (HEMA) and are "hydrophilic" or water-absorbing lenses. They are more comfortable than hard lenses because of their soft, flexible nature but are more likely to experience bacterial growth and have a greater need to be disinfected after removal. They are also more fragile and wear out within a year or two. *About Contact Lenses,* available on the internet at the Contact Lens Manufacturers Association web page, http://www.contact.inter.net/about.htm (Jan. 30, 1998).

[8]*Chronology,* available on the internet at the Bausch & Lomb web page, http://www.bausch.com/About/chronology.html (Jan. 28, 1998); *History*, available on the internet at the Bausch & Lomb web page, http://www.bausch.com/About/history.html (Jan. 28, 1998).

[9]*Contact Lens—Milestones in History*, available on the internet at the Contact Lens Council web page, http://www.iglobal.com/CLC/clc-08.htm (Jan. 28, 1998).

[10]*Id.*

[11]Food and Drug Administration, "Background Information: Prices of Contact Lenses" (July 28, 1994).

[12]*Stats on Contacts*, available on the internet at the Contact Lens Council web page, http://www.iglobal.com/CLC/clc-11f.htm (Jan. 28, 1998).

[13]*Id.*

[14]"Contact-Lens Sellers Just Don't See Eye-to-Eye," *Business Week*, July 12, 1993, at 28–30.

[15]Maremont, *supra* note 5.

[16]*Id.*

[17]Laura Johanne, "Law: Bausch & Lomb Settles an Investigation of Contact-Lens Brand Sales by States," *Wall Street Journal*, Aug. 20, 1997, at B4. CIBA-Vision, another lens manufacturer, had 25 percent of the market.

[18]"Blind Ambition," *Business Week*, Oct. 23, 1995; *Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action*, available on the internet at the Consumer Law Page, http://www.consumerlawpage.com/article/lenses.html (Jan. 27, 1998); Maremont, *supra* note 5.

[19]*Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action,* supra note 18.

[20]Bausch & Lomb, *The Bausch & Lomb Disposable and Planned Replacement System Fitting Guide*, 1991 (current for Oct. 1991 to Feb. 1992) (on file with the authors).

[21]Dawn C. Chmielewski, "Users of Contacts Should Look Closer," *Boston Patriot Ledger*, Apr. 30/May 1, 1994, at 1; Bausch & Lomb's Petition for a Writ of Mandamus at 6; Bausch & Lomb, *supra* note 20.

[22]"Contact-Lens Prices Change in the Blink of an Eye," *Consumer Reports*, Aug. 1994, at 90.

[23]Usually an ophthalmologist, optometrist, optician, or optical store.

[24]Jane Bennett Clark, "Bausch & Lomb: Pulling the Wool Over Its Customers' Eyes," *Kiplinger's Personal Finance Magazine*, Mar. 1994, at 152.

[25]Another brand name, "Criterion UltraFW," was later identified as also being a copy of the OptimaFW–SeeQuence2–Medalist design.

[26]*Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action, supra* note 18.

[27]Bausch & Lomb, Inc., 1993 Annual Report: Meeting Global Needs 25 (1994).

[28]*Id*. at 3.

[29]Interviews with Greg Brose, Supervising Attorney, Consumer & Environmental Protection Division, Ventura County, California District Attorney's Office; and with Michael Schwartz, Deputy District Attorney, Ventura County, California District Attorney's Office.

[30]Constance Sommer, "D.A. Questions FDA Approval of Lens Labels," *Los Angeles Times* (Ventura Co. East Ed.), Sept. 4, 1993, at B-1.

[31]Maremont, *supra* note 5.

[32]Sommer, *supra* note 30.

[33]Clark, *supra* note 24.

[34]FDA spokesperson Sharon Snider, quoted *id.*

[35]Chmielewski, *supra* note 21.

[36]Bausch & Lomb spokesperson Margaret Graham-Smith, quoted *id.*

[37]FDA spokesperson Joe Raulinaitis, quoted *id.*

[38]Ellis is a member of the Boston firm of Ellis & Rapacki.

[39]Knowles is a member of Doffermyre, Shields, Canfield, Knowles & Devine, an Atlanta firm.

[40]Some of the plaintiffs' attorneys, though certainly not all, had been involved in breast implant litigation.

[41]Subsequently, the Supreme Court held in *Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367 (1996), that federal courts could not withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts (thus removing a potential objection to state-court adjudication of national class actions).

[42]Class Action Complaint (May 10, 1994) (hereinafter Complaint).

[43]The Lanham Act prohibits the use of misleading and deceptive statements in advertising. 15 U.S.C. § 1125(a).

[44]The Racketeer Influenced Corrupt Organization Act provides for treble damages and attorney fees to be awarded when an enterprise conducts its affairs through a pattern of racketeering activity. 18 U.S.C. §§ 1962, 1964(c).

[45]Interview with David Woodward, Assistant Attorney General, State of Minnesota.

[46]Sommer, *supra* note 30; *Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action, supra* note 18.

[47]Complaint at 11, 35.

[48]"Bausch & Lomb Inc.: Judge Says Millions Can Join Action Over Contact Lenses," *Wall Street Journal*, Nov. 2, 1994, at B4.

[49]Johanne, *supra* note 17.

[50]Harold Johnson, President of Bausch & Lomb's contact lens division, quoted in Clark, *supra* note 24.

[51]Defendant's Opposition to Motion for Class Certification (Sept. 22, 1994) at 5 (hereinafter Opposition to Certification).

[52]*Morales Reaches Agreement with Contact Lens Maker Over Allegations of Deceptive Marketing Practices*, available on the internet at http://www.oag.state.tx.us/WEBSITE/NEWS/RELEASES/970819cs.htm (Dec. 26, 1997).

[53]*Id.*

[54]Defendant's Brief in Support of Motion for Summary Judgment (Oct. 17, 1994) at 3–5 (hereinafter Motion for Summary Judgment).

[55]George Weber, quoted in Chmielewski, *supra* note 21.

[56]Interview with Craig Jordan, Assistant Attorney General, State of Texas.

[57]Jordan interview; Woodward interview.

[58]Bausch & Lomb, Inc., *10-K for Fiscal Year Ending December 30, 1995* (1996) (hereinafter *Bausch & Lomb's 10-K for 1995*).

[59]Interview with Bob Reed, Investigative Unit, *American Journal* video magazine.

[60]Class Action Settlement Notice (Aug. 1, 1996) (hereinafter Settlement Notice).

[61]Boston's Ellis & Rapacki; Atlanta's Doffermyre Shields Canfield & Knowles; Birmingham's Hare Wynn Newell & Newton; San Francisco's Lieff Cabraser Heimann & Bernstein; Farmer Price Hornsby & Weatherford of Dothan, Alabama; The Alexander Law Firm in San Jose, California; Williams & Troutwine of Portland, Oregon; Charfoos & Christensen in Detroit; and The Attorneys Information Exchange Group, Birmingham-based plaintiffs' bar assistance organization. See *id.*

[62]Gregory H. Hawley and Fournier J. Gale III from Birmingham's Maynard Cooper & Gale; J. Mark White of Birmingham's White Dunn & Booker; George A. Riley of California's O'Melveny & Myers; and Harry Sacks of Sacks Montgomery, New York. Settlement Notice; Stipulation of Settlement and Compromise (July 25, 1996) at 27 (hereinafter Settlement Stipulation).

[63]Plaintiffs' Application for Final Approval of Class Action Settlement, Including Approval of an Award of Class Counsel's Attorneys Fees and Costs (Nov. 1, 1996) at 9 (hereinafter Application for Approval).

[64]Class Certification Order (Nov. 1, 1994) at 2.

[65]The Class Certification Order did not specifically set forth this purchase period, but subsequent pleadings made it clear that the class is so limited. Notice Order (Jan. 27, 1995) at 1; Order Preliminarily Approving Proposed Class Action Settlement (July 31, 1996) at 3 (hereinafter Order of Preliminary Approval).

[66]See, e.g., Complaint at 18–19.

[67]Class Certification Order at 2. Another of the originally named plaintiffs was dropped because she worked for one of the plaintiffs' law firms.

[68]"Bausch & Lomb Inc.: Judge Says Millions Can Join Action Over Contact Lenses," *supra* note 48.

[69]Notice Order at 2–3; Plaintiffs' Motion for Approval of Their Proposed Plan for Dissemination of the Class Action Notice (Nov. 14, 1994) at 5–6 (hereinafter Motion for Approval of Notice).

[70]Settlement Notice.

[71]Affidavit of James J. Thompson, Jr., Exhibit B to Application for Approval.

[72]Emily Nelson, "Marketing & Media: Bausch to Disburse Up to $68 Million to Settle Lawsuit," *Wall Street Journal*, Aug. 2, 1996, at B10; Johanne, *supra* note 17; Larry Bickford, O.D., *Extra! Late News 12/11/95—Three New Contact Lens Materials, A New Soft Lens Care System and the Latest on Bausch & Lomb's Consumer Problems*, available on the internet at the EyeCare Connection web page, http//www.west.net/~eyecare/extra.html (Dec. 18, 1997).

[73]Joint Motion for Extension of Time to Commence Notice Program (Feb. 24, 1995) at 1 (hereinafter Motion for Extension).

[74]Bausch & Lomb, *Bausch & Lomb Settles Contact Lens Class Action Lawsuit* (press release issued Aug. 12, 1996) (hereinafter *Bausch & Lomb Press Release*).

[75]Nelson, *supra* note 72.

[76]Amendment to Stipulation of Settlement (Aug. 15, 1996); Order re Administration of Proposed Settlement (Aug. 16, 1996) (hereinafter Administration Order).

[77]Settlement Notice.

[78]Settlement Stipulation at 12.

[79]Nelson, *supra* note 72.

[80]Settlement Stipulation at 7–8, 23.

[81]Application for Approval at 16–17.

[82]Nelson, *supra* note 72.

[83]This direct mailing was estimated by plaintiffs to have included "in excess of 10,000" eye care practitioners. Application for Approval at 18. Bausch & Lomb had agreed to reimburse the expenses of the practitioners for any mailing notices forwarded.

[84]"Known" class members appear to be those who had directly contacted plaintiffs' counsel or defendant or who previously had been directly notified of the class action. Application for Approval at 2, 18.

[85]Settlement Notice.

[86]Exhibit A to Amendment to Stipulation of Settlement.

[87]Settlement Stipulation at 11–12.

[88]*Id.* at 20.

[89]Settlement Notice.

[90]Final Order and Judgment of Dismissal with Prejudice (Nov. 26, 1996) at 2, Schedule A (hereinafter Final Order).

[91]Settlement Notice.

[92]Final Order at 2, Schedule B.

[93]Application for Approval at 8.

[94]Final Order at 4.

[95]Application for Approval at 20.

[96]*Id.* at 21.

[97]*Id.* at 21 n.4.

[98]Affidavit of James J. Thompson, Jr., Exhibit B to Application for Approval.

[99]Final Order at 3.

[100]*Id.*

[101]*Bausch & Lomb's 10-K for 1995, supra* note 59; Nelson, *supra* note 72.

[102]Bausch & Lomb, *10-Q For the Quarter Ended September 28, 1996; Bausch & Lomb Press Release, supra* note 75.

[103]Nelson, *supra* note 72.

[104]It should be noted that the estimates presented herein for maximum benefit payment exposure are in current dollars and do not account for other possible additions and subtractions such as interest and taxes.

[105]Complaint at 9.

[106]Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification (June 29, 1994) at 2 (hereinafter Motion for Class Certification).

[107]"Bausch & Lomb Inc.: Judge Says Millions Can Join Action Over Contact Lenses," *supra* note 48.

[108]Motion for Extension at 1.

[109]Nelson, *supra* note 72.

[110]Application for Approval at 3.

[111]"*Optima F.W.* soft lenses. . . cost about $46 a pair wholesale. *Medalist* lenses. . . cost $8 a pair wholesale. . . *SeeQuence 2* lenses. . . cost $5 a pair wholesale. . . " "Contact-Lens Prices Change in the Blink of an Eye," *supra* note 22, at 90.

"Optima F.W.…wholesales for $23 per lens. . . [Medalist] wholesales at $16 for four. . . {SeeQuence2] wholesales at $15 for six." Sommer, *supra* note 30, at B1.

"Wholesale prices for the [SeeQuence2, Medalist, and OptimaFW] lenses ranged from $2.50 to $23 apiece, according to the Massachusetts attorney general." Johannes, *supra* note 17, at B1.

[112]Such calculations do not include the claimant's cost of postage needed to send in a Verified or Alternative Claim Form and any supporting documentation.

[113]Settlement Stipulation at 22.

[114]See, e.g., Chmielewski, *supra* note 21, at 1, reporting that ". . . [Optima FW] lenses sell locally for $59 to $70 a pair. . . [Medalist] sells for about $3.75 a lens. . . [SeeQuence2 sells for] $3.33 a lens"; Clark, *supra* note 24, at 152, reporting that "[t]he priciest, Optima F.W., at $70 a pair. . . [t]he Medalist lenses, for $15. . . SeeQuence 2 lenses ($8). . . "; Maremont, *supra* note 5, at 29 reporting ". . . $7 to $9 per pair for the SeeQuence contacts and $15 to $25 for a pair of Medalists. . . The difference: Optima FW, costing $70 a pair. . ." See also Complaint at 14, alleging "[t]he Optima model. . . is priced at approximately sixty to seventy dollars ($60.00–$70.00) per pair. The Medalist model…sells for approximately ninety dollars ($90.00) for twelve pair. The SeeQuence 2 model. . . price is about eighty dollars ($80.00) for twelve pair"; and Motion for Class Certification at 3, alleging ". . . the Defendants engaged in a scheme to fraudulently induce the public to pay more (up to $64 more per pair for Optima as for SeeQuence 2) for lenses which they claims to be different."

[115]Again, using published reports of wholesale prices.

[116]Johanne, *supra* note 17. The Criterion UltraFW lens had already voluntarily been dropped from the Bausch and Lomb lineup prior to the stipulation of settlement.

[117]See, e.g., *Sample Price List*, available on the internet at the Contacts Plus web page, http://www.w2.com/docs2/b7/contactsplussamples.html (Feb. 2, 1998); *AccuLens Order Form*, available on the internet at http://futurefocusinc.com/acculens/acculens.html (Feb. 2, 1998); and *Eyeware Online—Bausch & Lomb,* available on the internet at http://www.lyuks.com/blomb.html (Feb. 2, 1998).

[118]Johanne, *supra* note 17.

[119]*Bausch & Lomb Pays States $1.7 Million to Settle Misleading Sales Claims,* available on the internet at http://www.oag.state.ny.us/press/aug97/aug19_97.html (Dec. 19, 1997).

[120]*Morales Reaches Agreement with Contact Lens Maker Over Allegations of Deceptive Marketing Practices, supra* note 52.

[121]*Bausch & Lomb Pays States $1.7 Million to Settle Misleading Sales Claims, supra* note 119.

Chapter Six

BANK BROKERAGE PRODUCT LITIGATION:[1] *PINNEY v. GREAT WESTERN*[2]

PROLOGUE

Banking deregulation in the early 1980s opened the way for banks, savings and loans institutions, and their affiliates to offer investment products and services previously offered only by broker-dealers and other nonbank securities firms. Many banks jumped at the opportunity to compete for the billions of dollars that customers had diverted to stocks, bonds, and mutual funds in search of higher yields than those offered by traditional bank savings accounts and certificates of deposit (CDs).

However, by the mid-1990s, regulators, politicians, and courts were hearing mounting numbers of allegations that banks and their affiliates were using misleading sales practices to deliberately muddy the distinction between FDIC-insured bank products and traditionally noninsured brokerage products, and that they were using confidential bank customer information to generate brokerage-product sales leads.

Great Western Bank is the principal subsidiary of Great Western Financial Corporation (GWFC), a diversified financial services company with assets of more than $42 billion.[3] Great Western Bank has branches in California and Florida and counts a large pool of senior citizens among its customers. In 1983, the parent corporation established a brokerage subsidiary called Great Western Financial Securities Corporation (GWFSC). In 1989, looking to improve its profitability, GWFSC developed a portfolio of proprietary mutual funds called "Sierra Trust" mutual funds. The non–FDIC insured mutual funds were advertised and sold in Great Western Bank branches by commission-based brokers employed by the brokerage. According to a business press report, Great Western undertook an intense and successful marketing effort to attract investors to its Sierra Trust funds.[4] By 1995, Great Western had reportedly drawn $2.8 billion into its Sierra Trust funds, which caused the institution to be ranked 17th in retail mutual fund assets among all banks and thrifts.[5]

Ruby Rosenthal, whose story stimulated this litigation, was a 94-year-old woman who had banked at the West Hollywood, California, branch of Great Western Bank for 30 years and had much of her life savings (about $60,000) in a CD.[6] In early 1993, someone who she thought was a bank employee suggested that she move her money to a higher yielding account—a bond fund—that she was allegedly told had a government guarantee so that her principal would be safe. She did just that. But after seeing the value of her account erode in the bond market downturn of 1994, she redeemed her shares at a loss of about $8,000. When the bank refused to make up her loss, Rosenthal turned for help to Michael Linfield, a great-nephew who practiced law. Linfield, a solo practitioner in Pasadena, contacted the bank on her behalf in the spring of 1994. He had close to a dozen conversations with persons at the bank—working his way up the management hierarchy—before the bank management dismissed his complaint with the explanation that Rosenthal had signed papers that contained clear disclosures about the risks associated with her investment.

In mid-October, Linfield filed a suit, *Rosenthal et al. v. Great Western Bank et al.*, that claimed, among other things, deceptive sales practices, invasion of privacy, and violation of the civil code protecting the health and welfare of senior citizens and the disabled—a claim that provides for trebling of the punitive damages or of any other civil penalties imposed against a defendant.[7] Linfield, a Harvard-trained attorney long active in civil and workers' rights litigation, held a press conference announcing the suit and highlighting the plight of his elderly relative. The press conference also featured representatives from a prominent national consumer advocacy group, Consumers Union, who expressed hope that the suit would encourage banks to do a better job of explaining the risks associated with mutual fund investments. Consumers Union had just published an article about the problem of deceptive banking practices. The press conference also came on the heels of a *Los Angeles Times* article published the previous month in which Great Western was ranked among the worst performers in a national survey—using "mystery shoppers"—that rated financial institutions selling mutual funds on a number of measures including disclosure and customer service.[8]

After the press conference, Linfield received scores—eventually hundreds—of phone calls from Great Western customers across southern California with similar stories. The calls almost all came from retirees living on fixed incomes who had been sold Sierra funds as allegedly risk-free accounts, but who had seen their principal erode. Linfield was struck by how many of the callers said essentially the same thing—something that had not been mentioned at the press conference: They said they had been told by a bank representative that they could not lose money unless the U.S. government went bankrupt. Over the course of about six months, Linfield added a total of 24 plaintiffs to the

Rosenthal case. These plaintiffs were hand-picked by Linfield from the many people who called, based on such factors as the circumstances of their case, their ability to present themselves well in depositions and in court, and geographic and ethnic diversity. Although Linfield filed suit on behalf of multiple claimants, he represented these plaintiffs individually and did not ask the court to certify a class action.

CLASS LITIGATION BEGINS

As the calls asking for help continued to pour in, Linfield asked two friends, Dan Stormer and Laurence Frank, to work with him. Stormer is a noted civil and employment rights attorney with Hadsell & Stormer, a two-partner firm that occupies the same building as Linfield. Frank is a similarly engaged solo practitioner in Los Angeles. The three attorneys wrote back to those who had called, inviting them to a community organizing meeting for Great Western Bank (GWB) customers. When hundreds of people showed up at the December 27 meeting, Linfield and his colleagues started thinking of initiating a class action. Meanwhile, shortly before the community meeting, a former Great Western broker came forward with a “script” that he said he had been given while at Great Western. The script detailed responses that brokers could use when selling mutual funds to overcome customers’ concerns about risk. The broker and his script were featured at the meeting, which received widespread media coverage.

In January, Stormer contacted Marc Coleman, a solo practitioner in Long Beach with whom he had often worked over the years and who, like himself, had class action experience in the areas of employment and civil rights. All told, six law firms from Los Angeles County joined together to finance and conduct the litigation.[9] None had any experience with securities litigation, but they thought it would be fairly easy to become more familiar with that area of law. Their lack of experience made them uncertain about what the litigation might cost, what the case might be worth, or even how many plaintiffs there might be. Each firm made an initial contribution, based on ability to pay, to create a total fund of $35,000, which they expected to cover their costs through class certification (and it reportedly did). The firms also agreed on a formula for continued funding of the litigation. At the time they filed, the attorneys expected the class to number a few thousand people, at most.

On March 31, 1995, three months after their organizing meeting, Linfield and his associates filed a class action on behalf of southern California customers of GWB. Titled *John Pinney et al. v. Great Western Bank et al.*, the suit was filed in the Federal District Court for Central California.[10] (Linfield decided to continue *Rosenthal* as a separate case with more individualized allegations.) The plaintiff

attorneys filed *Pinney* in federal court because they believed that federal judges generally have more experience with complex litigation than state court judges, and because they thought federal case law regarding class certification in cases of oral misrepresentation was more favorable than state case law.[11]

The complaint asserted violations of federal securities law as well as violations of various statutory and common-law doctrines including unfair business practices, false advertising, and unfair trade practices.[12] It alleged that the defendants employed a deceptive marketing scheme to convince Great Western's customers to transfer their savings from federally insured deposits to uninsured securities, which exposed customers to a risk of loss of their principal. In addition, the complaint alleged that the defendants did not inform customers that the Sierra Trust funds were owned by GWFSC and that they would be charged fees in connection with each investment. Later that year, in September, another case against Great Western was filed in federal court in Florida by a different legal team. Titled *Wegweiser et al. v. Great Western Bank et al.*, the complaint was characterized by the defense in *Pinney* court documents as "nearly the same."[13]

The *Pinney* defendants were represented by the Los Angeles office of Morrison & Foerster, a nationally prominent firm with a reputation for vigorous defense of complex civil cases. Senior U.S. district court judge Irving Hill, appointed to the bench in 1965 and the possessor of substantial experience in managing class actions, presided over the case.[14]

On a less-than-propitious note for the plaintiffs, Judge Hill denied on August 18, 1995, what class counsel thought was a pro forma application to extend the time to prepare their motion for class certification.[15] Caught by surprise, they were left with time to take only one six-day deposition—that of John Ruocco, a senior vice-president. But they were also able to collect about 100 declarations from plaintiffs in which each individual told essentially the same story about being persuaded to buy shares of mutual funds. The declarations indicated that the plaintiffs believed they were dealing with employees of the bank because the brokers had desks on the bank floor, introduced themselves as officers of Great Western, had access to the plaintiffs' bank records, and used the same phones and computers as the bank's employees. In addition, the declarations stated that plaintiffs were given false and misleading information about the safety of their investments and were told that the disclosure documents they were asked to sign on the spot were simply standard new account documents that repeated the information that had just been verbally conveyed by the representative. Plaintiffs' counsel had also discovered a memorandum from a branch office outlining allegedly misleading responses to customer questions

about the safety of the funds, such as whether they were FDIC-insured. Collectively, plaintiffs' counsel asserted that these pieces of evidence indicated a general plan on the part of Great Western to deceive potential purchasers of the funds.[16] On September 25, counsel for the plaintiffs filed a motion to certify a class action.

On October 2, counsel for the defense filed an opposition to the motion for class certification. The defendants countered plaintiffs' declarations with declarations from various representatives who had sold plaintiffs the subject funds and who denied making statements like those the plaintiffs claimed were fraudulent. Also pending with the court were defense motions to dismiss the complaint and amended complaints.

On October 16, the court heard the defendants' motion to dismiss and plaintiffs' request for class certification. Judge Hill denied the defendants' motion to dismiss the causes of action under the federal securities law, but he allowed their motion to dismiss most of the state law claims without prejudice to their being refiled in California state court.[17] To the plaintiff attorneys' surprise and dismay, Judge Hill then went on to say that he did not believe class counsel had sufficient experience in complex securities litigation to provide adequate counsel. To remedy this, he suggested that they ask a firm specializing in securities class action litigation to join their legal team. In other respects, however, Judge Hill said that he was inclined to certify the class. He gave class counsel the option of having him rule on class certification after they associated with experienced class counsel (within 30 days) or having him rule immediately.

One of the plaintiff attorneys we interviewed said that he and his colleagues were taken aback by Judge Hill's concern because no judge had ever questioned their substantive experience when determining adequacy of counsel in the context of class certification. However, in retrospect, this attorney termed the judge's intervention on this issue crucial to the outcome because the team had not yet realized the depth of resources, financial and experiential, that would be needed to litigate this case. After an intensive but short search, plaintiffs' counsel invited the San Diego firm of Milberg, Weiss, Bershad, Hynes & Lerach, one of the nation's leading plaintiff securities litigation firms, to join them. Linfield, Stormer, and Frank entered into an arrangement whereby Milberg, Weiss would cover the costs of the litigation in return for an agreed-upon share of attorney fees, and would share lead counsel responsibilities.[18] On November 22, 1995, after plaintiffs' counsel had filed a motion adding Milberg, Weiss as co-counsel, Judge Hill granted the motion to certify a class of California residents who, from April 13, 1992, through April 13, 1995, were deposit customers of a Great Western Bank branch in southern California and who, during that period, bought securities from one of the defendants.[19]

On March 15, 1996, plaintiffs initiated *Pinney et al. v. Great Western Bank et al.*, known as *Pinney II* in state court.[20] Defendants demurred to the complaint, and it was later subsumed under the original *Pinney* settlement.

Plaintiffs' counsel rapidly gained an appreciation for the added resources and manpower that Milberg, Weiss could bring to bear. For the next year and a half, the parties undertook extensive discovery in preparation for trial. Plaintiffs' discovery efforts are described in court documents as including inspection and analysis of approximately 275,000 pages of documents and 23 depositions of current and former officers and employees of defendants. The plaintiffs retained the services of L.R. Hodges & Associates, an investigative firm, to identify, locate, and interview GWFSC brokers and other former employees. Hodges contacted approximately 250 former employees of defendants and conducted over 100 interviews.[21] Defendants were also described as having undertaken considerable discovery, including obtaining documents in the possession of the nine named plaintiffs and deposing them as well as 22 additional absent class members.

Although plaintiffs' counsel felt they had uncovered substantial evidence supporting their claims, including, they said, the existence of a general plan of deception led by Great Western management—the centerpiece of their allegations—they faced a difficult burden of proof. Establishing classwide liability on the federal securities claims required proving that the defendants' misstatements and omissions were substantially similar; that they were material; and that they were made with actual knowledge or reckless disregard for the truth (what is described in law as *scienter*). The defendants also argued that class members should be required to prove *individually* that they reasonably relied on the oral misstatements and omissions. In other words, the defendants argued that it would not be sufficient for the plaintiffs to prove that the defendants made misrepresentations, but they would also have to prove that individual class members reasonably relied on those misrepresentations in making their investment decisions. "Reliance" is a standard requirement in contract law.

In September 1996, defendants' counsel moved to decertify the class, arguing that individual issues pertaining to reliance, statutes of limitations, and damages necessarily predominated over any common questions relating to the existence of the alleged scheme. Defendants' counsel cited testimony of plaintiffs and various absent class members in an attempt to show that the oral representations varied, that the plaintiffs and absent class members had varying degrees of sophistication and understanding about the risks of their investments (going to the issue of reasonable reliance), and that some absent class members did not believe they had been deceived. They noted that "the most common alleged misrepresentation—that the U.S. would have to go broke before they

would lose their money, or something similar, was allegedly made to [only] 42 of 96 declarants." Defendants further argued that case law had established that investors could not reasonably rely on oral representations if they were contradicted by clear disclosures in written materials given to the investor.

Plaintiffs' counsel felt that the risk of decertification of the class was small. They also felt that they could prove their claims of an overarching management-led scheme to defraud. Proof of that scheme would, in turn, demonstrate that in this case reliance on oral representations was justified because part of the fraud was minimizing the importance of the written materials. However, plaintiffs' counsel understood that the story, like most, was not entirely clear-cut, that the defendants would mount a vigorous defense, and that they therefore faced a significant risk that a jury would find that Great Western had adequately disclosed the risks of mutual funds.

NEGOTIATING THE SETTLEMENT

As discovery proceeded, the parties were also conducting settlement negotiations. With the court's approval, they engaged a highly respected mediator, retired federal district court Judge J. Lawrence Irving, to facilitate the negotiations. Reportedly, Judge Irving has often been called upon to play this role in securities litigation.

For many months there was little movement in the negotiations as the parties undertook discovery to understand the strengths and weaknesses of their cases and to value the damages. While the bases for valuing actual damages are established by case law, different theories of damages have been propounded by the courts, and how the law applies in particular cases is often a matter of sharp dispute.[22] The defendants' position in the negotiations was that, because the alleged oral misrepresentations focused on the safety of the principal invested by the class members, the class members would not be entitled to any damages unless they suffered an actual loss of principal—known as an "out-of-pocket" measure of loss.[23] The plaintiffs advanced a theory of damages based on the "benefit-of-the-bargain" measure, under which a class member would be entitled to recover the difference between the value of the investment that the consumer actually ended up with and the value of the investment that would have accrued had it been as safe as the defendants allegedly represented it to be—in this case, a certificate of deposit.[24] Plaintiffs' counsel also considered arguing that class members who suffered no loss were nonetheless entitled to some recovery, for example, in the form of disgorgement of profits gained by defendants. However, they felt that their ability to prevail in their request for such disgorgement was uncertain. Meanwhile, the bond market was continuing to recover from its 1994 lows, so the overall value of the plaintiffs suit under either

methodology was generally eroding as time passed (because many class members had continued to hold on to their shares).

The plaintiffs retained Princeton Venture Research, Inc. (PVR), a firm of professional securities and financial analysts often used in such litigation, to calculate damages using both methodologies. PVR used a database given to them by the defendants that contained actual transactional data for more than 85,000 accounts of class members who had purchased Sierra funds from October 19, 1990, through November 30, 1995. PVR calculated the out-of-pocket (or principal) losses of class members who had purchased Sierra funds during the class period to be $15.6 million, of which approximately $14 million were losses that had been "locked in" as a result of the class member having sold those shares on or before November 30, 1995. PVR calculated benefit-of-the-bargain losses (compared to a 4-percent return on a CD) for Sierra fund purchasers to be $34.9 million.[25]

REGULATORY ACTION

Press reports and our interviews indicate that the SEC was conducting an investigation of Great Western while the litigation was ongoing. However, in accordance with federal regulation, the SEC is prohibited from either confirming or denying the existence of such an investigation unless it undertakes public action, so we do not know what, if any, outcome resulted from any investigation.

SETTLEMENT

In late November 1996, on the eve of the hearing of the defendants' motion to decertify the class and the plaintiffs' motion to expand the class beyond southern California to include the entire state, the parties settled for $17.2 million—including all costs of notice, claims administration, and attorney fees. According to court documents, the amount of the settlement represented roughly 100 percent coverage of loss-of-principal damages (i.e., out-of-pocket losses) and roughly 50 percent coverage of benefit-of-the-bargain damages for the class.[26] As part of the settlement, the parties agreed to expand the definition of the class to include customers of Great Western Bank throughout California.[27] The Stipulation of Settlement was entered on January 28, 1997.

The allocation plan essentially called for benefit-of-the-bargain payments, calculated as the difference between the actual return on a class member's investment and 4-percent rate for a CD.[28] To claim these payments, class members were required to fill out a detailed claim form that included a specific statement, to be signed under penalty of perjury, that the claimant believed he

or she was not properly informed about the nature of risks associated with his or her investment. This requirement recalled the defendant's position that each class member had to claim individual reliance on the alleged misrepresentations.

Under the allocation plan, the entire net amount of the settlement fund (after subtracting administrative costs, attorney fees, and expenses) would be distributed to the claimants on a pro rata basis. For instance, if the total claims added up to one-half of the net amount in the settlement fund, then each claimant would receive twice the amount of his or her individual claim. On the other hand, if total claims added up to twice what was in the settlement fund, each claimant would receive one-half of the amount of his or her claim. On February 4, the court issued an order preliminarily approving the settlement, approving notice of the settlement, and setting a final hearing date for the settlement.

Approximately 112,000 notices of the settlement were mailed to members of the class who were identified from the defendants' records and from other sources by plaintiffs' counsel.[29] (The actual number of class members was estimated to be in the range of 50,000–70,000; the larger number was said to reflect multiple addresses and multiple accounts.) Notice was also published once in each of several California newspapers. Costs of notice totaled about $138,000.[30] The mailed notice described the case and the settlement in detail and told class members how to participate in the settlement hearing. It noted that plaintiffs' counsel would seek an award of up to one-third of the settlement amount plus expenses. The published summary notice was spare, stating the class definition, the settlement amount, and the date of the hearing, but it also told class members how to get a copy of the full notice as well as a request to opt out or a claim form. The deadline for both opting out and objecting to the settlement was March 25, 1997. About 450 class members opted out of the settlement.[31] Court documents note that most class members who indicated a reason why they were opting out said that they either had no losses or did not believe they were deceived by the defendants.[32] No objections were received.

Class counsel applied for and were granted an attorney-fee award of 30 percent of the fund (net of administrative expenses, including notice, and attorney expenses), and attorney expenses of about $454,000. In their application for the fee award, class counsel noted for purposes of comparison that with 15,044 hours claimed to have been expended on this litigation, the requested award would work out to a lodestar multiplier of 1.39 (and further noted that a multiplier of 2.0–4.0 is the range of what courts award for good-to-excellent results). The court ordered that $700,000 be set aside as a reserve for administrative expenses, including costs of notice, with any residual being distributed to the class and to attorney fees in the 70:30 ratio. Without any residual from the ad-

ministrative reserve or accrued interest, attorney fees would total about $4.8 million and the amount available for distribution to the class would be about $11.2 million.[33] Class counsel also applied for incentive awards in the amount of $5000 for each of the nine representative plaintiffs, to be paid out of class counsel's fee award. According to class counsel we interviewed, the named plaintiffs played an important role in the litigation and were chosen based not only on the representativeness of their claims but also on their willingness and ability to respond to numerous demands for their presence, and their ability to present the case well in depositions and—if necessary—in trial. The only estimate of defense costs that we were able to find was in an Associated Press article describing the settlement that said, "Great Western's legal costs for the battle so far are estimated at $5 million."[34]

On April 14, 1997, the court held a fairness hearing and, in the absence of objectors, granted final approval to the settlement, the plan of allocation, and attorney fees and expenses. The court retained jurisdiction over the action.

Great Western's news release regarding the settlement mentioned the "many steps it has taken to place the company at the forefront of customer education and disclosure practices. . . " including a series of meetings with leading consumer organizations that led to added disclosure and compliance materials; enhanced branch referral procedures; and even more distinctive GWFSC sales areas and employees within Great Western bank branches.

DISTRIBUTION

Proof-of-claim forms were required to be postmarked by June 18, 1997. On June 2, 1998, plaintiffs settlement counsel filed a final report with the court on the status of the claims processing.[35] The claims administrator had received 13,810 proof-of-claim forms (about 20–30 percent of the estimated class).[36] Of those claims, 7595 were determined to be eligible for payment. Another 5775 claims were rejected because they either had no apparent loss or did not have necessary or sufficient information to determine eligibility.[37] The remainder were duplicate claims. The report noted that the amount available for distribution to eligible class members was approximately $11.8 million, which included accrued interest.

The final report did not estimate the aggregate loss to eligible class members, but an earlier status report noted that 6290 eligible claims had an aggregate loss of approximately $28.6 million. If the additional claims were proportionally similar to those earlier claims, the aggregate loss to the class would be about $34.5 million. Given this loss, the $17.2 million settlement represents roughly 50 percent of total benefit-of-the-bargain claims by class members—consistent with counsels' estimates and representations at time of settlement. After ex-

penses and attorney fees, each claimant would receive roughly a 34-percent reimbursement of his or her claim.

EPILOGUE: ELEVENTH HOUR MANEUVERING

Jonathan Alpert of the Tampa, Florida, law firm Alpert, Barker & Calcutt had brought a number of suits against banks and their securities arms in recent years. Fifteen months after *Pinney* was filed, Alpert filed what California plaintiffs' counsel characterized as a "copycat" action on behalf of both California and Florida plaintiffs in federal court in Tampa, Florida, titled *Palmer et al. v. Great Western Financial Corporation, et al.*[38] This suit was in addition to the statewide class action (*Wegweiser*) filed by a different team of lawyers that was pending in federal court in the southern district of Florida.

According to plaintiffs' counsel we interviewed and related court documents, Alpert called Alan Schulman of Milberg, Weiss around the time that the Stipulation of Settlement was entered in *Pinney* and demanded that *Pinney* counsel "recognize the benefits" that he had conferred on the *Pinney* class. According to Schulman's declaration, Alpert intimated that otherwise he would seek to disrupt the settlement. On March 5, 1997, after Schulman had rebuffed Alpert's overture, a motion was filed with the *Pinney* court for extensive discovery on behalf of Alpert's only client who met the definition of a *Pinney* class member. The discovery was requested so that Alpert's client, Matthew Lifschiz, could "evaluate the fairness of the settlement. . . in time to decide whether or not to object to the proposed settlement."[39] Counsel for both plaintiffs and defendants in *Pinney* filed scathing objections to the discovery demands, noting Alpert's telephone call to Schulman and asserting that the motion was a device to "horn in" on the *Pinney* settlement and to get around the discovery stay that was then in place in the *Palmer* case. They also argued that the information available in the public court record was more than sufficient for anyone to make a determination about the fairness of the settlement. Class counsel we interviewed credited Judge Hill with procedurally blunting Alpert's efforts by delaying the hearing on his discovery motion until after the deadline to opt out of or object to the *Pinney* settlement. At that point, Alpert withdrew his discovery motion and reportedly left the scene.

In May 1997, according to press reports, Great Western settled the *Wegweiser* class action, comprising about 8000 class members, for $6 million.[40]

The *Rosenthal* case[41] that began this chain of litigation was settled as to most charges in November 1997, almost a year after the California Supreme Court determined that most of the plaintiffs were bound by the arbitration clauses they had signed with Great Western requiring bank customers to arbitrate (rather than litigate) all disputes with the bank. The settlement is not public

information, but the supreme court ruling would have adversely affected the plaintiffs' negotiating position. One of the *Rosenthal* plaintiffs who did not bank at Great Western and had therefore never signed an arbitration clause, had been brought into the litigation by Linfield for the express purpose of bringing suit under the California Business and Professions Code. The code allows any citizen to bring suit on behalf of the general public against a company allegedly engaging in unfair business practices, and provides for both injunctive relief and disgorgement of profits, which could potentially involve millions of dollars. As we went to press, this part of the *Rosenthal* suit was still ongoing.

Key Events	**Date**
Pinney I (federal) action commenced	March 31, 1995
Defendants file to dismiss Second Amended Complaint	August 16, 1995
Plaintiffs file motion to certify the class	September 25, 1995
Certification hearing	October 16, 1995
Defendants answer the Second Amended Complaint	October 26, 1995
Class certification granted	November 22, 1995
Pinney II (state) action commenced	March 15, 1996
Defendants move to decertify the class and plaintiffs move to expand class to state of California	September 1996
Parties settle	November 1996
Plaintiffs expand class to state of California	December 23, 1996
Stipulation of Settlement entered	January 28, 1997
Preliminary approval order	February 4, 1997
Opt-out and settlement objection deadline	March 25, 1997
Final fairness hearing	April 14, 1997
Final approval order	April 14, 1997
End of claiming period	June 18, 1997
Rosenthal case settled	November 1997

NOTES

[1]As part of our research on this litigation, we interviewed key plaintiff attorneys and reviewed most of the pleadings and papers filed in this class action. We also examined media coverage of the main class action and related litigation. Great Western and its counsel declined to participate.

[2]*Pinney v. Great Western Bank*, No. CV 95-2110 (C.D. Cal. 1997). All subsequent references to *Pinney* will be to the federal case cited here unless otherwise noted.

[3]See Hoover's Company Profile Database, Hoover's Inc., Austin, Tex. (1998); Great Western, Press Release of Feb. 3, 1997 (on file with authors) (announcing offer to settle federal class action lawsuits) (hereinafter Great Western's Press Release).

[4]Hoover's Company Profile Database, *supra* note 3, at 4.

[5]"Great Western Showing Them How It's Done," *American Banker*, Dec. 6, 1995, at 8.

[6]Great Western Bank was the latest, but not the only, owner of the branch during the time Rosenthal banked there.

After the start of the litigation, Rosenthal moved to Santa Monica, where she currently resides. All of the California cities mentioned in this case study—West Hollywood, Santa Monica, Pasadena, Long Beach, and Redondo Beach—are part of Los Angeles County and are located within a 25-mile radius of downtown Los Angeles.

[7]*Rosenthal v. Great Western Bank*, No. BC 114712 (Cal. Super. Ct. L.A. County 1997) (Baker, J., presiding). The most comprehensive press account of the Great Western case can be found in an article by David Cogan, "Sell or Be Hanged," *New Times*, May 29–June 4, 1997, at 6.

[8]Robert A. Rosenblatt, "B of A Ranks High in Mutual Funds Service," *Los Angeles Times*, Sept. 15, 1994, at 1D. The survey was self-initiated by a market research firm that had conducted a similar but smaller survey earlier in the year, commissioned by *Money* magazine.

[9]One of the firms eventually dropped out of the litigation. The five remaining firms were listed in court document service lists as Law Office of Marc Coleman, Long Beach, Cal.; Hadsell & Stormer, Pasadena, Cal.; Law Offices of Michael Linfield, Pasadena, Cal.; Lathrop & Villa, Redondo Beach, Cal.; Law Offices of Laurence B. Frank, Los Angeles, Cal.

[10]*Pinney v. Great Western Bank*, No. CV 95-2110 (C.D. Cal. filed Mar. 31, 1995) (Hill, J., presiding) (hereinafter *Pinney)*. The complaint named Great Western Financial Corporation, Great Western Bank, Great Western Financial Securities Corporation, Great Western Investment Management Corporation, Sierra Investment Advisors Corporation, Sierra Investment Services Corporation, and Sierra Fund Administration Corporation as defendants.

John Pinney, a class representative, was one of the people who had contacted Linfield and his colleagues in the wake of the *Rosenthal* publicity. Pinney was 80 years old, and he and his wife had banked at Great Western since 1987. According to his declaration, he was pressured into moving his money from a CD into the Sierra U.S. Government Fund even though he told the person he believed to be a bank representative that he could not afford any risk because he and his wife needed the income to pay current living expenses. Pinney's declaration said he was assured that the only way he could lose money was "if the government went broke." His declaration further stated that when he tried to read the papers put before him for his signature, the representative said the "documents were a formality." Declaration of John Pinney, Exhibit 37 to Plaintiffs' Notice of Motion and Motion to Certify Class Action (Sept. 25, 1995).

[11]See, e.g., *In re American Continental Corp. Litigation*, 140 F.R.D. 425 (D. Ariz. 1991) (denying defendant's motion to decertify class in federal securities fraud case), and *Mirkin v. Wasserman*, 5 Cal. 4th 1082 (1993) (holding that plaintiffs in state securities case must allege actual reliance).

[12]Specifically, the complaint asserted violations of the Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C. §§ 78j(b), 78t(a); Federal Rule 10b-5, 17 C.F.R. § 240.10(b)-5; California Business and Professions Code §§ 17200 (unfair competition), 17500 (false advertising), 170000 *et seq.* (unfair trade practices); and the common law tort of invasion of privacy.

Amended complaints filed through July dropped the unfair trade practices claim but additionally asserted claims for violation of the Securities Act of 1993, § 12(2), 15 U.S.C. § 77*l*; violation of California Corporations Code § 25401; and the common law tort of negligent supervision.

[13]*Wegweiser v. Great Western Bank*, No. 95-8543-CV-Hurley (S.D. Fla. 1997) (Hurley, J., presiding).

According to *Pinney I* counsel, the original *Wegweiser* case was filed before *Pinney I* but was dismissed for procedural reasons and was refiled about six months after the commencement of *Pinney I*. Plaintiff counsel for *Wegweiser* was Alvin D. Lodish of Dunn, Lodish & Widom, Miami, Fla.

[14]Judge Hill is since deceased.

[15]Ex Parte Application By Plaintiff For Extending Time to Move for Class Certification and to Complete Discovery (Aug. 15, 1995).

[16]Memorandum from Mike Delgado to Mike Patterson (Mar. 29, 1995). At the certification hearing on Oct. 16, 1995, Judge Hill noted that the memo indicated common questions of fact and law among the class. Transcript of Oct. 16, 1995 (hearing regarding motion to certify class action).

[17]Specifically, the court denied the defendants' motion to dismiss the causes of action for violation of the Securities Exchange Act, §§ 10(b) and 20(a); Rule 10b-5, the Securities Act of 1993, § 12(2); and California Corporations Code § 25401.

[18]Friends and associates questioned whether such a high-powered firm might not simply take over the litigation, but the parties entered into a detailed agreement early-on regarding roles and responsibilities. By all reports, the relationship proved to be a good one.

[19]Specifically, the class was defined as: "All California residents who, from April 13, 1992. . . through April 13, 1995 were deposit customers of a Great Western Bank branch in San Diego, Imperial, Riverside, Orange, Los Angeles, San Bernardino, Santa Barbara, Ventura, San Luis Obispo, Kern, Tulare, Kings, Inyo, and/or Fresno Counties and who during said period bought securities from Great Western Financial Corporation, Great Western Investment Management and/or Great Western Financial Services [sic] Corporation." Stipulation Regarding Class Definition (Nov. 17, 1995).

We asked one of the plaintiff attorneys why the original class was limited to southern California. His response was that all of their initial proof related to southern California. Class counsel was not sure whether the same practices were followed in other regions, and at that point they did not want to take on a larger burden than they had already assumed.

[20]*Pinney v. Great Western Bank,* No. BC 146276 (Cal. Super. Ct. L.A. County filed Mar. 15, 1996) (hereinafter *Pinney II*). The allegations in this suit generally comprised those dismissed by the federal court.

[21]Memorandum of Points and Authorities in Support of Plaintiffs' Application for Attorneys' Fees and Reimbursement of Expenses and for Incentive Awards (Apr. 3, 1997) (hereinafter Application for Attorneys' Fees). Hodges was described as having over ten years of investigative experience specializing in civil fraud, federal false claims, and securities act violations.

[22]Janet Cooper Alexander, "The Value of Bad News in Securities Class Actions," 41 *UCLA Law Review* 1421 (1994).

[23]See *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975) (holding that the general measure of damages in a §10(b) case is an "out-of-pocket" measure).

[24]*McMahan & Co. v. Wherehouse Entertainment,* 65 F.3d 1044 (2d Cir. 1995) *cert. denied,* 517 U.S. 1190 (1996).

[25]Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation (Apr. 3, 1997) at 19 (hereinafter Motion for Final Approval). These calculated losses were as of November 30, 1995, the last date for which PVR had received transactional data from the defendants.

[26]*Id.*

[27]Specifically, the class was defined for settlement as: "All persons who, from April 13, 1992 through April 13, 1995 were customers of a Great Western Bank branch located in California and who, during said period, purchased securities or other non-FDIC insured products from or through Great Western Financial Corporation, Great Western Investment Management Corporation, and/or Great Western Financial Securities Corporation." Order Regarding Class Definition (Dec. 19, 1996).

[28]For shares that had not been sold prior to November 30, 1995, the actual return would be based on the market value of those shares on November 30, 1995. Otherwise, the actual return would be based on the market value of the shares at time of sale.

[29]The court had earlier ordered the giving of notice of pendency of the class action but that notice never occurred, presumably because of concurrent motions by the defendants contesting certification of the class. See *Pinney,* Order Re Form and Giving of Notice of Pendency of Class Action (Sept. 16, 1996).

[30]Application for Attorneys' Fees at 32.

[31]The settlement provided for a "tip-over" amount filed in a sealed letter with the court: If the number of opt-outs exceeded the tip-over amount, the settlement would be void. We were told that such agreements are commonplace in securities class actions because with a sufficiently large number of opt-outs the settlement would no longer serve the defendants' purpose of capping their exposure.

[32]Actually, class members who had no desire to litigate did not have to opt out. The legal reason for opting out is to preserve one's right to sue.

[33]The court set aside a reserve of $700,000 for administrative expenses (on top of already-incurred expenses). Once claims administration costs were determined and paid, 30 percent of the remainder would be allocated for attorney fees and the rest to the settlement fund. With the exception of the funds set aside in the reserve, attorney fees were to be paid within three business days of this order.

[34]E. Scott Reckard, "S & L Settles Fraud Suits," *Orange County Register*, Feb. 4, 1997, at C-1. We contacted the reporter, who didn't recall the particular estimate but said that he would have attempted to get confirmation from two sources as to its credibility.

[35]*Pinney,* Final Report on Status of Claims Processing (June 2, 1998).

[36]Because each claim form allowed for multiple claims, we are assuming that most of the 13,704 proof-of-claim forms were filed by different class members. Recall that many class members held on to their shares through the recovery of the bond market and so did not suffer a claimable loss.

[37]Deficiency letters were sent to all appropriate claimants allowing them 60 days to cure the deficiency. Following that period, rejection letters would be sent to those who did not respond or who did not submit the requested documentation. The rejection letter would provide another 20 days to cure the deficiency or to request that the court review the denial of the claim.

[38]*Palmer v. Great Western Financial Corp.,* No. 96-1200-CIV-T-25C (M.D. Fla. filed June 18, 1996).

[39]All of the plaintiffs in *Palmer* were Florida residents, but the suit was purported to be brought on behalf of both California and Florida residents. The defendants had filed a motion to dismiss on October 8, and discovery in *Palmer* had been stayed pending a ruling on the defendants' motion pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(3)(B). Three days after Alpert's conversation with Schulman, he filed a motion to add three California residents as new plaintiffs in the *Palmer* action. Only Matthew Lifschiz met the definition of a *Pinney* class member. Lifschiz had been referred to Alpert by Great Western Bank on or about January 3 after he complained to them about not having been told about back-end sales charges on his Sierra fund investment. On January 9, Lifschiz sold his investment at a profit and incurred the back-end sales charge of $334.36. The next day, he signed a certification that was then filed by Alpert in connection with Lifschiz's motion to become a plaintiff in *Palmer.*

[40]"Turning Customers into Plaintiffs," *U.S. Banker*, Aug. 1997, at 17.

[41]*Rosenthal v. Great Western Securities Corp.,* 14 Cal. 4th 394 (1996).

Chapter Seven

COLLATERAL PROTECTION INSURANCE LITIGATION: [1] *GRAHAM v. SECURITY PACIFIC HOUSING SERVICES, INC.*[2]

PROLOGUE

The banking industry suffered a series of devastating failures in the 1980s. One result of these failures was closer regulatory examination of the solvency of banks and the financial arrangements into which banks entered.[3] Banking regulators suggested that one practice of the banking business that contributed to the crises of the 1980s was that some banks undersecured their loans.

To head off the potential problems caused by undersecured loans, banking regulators recommended that all borrowers who secured their loans with collateral such as a car or a home carry insurance so that the loan would be safe if the collateral suffered damage or failure. Therefore, beginning in the late 1980s through the mid-1990s, new loan agreements typically required that all assets securing loans be insured. If a borrower could not qualify for the insurance or allowed an existing insurance policy to lapse, banks would obtain insurance for the borrower and include the costs of the insurance in the loan premium. This practice became known as "force-placed collateral protection insurance" (CPI). Borrowers with CPI loans paid the insurance premiums as they paid down the original loan; the premiums were added to the principal, bumping up the total loan value. Either the number of installments or the size of installment payments was increased.

Borrowers soon began suing creditors, arguing that CPI contracts breached the terms of loan agreements as well as the appropriate relationship between the borrower and the creditor. Moreover, borrowers claimed banks were charging above-market premiums and commissions for the insurance and placing unnecessarily high coverages on the loans. Consequently, a family of litigation arose in many different consumer contexts—including loans for cars, homes, construction, and other forms of consumer credit—targeting not only regional and national banks but consumer credit firms and other lending companies as well.[4]

Graham v. Security Pacific Housing Services was one such case. The *Graham* case seems to have grown out of earlier litigation. Both the plaintiffs and defendants had had prior experience with CPI suits in other lending lines by the time the *Graham* complaint was filed. The defendants had negotiated two settlements involving mobile home loans: *Adams v. Security Pacific Housing Services* and *Burke v. Bank of America*.[5] *Graham's* place in the story comes at the end of the string of CPI actions defended by Bank of America, and after the bank had changed at least some of its practices pertaining to CPI.

CLASS LITIGATION BEGINS

John Deakle, a consumer attorney in Hattiesburg, Mississippi, devotes a large portion of his active practice to class action litigation. In early 1996, John Graham, who had formerly hired Deakle to represent him on a workers' compensation claim, visited Deakle's office after having read a newspaper story about a case Deakle had just settled. *Bentley v. Deposit Guaranty* was a federal class action filed by Deakle on behalf of borrowers from Deposit Guaranty National Bank who claimed that they were paying excessive insurance premiums on the collateral for their loans. This case aroused Graham's suspicions about his own mobile home loan, and he asked Deakle to review his loan documents with Security Pacific Housing Services, Inc., a former division of Security Pacific National Bank that had merged with Bank of America in 1994. After reviewing the documents, Deakle agreed to take Graham's case.

THE INITIAL COMPLAINT AND ITS ALLEGATIONS

Deakle filed suit on April 1, 1996, in the U.S. District Court for the Southern District of Mississippi in Hattiesburg, a university town of some 45,000 people.[6] The case was assigned to Judge Charles Pickering, a Bush appointee who had been on the bench since 1990. Neither Deakle nor class actions were new to Judge Pickering; in fact, he had just heard the *Deposit Guaranty* class action within the past year.[7] The representative plaintiffs named on the new complaint included John Graham and his wife Connie, and Dewey Brady and his wife Elmer,[8] another couple who had borrowed money from BankAmerica Housing Services to purchase a mobile home. When the Bradys filed for Chapter 13 bankruptcy in 1992, BankAmerica placed insurance on their mobile home. Consequently, the complaint named Security Pacific Housing Services, Inc. and BankAmerica Housing Services, Inc., a division of BankAmerica Corp., as defendants.[9] Both banks had force-placed CPI before their merger.[10]

In their complaint, the plaintiffs alleged various contractual, statutory, and negligence causes of action, including (1) breach of fiduciary duties, (2) breach of the implied covenants of good faith and fair dealing, (3) fraudulent misrepre-

sentation, (4) negligent misrepresentation, (5) unfair trade practices under the Federal Fair Debt Collection Practices Act, (6) antitrust violations, (7) conspiracy, (8) negligence, and (9) failure to disclose under Regulation Z of the Truth in Lending Act. The plaintiffs sought compensatory and punitive damages and an injunction preventing the defendants from engaging in future illegal behavior.[11] Deakle asserted the appropriateness of federal jurisdiction by alleging causes of action under the Federal Fair Debt Collection Practices Act[12] and the Truth in Lending Act.[13]

The plaintiffs sought certification of a statewide class of similarly situated plaintiffs defined as follows:

> All persons residing in the State of Mississippi who had loans or who co-signed or guaranteed loans with BankAmerica, secured by collateral in the form of automobiles, trucks, motor homes, mobile homes, boats, recreational vehicles, farm/contractor equipment, motorcycles, homes, or other personal property, who were charged for collateral protection insurance and related charges by BankAmerica, and/or any of its affiliates, agents, representatives or controlled persons.[14]

The complaint alleged that the defendants acted as the plaintiffs' fiduciary, or agent, and that the particular transgressions committed by the defendants could be described as two related breaches of their fiduciary duties to the plaintiffs, instances when the defendants were allegedly not acting according to the best interests of the plaintiffs. First, the insurance that Bank of America was placing for the borrower allegedly had coverage limits exceeding those required under the provisions of the loan agreement, and sometimes it insured types of losses not required to be covered under the terms of the insurance agreement.[15] Second, the plaintiffs alleged that the insurance was obtained from wholly owned insurance-broker subsidiaries of Bank of America and that the rates obtained from the insurance brokers were up to ten times higher than competitive market rates.[16] In addition, they alleged that the insurance brokers were awarded commissions that were then incorporated into the loan principal.[17]

As a result of these practices, plaintiffs claimed several hundreds of dollars in damages per policy holder. For example, representative plaintiffs Dewey and Elmer Brady, who had been charged $818 per year over a two-year period for insurance for a loan that had previously cost them only $440 per year, alleged damages totaling approximately $800.[18]

THE DEFENDANTS' POSITION

The defendants never directly answered these allegations because the parties began settlement negotiations almost immediately after the complaint was

filed. Nonetheless, the defendants' likely position may be gleaned from pleadings entered during similar litigation and interviews with the defense attorneys. They took the position that the practice of placing insurance for their borrowers is an important and necessary function. They thought that the insurance policies that were placed for their borrowers contained terms that did not vary materially from those required under the loan agreements, and that these terms provided significant benefit to the borrower.[19] Where the terms did vary, the insurance provisions included were often those that borrowers would have sought if they had been able to afford them. For example, force-placed insurance for mobile home security might include flood or fire coverage even though the loan agreement did not require that the borrower carry these coverages.

The defendants also held that the insurance was competitively priced. Force-placed insurance is always more expensive than other collateral insurance policies because borrowers who have insurance placed for them are often a high-risk population. In addition, the defendants pointed out that any insurance premiums charged to the borrowers were approved by the insurance commissioner in each state, a point that countered the claim that premiums were unreasonably expensive.

The defendants also felt that the insurance brokers provided important value for the borrowers, and deserved to receive commissions. Brokers were required to seek competitive bids for force-placed policies to obtain the best terms and premiums available, producing a significant value for borrowers. In addition, brokers served as agents for borrowers if they needed to collect benefits under the insurance contracts. But, as the defendants acknowledged, insurance brokers also provided services like foreclosure assistance that more directly benefited the banks than borrowers.

Furthermore, the defendants believed that one theory upon which the plaintiffs' complaint was based—the existence of a fiduciary relationship between the bank and the borrower—was inapplicable. A fiduciary relationship exists between parties when one places trust and confidence in the other; in that case the trusted party must exercise a corresponding degree of fairness and good faith with regard to the other. The defendants viewed the relationship between a bank and a borrower as a business or consumer relationship, not one that creates the level of trust necessary to create a fiduciary relationship.

PRIMARY ISSUES IN THE LITIGATION

According to our interviews, Deakle initially brought the case as a statewide (rather than nationwide) class action because he worried that a judge might not certify a nationwide class in this action and because different legal standards

would be applied to state-law claims in each state. However, Deakle did not limit the investigation or the litigation to Mississippi. He filed complaints in six other state and federal courts around the country over the next few months.[20] According to our interviews, these actions were filed for two reasons. First, Deakle wanted to expand the jurisdiction of the Mississippi case to the nation; or if the judge refused to do so, he wanted to preserve his opportunities in these other states for a series of statewide class actions. In addition, a judge in another state might certify a nationwide class if Judge Pickering in Mississippi refused to do so. By filing in other states, Deakle might be able to preclude competitive class actions by other attorneys.

To file complaints in these other states, Deakle recruited attorneys and firms licensed in these states with whom he had already worked.[21] In addition to assisting Deakle with the cost, expense, and labor involved in this case, these attorneys would be able to coordinate class enrollment in other jurisdictions. Ultimately, they were named co–class counsel in *Graham*.[22]

Deakle and his associates chose Mississippi as their preferred venue for several reasons. Mississippi juries were viewed as generous to plaintiffs because of a 1995 Mississippi state court jury verdict against Trustmark National Bank in which two individual plaintiffs received $500,000 in compensatory damages and $38 million in punitive damages in a CPI case for an automobile loan agreement.[23] In addition, the plaintiffs' attorneys felt that there was a good chance that Judge Pickering would certify a statewide—if not a nationwide—class in this case because he had certified similar classes previously. And finally, Hattiesburg was convenient for Deakle as lead class counsel.

The defendants were represented by local attorneys in Mississippi, who were assisted by attorneys from the New York office of Morrison & Foerster, a large national law firm based in San Francisco. In addition, in-house counsel for Bank of America played an important role in the litigation.

PARTIES MOVE TOWARD SETTLEMENT

Even though the defendants consistently denied the plaintiffs' allegations, they were receptive to settlement negotiations because of the costs of litigating the dispute and the possibility of a large recovery if the plaintiffs won. In fact, Bank of America had already settled other similar suits arising out of both home loans and other lending lines;[24] therefore, it knew the potential settlement value and costs of litigating the case to trial. In addition, because the plaintiffs had filed complaints in a number of states representing a large fraction of the nation's population, the defendants were receptive to the idea of expanding the Mississippi case to include all potential plaintiffs nationwide.

Settlement negotiations were also facilitated by the defendants' belief that the Fifth Circuit Court of Appeals (which Mississippi is subject to) would be favorable to a mandatory, non-opt-out class (under Rule 23(b)(2)). If defendants could obtain a non-opt-out settlement, they could eliminate all exposure to subsequent suits.

Since settlement negotiations began almost immediately after filing, the case proceeded without the defendants ever answering the initial complaint. No formal discovery was undertaken by either side. Instead, the parties exchanged relevant information voluntarily. The defendants gave business and financial information to the plaintiffs so that class counsel could establish the claimants' actual losses and the value of their claims. (The defendants did not, however, give the plaintiffs any information that would have established the strength of the claim for liability.) The parties' readiness to settle was also reflected in Judge Pickering's issuance of an order temporarily certifying the class in June, just two months after the complaint was filed. The express purpose of this order was to facilitate settlement negotiations.

On October 1, 1996, the plaintiffs filed an amended complaint in which they expanded the class definition to include:

> All persons residing within the United States of America and all of its territories who had loans or who co-signed or guaranteed with BankAmerica, secured by collateral in the form of automobiles, trucks, motor homes, mobile homes, boats, recreational vehicles, farm/contractor equipment, motorcycles, homes or other personal property, who were charged for collateral protection insurance and related charges by BankAmerica, and/or any of its affiliates, agents, representatives or controlled persons.
>
> Excluded from the Class are Defendants, any parent, subsidiary, affiliate, or controlled person of the Defendants, the officers, directors, agents, servants, or employees of the Defendants, and the members of the immediate family of any such person.[25]

This emendation expanded the potential class from residents of Mississippi only to all U.S. residents for whom the defendants had placed CPI for any secured personal loan products.

At the same time, the parties informed the judge that another order temporarily certifying the class would assist their settlement negotiations.[26] The court issued this order on the same day without briefs or argument and at the agreement of the parties. The order certified a mandatory non-opt-out class under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2), and included a paragraph enjoining "all potential class members . . . from commencing new actions against the defendants which arise from or relate in any way to the subject

matter of this action."[27] Consistent with the rules for (b)(1) and (b)(2) classes, no notice of the pending class action was issued at this time.

TERMS OF THE INITIAL SETTLEMENT

After temporary class certification, the parties continued negotiations and reached a settlement in December 1996—nine months after filing—that was granted preliminary approval and entered by the judge on January 10, 1997.[28] At this time, the parties filed a second amended complaint in which they changed the class definition to read:

> All customers who financed mobile or manufactured home loans with defendants (as defined below) or whose mobile or manufactured home loans were serviced by defendants, and whose loans at defendants were charged any amount for earned insurance premiums as a result of collateral protection insurance placed by defendants. Specifically excluded from this class are all customers who are members of the certified classes in either of the following cases: 1) *Adams v. Security Pacific Housing Services* (N.D. Ala.) (CV 95-P-1958-W) or 2) *Burke v. Bank of America* (Maricopa County Superior Court) (No. CV-93-23222).
>
> The term defendants as used in this Complaint includes Security Pacific Housing; Security Pacific Housing Services, Inc.; Security Pacific Financial Services, Inc.; Security Pacific Housing Services, a division of Bank of America, F.S.B.; BankAmerica Housing Services, a division of Bank of America, F.S.B.; and each of their respective parents, affiliates, subsidiaries, predecessors, successors and assigns.[29]

The Second Amended Complaint reduced the scope of the class to only those CPI borrowers from the defendants who had not been included in the other class action settlements that had been reached by this time. The terms of the settlement required that the defendants cease their policies regarding collateral protection insurance, and create a fund to compensate plaintiffs.[30] Judge Pickering set April 16, 1997, as the date for the final fairness hearing.

Common Fund

The defendants agreed to create a common fund of $6.7 million from which all payments would be made. The basis for this figure was not indicated in the public documents.[31] The negotiations focused on the potential size of the class and the amount of each individual claimant's damages, but the public documents said nothing about the relationship between total losses to the class members and the actual settlement amount.[32] Under the proposed settlement, any amount of money remaining in the common fund after payment of claims and attorney fees and costs would revert to the defendants.[33]

Individual Recovery Amounts

The amount each individual class member who successfully claimed compensation would receive in the settlement was calculated based on the insurance premiums charged to that person. Each claiming class member was to receive a portion of the common fund (minus attorney fees and costs) based on the premiums each had paid to the defendants as a percentage of the total premiums paid by all class members. This portion was calculated for each class member using the following formula:

$$\frac{\text{individual premium paid by claimant}}{\text{total premiums paid by all class members}} \times \text{common fund} - \text{attorney fees}$$

Thus, the total amount of money to be paid out of the fund (after deducting attorney fees) would depend on both the premiums paid out by all class members (whether or not they eventually submitted a claim) and the total premiums paid by actual claimants. If the total of claimants' premiums were half of all class member premiums, then only half of the net settlement fund would be paid out. If all class members claimed a share, the average amount paid to each would be about $22.[34]

The class was divided into three subclasses. Subclass One included all class members who were residents of a state other than Mississippi. Subclass Two included all class members who were residents of Mississippi who had compensatory damages claims. Subclass Three included all class members who were residents of Mississippi who claimed punitive damages. Functionally, Mississippi residents were members of both Subclasses Two and Three. Subclass One members would receive one share of the compensation fund, calculated using the formula above. Each member of Subclass One or Subclass Two could opt out of the settlement for purposes of claiming compensation.[35]

Subclass Three members were not allowed to opt out of the punitive damages aspect of the settlement. Each member in this subclass was given an additional share to compensate him or her beyond other class members.[36] Therefore, each Mississippi resident who was a member of the class could opt out of the settlement and pursue a compensatory damage claim individually; however, Mississippians could not opt out of the settlement and pursue a punitive damage claim.[37]

The creation of Subclass Three, limited to Mississippi, reflects the defendants' particular concern about their exposure to punitive damages in that state. Although punitive damages were available in other states, the defendants did not perceive them to be a serious threat.

Claims-Made Distribution

Significantly, the fund was to be distributed on a "claims-made basis," meaning that money would be paid out only to those class members who submitted forms to the claims administrator within one month of notice and that any residual amount would revert to defendants. The short turnaround time made notice provisions crucial to class members. If a class member did not submit a claim or opt out (Subclasses One and Two), he or she would not receive compensation and would give up the right to pursue compensation individually later.[38]

Injunction

The settlement required that the defendants agree to the terms of a permanent injunction enjoining and restraining them from a variety of acts until June 30, 1999. The injunction prohibited defendants from charging for insurance other than physical damage coverage, charging borrowers for commissions paid to insurance brokers, and imposing coverage limits higher than those required under the terms of the loan agreement.[39] According to our interviews, at least some of the policies that these provisions addressed had already been changed by the defendants.

For purposes of the settlement, the parties attempted to monetize the benefit of the injunction to the class and consumers generally so as to include this amount in the value placed on the settlement. A higher value settlement might be viewed kindly by the judge; it might also generate higher fees for class counsel. The plaintiffs introduced the testimony of economist G. Richard Thompson, a professor of economics at Clemson University in South Carolina, who performed calculations on the future and present value of the injunctive relief.[40] In his analysis, Thompson estimated the difference between insurance rates with and without the injunction in place for the years 1997–1999 for all customers of the defendants. Based on this analysis, Thompson placed the value of the injunction at about $11.7 million.[41]

Attorney Fees and Costs

Under the agreement negotiated by the parties, class counsel were to receive no more than $5,398,500 from the common fund, which represented 29.5 percent of the estimated value of the total settlement—the value of the injunction plus the monetary benefits.[42] If the value of the injunction were not included in the value of the settlement, the attorney fees would represent 80.5 percent of the common fund.

All costs of notice and administration of the class were to be paid directly by the defendants, not out of the common fund. At one point these costs were estimated as unlikely to exceed $100,000.[43] However, if some residual amount remained after the distribution of the settlement fund, then defendants' costs of notice and administration would be paid out of that residual. Only after the payment of notice and administration costs from the residual of the settlement fund would any amount be returned to the defendants. The distribution of the attorney fees among all of the class counsel was subject to a private fee-sharing agreement not part of the public record. There was also a provision for the defendants to reimburse class counsel's incurred costs of notice and administration.

Notice

The best practicable notice in this case was determined to be a direct mailing to all customers of the defendants for whom the defendants still had addresses. Supplemental notice was made via publication in the national edition of *USA Today* on February 3, 1997. The parties hired Gilardi & Co., a California company with considerable experience in class fund administration, to coordinate the mailing program. Based on a review of the defendants' records, the class was determined to include 60,379 individuals.[44] (This count excludes Alabama and Arizona policy holders who had separately settled with the defendants in previous statewide class actions.) The notice schedule agreed to by the parties and the court consisted of a first notice mailed on January 27, 1997, with a claim-filing deadline 30 days later, and a second notice and claim form mailed on February 27, 1997, with another 30-day claim-filing deadline.[45] Coupled with other settlement provisions, the filing deadlines allowed both parties to decide whether to agree to the final settlement. If five or more individuals opted out of the settlement, the defendant would have the option to void it. Therefore, even though Subclasses One and Two allowed opt-outs, defendants would ensure that any class settlement they agreed to would effectively extinguish the litigation. In addition, if too many claims were made against the settlement fund, the judge could decide that each individual reimbursement would be so small as to render the settlement unfair.

The notice consisted of a description of the litigation and settlement, the right to object or opt out, and the final fairness hearing, scheduled for April 16, 1997. Second notice was mailed to those class members whose addresses were returned as undeliverable after additional searching for addresses.[46] Opt-out cutoff for those class members who received notice from the first direct mailing or the newspaper ad was February 26, 1997, and for those who received the second mailing it was March 13, 1997. In either case, objections had to be received by the court by March 2, 1997.

The defendants' addresses for potential class members were screened by the National Change of Address System maintained by the U.S. Postal Service. The first notice was mailed to 60,372 class members. Of the first notices, 8439 were returned as undeliverable. Altogether, the second notice was mailed to 4286 addresses. Of the second notices, 323 were returned. An additional search was made, and 168 of these potential class members were eventually located and notified of the pending settlement.[47]

OBJECTIONS

In early 1997, Arthur Bryant, the executive director of Trial Lawyers for Public Justice (TLPJ), a Washington, D.C.–based public interest law firm funded by plaintiff attorney firms, reviewed the *Graham* settlement. As part of its Class Action Abuse Protection Project, TLPJ routinely monitors class action settlements specifically to protect class members' rights. The firm intervenes in cases if it feels that those rights are not being adequately represented by class counsel. According to our interviews, TLPJ had intervened in the *Bentley* case, Deakle's earlier CPI case that had also been heard by Judge Pickering. Consequently, TLPJ decided to look into *Graham* after an attorney informed the firm that Deakle was proposing another CPI settlement before Judge Pickering.

Bryant was concerned about the provisions limiting Mississippi class members' opportunity to opt out. On April 9, 1997, TLPJ filed a motion to intervene and entered an opposition to the stipulation of settlement on behalf of five class members—William Overstreet, Diane Rowell, Darin Padgett, Christine Page, and Randall Newman.[48] TLPJ had made an earlier attempt to intervene in the action, but that attempt failed when the class members they had recruited as intervenors settled privately with the defendants.[49]

TLPJ and the intervening class members made a number of arguments in opposition to the settlement. First, TLPJ asserted that Mississippi class members with punitive damage claims should be afforded the opportunity to opt out of the settlement. Second, it argued that the common fund amount was too small to adequately compensate the class for its damages, and that the amount was inappropriate in comparison to the fees awarded the class counsel under the terms of the settlement. Third, TLPJ claimed that compensation of each class member should not depend on his or her filing a special claim application. Instead, TLPJ thought that each member's compensation should be calculated based on the defendants' records and automatically forwarded to the last known address pursuant to the procedures employed for the class notice. Fourth, TLPJ argued that Mississippi class members should not be entitled to a double claim because of the greater probability of punitive damages being

awarded in that state.[50] Finally, TLPJ objected to the reversion of any residual amount in the common fund to the defendants.[51]

FINAL FAIRNESS HEARING

The final fairness hearing was set for April 16, 1997. In addition to hearing arguments from the parties and any objectors as to the fairness of the settlement, the judge would hear TLPJ's arguments on the motion to intervene on behalf of class members Overstreet, Rowell, Padgett, Page, and Newman. At stake for the parties was a final approval of the settlement that would bind to the settlement agreement all potential class members who had not opted out and all Mississippi class members as to punitive damages.[52]

Before the hearing, there was some indication that it would be contentious. In an April 11, 1997 memo to Deakle and Mike Wallace, a defense attorney who helped negotiate the settlement, Judge Pickering raised many questions about the logic and merits of the settlement, including: (1) the valuing of the injunctive relief at $11.6 million and the termination of this relief on June 30, 1999; (2) the change in CPI coverage calculation methods after the settlement; (3) the double payment for Mississippi class members allowing for punitive damages; (4) the apparent exclusion of other class members from claiming punitive damages; and (5) the adequacy of the notice program.[53] One of the memo's salient points was the judge's "serious reservations" about the requested attorney fees and "the fact that the claimants will only receive one-third of the amount negotiated to be put in the common fund."[54] He concluded the memo by stating, "I am not at all sure that this is a proposed settlement that can be found to be fair and reasonable. I await your comments."[55]

As the hearing date approached, the terms of the settlement appeared to be in flux. In the Application of Plaintiffs' Class Counsel for Award of Attorneys' Fees and Expenses Pursuant to the Proposed Settlement Agreement, the description of the terms of the settlement had changed from those originally set out in the Stipulation of Settlement. The new document increased the common fund to approximately $7.7 million, out of which class counsel sought an award of $3.9 million, increasing the funds available to the class by $2.5 million and *decreasing* attorney fees by about $1.5 million.[56] No other settlement terms were changed. Our interviewees did not explain this change; it may have been an attempt to anticipate and derail any opposition to the settlement.

However, this amended settlement was never introduced into court. According to our interviews, at the hearing Judge Pickering first met with the parties in his chambers and indicated his initial thoughts. In the afternoon, the judge listened only to arguments on the motion to intervene. At the end of the day, he took the motion to intervene under advisement and continued the fairness

hearing for a period of two weeks. On the record and in open court, the judge advised the parties that during this period they should modify the settlement.

At this time, TLPJ began to play a more active role in the settlement process. After the fairness hearing, Judge Pickering gave TLPJ access to information from the parties that allowed it to evaluate the settlement more effectively and to react to the provisions of the settlement as they were being negotiated.

For the next two weeks, the parties attempted to negotiate a settlement that would satisfy the judge. On April 22–23, 1997, in an Enhancement to the Stipulation of Settlement signed by the parties, the common fund was increased by $1.9 million to $9.6 million.[57] Each claimant's recovery was calculated as before, and, importantly, each claimant still needed to submit a proof of claim. The attorney fees, costs, and expenses to be deducted from the common fund were reduced to not more than 20 percent of the common fund, $1.92 million—or about $3.5 million less than their initially negotiated share. However, up to $300,000 in notice and administration costs—previously the sole responsibility of the defendant—were now to be deducted from the common fund, meaning that the net value of the settlement fund available to the claimants would be reduced (plaintiffs' attorneys' fees and other expenses were protected by the 20-percent agreement based on the value of the common fund prior to any deductions). The cost amount was to include both costs incurred by the defendant and any amount the defendant paid to the class counsel to reimburse its own costs of notice and administration.[58] The value of the injunction was no longer included in evaluating the monetary benefit of the settlement to the class.

The revised settlement included an additional notice program providing for notice to be mailed within 30 days of the court's final judgment and order of dismissal. This notice allowed class members an additional opportunity to file claims, but did not provide any class member with an additional opportunity to opt out.[59]

The fairness hearing resumed on April 30, 1997. According to our interviews, at this hearing the judge received the enhanced settlement reached by the parties and heard additional arguments about the agreement. However, Judge Pickering was still dissatisfied with the agreement and continued the fairness hearing for another month, keeping the motion to intervene under advisement and directing the parties to continue to negotiate the terms of the settlement with the intervening class members. TLPJ continued to voice its concerns over the fairness of the settlement, and at this time the judge explicitly directed the parties to include TLPJ in the settlement negotiations.

During May, the parties, including TLPJ, engaged in additional negotiations focused mostly on the opt-out provision. TLPJ was adamant that all Mississippi

class members be given the opportunity to opt out of the settlement; the defendants were equally adamant that they not be. The defendants' position reflected their continued concern about the potential for costly liability resulting from punitive-damage jury awards. If Mississippi class members with punitive-damage claims opted out of the settlement and brought lawsuits, the defendants might face a high-cost verdict. If that happened, the defendants' purpose of controlling liability through a nationwide settlement would have been defeated.

In the days leading up to the resumed fairness hearing, all issues other than the opt-out for Mississippi class members were resolved. The parties even obtained the assistance of the judge to mediate a share of the fees for TLPJ. However, two issues remained unresolved: Mississippi claimants could not opt out of the class with respect to their punitive damage claims, and they were treated differently from claimants from other states. On May 28, 1997, the day of the fairness hearing, the defendants agreed to allow Mississippi class members with punitive damage claims the opportunity to opt out of the settlement. With that concession, all parties—including TLPJ—accepted the settlement.

On June 6, 1997, the parties signed a Second Enhancement to the Stipulation Agreement that embodied the agreement reached on May 28. In this agreement, the common fund was increased to \$10.5 million—50 percent larger than the originally negotiated amount.[60] Class counsel fees sought under the Second Enhancement remained at \$1.92 million;[61] however, the notice and administration reserve in the common fund that the defendant could claim against to recover its costs was increased to \$350,000.[62] In addition, TLPJ attorneys were awarded \$350,000.[63] The restrictions contained in the Permanent Injunction were also extended to June 30, 2001.

Other settlement terms were also altered. First, class members were no longer required to submit claim forms in order to qualify for a disbursement from the common fund. Instead, all those who did not opt out of the class would receive payments automatically.[64] Different procedures applied to those class members who still owed money to the defendants and those who had paid off their debts. For those who still owed money, the claim amount would be credited to their account (and deducted from the common fund). For those who had paid off their loans, a check would be issued to the most current address known to the defendants or the settlement administrator.[65] This new policy of automatic disbursement meant that all (or almost all) of the settlement fund available to claimants would eventually be paid out.

Second, all amounts remaining in the common fund after distribution, including all checks returned as undeliverable and all those not cashed within 180 days of issuance, would be distributed to one or more charities proposed by the

parties in the agreement.[66] Third, six payments of $2000 each would be made out of the common fund to the Grahams and the Bradys as plaintiffs in the matter and to Overstreet, Rowell and Padgett (jointly), Page, and Newman as intervenors. Last, Mississippi claimants would have the opportunity to opt out of the settlement and would be given notice to this effect.[67] No other additional notices would be issued.[68]

Under these terms, class members who filed claims would get, on average, about $130 each.[69]

DISTRIBUTING SETTLEMENT AWARDS

Final judgment was entered on June 26, 1997,[70] and the distribution of funds from the common fund took place on November 17, 1997, and December 17, 1997—110 and 140 days respectively after the effective date of the settlement.[71] In addition to retaining continuing jurisdiction over the implementation of the settlement, the court approved provisions in the settlement agreement that require the administrator or the defendant to make a final report to the court regarding settlement distribution and administration. The close-out date of the administration of the class was February 17, 1998, or as soon thereafter as the distribution of the residual of the common fund to a charity took place.[72] Although distribution has taken place, some of the checks have not yet been cashed by the recipients, and final close-out of the settlement had not yet occurred as of August 1998.

As of May 1, 1998, 41,960 claimants who were current bank customers at the time of the distribution had their accounts credited by a total of $5,976,607. Those who were no longer customers of the bank—18,235 in all—were issued checks totaling $1,891,444. However, 3689 of these checks had not been presented for payment and $284,952 remained in the settlement fund. At this time it is unclear how much of this remainder will eventually be claimed by class members or be paid to charities as the Second Enhancement of the settlement directs.

Key Events	Date
Complaint filed	April 1, 1996
Amended Complaint	October 1, 1996
Order temporarily certifying the class	October 1, 1996
Second Amended Complaint	January 10, 1997
Settlement Agreement signed	January 10, 1997
Preliminary approval of settlement	January 10, 1997

First notice mailed	January 27, 1997
Notice published in *USA Today*	February 3, 1997
Opt-out cutoff for first notice recipients	February 26, 1997
Claims cutoff for first notice recipients (later dropped)	February 26, 1997
Second notice mailed	February 27, 1997
Objection filing cutoff	March 2, 1997
Opt-out cutoff for second notice recipients	March 13, 1997
Claims cutoff for second notice recipients (later dropped)	March 26, 1997
TLPJ Motion to Intervene	April 9, 1997
Fairness hearing	April 16, 1997
Enhancement to Stipulation of Settlement	April 22–23, 1997
Final fairness hearing	May 28, 1997
Second Enhancement of the Stipulation Agreement	June 6, 1997
Final Judgment	June 26, 1997
Permanent injunction on BankAmerica's CPI policies expires	June 30, 2001

NOTES

[1]As part of our research on this litigation, we collected information from the primary plaintiff, defense, and intervenor attorneys; defendant spokesmen; and judicial officers. We also reviewed the pleadings and papers filed in the case as well as other publicly available documents including newspaper articles, magazine articles, and press releases.

[2]*Graham v. Security Pacific Housing Services, Inc.,* No. 2:96-CV-132 (S.D. Miss. filed Apr. 1, 1996).

[3]For a good discussion of the mid-1980s banking crisis, see Lawrence J. White, *The S & L Debacle: Public Policy Lessons for Bank and Thrift Regulation* (New York: Oxford University Press, 1991).

[4]See Kenneth Cline, "Collateral Protection Insurance Cases Are Fewer but Remain Expensive," *American Banker*, Sept. 14, 1994, at 5; Kenneth Cline, "Once Obscure Auto Insurance Product Brings an Avalanche of Costly Lawsuits," *American Banker*, Dec. 9, 1993, at 4.

[5]*Adams v. Security Pacific Housing Services*, No. CV 95-P-1958-W (N.D. Ala. filed 1995) and *Burke v. Bank of America*, No. CV-93-23222 (Ca. Super. Ct. Maricopa County filed 1993).

[6]*Graham v. Security Pacific Housing Services, Inc.,* No. 2:96-CV-132 (S.D. Miss. filed Apr. 1, 1996)(hereinafter Complaint).

[7]*Bentley v. Deposit Guaranty National Bank* (S.D. Miss. 1995). However, according to our interviews, this was his only previous CPI case.

[8]Complaint at 1–2. The Bradys had obtained a loan from BankAmerica Housing Services, Inc., a division of BankAmerica Corp. *Id*. at 5–6. The Grahams had obtained a loan from Security Pacific Housing Services, Inc., a division of BankAmerica Corp. *Id*. at 3–5.

[9]*Id.* at 1.

[10]Hereinafter, we use the term "Bank of America" to refer to all defendants, including the former Security Pacific National Bank and its subsidiaries and the former Bank of America and its subsidiaries.

[11]*Id.* at 13–31.

[12]15 U.S.C. § 1692.

[13]15 U.S.C. §§ 1430 *et seq.*

[14]Complaint at 2–3.

[15]*Id.* at 5–7.

[16]*Id.* at 3.

[17]First Amended Complaint (Oct. 1, 1996) at 27.

[18]*Id.* at 11–14.

[19]In addition, according to our interviews, Security Pacific National Bank actually offered its borrowers the option of forgoing any coverage that was not required under the terms of the loan agreement.

[20]*Bennet v. BankAmerica Corp.*, No. CV-96-L-108 (Ill. Cir. Ct. Champaign County filed Mar. 25, 1996); *Dawley v. BankAmerica Corp.*, No. 96CV1290 (Wis. Cir. Ct. Racine County filed Aug. 5, 1996); *Jackson v. BankAmerica Corp.*, No. CV-96-7728-CA01 (Fla. Cir. Ct. Dade County filed Apr. 17, 1996); *Lockhart v. BankAmerica Corp.*, No. CV196-620CC (Mo. Cir. Ct. Franklin County filed July 25, 1996); *Monk v. BankAmerica Corp.*, No. 96-CVS-655 (N.C. Super. Ct. Duplin County filed July 29, 1996); *Morley v. Security Pacific Housing Services*, No. CV-96-72568 (E.D. Mich. filed June 3, 1996); *Smith v. Security Pacific Housing Services*, No. 6:96CV505 (E.D. Tex. filed June 13, 1996); and *Yauck v. BankAmerica Corp.*, No. 96-CV2517CC (Ore. Cir. Ct. Douglas County filed July 3, 1996). See also the complaint for *Chandler v. BankAmerica Corp.*, drafted for the state trial court of Pulaski County, Ark., but never filed (on file with authors). However, according to our interviews, many of these complaints would have been easily dismissed on the pleading because of jurisdictional and procedural defects.

[21]Phebus, Winkelmann, Wong & Bramfield of Illinois; Carey & Danis of Missouri; Dole, Coalwell & Clark of Oregon; Roesti, James & Sirlin of Michigan; and Richard Worsham of Arkansas.

[22]See Stipulation of Settlement (Jan. 10, 1997) at 4.

[23]*Smith v. Trustmark National Bank,* No. 93-4-47 (Miss. Cir. Ct. Jones County 1995) (verdict reduced to $500,000 compensatory damages and $5 million punitive damages by trial judge). See also Christopher Rhoads, “Flood of Car Insurance Suits Threatens To Swamp Small Banks in Mississippi,” *American Banker,* Feb. 15, 1996, at 1.

[24]See *Adams v. Security Pacific Housing Services,* No. CV 95-P-1958-W (N.D. Ala. filed 1995) and *Burke v. Bank of America,* No. CV-93-23222 (Ca. Super. Ct. Maricopa County filed 1993).

[25]First Amended Complaint at 11.

[26]Order Temporarily Certifying Class (Oct. 1, 1996) at 1 (hereinafter Certification Order).

[27]Certification Order at 3.

[28]Stipulation of Settlement at 1.

[29]Second Amended Complaint (Jan. 10, 1997) at 10–11.

[30]Stipulation of Settlement at 16.

[31]*Id.* It is interesting to compare this settlement with those resolving other contemporary CPI cases. These settlements—some of which involved statewide classes and others nationwide classes—ranged from $5.6 million to $58.3 million. See Kenneth Cline, “NationsBank and Toyota Are Latest to Be Hit with Collateral Protection Suits,” *American Banker*, Dec. 2, 1994, at 5. In Mississippi, for example, one case was settled for $38 million. See Rhoads, *supra* note 23.

[32]Permanent Injunction, Exhibit E to Stipulation of Settlement.

[33]Stipulation of Settlement at 19.

[34]This estimate is made using the Gilardi & Co. estimate of 60,379 class members and $1,301,500 available in the common fund (after deducting $5,398,500 in potential attorney fees).

[35]Stipulation of Settlement at 11.

[36]*Id.* at 17. Each Mississippi class member who claimed compensation would receive a second identical share, but the amount of the total is not quite doubled because the addition of each

punitive damage claim would increase the denominator of the formula and consequently decrease the payment to each claiming class member.

[37]*Id*. at 17, 20.

[38]*Id*. at 26. See Affidavit of Daniel Rosenthal re Publication and Mailing of Notices, and Initial Class Member Telephone Support (Apr. 7, 1997) at 2–3 (hereinafter Rosenthal Affidavit).

[39]Exhibit E to Stipulation of Settlement, 1–2, 4.

[40]Affidavit of G. Richard Thompson, Ph.D. (Apr. 8, 1997) (hereinafter Thompson Affidavit).

[41]Stipulation of Settlement at 16. This value reflects the benefit for all current customers as well as the benefit for future customers. It appears that Thompson's calculations assume that without the injunction all premiums would be priced at what he terms "full package rates"; presumably this would require the defendants to employ all the practices enjoined by the injunction regardless of whether the practice had ended prior to settlement.

[42]Stipulation of Settlement at 18.

[43]*Id.*

[44]Rosenthal Affidavit at 1.

[45]Stipulation of Settlement at 25.

[46]Rosenthal Affidavit at 3.

[47]*Id.* at 3.

[48]Motion to Intervene by Randall A. Newman, William A. Overstreet, Diane Rowell, Darwin Padgett, and Christine Page (Apr. 9, 1997); Response by Movants Randall A. Newman, William A. Overstreet, Diane Rowell, Darwin Padgett, and Christine Page in Opposition to Stipulation of Settlement (Apr. 9, 1997).

[49]See Vivien Lou Chen, "Attorneys Lose $3.4 million in New B of A Deal," *Los Angeles Daily Journal*, Apr. 20, 1997, at A1.

[50]This treatment is consistent with allowing Mississippi class members the opportunity to opt out of the punitive damage part of the settlement.

[51]Opposition to Settlement.

[52]It is reasonable to assume that at this point both parties knew how many class members had filed claims since the deadline had passed, but this number is not part of the public record and was not given to us during our interviews.

[53]Memorandum from Judge Charles Pickering, Sr., to John Deakle and Mike Wallace (Apr. 11, 1997). Mike Wallace is a partner at Phelps Dunar, L.L.P., a Jackson, Mississippi firm retained by the defendants to represent them in Mississippi. Ross Bass, Jr. served as lead counsel for Phelps in this matter.

[54]*Id*. at 1–2.

[55]*Id*. at 2–3.

[56]Application of Plaintiffs' Class Counsel for Award of Attorneys' Fees and Expenses Pursuant to the Proposed Settlement Agreement (Apr. 16, 1997) at 1–3.

[57]Enhancement to Stipulation of Settlement (Apr. 23, 1997) at 2.

[58]*Id.*

[59]Additional Notice of Proposed Class Action Settlement at 2, Exhibit 1 to Enhancement to Stipulation of Settlement.

[60]Second Enhancement to the Stipulation of Settlement (June 6, 1997).

[61]*Id.* at 2–3, 5.

[62]*Id.* at 2–3.

[63]*Id.* at 5.

[64]*Id.*

[65]*Id.*

[66]Defendants suggested that any residual be shared equally with the Mississippi Bar Foundation's Legal Aid for the Poor program, the Legal Aid Association of Los Angeles, and the Legal Aid Association of San Francisco. Class counsel wanted the residual to go to the Cancer Treatment Unit of St. Jude's Children's Hospital. Intervenor's counsel suggested that at least one-third of the residual be shared equally with the Public Citizen Foundation and the National Consumer Law Center.

It is unclear from the wording of the Second Enhancement whether the defendant would still be able to make claims against any residual amounts left in the settlement fund for uncompensated costs of notice or administration as set forth in the original settlement agreement.

[67]Interestingly, the Second Enhancement also contained a provision preventing counsel for the intervenors from soliciting Mississippi class members for the purpose of exercising their newly granted ability to exclude themselves from the settlement.

[68]*Id.*

[69]Per class member allocation of the settlement fund assumes 60,372 class members and the payment of the full $350,000 reserve to the defendant for its costs of administration and notice.

[70]Final Judgment and Order of Dismissal (June 26, 1997).

[71]Second Enhancement to Settlement at 6.

[72]According to the Stipulation of Settlement, 200 days after the effective date (July 28, 1997).

CABLE TV LATE FEE LITIGATION:[1]
SELNICK v. SACRAMENTO CABLE[2]

PROLOGUE

Sacramento Cable Television is the sole cable television operator for Sacramento, California, a metropolitan area of about 1.5 million residents. It services the cities of Sacramento, Folsom, and Galt as well as the County of Sacramento. Through 1996, Sacramento Cable Television operated as a partnership of Scripps-Howard Cable Company of Sacramento, which was owned by the large Scripps-Howard Broadcasting Corporation, and River City Cablevision, Inc.[3] Although the subscriber base has varied as households add and drop cable services, the company serviced, on average, approximately 209,000 subscribers per month between 1992 and 1994 for charges ranging from $10 to $23.[4]

On March 23, 1993, Sacramento Cable instituted a policy of charging a $5.00 late fee for tardy payments of monthly subscriber bills.[5] The company's practice was to mail bills on the first day of the service period and impose a payment due date 20 days later. If Sacramento Cable did not receive payment within four days of the due date, the company charged the subscriber the $5.00 late fee.[6] After imposing late fees, Sacramento Cable engaged in a series of efforts ranging from notices to disconnecting the cable to obtain payment of the subscriber's account balance. Table 8.1 describes the steps by which Sacramento Cable sought payment. The company's statistics indicate that, on average, from 1992 through 1994 approximately 35,000[7] customers were charged late fees each month, amounting to about $175,000 per month paid to the company.

Sacramento Cable's customers responded to the new late fee policy with numerous complaints to the local cable regulatory commission, the Sacramento Metropolitan Cable Television Commission. In fact, late fees were the number-one complaint received by the commission.[8] Based on these complaints, in 1994 the commission opened an investigation into Sacramento Cable's pricing policies with particular focus on its late fees. In May 1994, the company commissioned a study by Price Waterhouse, which it expected to support its poli-

Table 8.1

Sacramento Cable's Process for Settling Accounts*

Action	Days Elapsed	Number of Subscribers Involved
Invoice mailed	0	209,000
Due date	20	209,000
Late fee	24	35,000
Delinquent notice	37–40	21,000
Soft disconnect	45	7,700
Phone contact	50–55	4,200
Hard disconnect	65	1,800
Second delinquent notice	75	1,350
Final delinquency notice	85	1,250

*Opposition to Certification at 4–7.

cies—policies, it maintained, that were necessary to cover the cost of all actions taken to satisfy its accounts.[9]

CLASS LITIGATION BEGINS

As the commission investigated the late fees, an outside attorney who was assisting the commission asked an acquaintance, Mark Anderson, about cable late fee cases and informed him of the ongoing investigation into Sacramento Cable. Anderson, a San Francisco attorney active in the consumer class action arena, had previously brought consumer class actions alleging improper late fees.[10]

Anderson made his own inquiries and obtained copies of the various documents filed with the commission. Upon reviewing this information, he concluded that Sacramento Cable's late-fee charges were probably illegal under California law because the company's policy did not seem to be based on a reasonable estimate of the damages incurred by overdue bills. At the time, under California law, a late fee on a consumer bill could be charged only when the damages that would be incurred by late payment would be difficult to ascertain, and the charge imposed as a late fee was reasonably related to the damages actually incurred.

Consequently, Anderson initiated litigation against Sacramento Cable. Through his contact in Sacramento, he identified Donna Selnick, a professor of consumer rights at California State University—Sacramento, to be the representative plaintiff in this action.[11]

PRIMARY ISSUES OF THE LITIGATION

On July 25, 1994, Anderson filed his complaint in state court in Sacramento, naming Selnick as the representative plaintiff and Sacramento Cable Television, Scripps Howard Cable Company of Sacramento, and River City Cablevision as the defendants.[12] For purposes of pretrial motions, the suit was assigned to Judge John R. Lewis, a 16-year veteran of the bench.

Using the defendant's statistics for monthly late charges, Anderson estimated a potential class recovery of $4.6 million[13] by calculating $5.00 per late fee times 33,000 late-fee charges per month over 28 months from March 1992 through July 1994. This amount reflects the recovery total if all individuals who were charged late fees received a refund of all charges. In addition, the plaintiffs sought injunctive relief enjoining the defendants from imposing an unlawful late-fee charge.

The complaint pled two causes of action based on the business practices described above. The plaintiffs alleged that the late fee was in violation of California Civil Code Section 1671, and that the defendants engaged in unlawful and unfair business practices as defined by California Business & Professions Code Section 17200.[14] The complaint and much of the activity in the case focused on the legal standards underlying these causes of action because the relevant facts were largely undisputed.[15]

The central cause of action was the violation of Section 1671.[16] This statute generally describes the circumstances under which liquidated damages clauses in contracts—provisions that provide the amount of damages for breach of contract—are enforceable. In contract law, late payment of a bill constitutes a breach of contract, and late-fee provisions are a type of liquidated damages clause. However, in consumer contracts, liquidated damages clauses are valid only "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages."[17]

In a series of cases, California state courts have identified those costs that are a reasonable basis for fixing late-fee amounts. Cases interpreting the statute have held that a liquidated damages clause will be struck down if the charge "is designed to exceed substantially the damages suffered" as a result of the breach of contract.[18] Under such circumstances, the clause becomes a penalty instead of an attempt to fix damages reasonably. If a party to the contract has made a "reasonable endeavor" to ascertain the actual damages resulting from a breach of the contract, the damage clause is more likely to be viewed as enforceable.[19] In this lawsuit, the parties agreed that it was difficult for Sacramento Cable to determine the amount of damages that it incurred as a result of delinquent sub-

scriber payments; therefore, the defendants were permitted to impose a late fee.[20] However, the parties disagreed about whether Sacramento Cable had made a reasonable effort to ascertain actual damages as a basis for setting the late-fee amount.

The defendants—represented by the Los Angeles offices of the national law firm Baker & Hostetler—argued that they did make a reasonable endeavor to fix the costs of delayed subscriber payments.[21] The defendants claimed that they had performed an analysis of Sacramento Cable's costs before the late fees went into effect.[22] In addition, they pointed to the Price Waterhouse report, which indicated that Sacramento Cable incurred a cost of $5.28 for each delinquent account.[23]

Throughout the litigation, the plaintiffs argued that the $5.00 late fee amount bore no relationship to the actual damages incurred by Sacramento Cable as a result of a late payment. Anderson argued that Sacramento Cable employees had simply called other cable companies and learned that they were charging $5.00 late fees. Such a survey of other companies' policies would not establish the actual costs incurred by Sacramento Cable and could not be used legally to set the late-fee amount. Furthermore, if the case went to trial, the plaintiffs were prepared to present a witness who would testify that the defendants received $6.5 million in revenue from the late fees during the period they were imposed, and incurred only $1.5 million in costs as a result of late payments. This witness was also prepared to say that the purpose of imposing the late fee was to raise revenue.[24]

The proportion of recovery the plaintiffs would receive if liability were found against the cable company constituted another legal issue. When a charge is declared invalid as a penalty, the customer "remains liable for the actual damages resulting from his default."[25] From the plaintiff's perspective, if only $1.5 million of $6.5 million of late-fee revenue was required to cover Sacramento Cable's actual costs, then the class should receive $5 million in compensation.

As the litigation got under way, Sacramento Cable changed its procedures in response to the commission investigation. On October 22, 1994, it began charging late fees 37 days after the invoice date—or 17 days after the due date—and giving customers almost two more weeks' grace period.[26] This policy change, occurring three months after the complaint in the class action litigation was filed, may have resulted from the commission investigation, the class action complaint, or both. After the policy change, the company collected, on average, 22,000 late-fee charges per month, down from 33,000.[27]

LITIGATION OF THE CASE

On March 13, 1995, about eight months after filing the complaint, Anderson filed a motion for class certification. He argued that this case met all of the requirements under California Code of Civil Procedure Section 382. The principal issue of whether Sacramento Cable's business practices were unlawful comprised questions of law and fact common to the entire class.[28] The only issue individual to each putative class member was the number of late fees charged to each individual, an issue relevant to damages but not to liability. The plaintiffs argued that, under these circumstances, class certification was appropriate.

The defendants vigorously opposed the plaintiffs' motion and argued that: (1) the proposed class was vague and ill-defined, (2) individual issues predominated over any common issues of the putative class, and (3) alternatives to class action were superior for achieving justice in this case.[29] The defendants asserted that the class was ill-defined because not everyone who paid a late fee was actually financially injured by the charge. Only if the charge violated Section 1671 as interpreted by case law would the subscriber have a cause of action against the defendants. Because violations of Section 1671 had to be determined on a case-by-case basis, the defendants contended, the class was not well-defined and should not be certified. Second, and similarly, the defendants argued that individual issues of injury predominated over any common issues among members of the proposed class because the damage sustained by each injured plaintiff varied. As a result, they claimed any litigation should proceed as individual actions and not as a class action.

The motion was argued on April 12, 1995. Judge Lewis granted the plaintiffs' motion, and in an order dated April 25, 1995, certified the class. The class was defined as:

> All current and former subscribers who paid late fees to defendant Sacramento Cable Television, a California partnership, in the period March 1, 1992, to the present (for purposes of damages) and all current Sacramento Cable Television subscribers for the purpose of injunctive relief.[30]

In his certification order, Lewis held that common issues predominated over individual ones. He noted that the commission had chosen to defer to a class action as the appropriate mechanism for seeking redress. He indicated that the plaintiff would be an adequate class representative, and if it appeared that there existed subclasses for whom she would not provide adequate representation, then additional representatives could be established.[31]

After the judge granted the class-certification motion, the parties agreed to a program providing notice of the pending class action to the class members.[32]

Under the approved program, notice of class certification was required to be published in the *Sacramento Bee* one day before July 15, 1995, and televised in the Sacramento Cable service area once every four hours for five consecutive days on the company's own Preview Channel before July 20, 1995. Operated by Sacramento Cable, the Preview Channel provides subscribers with information about upcoming programming. All costs of this notice program were borne by the defendants. Interestingly, no direct notice of the pending class action was supplied to the group easiest to identify and contact—current Sacramento Cable Television subscribers.

The notice described the litigation and the potential class and informed potential class members of their rights. Potential members had three options:

- do nothing, in which case they would be automatically included in the class
- enter an appearance through their own counsel, or
- file a written request to be excluded from the class (opt out).

If a class member wished to opt out, he or she had to submit a request by July 30, 1995, or two weeks after notice was published and ten days after the Preview Channel broadcast.[33]

From June 1995 to May 1996, litigation in the case continued. Both sides propounded and responded to discovery requests, took and defended depositions, and prepared the case to go to trial. The trial date was initially set for May 6, 1996.

NEGOTIATING THE SETTLEMENT

According to our interviews, settlement negotiations did not begin until the mandatory settlement conference, which occurred approximately 30 days before the initial trial date. The defendants' initial settlement offers included an injunction preventing Sacramento Cable from illegally imposing a late fee and providing for attorney fees for class counsel, but no direct compensation for the class. But without at least some compensation for late fees paid by class members, Anderson would not settle. The offer of injunctive relief provided little satisfaction at this point because Sacramento Cable had already changed its policy by delaying late fees.[34] The trial, however, was postponed on May 6 because the parties were nearing an agreement.

The parties reached a settlement on May 31, 1996.[35] It provided for (1) a fund to reimburse class members for a portion of late fees paid, (2) payment of attorney fees and costs out of the settlement fund, and (3) a requirement that any

moneys remaining in the settlement fund after payment of all class claims, fees, and other expenses would be distributed at the court's discretion.[36] The latter provision was required by California law, which specifies that the court must be informed of any moneys remaining after the distribution of a class settlement fund and that the residual (plus interest) thereafter be paid as the court directs, rather than reverting to the defendants. The payment must be made "in a manner either designed to further the purposes of the underlying causes of action, or to promote justice for all Californians."[37] The parties can recommend recipients of the unspent fund, but the final decision rests with the judge. The amount of attorney fees and costs were to be approved by the court at the final fairness hearing.

The Stipulation of Settlement did not address the original request for an injunction to enjoin the defendants from imposing a late fee in the future, perhaps because legislation allowing late fee charges of up to $4.75 for cable services had been introduced into the California Senate on February 22, 1995.[38] Sponsored by the California Cable Television Association in direct response to class action cases against late-fee charges, the bill passed both houses on August 30, 1996. Governor Pete Wilson signed it into law in late September. Under the new law, companies could charge higher fees if they could justify them as long as they did not violate Section 1671.

The class defined under the settlement included "all persons who paid late fees to Sacramento Cable between March 1992 and May 6, 1996,"[39] the trial date. In late April 1996, Anderson had filed an amended complaint extending the class definition in preparation for trial to include persons who paid late fees up to the scheduled trial date. This expanded class definition now bound individuals who had not had an opportunity to opt out of the class, i.e., persons who were not Sacramento Cable subscribers in July 1995—and so did not know of the pending class action settlement, but paid late fees to Sacramento Cable between August 1995 and May 6, 1996. Presumably, the company accepted class expansion to end its exposure to liability; however, because the defendants did not provide us information for this study, we may only speculate about the causes of their actions. Because of this change, it remains unclear how many subscribers were included in the class.

Settlement Fund

The settlement provided for the creation of a fund of $1.5 million[40] to compensate the plaintiffs as well as provide for attorney fees and the costs of the administration of the class. The only expenses that would not come out of this fund were the costs of notice, which were to be paid separately by the defendants.[41]

Individual Claim Amounts

The agreement provided that the claimants would receive refunds for up to ten late fees, or $50.00.[42] The plaintiffs' attorney proposed the ten-claim limit, which was modeled after the settlement of a recent late-fee case reached by the District Attorney for Santa Clara County.[43] To receive the funds, a claimant had to submit a claim form to the claims administrator. Claimants did not need to prove payment of late fees, only submit a claim signed under oath. The defendants claimed that they did not have records for individuals who had paid late fees in the past and whose accounts had been closed, so they could not provide automatic refunds. Instead, class members were required to mail their forms to the claims administrator by August 30, 1996. (The deadline was extended to December 31, 1996, at the time of the final fairness hearing.)

Notice and Preliminary Settlement Approval

On June 26, 1996, the court granted the plaintiffs' motion for preliminary approval of the settlement and ordered notice to the class.[44] The notice plan required a two-part process. First, defendants were asked to mail the notice and a claim form to all current Sacramento Cable Television subscribers in their monthly bills by August 16, 1996.[45] Second, defendants were required to publish the notice and a copy of the claim form in the Metro section of the *Sacramento Bee* one day a week throughout July 1996.

The text of the notice statement advised class members of the settlement, apprised them of their rights under the settlement and the law, and gave them instructions on how to claim payment as part of the class.[46] In addition, the notice described the litigation and the terms of the settlement. Class members were advised of their options, which included (1) taking part in the settlement, (2) not taking part in the settlement, which, as a practical matter, would mean that the class member would be unlikely to recover any funds from the defendants, and (3) appearing in the lawsuit and objecting to the settlement. Class members who had not previously opted out of the class did not have the opportunity to opt out at this stage but could appear with counsel at the final settlement hearing in Sacramento on September 19, 1996. The notice did not place time limits on making objections, so presumably class members could appear at the fairness hearing to voice concerns without first informing counsel or the court.

Final Settlement Approval

During the period between the preliminary settlement approval and the final fairness hearing, the plaintiffs' attorney received only a few complaints regard-

ing the terms of the settlement.[47] All of these complaints centered on the fact that each class member was limited to claiming compensation for no more than ten late fees. Of the complaints received by the plaintiffs' attorney, only one class member voiced his intention to file written objections to the settlement and appear at the fairness hearing.[48] According to class counsel, fewer than five class members elected to opt out of the settlement.

Before the final fairness hearing, Anderson filed a motion in support of the final settlement and for fees and other awards. In this document, he asked the court to approve $457,000 in fees and an additional $58,101 in costs associated with the litigation.[49] The fee requested represented 30 percent of the settlement fund, including projected interest to November 1996 ($1,523,000). In support of this request, Anderson totaled the hours devoted by him and his associates to prosecuting the action up to that point and estimated the time that would be required to complete the case—547.5 hours. The costs included filing fees, service charges, expert witness fees, court reporter fees, travel expenses, and mailing and copying costs. Anderson also asked the court to approve a payment of $2500 to Donna Selnick, the representative plaintiff.[50] The plaintiffs' counsel indicated that he had settled a competing class action[51] that also alleged the illegal collection of late fees by Sacramento Cable and that the $9126 paid to resolve the case would come out of any attorney fees awarded in the instant action. Additional moneys would be deducted from the settlement fund for the administration of the settlement, including payment of the class administrator and payment of taxes due on income earned by the interest-bearing account into which the settlement amount had been deposited.

The fairness hearing was held on September 19, 1996. No appearances or objections were made to the settlement, the attorney award request, or the representative-plaintiff award request. The judge approved the settlement as well as attorney and representative-plaintiff awards, and entered judgment on the same day.[52] In addition to retaining jurisdiction over the implementation of the settlement, the court approved provisions in the settlement agreement that require the class counsel to make a report to the court regarding any moneys remaining in the settlement fund after the distribution of benefits to the class and the payment of settlement-related expenses.

Distributing Settlement Awards

Some claims were already in the class administrator's hands, so administration of the settlement could begin as soon as the judgment was final 60 days after the September 19 hearing.[53] By January 1997, the total settlement fund was $1.5 million plus $29,870 in accrued interest.[54] On or about January 8, the claims administrator mailed out all claimant payments—7629 claims for a total

of $271,450.[55] Next, $520,101 in plaintiffs' attorneys' fees and costs were paid, as was $2500 in an incentive fee to the representative plaintiff.[56] Fund administration costs, including tax payments and future costs, came to $66,353.[57]

Once these payments were made, $669,466—about 44 percent of the total settlement fund plus interest—remained in the class fund for allocation to charities in a cy pres, or "next best," distribution, in accordance with the court's discretion according to California law.[58] In February 1997, Anderson recommended distribution of the residual to a variety of groups that he felt would use the money for protecting consumers (see Table 8.2).[59]

Anderson thought the cy pres award should go to consumer advocacy groups because the class action had been originally based on California Civil Code §1671—essentially a consumer protection statute. Because at least one of the class counsel's proposed recipients was a party to other matters pending in Judge Lewis's court, he disqualified himself from ruling on the distribution of the residual funds.

Judge Joe S. Grey made the final decision in his stead in November 1998. At that time, Judge Grey ordered that the money be donated to the University of the

Table 8.2

Proposed Cy Pres Distribution

Recipient	Award	Purpose
California State University, Sacramento	$250,000	To endow a fund for teaching and research in consumer education
Legal Services of Northern California	$200,000	For projects addressing "welfare to work" issues and foreclosure prevention for older adults
Western Center on Law & Poverty	$64,000	For a fund to advocate welfare reform in the state capital
The National Association of Consumer Advocates, Inc.	$87,000	For support of this nonprofit association of attorneys in representing consumers on matters regarding abusive or unlawful business practices
Mutual Assistance Network of Del Paso Heights	$25,000	To provide information to low-income community members on food budgeting and nutrition
KVIE-TV	$25,000	To produce a television program about consumer protection
Legal Community Against Violence	$12,000	To expand its program promoting ordinances designed to increase controls on firearm sales and related issues
National Consumer Law Center	$5,000	To support this nonprofit consumer resource center for attorneys and other consumer-protection advocates

Pacific's McGeorge School of Law for the establishment of the Center for Access to the Courts Through Technology. The center would be under the direction of law professor J. Clark Kelso, and its stated purpose would be to facilitate "access to public dispute resolution systems using modern communication and information technologies" with particular awareness of "the special needs of pro per litigants and under-represented persons and consumers."[60]

Key Events	**Date**
$5.00 late fees policy begun	March 23, 1993
Complaint filed	July 25, 1994
Bill allowing $4.75 late fees introduced in California Senate	February 22, 1995
Motion for class certification filed	March 13, 1995
Motion for certification argued	April 12, 1995
Class certified	April 25, 1995
Print notice deadline	July 15, 1995
Broadcast notice deadline	July 20, 1995
Opt-out deadline	July 30, 1995
Initial trial date (postponed)	May 6, 1996
Settlement reached	May 31, 1996
Preliminary approval of settlement and order to notify class	June 26, 1996
Final fairness hearing	September 19, 1996
Bill allowing $4.75 late fees signed into law	late September 1996
Deadline for submission of claim forms	December 31, 1996
Payments mailed to claiming class members	early January 1997
Approval of cy pres award to charities	November 1998

NOTES

[1]As part of our research on this litigation, we interviewed the primary plaintiffs' attorney. We contacted the defendants' attorneys, and through them the defendants, but were not able to interview representatives from either. We contacted the judges involved in this case but they declined to be interviewed because of concerns over pending motions in the matter. We also reviewed the pleadings and papers filed in the case as well as other documents including newspaper and magazine articles, law review articles, and press releases.

[2]*Selnick v. Sacramento Cable,* No. 541907 (Cal. Super. Ct. 1996).

[3]Complaint for Damages, Restitution, and Injunctive Relief for Violation of the Liquidated Damages Statute and Unfair Trade Practices Act (July 25, 1994) (hereinafter Complaint).

[4]Complaint at 2.

[5]Complaint at 3; Defendants' Memorandum of Points and Authorities in Opposition to Motion for Class Certification (Mar. 30, 1995) at 2 (hereinafter Opposition to Certification).

[6]Complaint at 2; Opposition to Certification at 2.

[7]Opposition to Certification at 3; Complaint at 4.

[8]Pam Slater, "Cable TV Firm Under Fire for Late Charges," *Sacramento Bee*, Aug. 6, 1994, at B1.

[9]Price Waterhouse, *Report on Late Fee Revenues and Collection Costs Related to Delinquent Subscriber Accounts* (1994).

[10]See, e.g., *Waggener v. Television Signal Corp.*, No. 946142 (Cal. Super. Ct. San Francisco County 1992).

[11]Clint Swett, "Judge OKs Pact to Settle Cable Suit," *Sacramento Bee*, Sept. 24, 1996, at B1.

[12]Complaint at 1–2.

[13]Complaint at 4.

[14]Complaint at 2.

[15]For example, the defendants never argued that they did not impose a late fee of $5.00 during the period March 1992 through July 1994. See Answer to Complaint (Aug. 31, 1994) at 3.

[16]Cal. Bus. & Prof. Code § 17200 *et seq.*, defines and proscribes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . " This broadly worded statute provides the basis for many causes of action, but is less relevant to this particular litigation than California Civil Code § 1671.

[17]Cal. Civ. Code § 1671(d). Consumer contracts are defined as those in which the contract is enforced against either "(1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or (2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support." § 1671(c).

[18]G*arrett v. Coast & Southern Federal Savings & Loan Ass'n,* 9 Cal. 3d 731, 740 (1973).

[19]*Id.* at 740; *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383, 1390 (1991).

[20]Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Class Action Settlement (June 6, 1996) at 8 (hereinafter Motion for Preliminary Approval).

[21]Motion for Preliminary Approval at 9.

[22]See, e.g., Opposition to Certification at 2–3.

[23]Opposition to Certification at 3–4.

[24]Motion for Preliminary Approval at 10. This estimate of revenues is higher than the $4.6 million mentioned in the complaint because it covers a different period and is based on information brought forward during discovery.

[25]*Garrett v. Coast & Southern Federal Savings & Loan Ass'n,* 9 Cal. 3d at 741; *Beasley v. Wells Fargo Bank,* 235 Cal. App. 3d at 1402–03.

[26]Opposition to Certification at 4–5.

[27]Swett, *supra* note 11.

[28]Plaintiff's Memorandum of Points & Authorities in Support of Motion for Class Certification (Mar. 13, 1995) at 9–11 (hereinafter Motion for Class Certification).

[29]Opposition to Certification at 8–24.

[30]Order Certifying the Class (Apr. 25, 1995) at 3 (hereinafter Certification Order).

[31]Certification Order at 2–3.

[32]Stipulation and Order for Notice to the Class Members of the Pendency of this Action (Jun. 6, 1995) at 2 (hereinafter Order for Notice).

[33]Proposed Notice for Publication, Exhibit A to Order for Notice.

[34]Defendants' Opposition to Certification at 4–5.

[35]Motion for Preliminary Approval at 2.

[36]Stipulation of Settlement (May 31, 1996) at 8, 15.

[37]Cal. Civ. Proc. Code § 384(a).

[38]Codified at Cal. Gov't Code §53088.7.

[39]Plaintiff's Memorandum in Support of Motion For Final Approval of the Settlement & for Award of Attorney Fees, Costs & Special Award to the Named Plaintiff (Aug. 30, 1996) at 5 (hereinafter Motion for Final Approval).

[40]Stipulation of Settlement at 8. The settlement amount was to be deposited into an interest-bearing account that would further augment the moneys available for claim payment. *Id.*

[41]Because the defendants and their counsel declined to be interviewed for this research, we were unable to ascertain the costs of notice of settlement or notice of certification.

[42]Notice and Claim Form to be Mailed to Current Subscribers, Exhibit A to the [Proposed] Order Preliminarily Approving Settlement (May 31, 1996) (hereinafter Notice and Claim Form).

[43]Motion for Final Approval at 3.

[44]Notice of Motion for Preliminary Approval of Class Action Settlement at 1.

[45]Motion for Final Approval at 2; [Proposed] Order Preliminarily Approving Settlement at 4.

[46]Notice and Claim Form.

[47]Motion for Final Approval at 7.

[48]Declaration of Mark Anderson in Support of Motion for Final Approval of the Settlement & for an Award of Fees & Costs (Aug. 30, 1996) at 2.

[49]Motion for Final Approval at 5. This should have yielded a total award to class counsel of $515,101; however, an additional $5,000 was eventually granted. Whether this represents an increase to the fee award or to the cost award (or some combination of the two) is unknown.

[50]It appears that the incentive award was deducted from the settlement fund. See Memorandum of Points & Authorities in Support of Motion for Approval of Plaintiff's Recommendations for Distribution of Residual Funds (Jan. 24, 1997) at 2 (hereinafter referred to as Plaintiff's Recommendations for Distribution).

[51]*Donald v. Scripps-Howard Broadcasting*, Civ. No. 95AS00850 (Cal. Super. Ct. Sacramento County 1996).

[52]Notice of Entry of Judgment (Sept. 19, 1996); Final Judgment and Order of Dismissal (Sept. 19, 1996).

[53]Stipulation of Settlement at 20.

[54]Recommendation for Distribution, Page 2.

[55]*Id.*

[56]*Id.*

[57]*Id.* Actual payments to the class claims administrator were $27,603 and estimated future payments were $21,000, for a total of $48,603 in basic administration and notice costs. Because the settlement fund was placed in an interest-bearing account, $750 in CPA fees for filing tax returns and an estimated $17,000 in state and federal tax liabilities were also added to the overall fund administration figure.

[58]*Id.* Of this amount, accrued interest accounted for $12,120 after deducting estimated future CPA fees and tax liabilities.

[59]Memorandum of Points & Authorities in Support of Motion for Approval of Plaintiff's Recommendations for Distribution of Residual Funds (Jan. 24, 1997) at 5–10.

[60]"Order Establishing Trust and Agreement of Acceptance by Trustee to Govern the Administration of the Center for Access to the Courts Through Technology," undated copy supplied to the authors by Professor Kelso.

Chapter Nine

CREDIT LIFE INSURANCE PREMIUM OVERCHARGING LITIGATION:[1] *INMAN v. HEILIG-MEYERS*[2]

PROLOGUE

When a consumer buys relatively costly items such as automobiles, furniture, or appliances, the purchase price is often wholly or partly financed by the dealership or retail store. When the contracts of sale and financing are signed, buyers are frequently asked if they would also like to obtain a special kind of insurance—for an additional fee—that would protect their purchase from repossession if they were unable to make the required monthly payments as a result of various calamities. One such coverage, dubbed "credit life insurance," is designed so that in the event of the purchaser's death, no further payments of any installments would be needed.[3] The primary financial beneficiary of this type of insurance is not the purchaser's family, but rather the seller-creditor who would be paid directly for all outstanding amounts owed on the purchase. But such coverage allows the surviving family members to rest assured that they would not have to return the goods or incur continued monthly payments if income ceased due to death. Offering this coverage is attractive to retailers not only because they are confident that they will be paid in full despite the death of the purchaser, but also because they often receive a commission for the sale of each policy.

Most credit life policies are "decreasing" or "declining term" in nature; that is, the insurer is obliged to pay an increasingly smaller benefit to the retailer as the purchaser's balance decreases. Once all payments have been made, coverage is terminated. The credit life insurance premium is sometimes itself financed and included in a loan's repayment schedule. Credit life shares a number of similarities with other optional finance insurance policies, such as those that cover the loss of the property (credit property) or the loss of the purchaser's income from either involuntary unemployment (credit unemployment) or health reasons (credit disability).

For some families, credit life policies are a plausible alternative to ordinary life insurance for the protection of their property from repossession because these policies usually have limited or no medical requirements for obtaining the insurance, and because the minimum coverage (and associated premium) can be smaller and more affordable than that associated with traditional life insurance.[4] In Alabama, for example, the cost of this insurance is 80 cents for each $100 of the financed purchase price for each year financed.[5] For these reasons, credit life policies (as well as the other types of optional finance insurance) are more popular in low-income communities where the ramifications of the loss of a family member's income may be especially severe. However, credit life insurance is generally not regarded by consumer advocates as a particularly good purchase because of its low rate of payout per premium dollar.[6]

The *McCullar* Case

In early 1993, the credit life industry in Alabama was about to undergo a radical upheaval due in no small part to the actions of attorney Garfield "Garve" W. Ivey, Jr. Ivey and his firm of King Ivey & Warren, in the north central Alabama town of Jasper, enjoyed a local reputation for litigating financial disputes, especially on behalf of consumers and against lenders.

The story began when an attorney friend of Ivey's, J. O. Isom of Hamilton, Alabama, reviewed client Cindy McCullar's installment contract for the purchase of a new automobile in order to uncover any potential defenses to an action brought against her for default on her auto loan. Initially, Isom thought there might possibly be some issues revolving around McCullar's contention that she had thought she was purchasing a six-cylinder automobile when in fact the dealer had only delivered a four-cylinder model. Isom filed a complaint based on a fraud theory, but during the course of his research he learned more about one particular aspect of McCullar's installment contract: the supplemental credit life policy she had agreed to buy as an add-on to financing when purchasing the car from the dealership. After studying the contract and discussing related issues with another Alabama attorney, Isom realized that its credit life premium was calculated using both the initial amount financed and *all* interest that could conceivably be paid over the life of the loan. In other words, the policy covered the total of all monthly payments anticipated in the installment plan, including any interest. Arguably, this calculation resulted in more coverage than was needed, because if the purchaser died while still making payments, the insurer would have to pay the seller only the unpaid principal (and possibly a single month's interest) in order for the surviving family to own the goods free and clear. The seller would certainly not be entitled to any interest not yet accrued.

If McCullar had died, the coverage would have been more than enough to pay off the outstanding debt and would have resulted in a surplus. Even though any excess credit life insurance benefits not needed to pay off the outstanding principal (and any interest accrued since the last payment made before death) would be rebated to McCullar's family or estate,[7] she had arguably paid a higher premium than she might have if the amount financed had been the sole focus of the coverage.

On the contract in question, the amount financed was $15,108.54 and was to be paid over 60 months; the total purchase price, plus precomputed interest, was $20,742.[8] According to McCullar's attorney, had the credit life policy covered only the unpaid principal, rather than also including the yet-to-be-incurred interest, the premium would have been $755.45 rather than $1037.10.[9] The difference of $281.65 was equivalent to a 27.16-percent reduction in the credit life insurance premium and a 1.36-percent decrease in the overall amount to be paid by the McCullars. What the McCullar family would have received as the rebated difference between the coverage amount and the outstanding principal (plus one month's interest) depended on the number of payments already made at the time of death. For example, assuming monthly loan payments of $345.70 and a 13.25 percent interest rate, the purchaser's death around the due date of the first payment would have resulted in a rebate of $5467 after the outstanding principal of $15,108.54 and a single month's interest of $166.82 were paid to the dealership. By the time the 30th payment was due, the rebate would have been about $1600; by the 50th, only $200.

The practice of calculating credit life premiums on the total of installment payments instead of only on the principal had arguably been sanctioned by both the Alabama Banking Department and the Alabama Department of Insurance since at least 1982.[10] Moreover, 14 other states indisputably allowed the coverage to include the total of payments and arguably 26 other states did as well.[11] Nevertheless, Isom felt that his interpretation of various Alabama state statutes and regulations relevant to credit life premiums was persuasive enough to drop that original fraud suit (over the number of cylinders in McCullar's auto) in favor of a new complaint that concentrated only on credit insurance issues. Isom filed a suit (*Cindy McCullar v. Universal Underwriters Life Insurance Company et al.,* No. CV93-89, Marion County Circuit Court) against the credit life insurer and the dealership in May 1993. The complaint was based in part upon the state's truth-in-lending law, the Alabama Consumer Credit Act[12] (popularly known as the "Mini-Code"). A key issue revolved around the meaning of the following provision:

> With respect to any credit transaction, the creditor shall not require any insurance other than insurance against loss of or damage to any property in which the creditor is given a security interest and insurance insuring the lien of the

> creditor on the property which is collateral for said transaction. Credit life and disability and involuntary unemployment compensation insurance may be offered and, if accepted, may be provided by the creditor. The charge to the debtor for any such insurance shall not exceed the authorized premium permitted for such coverages. *Insurance with respect to any credit life transaction shall not exceed the approximate amount and term of the credit.* (Emphasis added.)[13]

The question was whether the practice of selling coverage for as yet unpaid principal *plus* interest, alternatively referred to as "gross coverage," "total of payments coverage," and "gross-based premiums" (or "gross loan balance"), exceeded the "amount and term of the credit" limits as defined in the Mini-Code. Also of concern was Alabama Insurance Regulation No. 28 § III, which provided that insurance "with respect to any credit transaction shall not exceed the approximate unpaid balance of the loan." The issues were serious ones, even given the relatively small amounts alleged to be overcharged, because at the time the Mini-Code's penalties for intentional excess finance charges included forfeiture of both the interest *and* the underlying principal.[14]

While his case was proceeding, Isom dropped off a copy of his complaint at the offices of his friend Garve Ivey for review. Unfortunately for Cindy McCullar, a Marion County circuit judge was not convinced by her attorney's arguments that the practice violated state laws and regulations. After considering the affidavits of key banking and insurance department staff members who indicated that their agencies had expressly approved the use of total of payments policies, the trial court granted summary judgment for the defendants in October 1993. Isom thereafter appealed the ruling to the Alabama Supreme Court, but by this time he had Ivey's assistance and expertise in consumer-related financial litigation to help in arguing his case.[15] While the *McCullar* case only involved a single policy, the outcome would have a significant impact on the entire credit life industry.

THE LITIGATION BEGINS

Even before the supreme court's deliberations in the *McCullar* matter, and despite the adverse summary judgment in that case at the trial-court level, Ivey saw the potential for large-scale class actions based upon the credit life premium fraud theory currently being advanced in the Marion County matter. As one of the targets for such a class suit, he selected Heilig-Meyers Furniture,[16] a furniture retailer based in Richmond, Virginia, with over a billion dollars in annual sales and whose forté is "face-to-face" contracts with customers who may not have checking accounts, credit cards, or good credit.[17] One of the largest

furniture retailers in the nation, Heilig-Meyers had 700 stores nationwide in August 1996 and 39 in Alabama,[18] where it had been selling furniture through its retail store operations since 1986. Part of the operating strategy of the corporation includes locating its stores primarily in small towns and rural markets that are at least 25 miles from a metropolitan area, as well as offering in-house credit programs to provide flexible financing to its customers.[19] Technically Heilig-Meyers is only a retailer of furniture, not a lender, but because the company "extends merchandise on credit" as per the Mini-Code definition, it falls under its requirements as a seller of credit.

Heilig-Meyers drew Ivey's attention because furniture buyers who were being extended credit by the retailer had routinely been given the option of buying a supplemental credit life policy. Though Heilig-Meyers' sales personnel were providing the opportunity to buy the credit life coverage, Voyager Life Insurance Company[20] technically issued the optional insurance. Voyager had been issuing Heilig-Meyers' credit policies since September 1989. Voyager is not related to Heilig-Meyers; however, Voyager paid a 50-percent commission to Heilig-Meyers for each policy sold. The furniture company deducted its commissions from the policy premiums received from the installment purchasers before forwarding the remainder of the premiums to Voyager.[21]

During the appeal of the *McCullar* case, Ivey chose nearby Fayette County, a semirural area of northwestern Alabama with about 18,000 inhabitants,[22] as the site for his May 12, 1994 filing against Heilig-Meyers and Voyager.[23] The suit was one of the first times Heilig-Meyers had been a defendant in a consumer class action. Instead of a single plaintiff and a single transaction as in the *McCullar* matter, the case was pled from the beginning as a statewide class action and alleged credit life premium overcharging on a company-wide scale. Marilyn and Gary Inman, Heilig-Meyers customers who on May 12, 1993, had made a purchase on one of the furniture retailer's installment contracts and had also purchased an optional credit life policy underwritten by Voyager Life, were the designated plaintiffs.[24] Counsel associated with Ivey were Clatus Junkin (a recently retired Fayette County judge), Charles E. Harrison, and subsequently Barry A. Ragsdale. The trial judge was James W. Moore, Jr., reportedly Junkin's choice to succeed himself on the bench. Heilig-Meyers' defense was initially handled by Luther M. Dorr, Jr., of Birmingham's Maynard Cooper & Gale, and E. Duncan Getchell, Jr., of McGuire Woods Battle & Boothe, in Richmond, Virginia; eventually David G. Greene of Atlanta's Lord Bissell & Brook also participated on the defendant's team. Voyager was represented by William B. Hairston, Jr., and Nathan B. Norris of the Birmingham firm of Engel Hairston & Johanson.

The Heilig-Meyers class action was one of over a hundred Ivey and his office would subsequently file that advanced similar credit life overcharging theories against other installment contract providers in Alabama, such as auto dealerships, retail stores, and small loans brokers. [25]

PRIMARY ISSUES OF THE LITIGATION

The complaint alleged that Heilig-Meyers and Voyager entered into a contract for insurance on the lives of the plaintiffs for coverage sufficient to protect any "unpaid indebtedness";[26] however, the contract was breached when the amounts of insurance actually sold were in excess of that needed to protect whatever indebtedness remained in the event of death. Moreover, the overcharging of credit life premiums was alleged to be "oppressive, unreasonable, unconscionable, against public policy and not in the public interest."[27] Other allegations—though not as novel as the overcharging claim—were also included.[28] The complaint charged that fraud occurred when Voyager and Heilig-Meyers misrepresented to plaintiffs that the credit life policy premiums would be paid "to the insurance company for credit life insurance," when in actuality some amount of the premium was eventually retained by Heilig-Meyers as its commission.[29] The failure to disclose that these were decreasing term policies was also felt to go to the issue of fraud.[30] These actions (or inactions) were held out to be part of the defendants' "routine, daily, and standard" "pattern and practice" and were alleged to have been part of each credit life transaction, the only difference being the size of the premiums. The plaintiffs asked for compensatory and punitive damages and for an order declaring the contracts void and unenforceable. The complaint also asked the court to certify an Alabama Rules of Civil Procedure (ARCP) 23(b)(3) class,[31] with the Inmans as representatives of over 10,000 retail installment contract purchasers who had bought credit life coverage from the defendants, to award monetary damages for the class, and to provide declaratory and injunctive relief.[32]

Like the car dealership in the *McCullar* transaction, Heilig-Meyers gave its customers the option of purchasing a credit life policy in conjunction with the credit transaction. There was no question that the premiums were indeed written on the gross loan balance, nor that Heilig-Meyers earned a 50-percent commission on the credit insurance premiums sold to its customers.[33] In response to the plaintiffs' allegations, however, Heilig-Meyers argued that the buyers were, or reasonably should have been, aware of exactly what was the subject of the credit life policy. The defendants claimed that the federal Truth in Lending Act[34] disclosures in the credit contracts—"the benchmark for consumer protections in these types of transactions"[35]—adequately set forth the amount financed, the applicable percentage rate, the total finance charge, and

the total of payments. Moreover, the "Total of Payments" figure was defined in the contract as the "amount you will have paid after you have made all payments as scheduled."[36] On the Customer Insurance Certificate issued by Voyager and attached to the credit contract, the "Initial Amount Insured" set forth was the same as the total of payments on the credit contract.[37] There was no subterfuge or attempt to mislead, Heilig-Meyers suggested; indeed, the buyers knew exactly what they were getting into. No breach could have taken place because Heilig-Meyers obtained precisely the amount of insurance the Credit Contract and Customer Insurance Certificate indicated. In addition, any insurance benefits not needed to pay the outstanding principal would have been rebated to the decedent's estate, a fact the defendant claimed was clearly revealed on the Customer Insurance Certificate,[38] so no excess would have been pocketed by Heilig-Meyers. The defendants also claimed that the additional coverage was prudent in light of the fact that monthly payments often are missed during the period preceding death from illness, and if the policy paid off only the principal, the surviving family would still owe some amount—possibly a substantial one—of interest. In regard to the commissions Voyager paid to Heilig-Meyers, defendants argued that such commissions were regulated and approved by the Alabama Department of Insurance, were typical of commissions allowed in other states, need not be disclosed because the federal disclosure requirements were silent on this issue, and could legally be withheld by the furniture retailer out of the policy premiums it collected on Voyager's behalf. [39] Additionally, Heilig-Meyers also counterclaimed against the Inmans for nearly $1900 left on the installment contract.[40]

Paralleling their defense in *McCullar*,[41] defendants subsequently offered affidavits from Robert F. Floyd, supervisor of the Alabama Banking Department's Bureau of Loans (the designated deputy administrator responsible for enforcing the Alabama Mini-Code), and from Harland Dyer, consulting actuary for the Alabama Department of Insurance (one of the persons responsible for interpreting and applying insurance statutes and regulations as they relate to actuarial computations).[42] Defendants argued that the interpretations of these key agencies' staff members who routinely oversaw the calculation and sales of credit life policies lent credence to the view that coverage for the total amount of unpaid installments was within the bounds of the law:

> 4. The State Banking Department, in its official capacity as the regulatory agency over licensees under the Mini-Code, has consistently interpreted the Mini-Code to permit and authorize credit life insurance premiums to be calculated and the amount of credit life insurance to be written based upon the "total of payments" in the context of an add-on, precomputed interest loan. The Department has so informed and enforced the interpretation of the Mini-Code and its implementing regulations as to licensees.[43]

> The Insurance Department agrees with this interpretation as consistent with Insurance Regulation 28, and has so confirmed both to insurers and financing companies who have so asked.[44]

How the state supreme court eventually would rule on the similar assertions of *McCullar* would have great impact on the resolution of *Inman*.

THE LITIGATION CONTINUES

Litigation in the *Inman* case moved slowly because crucial issues were simultaneously being addressed in the supreme court's consideration of Isom's and Ivey's appeal of the October 1993 summary judgment ruling in *McCullar*. However, the first order of business was the motion for class certification that was filed simultaneously with the original complaint in *Inman*. Plaintiffs' counsel moved the court to certify a class of all living Alabama residents who had purchased credit life from Voyager as part of a Heilig-Meyers installment contract during the 20 years before the filing of the action in May 1994. In actuality, the period in question for covered purchases would have been less than four years because Voyager had been writing credit life insurance for Heilig-Meyers customers only since September 1989. Through September 1994, Heilig-Meyers had sold Voyager credit life policies generating an estimated $3.15 million in premiums to perhaps as many as 150,000 consumers in 300,000 transactions.[45]

After listening to the oral argument of counsel in a vigorously contested hearing that lasted about half a day, Judge Moore ordered on November 29, 1994, that the case could conditionally proceed as a class action "pursuant to Rule 23(b)(1), (2), and (3) of the Alabama Rules of Civil Procedure," and that there would now be two subclasses: one for any purchasers of Voyager credit life insurance, and a second for Heilig-Meyers customers who had purchased any credit life insurance from any insurer as a result of installment contracts with the furniture retailer.[46] As requested, the subclasses were limited to living class members, and the period of time for which purchases qualified a consumer for class status was set at 20 years. The division of the class into two subgroups essentially dissolved the linkage between the two defendants in terms of the allegations; a consumer could now be a class member if he or she had purchased any Voyager credit life policy (from any retail store, dealership, or other installment contract seller) *or* if he or she had bought any credit life policy offered through Heilig-Meyers (regardless of whether it was underwritten by Voyager or some other insurance company).[47]

The Inmans were appointed as class representatives and Ivey, Junkin, and Harrison were named as class counsel. The defendants were required to pro-

vide the names, addresses, and telephone numbers of all class members to class counsel by December 19.[48] Notice to the class of the certification was to be accomplished in two ways: Class counsel was to publish a notice in newspapers of general circulation once a week for three weeks and to mail a copy of the notice to each class member. Assuming that the mailing of notice would be completed by February 1, 1995, the court set March 1, 1995, as the deadline for class members to opt out of the action.[49] A Request for Exclusion form was subsequently added to the anticipated notice to provide a convenient method by which class members could opt out.[50]

The dates for providing the identity of class members and for giving notice set out in the certification order soon became irrelevant. In December 1994, the defendants filed motions for reconsideration of the certification order.[51] Heilig-Meyers wanted the notice to advise class members that by electing to remain in the class, a "substantial number" of class members would be subjecting themselves to compulsory counterclaims (as had been filed against the Inmans). Voyager claimed that it did not maintain a list of the names and addresses of the purchasers of its credit life policies and so could not provide the information to the class counsel as ordered. In light of this claim of having no list of insureds, Voyager also wanted the notice to be amended to reflect that each class member would have the burden of proving each policy purchase. The 20-year purchase period was also attacked as being too broad. The defendants argued that statutes of limitations barred any tort claims involving contracts executed more than two years before the complaint was filed; moreover, the loan and insurance documents that class members had received provided sufficient information to put them on notice of any alleged fraud (thus, the statute began to run immediately at the time of purchase).[52] The defendants also argued that, in any event, the longest statute of limitations for the key allegations of breach of contract, fraud, and unconscionability would be six years. At the very least, they maintained, the size and scope of any class should be limited to customers in this smaller group.

Soon after they made the motions for reconsideration, defendants moved for summary judgment, primarily on the basis that the Alabama Banking Department's Bureau of Loans and the Alabama Department of Insurance had given their stamp of approval to total-of-payment credit life premiums.[53] Because the motions for summary judgment and reconsideration of the certification order could conceivably determine whether there was a need for plaintiffs' attorneys to initiate the process of informing the class, class counsel deferred the initiation of notice until the court ruled. Additionally, the parties were beginning to explore the possibility of settlement; consequently, Judge Moore granted an oral motion for postponing notice.

Final rulings on the reconsideration of summary judgment and certification never came, in part because of the pending appeal of the similar suit in *McCullar*. Over the next few months, not much activity transpired in the Fayette County courtroom because there was little point in pushing the *Inman* matter along briskly until the core issues had been decided elsewhere.

Finally, the dam broke. The Alabama Supreme Court ruled on September 29, 1995,[54] that the credit life premium calculations in *McCullar* indeed constituted overcharging and were in violation of the Mini-Code. Moreover, the court declined to apply the case's holdings prospectively only.[55] In ruling that the concept of gross coverage "contravenes the plain language of the statute," the court also held that prior state banking and insurance department interpretations were "inconsistent with this plain meaning."[56] Critically, the court ruled that selling the insurance in a manner consistent with regulatory agencies' interpretations did not absolve the defendants of liability for fraud:

> . . . we determine that the species of fraud under which a plaintiff can assert a claim is that of an "innocent/mistaken" misrepresentation.[57]

Whether the creditor's actions constituted fraud was held to be a question of fact for the jury, and the underlying summary judgment was therefore overturned.[58]

With the supreme court's decision in *McCullar*, the outcome of *Inman* was arguably a forgone conclusion. One commentator felt that insurers would have little choice but to settle such credit life overcharging cases:

> Numerous class action suits relying on McCullar have been filed throughout the state of Alabama. One consumer class action suit names 224 insurance companies as defendants and any other "person or entities . . . who or which sold or made available for sale, credit life insurance in the State of Alabama at any time within the period of twenty (20) years preceding the filing of this action." *As plaintiffs' attorneys capitalize on the McCullar holding, insurance companies will probably settle to avoid further liability. Insurance companies are in a precarious position because McCullar leaves them with no bargaining power, and litigating cases involves the risk of punitive damages. Thus, insurance companies will have little choice but to settle these cases.* (Emphasis added.)[59]

McCullar also directly affected Heilig-Meyers' operations. The defendant reported to us that within two weeks of the supreme court's decision, the furniture retailer stopped selling credit life insurance policies that were based upon the total of payments.

Activity in another branch of government also had an effect, albeit an indirect one, on the outcome of *Inman*. During the spring of 1996, the Alabama legisla-

ture debated the credit life coverage problem in response to the supreme court's rulings and the flurry of class action filings. When amendments to the Mini-Code were finally passed, they specifically forbade the use of unearned finance charges, except for a single payment's worth of interest, in the calculation of credit life policies for all consumer credit transactions entered into on or after June 19, 1996 but did not speak to policies issued before that date.[60] The legislation provided a safe harbor for creditors in the future: They could not be held liable for a violation if they were following state regulations. The amendments also limited the penalties for intentional finance overcharges to forfeiture of the interest on the contract rather than including forfeiture of the underlying principal. Importantly, the legislature applied these limits on forfeiture penalties retroactively, including to pending lawsuits such as *Inman*. Garve Ivey, a member of the negotiating team for the Mini-Code amendments on behalf of the Alabama Trial Lawyers Association, downplayed the impact of the legislation:

> The Mini-Code bill that passed is substantially unchanged from the current law . . . . The penalties do change somewhat, to the detriment of the consumer. But taken as a whole, it was a reasonable compromise.[61]

David Greene, the attorney for Heilig-Meyers at this time, felt that the revisions were a "hodgepodge" that would not end the litigation problems because the legislation's safe harbor for following state regulations and certain other provisions did not apply retroactively.[62] As the legislature debated the Mini-Code amendments, the *Inman* case moved forward, albeit with the possibility that the plaintiffs might be forestalled from recovering the underlying principal on the contracts.

Greene was experienced in representing large corporate defendants who were being sued in Alabama, and he realized that the combined impact of statewide issues being argued in a venue located in a semirural community, a verdict with at least the potential for punitive damages, and the currently controlling appellate case law was overwhelmingly in favor of the plaintiffs. On the other hand, the legislature was moving toward reducing the potential size of any compensatory verdict in the case by retroactively limiting the penalties for finance-charge excesses to the amount of interest overcharged. And on April 1, 1996, the Alabama Supreme Court heard arguments for reconsideration of its holdings in *McCullar*, most critically in regard to issues of retroactive application,[63] thus giving defendants the hope that the adverse decision might be blunted with respect to past transactions. Indeed, one possible interpretation of the supreme court's initial ruling was that credit life total-of-payment fraud claims could *only* be brought as "innocent/mistaken" misrepresentation; if this were true, punitive damages might not be available because the requisite require-

ments of unconscionable behavior would be lacking. During this relatively favorable period of uncertainty about the impact of *McCullar* on rehearing, Greene felt the time was right for resolving the case as inexpensively as possible. On April 12, 1996, the case partially settled, and the settlement class was broadened to all credit life and credit disability insurance transactions with Heilig-Meyers.

Greene, in a newspaper story about the case, was quoted as saying that Heilig-Meyers agreed to the settlement to avoid lengthy litigation. "These are extremely technical arguments about how premiums should be calculated and charged. . . . There was a valid question raised here. It wasn't that big an amount of money."[64]

DETAILS OF THE AGREEMENT

The Settlement Class and Settlement Benefits

The settlement between defendant Heilig-Meyers and class counsel did not include Voyager. Ivey and Greene agreed to a settlement that was defined as "each and every living person who, while a resident of Alabama, at any time on or before October 13, 1995, purchased any policy, contract, or other form of coverage" from Heilig-Meyers for either credit life or credit disability insurance.[65]

This class was proposed to be certified as a non-opt-out class under ARCP Rule 23(b)(2) for the purpose of obtaining injunctive relief. Interestingly, in the original complaint, the plaintiffs had asserted that the prerequisites for certification under either Rule 23(b)(1) or (b)(2) did not apply to the action.[66] Another change from the early days of the litigation was the addition of credit disability policy buyers to the class definition. Both the plaintiffs and defendants felt that because such coverage was only issued as a rider on Heilig-Meyers credit life policies and essentially arose out of the same transaction, inclusion of any claims related to credit disability into the settlement agreement was compulsory.[67] The key issue from the original complaint germane to credit disability policies would have been the alleged nondisclosure of the commissions earned by Heilig-Meyers (as well as the retention of commissions before it remitted the balance to Voyager); this type of insurance makes monthly payments for purchasers during any period where illness or injury prevents them from working, so there was no dispute over the need to include both principal and interest in each payment.

Under the claims-made settlement agreement, those class members who submitted a claim would be entitled to one-half the difference between any premi-

ums paid that were calculated on the gross basis and what they would have been if they had been calculated on the net amount of principal owed. The agreement claimed that such restitution "effectively divests Heilig-Meyers of its earnings on the credit life and/or disability charges challenged in the Action";[68] because Heilig-Meyers received a 50-percent commission on the amount of the premiums collected from the purchaser, half of the alleged excess amounts collected would constitute their "earnings" on the overages. An additional fund for "extra contractual damages" of $250,000 was also established, to be divided equally among all class members who had satisfied the proof-of-claim requirements.[69] As part of the settlement, and as the basis for (b)(2) class treatment, Heilig-Meyers was "enjoined from certain practices in connection with permitting the sale of credit life and/or disability insurance" written on their retail installment sales contracts. Aspects of this injunction on Heilig-Meyers regarding its practices on supplemental insurance would be modified automatically to comport with subsequent legislation, regulation, or Alabama Supreme Court rulings. In return, the class released any possible claims regarding the premiums, rates, methods of sales, disclosures made or not made, or amounts of credit life or disability insurance. It also released any claims over issues related to commissions retained by Heilig-Meyers out of the premiums. Claims against Voyager were not affected by this agreement.

Even though it was part of the parties' settlement, the supplemental fund of $250,000 to be shared among the claiming class members became a point of disagreement between the class and the defendant's counsel as to its purpose. At the time, Ivey referred to the fund as "punitive damages," while Greene suggested that even had the defendant's conduct been wrong, it certainly would not qualify as outrageous or reprehensible.[70]

Notice

Heilig-Meyers would provide notice of settlement (as well as the pendency of the class action and the forthcoming fairness hearing) to the class within 60 days of entry of the preliminary order with respect to the settlement. Defendant's counsel would notify class members in two ways: by first-class mail to all class members who currently had balances on Heilig-Meyers retail installment sales contracts, and by publication to those without current balances or those who did not receive the notice by mail. Notice by publication would be effected by placing ads once a week for three consecutive weeks in newspapers of general circulation in the state's largest cities: Mobile, Montgomery, Birmingham, and Huntsville. Heilig-Meyers would bear the costs of this initial notice. Class members who wished to object to any aspects of the settlement would be required to file an objection no later than 15 days before the fairness hearing. If the settlement was approved at the fairness hearing, provisions for notice of

such approval and of the claim process were to be similar to those used for the notice of the proposed settlement.

Claiming Process

To obtain the refund, the claiming class member would have to submit a properly completed claim form (containing name, address, date and location of purchase, and a description of the item bought), a copy of the customer's insurance certificate, and a copy of the underlying retail installment sales contract.[71] Heilig-Meyers would make the refund by crediting the accounts of those class members with outstanding balances and by writing checks to all others. If a class member could submit only the claim form with his name and the date and store of purchase, but could not provide a copy of one or both of the other two documents, Heilig-Meyers agreed to conduct a "diligent search" to obtain the missing items. In the event the search was unsuccessful, class members who had submitted only a claim form would receive a certificate for 10 percent off the regular selling price of any item in an Alabama Heilig-Meyers store. The certificates would be freely transferable but would expire after June 30, 1998—about two years after the settlement date. Any potential benefits owed to class members who could not be located by May 30, 1997, would revert to Heilig-Meyers, as would the value of the coupons after their 1998 expiration date.

Interestingly, nowhere in the stipulation of settlement or the joint motion for approval do either the plaintiffs or the defendants state what they believed was the total size of the class, the total damages owed to the class, an estimate of the number of class members who were likely to make a claim, an estimate of the total amount of money that was likely to be paid to class members, or any formulae for calculating the difference between net and gross premiums. However, one of the plaintiffs' attorneys we spoke to indicated that such estimates were probably a part of the oral discussion at the final fairness hearing.

Fees and Expenses

Plaintiffs' counsel agreed not to petition the court for any fees and expenses exceeding $580,000, and Heilig-Meyers agreed to not to object to any amounts requested as long as they did not exceed this cap. According to the settlement stipulation, these covenants were not to be "construed as an agreement between plaintiffs, their counsel, and Heilig-Meyers as to the amount of attorneys' fees to be paid to class counsel by Heilig-Meyers."[72] No pleadings were filed with the court that demonstrate any justification for the size of the plaintiffs' fee request in regard to hours expended, comparison to class benefit, or effect on

the practices of the defendants. One of the plaintiff attorneys has asserted that justification for the fees would have been made orally at the final fairness hearing. Moreover, the attorney asserted that the fee request should be viewed in light of not only the amount of money ordered to be refunded to the class but also the suit's effect on the defendant's credit life practices. For the most part, the settlement was negotiated while the reconsideration of the original *McCullar* decision was pending; because the plaintiffs were uncertain how the Alabama Supreme Court would eventually rule, they felt the settlement required a specific injunction to prevent future total-of-payment policies. They also believed the cessation of such sales to be indirectly influenced by this and other credit life class actions because the latter forced the Alabama legislature to clarify the relevant issues through its 1996 revisions to the Mini-Code.

PRELIMINARY APPROVAL

On May 15, 1996, after an hour-long hearing, the court issued its preliminary settlement order and found that the terms of settlement appeared to be within the "range of reasonableness."[73] The class certified in November 1994 was now officially modified to consist of:

> Each and every resident of the State of Alabama, or persons then present in Alabama, who at any time prior to the date of this Order made an installment purchase through or from the defendant Heilig-Meyers Furniture company, on which installment sale credit life and/or disability insurance was included. [74]

Because Heilig-Meyers had operated in Alabama since 1986, this group would conceivably include anyone who bought coverage during the previous decade; in actual practice, however, Heilig-Meyers' credit life insurance sales were initiated around the beginning of 1990, so the settlement class only included sales made during the previous six years. At the plaintiffs' request, the preliminary certification provided for an ARCP Rule 23(b)(2) non-opt-out class.[75] The court designated the Inmans as class representatives and Ivey and Junkin as class counsel. A final certification and settlement approval hearing was set for 120 days following.

Some of the terms of the settlement agreement were amended slightly by this preliminary order. The court now required notice by first-class mail of all members for whom Heilig-Meyers had addresses and made no mention of limiting mail notice only to those with current balances. All others with unknown addresses were to be given notice by publication. Also, the court held that those class members who failed to object according to the terms of the settlement waived their right to object or relitigate their claims.

FINAL APPROVAL

Though they jointly agreed to end the case, lawyers for the plaintiffs and for Heilig-Meyers assessed the need for the litigation differently between the preliminary approval of the settlement and the final hearing. Ivey saw the case as an example of litigation protecting consumers[76] from contracts that put them at a distinct disadvantage, and was quoted as saying: "Their customers may have a high degree of sophistication in their trade or craft, but not in financial matters. Heilig-Meyers has some of the finest lawyers in America put together these contracts for the average guy to sign." [77]

Greene thought the suit was yet another example of the greed and power of Alabama trial lawyers and that the motivations behind bringing such suits were not purely altruistic: "These guys are not in it out of the goodness of their hearts."[78]

The final hearing on the settlement was conducted on September 17, 1996.[79] The questions presented were whether the litigation should be finally certified as an ARCP Rule 23(b)(2) class action, and the amount of the award to the plaintiffs' attorneys; in addition, Judge Moore was to consider any objections to the proposed settlement. In support of approval, Heilig-Meyers informed the court that it had indeed provided notice as required by mailing "greater than 100,000 Settlement Notices" to class members for whom they had an address and by newspaper publication.[80] The defendant indicated that in response to the notice effort, it had received only a couple of hundred letters regarding the settlement. These letters from class members were primarily notifications of name or address changes or complaints regarding unrelated problems (e.g., scratched furniture) and none were formal objections to the proposed settlement. Five class members (represented by two separate lawyers) did indicate to Heilig-Meyers that they considered filing an objection, but the defendant separately settled each of their claims (Heilig-Meyers has declined to reveal the terms of these settlements). With the resolution of these matters, neither the parties to the agreement nor the court had received any formal objections by the time of the final hearing. By terms of the agreement and preliminary order, no class member requests for exclusion from the settlement were considered because this was a non-opt-out injunctive class.

As a result of a hearing that, like the preliminary approval hearing, lasted about an hour, the court found that the requirements of ARCP Rule 23(b)(2) were met[81] and approved the class set forth in the preliminary order. Alabama class action rules require that, in addition to the standard tests of numerosity, commonality, typicality, and adequacy of representation, a (b)(2) class is appropriate when

> [t]he 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. . .

The maintenance of the action as a (b)(2) class was found to be "superior to any other means of adjudicating the claims raised."[82] In this light, all class members—regardless of whether they completed the claiming process—were then "enjoined and prohibited from commencing or prosecuting any action . . . [or] asserting any claims that are released under the settlement. . ."[83] Any and all class members' claims against Heilig-Meyers over their purchases of credit life or disability insurance—including claims of fraud, misrepresentation, Mini-Code violations, violations of federal Truth In Lending, RICO, or Antitrust and Restraint of Trade Acts, or breach of contract—were dismissed with prejudice. However, the court expressly retained its jurisdiction over the enforcement or implementation of the settlement agreement and all other issues involved in the action. The Final Judgment was careful to note that the release from liability was only effective for Heilig-Meyers and did not include Voyager Life Insurance Company.[84]

In approving the settlement between the parties, the court found the notice given to class members of the proposed settlement and fairness hearing to be the best practicable under the circumstances and noted that there were no objections to its adequacy. Heilig-Meyers was ordered to send class members another notice of the final claim process within 60 days of the effective date.[85] Like the original notice of preliminary settlement, notice of final approval and claiming process was to be accomplished by first-class mail to all class members for whom Heilig-Meyers had addresses and by newspaper publication (once a week for three consecutive weeks in newspapers of general circulation in Mobile, Montgomery, Birmingham, and Huntsville) to all others (or to those who for some reason did not receive the notice by mail). All costs of this re-notice and of the administration of the settlement were to be borne by the defendants.

Fee Award and Settlement Fund

Finding that Ivey and Junkin had adequately represented the interests of the class, the court also awarded $580,000 to class counsel to be paid by Heilig-Meyers.[86] No other fees or costs were awarded. The basis of this award (either as a percentage of the total settlement fund or as compensation for actual hours of work) is unclear from the final order itself (presumably, it might have been based on oral arguments made at the hearing).

How much money was actually being offered to settle the class action, and what would the average class member receive? Though the approved settlement provided that successful claimants would receive 50 percent of the portion of the premiums that pertained to covering the interest payments on the purchase (plus a pro rata share of the $250,000 supplemental fund), pleadings filed in the case do not set forth the estimated size of the settling class, the total amount of overcharges, or what the defendant expected to distribute in benefits. Nevertheless, we can get a rough idea of the size of the defendant's maximum potential exposure by using what little information is publicly available.

Combining estimates offered by plaintiffs and defendants in various pleadings throughout the litigation, we find that Heilig-Meyers appears to have collected about $3.15 million worth of Voyager credit life premiums from 150,000 consumers in 300,000 transactions over a five-year period ending in September 1994. Figures for the period from September 1994 up to the point at which the defendant ceased sales of total-of-payment policies are not available.[87] How much of this $3.15 million would have been "excess" in terms of using the total-of-payments (principal plus interest), rather than the initial purchase price only, as the basis of the premium? Because the price of credit life insurance is a fixed percentage per $100 financed per annum, the excess on any particular contract would be the cost of credit life coverage on the total interest charges; therefore, the proportion of a premium that was excessive is the same as the proportion that total contracted interest would be of the aggregate total monthly payments. This proportion is independent of the price of credit life insurance ($.80 or $1.00 for every $100 financed for each year financed) or the amount of the underlying principal. It is, however, a function of the annual interest rate and the number of months financed. For example, 27.16 percent of the credit life insurance premium charged in the *McCullar* automobile finance contract—on a 60-month contract with a 13.25 percent annual interest rate—was alleged to be improperly based on the precomputed interest. This percentage would increase as the number of monthly payments increased (e.g., 35.05 percent for 84-month contracts) or as the annual interest rate increased (34.37 percent at 18 percent APR). Thus, it is possible to know how much of a premium was for excess coverage if one also knows the length of the loan and the annual percentage rate.

While Heilig-Meyers, for all its stores nationwide, extends credit for terms for up to 24 months, the average installment contract was about 17 months, according to documents the company filed with the Securities and Exchange Commission.[88] Telephone calls to the credit departments of a number of Heilig-Meyers Furniture stores in Alabama indicated that in April 1998, the company offered financing of retail purchases for periods of three to 20 months with a range of annual interest rates from 20 to 24 percent. Using these maximum rates and

lengths as upper bounds, a credit life policy premium based only on the underlying principal in a Heilig-Meyers 20-month, 24-percent interest loan would be, at most, 18.24 percent less than a premium calculated on total-of-payment coverage.[89] If these terms were consistently applied to the contracts entered into by all class members, as much as $574,560 of the $3.15 million in all premiums paid in the five-year period through September 1994 would have been based on the total interest paid. Therefore the average overcharge for each of the estimated 150,000 consumers was $3.83. To the extent that finance agreements were for less than 20 months of payments or for less than 24 percent annual interest, the total estimated overcharge would be reduced from $575,000, and the average overcharge per consumer would drop as well. On the other hand, because consumers might have entered into multiple contracts with the furniture retailer, or made particularly large purchases, some might have been overcharged more than our estimated $3.83 average. For example, if a customer bought $5000 worth of furniture (perhaps as a result of multiple transactions), financed this amount over 20 months and at 24 percent interest, and bought a supplemental total-of-payments credit life policy at $1 per $100 financed per year, the excess premium would be $18.59.[90] Our classwide average of $3.83 in overcharges is similar to a $1030 purchase paid over 20 months, at 24 percent, and a credit life cost of $1 per $100 financed per year (or a $1286 purchase at the post-August 1991 credit life rate of $.80 per $100 per year).

Although we were able to collect some information on Heilig-Meyers sales to calculate this average overcharge, we cannot make an accurate estimate of total overcharges to the class because the total class period covered by the Heilig-Meyers settlement includes purchases made up to the date of the preliminary order approving the settlement (May 15, 1996), or about 19 months longer than the 60 months for which we have some indication of the amount and number of policies sold. Even using the reported October 1995 date for the last Heilig-Meyers gross coverage credit life sales, we would still lack about a year's worth of additional data.

Nevertheless, we have some idea of the responsibility of the defendant under the settlement agreement. Heilig-Meyers claimed to have mailed individual notices to more than 100,000 class members and all others were given notice of the settlement by publication only. One should remember that Heilig-Meyers mailed notices only to individuals for whom it had addresses, so we can assume that the true class size is larger than the number of letters sent. This assumption is supported by indications that over a five-year period ending in September 1994, an estimated 150,000 customers made purchases involving credit life insurance. Assuming these customers satisfied the settlement class criteria, they would also have been part of the class—but so would have other customers who made purchases any time from October 1994 to May 1996 (or October

1995, if we use the defendant's reported date of last gross coverage policy sales). If 150,000 indeed represents the actual size of the class, and all members sent in a successful claim form and were paid 50 percent of the average premium excess ($3.83/2 = $1.92) plus their share of the $250,000 supplemental fund, we estimate that Heilig-Meyers would have been responsible under the terms of the settlement for issuing checks and credits totaling about $537,325 (for an average benefit of $3.58). In the unlikely event that there were 200,000 in the class, the defendant might have had to pay out $633,100 (average benefit of $3.17). If the true class size were doubled or tripled compared to the 150,000 floor, Heilig-Meyers' responsibility to the class would have been at most $824,649 or $1,111,974 (and average benefits of $2.75 and $2.47 respectively).

We think it is fair to compare these estimates (ranging from $540,000 to $1.1 million) to the class counsel award of $580,000. But the plaintiffs' attorneys have argued to us that the figures do not tell the whole story of the impact of *Inman* and similar litigation. In their view, the suit forced the entire credit life industry in the state of Alabama, and Heilig-Meyers in particular, to halt the sale of total-of-payment policies.[91]

DISTRIBUTION OF SETTLEMENT FUNDS

The process for making a claim was simple. Because the defendant had agreed to make a search of its records to locate retail installment contracts and the insurance certificates, conceivably all that class members had to do was send in their names and addresses and the location of the store of purchase to obtain the benefits. According to the Final Judgment, all such proof of claims would have to be filed within 180 days of the effective date of the settlement. Heilig-Meyers would have up to 90 days to provide benefits after the cutoff for filing a proof of claim. However, class members who did not receive notice, were not located, or for any reason failed to make a valid and timely claim forfeited their rights to the settlement. No requirement was placed upon Heilig-Meyers to pay any such forfeited benefits, or the value of any checks issued but not cashed within 180 days, to the court, to other class members, or to any third-party charity. The process of settlement administration was to be self-administered by Heilig-Meyers at its expense, and the records of distribution would be provided to class counsel. However, there was no provision for ongoing reporting of the claims process to the court nor any requirement that a final report of the distribution be made to the court.

Because public accounting was not required, it is not possible to assess independently the distribution of the settlement benefits to the class without the cooperation of either class counsel or the defendant. Heilig-Meyers did provide such information to us. It appears that 5940 claims were made to recover one-

half of the credit life premium overcharges plus a share of the $250,000 supplemental fund. The total amount distributed to the class was approximately $272,000 for an average payment of $45.79 per claim. Almost all of the average payment was from the supplemental fund; only $3.70 was for the overcharge. Heilig-Meyers also reported to us that the costs of providing the notice of the settlement, final judgment, and claiming process were about $125,000, and the costs of administering the settlement benefit distribution were at least $175,000.[92]

One cannot independently assess the actual value of the settlement as disbursed without knowing what the parties estimated the size of the class to be at the time of the final judgment. It appears that claimants who actually received settlement benefits had entered into contracts that resulted in excess premium payments that were much higher than what we believe the overall class average to be. The distributed benefits, less the accompanying share of the supplemental fund, averaged $3.70, but this amount constituted only one-half of the actual premium overcharge. Assuming class members with successful claims were indeed paid one-half their actual loss, the full amount of the average overcharge to claimants would have been $7.40 (compared to our estimate of $3.83 for all class members, claiming or not). This compensation formula corresponds to about a $1993 purchase paid over 20 months, at 24 percent, and a credit life cost of $1 per $100 financed per year (or a $2490 purchase at a credit life rate of $.80 per $100 per year).

EPILOGUE

Two months after the final settlement with Heilig-Meyers was approved, the Alabama Supreme Court reaffirmed its earlier holding in *McCullar* after considering arguments made at the April 1996 rehearing.[93] The court again found total-of-payment credit life policies to violate the Mini-Code, and it reaffirmed and strengthened the retrospective nature of the opinion. Despite the apparent boost the court had given the plaintiffs' case, the litigation with respect to Voyager Life Insurance continues.[94] The Heilig-Meyers settlement resulted only in making one-half of the excess premiums collected available to the class; to obtain the remainder, plaintiffs' attorneys have renewed their action against Voyager.[95] However, Voyager's counsel have not been as quick as Heilig-Meyers to negotiate a settlement.

For a number of reasons, Voyager's attorneys felt that the *McCullar* decision did not control their destiny. First, *McCullar* was believed to speak only to the Mini-Code's statutorily defined responsibilities for lenders and credit providers such as Heilig-Meyers, not to those of the underlying credit life insurance companies. Second, the insurers' attorneys felt that the Alabama Supreme Court

still required proof of the oral misrepresentations actually made to the purchasers and their individual reliance thereon, so a class action would be inappropriate. In their view, ". . . *McCullar* rings a death knell for class treatment of similar 'net vs. gross' causes of action due to its emphasis on the individualized factual demonstration absolutely required to prevail on this cause of action."[96]

Further, Voyager counsel hoped that any adverse impact of *McCullar*, even on insurance policy issuers, would disappear with the passage of time. They believed that the *McCullar* opinion was only the view of a plurality of the court's justices and would be controlling for only the facts of the case immediately before the court;[97] any future change in the composition of the court might result in the decisions being overturned. Finally, defense counsel were encouraged, because despite the multitude of gross versus net credit life lawsuits filed before and after the *McCullar* decision, relatively few had reached settlement.[98] The original certification order from November 1994 involving Voyager insureds was vacated in February 1998 in light of recent Alabama Supreme Court rulings regarding the prerequisites of class certification. As we went to press, plaintiffs were in the process of obtaining a new class certification order and were also employing, on the credit life gross-versus-net issue only, theories that Voyager is additionally guilty of fraudulent suppression (of the fact that more than the lawful amount was being charged) and unjust enrichment.[99]

Heilig-Meyers' battles over its credit life policies, including those it might have with Garve Ivey, are not over. In April 1997, both Heilig-Meyers and Voyager were sued in U.S. District Court for the Northern District of Florida in a putative class action that also alleged gross-versus-net premium issues.[100] The complaint, while filed by a Panama City, Florida, attorney, listed the Jasper, Alabama, firm of King Ivey & Junkin as being "of Counsel." A national class was anticipated, presumably one that would ultimately exclude the Alabama settlement class as it pertained to Heilig-Meyers, but the matter was stayed pending a Florida state appellate court's review of a circuit judge's dismissal of a credit life premium case previously filed. This time, the ultimate outcome was in favor of the defendants. Unlike the Alabama Supreme Court's decision in *McCullar*, in November 1997 the Florida First District Court of Appeals held that both statutory laws and administrative regulations permitted total-of-payment credit life insurance in Florida and upheld the lower court's ruling.[101] When notified of the state appellate decision, the federal district judge dismissed with prejudice all claims of the named representative against Heilig-Meyers (because the representative's purchase was made in Florida and thus would have been permissible under state law as interpreted by the Florida appellate justices).[102] However, because no class had actually been certified, claims of potential class members were dismissed *without* prejudice. Conceivably, the

door is still open for national class treatment of credit life premium issues involving Heilig-Meyers' operations in those states where the gross-versus-net question has not been settled.

This family of credit life litigation in Alabama was not unexpected, even before the September 1995 supreme court ruling. Though the Alabama Retail Association and the Automotive Dealers Association of Alabama claimed that the court's decision in *McCullar* ignited many similar suits *after* publication,[103] Chief Justice Hooper's dissent in *McCullar* commented on the cases filed in anticipation that the summary judgment in *McCullar* would be overturned:

> Before the release of the first opinion in this case on September 29, 1995, potentially huge lawsuits were already filed against companies that have conducted thousands of transactions that as of September 29, 1995, all members of the finance and insurance industries thought were perfectly legal. The opinion of this Court is made worse by the fact that the decision will not apply prospectively only, but retroactively. Therefore, the lawsuit floodgates have been opened wide. The potential damage to the Alabama economy is beyond estimate. A constitutional case might arise from this opinion over the implications attendant to exposing business to massive liability for actions taken in reliance on the regulations and statutory interpretations of state agencies.
>
> This new construction of § 5-19-20(a)—a complete departure from the longstanding administrative construction of this provision of the Mini-Code—should be applied prospectively only. The result of retroactivity will be massive litigation and massive liability—liability so great that it could destroy much of the consumer credit and insurance industry in Alabama. If this opinion is allowed retroactive application as to already-filed cases, then any consumer who has obtained a precomputed interest credit life insurance loan—and there could be literally hundreds of thousands of potential litigants—could join a class action lawsuit and sue his or her consumer lender, retailer, and insurance company, despite those companies' strict compliance with every statute, rule, or policy governing these transactions for approximately 25 years. The potential exposure of these consumer lenders, retailers, and insurance companies—every bank, every thrift, every life insurer, every automobile or appliance dealer, every furniture store—is virtually limitless.[104]

The Alabama litigation involving Heilig-Meyers appears to be just one of these anticipated suits.

Key Events	**Date**
Filing	May 12, 1994
Certification hearing	November 29, 1994
Certification order	November 29, 1994

Notice of certification	Ordered but not made
Certification opt-out cutoff	Not applicable as notice of certification is not made
Settlement reached	April 12, 1996
Preliminary approval hearing	May 15, 1996
Preliminary approval order	May 15, 1996
Notice of preliminary settlement and class certification	May, June, July, 1996
Settlement opt-out cutoff	Not applicable; was injunctive class without opt-out
Settlement objector cutoff	September 2, 1996
Fairness hearing	September 17, 1996
Final approval order	September 17, 1996
Notice of final approval	October, November, and December 1996
Notice of claiming procedures	October, November, and December 1996
Claiming period ends	April 22, 1997

NOTES

[1]As part of our research on this litigation, we interviewed the plaintiffs' and defendant's attorneys, one of the defendants, the judge, and the organization responsible for claims administration. We also reviewed the pleadings and papers filed in the case as well as other documents including newspaper and magazine articles, law review articles, press releases, and internet web site postings.

[2]*Inman v. Heilig-Meyers Furniture*, No. CV 94-047 (Ala. Cir. Ct. Fayette County filed May 12, 1994).

[3]For an excellent discussion of credit life policies generally, see JoClaudia Mitchum, Comment, "The Death of Credit Life Insurance*: McCullar v. Universal Underwriters Life Insurance Company,"* 27 *Cumberland Law Review* 719 (1997).

[4]Thomas Caywood, *New Orleans City Business - Suit Alleges Fraud in Car Dealers' Sale of Credit Life Insurance* (July 7, 1997), available on the internet at http://www.neworleans.com/citybusiness/..-Suitalleges.html (Feb. 6, 1998).

[5]For example, the credit life insurance premium for an item priced at $2500 with a down payment of $500 and a net balance of $2000 to be financed over three years would be $48 ($2000/$100 x $.80 x 3). This rate is fixed by the Alabama State Banking Department; before September 1, 1991, the premium rate was $1 per $100 per annum. Affidavit of Robert K. Floyd (Aug. 1, 1994) at 2, Exhibit A to Defendant Heilig-Meyers Furniture's Motion for Summary Judgment (Jan. 1, 1995), *Inman v. Heilig-Meyers Furniture*. Unless noted otherwise, hereinafter all court documents cited pertain to *Inman v. Heilig-Meyers Furniture.*

[6]Average credit life insurance payout in 1995 was 42 cents for every dollar collected in premiums as compared to the National Association of Insurance Commissioners' recommendation that insurance generally should pay out at least 60 cents per premium dollar; see *Most Credit Life*

Insurance Still a Rip-Off, available on the internet at the Public Interest Research Groups' home page, http://www.pirg.org/press/life96.html (press release of Jan. 29, 1997).

[7]Mitchum, *supra* note 3 at 724.

[8]*McCullar v. Universal Underwriters Life Insurance Co.,* 687 So. 2d 156, 160–61 (Ala. 1996).

[9]*Id.*

[10]Amicus curiae briefs filed by both departments in *McCullar v. Universal Underwriters Life Insurance Co.* appeared to confirm this interpretation. 687 So. 2d at 162, 174; Mike Cason, "Heilig-Meyers Settles Suit, Raps Lawyers," *Montgomery Advertiser*, Aug. 7, 1996, at 3B (hereinafter Cason, "Heilig-Meyers Settles Suit"); Mike Cason, "Insurance Case Returns to High Court," *Montgomery Advertiser*, Apr. 2, 1996, at 3B (hereinafter "Insurance Case Returns").

[11]Appendix to Special Opinion of Chief Justice Hooper, *McCullar v. Universal Underwriters Life Insurance Co.,* 687 So. 2d at 186. Whether or not the 40 states actually allowed premiums based on the total outstanding payments or only on the net principal owed was hotly disputed by both sides. Litigation over credit life premiums has arisen in at least five other states besides Alabama. Caywood, *supra* note 4.

[12]Ala. Code §§ 5-19-1 *et seq.*

[13]Alabama Code § 5-19-20(a) (Supp. 1995).

[14]Mike Cason, "Mini-Code Legislation Passes; Both Sides Win?" *Montgomery Advertiser,* May 21, 1996, at 3B.

[15]Under Alabama court procedures, civil appeals from the circuit courts of general jurisdiction involving over $50,000 in controversy are heard by the state supreme court.

[16]Hereinafter referred to as Heilig-Meyers.

[17]The company reported sales of $1.139 billion for the fiscal year ending February 29, 1996. Its SEC 10-K filing for that period discussed Heilig-Meyers' approach to offering financing to those without a strong credit history: "Because Company representatives work with customers on a local level, they can often extend credit, without significantly increasing the risk of nonpayment, to customers who may not qualify for credit under bank card programs or from competitors who typically use strict, impersonal credit extension models." Heilig-Meyers Furniture Co., Form 10-K Filing for the Fiscal Year Ended February 29, 1996 at 6 (hereinafter Heilig-Meyer's 1995 10-K).

[18]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[19]Heilig-Meyers 1995–96 10-K, *supra* note 17 at 6.

[20]Hereinafter referred to as Voyager.

[21]Memorandum in Support of Motion for Summary Judgment (Jan. 31, 1995) at 9–10.

[22]See table labeled "General Profile," in U.S. Census Bureau, "Geographic Area: Fayette, AL (01057)," *USA COUNTIES 1996*, available on the internet at the U.S. Census Bureau web page, http://www.census.gov/statab/USA96/01/057.txt (Feb. 20, 1998).

[23]Interestingly, Ivey once sold credit life policies as part of his duties as a used car salesman.

[24]Complaint (May 12, 1994) at 1–2. The Inmans also purchased an optional credit property policy. Memorandum in Support of Motion for Summary Judgment at 3.

[25]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[26]Complaint at 1–2.

[27]*Id.* at 4.

[28]Claims against lenders who failed to disclose the receipt of a commission for credit life policies they sold as an adjunct to the extension of credit had been previously litigated elsewhere. See, e.g., *Spear v. Colonial Bank of Alabama,* 514 So. 2d 814 (Ala. 1987), *Rivera v. Dick McFreely Pontiac, Inc.,* 431 F. Supp. 506 (N.D. Ill. 1977).

[29]Complaint at 2.

[30]Plaintiffs' Memorandum of Law in Support of Motion for Class Certification (Nov. 22, 1994) at 3 (hereinafter Memorandum in Support of Certification).

[31]Alabama follows the federal procedural rule structure and federal decisions regarding Rule 23 are "persuasive authority" for Alabama courts interpreting class action rules. *Adams v. Robertson,* 676 So. 2d 1265, 1268 (Ala. 1981).

[32]Complaint at 5.

[33]Defendant Heilig-Meyers Furniture's Motion for Summary Judgment (Jan. 1, 1995) at 2 (hereinafter Motion for Summary Judgment). The defendant later stipulated that it had acted as a licensed agent for Voyager in connection with the sale of insurance products. Stipulation of Settlement (Apr. 12, 1996) at 15.

[34]15 U.S.C. §§ 1601 *et seq.*

[35]Memorandum in Support of Motion for Summary Judgment at 7–9.

[36]Motion for Summary Judgment at 2.

[37]*Id.*

[38]*Id.* at 1–2. The Certificate of Insurance provided that Voyager would ". . . pay all benefits to the Lender. The Lender will apply the payments to reduce or pay off the debt. Any amount left over will be paid by the Lender as follows: for life insurance benefits, the excess will be paid to the estate of the Insured who died, or his named beneficiary." Memorandum in Support of Motion for Summary Judgment at 4.

At an early point in the litigation, the plaintiffs made a claim that in actual practice, the excess was not being rebated as required. See, e.g., Memorandum in Support of Certification at 3. No evidence was offered to support a claim that either Heilig-Meyers or Voyager ever failed to rebate any excess. This issue does not seem to have been developed further, presumably because the failure to pay any excess would impact only the beneficiaries or estate of purchasers who had died, a group not contemplated as being part of the proposed class. Interestingly, it was suggested to us by various sources that some Alabama insurers did indeed retain the excess as a matter of practice.

[39]Motion for Summary Judgment at 2; Memorandum in Support of Motion for Summary Judgment at 10; Deposition of Brent Lee Fletcher (Nov. 10, 1994) at 29, quoted in Memorandum in Support of Certification at 4 n.6.

[40]Defendant Heilig-Meyers Furniture's Counterclaim (June 16, 1994) at 1–2.

[41]Indeed, it was argued by the defense early in the *Inman* litigation that the trial court's granting of summary judgment in the pre-appeal phase of *McCullar* was dispositive of any issue over credit life overcharging fraud. Memorandum in Support of Motion for Summary Judgment at 5–6.

[42]Affidavit of Robert K. Floyd (Aug. 1, 1994), Exhibit A to Motion for Summary Judgment, and Affidavit of Harland Dyer (July 27, 1994), Exhibit B to Motion for Summary Judgment.

[43]Affidavit of Robert K. Floyd at 2.

[44]Affidavit of Harland Dyer at 2.

[45]During depositions, defendants estimated that $3,151,463 in premiums were collected over the period of fiscal year 1990 through September 1994 and that credit life policies were sold to at least 136,000 consumers in over 270,000 transactions since February 1990. Memorandum in Support of Certification at 8. Plaintiffs' attorneys offered the figures of 150,000 consumers and 300,000 transactions in their pleadings in support of certification to account for the handful of months from September 1989 that were not included in the defendants' estimates. *Id.* at 15.

[46]Order (Nov. 29, 1994) at 1–2 (hereinafter Certification Order).

[47]It appears that while Voyager provided credit life insurance services through a multitude of retailers, finance companies, and other entities, Heilig-Meyers had offered Voyager policies only through its Alabama operations during the period in question.

[48]The judge gave the defendants 20 days from entry of the certification order on November 29 to forward the names to class counsel. Certification Order at 2–3.

[49]The court anticipated that class counsel would learn the identities of the class members by December 23 and so gave them 40 days thereafter to mail notice to the class. *Id.* at 3.

[50]Motion for Correction and Supplementation of Class Notice (Dec. 8, 1994) at 1–2.

[51][Defendant Heilig-Meyer's] Motion to Reconsider November 29, 1994 Order (Dec. 5, 1994); [Defendant Voyager's] Motion to Reconsider Class Certification (Dec. 22, 1994); Amendment to

Defendant Heilig-Meyers Furniture, Inc.'s Motion to Reconsider Class Certification Order (Mar. 22, 1995).

[52][Defendant Voyager's] Amendment to Motion to Reconsider Certification (Jan. 17, 1995) at 1–2.

[53]See, e.g., Affidavit of Robert K. Floyd at 2; Affidavit of Harland Dyer at 2.

[54]*McCullar v. Universal Underwriters Life Insurance Co.*, No. 1930246, 1995 WL 577025 (Ala. Sept. 29, 1995). The original opinion in this case was subsequently withdrawn and substituted on rehearing. The official opinion was released on November 22, 1996, but differs from the original primarily in the extent of the discussion of the prospective nature of the ruling and in the concurring and dissenting opinions. *McCullar v. Universal Underwriters Life Insurance Co.*, 687 So. 2d 156 (Ala. 1996). Passages found herein that are attributed to the Alabama Supreme Court's ruling in *McCullar* are taken from the November 1996 version.

[55]687 So. 2d at 166.

[56]*Id.* at 163–64.

[57]*Id.* at 164.

[58]It should be noted that the Alabama Supreme Court did not hold that the practice of gross coverage was per se fraud or constituted misrepresentation; there would still be the issue of whether the creditor disclosed "information relevant to insurance and banking laws, the costs of premiums allowed, or the type of installment loan contract" to which the plaintiff agreed. *Id.*

[59]Mitchum, *supra* note 3, at 749 (footnotes omitted); emphasis added.

[60]Cason, *supra* note 13.

[61]*Id.*

[62]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[63]Cason, "Insurance Case Returns," *supra* note 10.

[64]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[65]Stipulation of Settlement at 9.

[66]Complaint at 5–6.

[67]We received conflicting information as to whether the Inmans had purchased any credit disability insurance. Pleadings in the matter indicate that besides the credit life policy, a credit *property* policy was also obtained at the time of financing. Memorandum in Support of Motion for Summary Judgment at 6. One attorney involved in the case asserted that the Inmans also had a credit disability policy while another told us that they did not (but argued that the inclusion of such claims was compulsory nevertheless).

[68]Stipulation of Settlement at 13.

[69]*Id.* at 14–15.

[70]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[71]Notice for Proof of Claim (May 15, 1996), Exhibit B to Motion for Approval of Heilig-Meyers Settlement.

[72]Stipulation of Settlement at 24.

[73]Preliminary Order with Respect to Proposed Settlement (May 15, 1996) at 2.

[74]*Id.* at 1.

[75]*Id.* at 1–2.

[76]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[77]Mike Hudson, "Theories Abound on Chain's Rapid Growth," *Roanoke Times & World News*, July 21, 1997, at A-4.

[78]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[79]Final Judgment, Settlement Approval, and Dismissal with Prejudice (Sept. 17, 1996) at 1 (hereinafter Final Judgment).

[80]Heilig-Meyers' Brief in Support of Stipulation of Settlement (Sept. 16, 1995) at 1–2.

[81]Final Judgment at 3.

[82]*Id.*

[83]*Id.* at 4.

[84]Handwritten notations—initialed by both Ivey and Greene—clarifying that Heilig-Meyers was the only defendant being released appear throughout the Final Judgment.

[85]*Id.* at 4.

[86]Final Judgment at 2. In comparison, Heilig-Meyers reported to us that it spent approximately $115,000 in outside legal fees and costs in defending and settling this litigation. We do not have an estimate of the in-house legal expenses incurred by the defendant.

[87]Memorandum in Support of Certification at 8, 15.

[88]For the fiscal years ending February 28, the reported average was approximately 16.7 months for fiscal year 1994 and 17 months in fiscal years 1995 and 1996. Heilig-Meyers Furniture Co., Form 10-K Filing for the Fiscal Year Ended February 28, 1994; Heilig-Meyers Furniture Co., Form 10-K Filing for the Fiscal Year Ended February 28, 1996; Heilig-Meyers' 1995 10-K, *supra* note 17 at 6.

[89]Other combinations of length of payments and annual percentage rates would be 17 months and 20 percent: 13.54 percent reduction in premiums charged; 17 months and 24 percent: 15.93 percent reduction; 24 months and 24 percent: 21.19 percent reduction.

[90]It is unlikely, however, that any one consumer would have had an overcharge that exceeded $50. In order to incur $50 in overcharges, one would have to finance at least $13,500 over 20 months and at 24 percent interest at a credit life cost of $1 per $100 financed per year. Discussions with the defendant indicated that Heilig-Meyers would not extend credit at this level on any single transaction, that the amount financed in the overwhelming majority of instances would be less than $2500, and that the average sale (though not necessarily the average sale that also involved credit life coverage) was around $800.

[91]It should also be noted that at least some of the members of the class counsel team have indicated to us that *Inman* was a fairly early case in terms of their own class action experiences and that their current practices involving documentation of class loss and justification for fee awards, as well as designing settlement benefit distribution procedures, are more refined.

[92]Rust Consulting's Claims Administration Services of Minnesota was responsible for providing telephone support to Heilig-Meyers during the claim process.

[93]Mitchum, *supra* note 3, at 732.

[94]While the Heilig-Meyers settlement was under review, and while the Alabama Supreme Court considered the arguments advanced in the rehearing of the *McCullar* matter, Voyager moved for a stay in the case or a continuance of the trial then scheduled for August 26, 1996. Motion for Stay or Continuance of Trial (July 31, 1996). Voyager argued that besides the interests of judicial economy in waiting to see how the high court would eventually rule, holding trial would have been premature because the court had not yet ruled on the motions for reconsideration of the class certification and for summary judgment filed back in the winter of 1994–1995. With the publication of the second supreme court decision in November 1996, the case is again proceeding in the Fayette County Circuit Court.

[95]Two groups of consumers are apparently still able to pursue a claim against Voyager: settling Heilig-Meyers customers who could seek to recover the other half of the excess premium, and the original subclass of all living, Alabama resident, Voyager credit life purchasers. The extent to which these two groups overlap is not known.

[96]Defendant Voyager Life Insurance Company's Supplemental Memorandum in Support of Its Motion to Reconsider Class Certification (Feb. 12, 1997) at 5–6.

[97]*Id.* at 3. "The *McCullar* opinion was less than anticipated in that only three justices joined in the opinion for the court. Only two justices concurred in the result (reversal of summary judgment in favor of the credit insurer and car dealership), one justice concurred in the result but expressly disagreed with the opinion. Chief Justice Hooper agreed that further discovery was needed but otherwise dissented and one justice simply dissented." *Id.*

[98]Information from counsel on both sides in the remaining action against Voyager indicates that fewer than ten credit life overcharge class actions were settled prior to early 1998, and more recently perhaps an additional five to ten settlements have been reached. Class counsel also informed us

that while a number of credit life class actions still remained open, most of the insurance companies that offered the coverage have settled at least one or more of the various actions against them.

[99]First Amended Complaint (Apr. 22, 1997). The court dismissed an additional count of theft by deception on December 11, 1997.

[100]*Cain v. Heilig-Meyers Furniture*, No. 5:97-CV-96RH (N.D. Fla. filed Apr. 7, 1997).

[101]*Robertson v. PHF Life Insurance Co.*, 702 So. 2d 555 (Fla. Dist. Ct. App. 1997).

[102]Order Granting Motion to Dismiss (Jan. 15, 1998), *Cain v. Heilig-Meyers Furniture*.

[103]Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

[104]*McCullar v. Universal Underwriters Life Insurance Co.,* 687 So. 2d at 183 (dissent of Chief Justice Hooper, decision substituted November 22, 1996).

INSURANCE PREMIUM DOUBLE ROUNDING LITIGATION:[1] *MARTINEZ v. ALLSTATE*[2] AND *SENDEJO v. FARMERS*[3]

PROLOGUE

In May 1995, former Texas Department of Insurance (TDI) General Counsel D. J. Powers, then working as a solo practitioner in Austin, received a call from Dallas attorney John Cracken seeking Powers' help in exploring a new area of litigation. Cracken, a personal injury attorney described by the *San Antonio Express-News* as having "a reputation for aggressive if not audacious litigation,"[4] reportedly had seen his caseload and earnings threatened by recently enacted Texas tort reform.[5] He had watched the progress of a class action suit handled by an attorney he admired and wound up liking both the action and the outcomes involved in this sort of litigation. In pursuit of a new line of work, Cracken thought that there might be good "small claims" class action cases within either the utilities or insurance arenas and hired Powers at $150 per hour as one of his consultants to see if there were any potential for a consumer class action against the insurance industry.[6] Other consultants were concurrently investigating possible utility-related class action litigation.

Powers was eminently qualified for this role. Before his stint as general counsel from November 1993 through January 1995, he was a staff attorney with the Office of Public Insurance Counsel (OPIC), the state agency that represents the interests of consumers in matters involving insurers and regulatory agencies. Generally regarded as an advocate for consumers and insureds during his tenure at OPIC and TDI, Powers had felt his time at the agency was coming to a close with the election of Republican George W. Bush as Governor of Texas. After the election, Powers worked furiously on passing controversial rules that would prohibit redlining, the practice of refusing to write insurance policies—or overcharging for their premiums—in underprivileged areas. With the appointment of Elton Bomer as commissioner for the TDI, regarded by many observers as more conservative than the incumbent commissioner, Powers felt that the new administration would quickly terminate him.

The day before Bomer took over, Powers resigned. He subsequently went into private practice but saw an opportunity to continue his work on redlining when Cracken contacted him for assistance. As part of the research he undertook for Cracken, Powers set up computer spreadsheets that he could use to replicate the rating process used by insurance companies. His idea was to see if there were any difference between the unlawful premiums for purchasers in certain geographical areas and those premiums charged for a set of actual policies. However, Powers' spreadsheets contained an apparent minor bug: When compared to the sample policy declarations, the calculations for two insurers—Allstate and Farmers—were occasionally off by a dollar. Oddly, this anomaly did not occur all the time. Moreover, the discrepancy never occurred in State Farm's calculations, the state's biggest auto insurer.

Around July 1995, Powers believed he had figured out the source of the problem. In Texas, insurance companies writing private passenger motor vehicle policies are required to round off premiums to whole dollars. *Texas Automobile Rules and Rating Manual* Rule 9.B specifies how to perform the rounding:

> Round the premium for each peril, coverage and exposure for which a separate premium is calculated, to the nearest whole dollar. Round a premium involving \$.50 or over to the next higher whole dollar: e.g. 100.50 = 101.00, but 100.49 = 100.

The rule comes from the days when it was to everyone's advantage (consumers and insurers) to use whole dollar amounts in accounting and check writing.[7] In the early 1960s, the predecessor to the Insurance Services Offices, the National Bureau of Casualty Underwriters (NBCU), adopted a proposed uniform rule for "whole-dollar rounding" whose purposes included the simplification of premium payments by policy holders and the reduction of the number of characters needed on the insurance companies' punch cards for their data processing.[8] In 1964, the predecessor to TDI, the Texas State Board of Insurance (TSBI), adopted a similar rule that tracked the proposed NBCU uniform rule almost verbatim. The rounding was the standard ".50 to .99 round-up and .01 to .49 round-down" rule,[9] and in theory its effect was neutral over the long run because about half the premiums are rounded up and about half are rounded down.

However, the situation becomes somewhat more complicated—and the results surprising—when premiums are charged for terms of less than a year. In Texas, there was also a regulation that prescribed how semiannual (or monthly or quarterly) premium payments were to be computed after the annual premium was calculated. *Texas Automobile Rules and Rating Manual* Rule 7.B specified:

> Policy terms less than one year. Compute the premium on a pro rata basis of the annual premium. The premium for the 6 month, 3 month, and 1 month

> policies shall be 50 percent, 25 percent, and 8 1/3 [percent] respectively of the annual premium for coverage afforded.

Powers says that he finally realized that Allstate and Farmers did the rounding process twice, once when the annual premium was calculated *and again* after making the pro rata computation for a six-month or shorter term. The rules appeared to be somewhat confusing in terms of their plain-language interpretation. Does the whole-dollar rounding rule apply to annual premiums only? Does it apply to policy terms of less than one year? When would the rounding take place for other than annual policies? On first glance, when the rounding happened should not matter as long as the insurer was consistent, because 50 percent of the time it would go up and 50 percent of the time it would go down. However, when—and how often—the premiums are rounded indeed *does* make a difference, albeit a small one, for some policy calculations.

Essentially, there seemed to be two different ways passenger auto insurance policy semiannual premiums were being calculated in Texas. All premiums, regardless of method, were first calculated on an annual basis. "Single rounding" can be defined as the insurer first determining the six-month pro rata share of this original annual premium and then rounding the pro rata share. Here, the only rounding that takes place is performed just after the annual premium is divided by two (for a six-month policy). However, "double rounding" occurs when the original annual premium is first rounded, then the six-month pro rata share of this now-rounded annual premium is determined, *and* then the pro rata share is rounded again to generate the final billing. Under this scenario, the annual premium is rounded and the six-month share is also rounded. Arguably, the Texas insurance rules seemed to permit either scheme. But for one out of four policies written—depending on whether the amount of the annual calculation is odd or even whole dollars and whether the residual cents are over or under the .49/.50 line—double rounding can give the insurer an extra dollar at the six-month interval (and a yearly windfall of two dollars) as compared to what would happen if single rounding were used.

Tables 10.1 and 10.2 show different coverages that represent groupings of the four possible annual premium types: those with odd or even whole dollars and those whose decimal portions would either be rounded up or down. The first table illustrates how State Farm and most other auto insurers in Texas were calculating their coverages (rounding only just before billing on the six-month policy) and the second shows how Allstate and Farmers were doing their calculations (rounding both the annual premium and the six-month premium).

As can be seen, the six-month premium for coverage #2 in Table 10.2 is a dollar over what it would have been if only single rounding had been used. However, the other three six-month coverages are unchanged regardless of rounding

Table 10.1

Single Rounding Only After Semiannual Premium Calculated

Coverage Example Number	Original Annual Premium	Annual Premium Used for Pro Rata Calculation	Pro Rata Semiannual Premiums	Rounded Semiannual Premiums	Total Yearly Amounts Paid in Premiums	Difference from Original Annual Premium
#1	$1000.48	$1000.48	$500.24	$500.00	$1000.00	–$.48
#2	$1000.52	$1000.52	$500.26	$500.00	$1000.00	–$.52
#3	$1001.48	$1001.48	$500.74	$501.00	$1002.00	+$.52
#4	$1001.52	$1001.52	$500.76	$501.00	$1002.00	+$.48
Total	$4004.00			$2002.00	$4004.00	$.00

Table 10.2

Double Rounding at Annual Premium and After Semiannual Premium Calculated

Coverage Example Number	Original Annual Premium	Rounded Annual Premium Used for Pro Rata Calculation	Pro Rata Semiannual Premiums	Rounded Semiannual Premiums	Total Yearly Amounts Paid in Premiums	Difference from Original Annual Premium
#1	$1000.48	$1000.00	$500.00	$500.00	$1000.00	–$.48
#2	$1000.52	$1001.00	$500.50	$501.00	$1002.00	+$1.48
#3	$1001.48	$1001.00	$500.50	$501.00	$1002.00	+$.52
#4	$1001.52	$1002.00	$501.00	$501.00	$1002.00	+$.48
Total	$4004.00			$2003.00	$4006.00	+$2.00

method. This situation yields an additional $2 a year in premiums collected annually on one out of every four coverages (assuming a random distribution for annual premiums with odd-even whole-dollar amounts and decimal portions above and below 49/50 cents). Viewed another way, the practice of double rounding would allow an insurer to collect an extra dollar on 25 percent of all coverages on six-month policies by rounding up 75 percent of the time rather than 50 percent of the time. It should be remembered that the rounding takes place on each *individual coverage* type (liability, uninsured motorist, medical payments, collision, etc.; up to about seven in all) in the calculation of a total auto policy premium, so that in a worst-case scenario conceivably as much as $14 extra could be paid per year by a particularly unlucky policy holder who purchased all seven coverage types (or about $3.50 for the average fully insured policy holder, given the mathematical frequency of occurrence of 25 percent).[10] Cracken and Powers later claimed that on a per-motor-vehicle basis, the *average* consumer would be overcharged about $3.00 per year.[11] Interestingly, this mathematical quirk is not a problem if the term of the policy is monthly or quarterly instead of semiannually.

Powers says that it was not until July 10, 1995, that the double-rounding practice became clear to him as it applied to Allstate and Farmers' policies and the effect on premiums collected.[12] He subsequently confirmed his suspicions with staff members at TDI and OPIC and then relayed the information to Cracken, who immediately saw the potential for a major class action.

THE LITIGATION BEGINS

Cracken and Powers next consulted a number of former TSBI members and TDI commissioners, and both current and former staffers for TSBI, TDI, and OPIC about possible interpretations of the Texas manual's Rules 7 and 9. In early August 1995, one of Powers' contacts at OPIC requested that Allstate explain its method for calculating premiums on a sample declaration sheet. The response confirmed the use of the double-rounding method. The stage was now set for suits against Allstate and Farmers, the only insurance company groups in Texas that appear to have employed double rounding in the mid-1990s. (It is possible that some smaller companies also used the same method (though neither the defense nor the plaintiffs have ever publicly identified any) or that some insurers might have double rounded in prior years.)

Cracken engaged Crystal City, Texas, attorney Joe Luna to survey local residents in order to find someone who was insured by either of the two future defendants.[13] Tiny Crystal City is the county seat of sparsely populated Zavala County,[14] which is located on the Mexican border in southwest Texas. This area is one of the poorest parts of Texas,[15] with less than 1 percent of all Texas motor vehicle policy holders, and was reported, perhaps apocryphally, to be so "plaintiff-friendly" that railroads had torn up their tracks within the county lines to prevent lawsuits.[16] In late August 1995, Luna identified Armando Martinez and Maria Sifuentes as Allstate policy holders and helped sign them on as potential plaintiffs in the anticipated litigation against that insurer.[17] Other plaintiffs were signed up for the suit against Farmers.

Just days before the effective date of new Texas rules on venue and forum choice,[18] Cracken filed two separate but identical suits on August 28 and 30, 1995.[19] One suit named Northbrook, Illinois, corporations Allstate Insurance Company and Allstate Indemnity Company as defendants, and the other named Travis County's Texas Farmers Insurance Company and another Farmer's company, Mid-Century Insurance Company.[20] The matter was assigned to District Judge Amado Abascal III and Rene Barrientos was hired as local counsel.[21] These cases were the first commercial class actions Cracken's firm had ever filed.[22]

The litigation was soon being touted as being worth more than $100 million, based on the supposed ten years of double rounding[23] and the reported num-

ber of coverages sold by the two defendants,[24] whose combined sales accounted for three out of every ten Texas auto insurance policies.[25] The original petition alleged both breach of contract (failure to charge the lawful rate for private passenger motor vehicle insurance policies)[26] and "money had and received" (an equitable action alleging that one entity, the insurance company, possesses moneys that in good conscience and equity belong to the policy holders and would be unjustly enriched if allowed to retain such moneys). As the litigation progressed, a cause of action under the Texas Deceptive Trade Practices Act (DTPA) was added, and in addition to the recovery of the $100 million in overcharges, plaintiffs also sought treble damages under the DTPA and statutory attorney fees recoverable under Tex. Civ. Prac. and Rem. Code § 38.001 *et seq*.

A key concern of the defendants was the state court venue in Zavala County. One way out was to have the matter heard by a federal judge in one of the cities where the U.S. district courts in Texas are located. But in order to remove the case to a federal court, the defendants would have to show that the parties were citizens of different states and that the amount of money being sought exceeded the statutorily set minimum of $75,000. This task was more difficult than it might seem. Though Cracken had claimed that Farmers and Allstate had illegally overcharged Texas policy holders $57 million and $52 million, respectively,[27] the U.S. Supreme Court has repeatedly held that individual class members' claims for compensation cannot be aggregated to satisfy the federal statutory minimum.[28] Even in a worst-case scenario, no individual class members' claims of overcharging came even close to $75,000. Nevertheless, in October 1995 Allstate (which was an Illinois corporation) was successful in convincing a U.S. Magistrate-Judge for the Western District of Texas that removal of its case to U.S. district court was appropriate under diversity of citizenship jurisdiction. Allstate argued that the Fifth Circuit Court of Appeals had held that a claim for punitive damages in a class action arose from a single course of action, and so a classwide claim for a large-enough punitive award could be used to satisfy the jurisdiction's $75,000 requirement.[29] The plaintiffs had not made any explicit claims for punitive damages, but Allstate argued that any claims of fraud and breach of contract naturally embraced a real potential for a punitive award by a jury. A similar argument was also advanced by Allstate for using the plaintiffs' request for attorney fees to satisfy the amount-in-controversy requirement. Farmers was unable to make similar claims for federal diversity of citizenship jurisdiction because both Texas Farmers Insurance Company and Mid-Century Insurance Company were headquartered in Travis County, Texas. As it turned out, Allstate's respite from a Texas state court was short-lived. Federal District Judge Fred Biery saw things differently from the magistrate-judge, and on February 13, 1996, he remanded the matter to the Zavala County trial court for further processing.

The litigation began in earnest when the two defendants were both in Zavala County before Judge Abascal. Cracken revealed that he had a "war chest" with a total of $4 million in funds to finance the suit and identify potential plaintiffs;[30] that he was willing to commit another $1 million to litigate the case;[31] and that more than a half-dozen lawyers and a dozen nonlawyers were working full-time on the matter.[32] Furthermore, during the course of the litigation he assembled an impressive set of legal consultants that included University of Texas professors Samuel Issacharoff and Charles Silver, attorney Alan Dershowitz, Columbia professor John Coffee, New York University professor Geoffrey Miller, and Harvard professor Arthur Miller.[33] Notwithstanding any involvement in the case by the law professors, Powers, local counsel, or other attorneys, it was clear from the start that the plaintiffs' attack was led and financed by Cracken and his firm of Cracken & Harkey.[34] On the defense side, Farmers was represented by Thomas T. Rogers and Harold R. Loftin, Jr. of Austin's Small Craig & Werkenthin; Allstate picked Roger Higgins and Robert B. Wellenberger of Dallas' Thompson Coe Cousins & Irons as trial counsel.

In March 1996, the defendants moved to dismiss the case in favor of having TDI handle the matter, but the plaintiffs countered with a motion for class certification on March 25, thus sparking statewide interest in the proceedings. By the end of the month, newspapers across the state had begun to report on this hard-fought battle over the use of a class action to recover small-value consumer claims.

PRIMARY ISSUES OF THE LITIGATION

The arguments of the parties to the two suits—advanced both in the courtroom and in the public arena—and of consumer advocacy groups, newspapers, and state agencies, revolved around four central themes:

- Was the practice of double rounding unauthorized and did it violate state law?
- Was this a matter that should be left to TDI to resolve?
- Was Zavala County the proper forum?
- Was the litigation merely a method of enriching attorneys with little benefit to policy holders, or was it an effective way to protect the interests of relatively powerless consumers?

These questions were intertwined, and all were still being hotly debated at the time of the eventual settlement.

Double Rounding and Insurance Regulations

The defendants asserted that not only was double rounding within the meaning of the *Manual* rules, but the companies were both permitted and required to calculate their premiums in this way. Robert Pike, chief corporate counsel for Allstate, argued that instructions from TDI clearly upheld the practice of double rounding:

> We're in the unique position of believing, with the support of all the correspondence with the department, that we have done exactly what we have been told to do by regulators in Texas.[35]

Defendants pointed to correspondence between Allstate and TDI employee Grover S. Corum in 1985 as requiring them to round the annual and six-month premiums[36] and to a 1981 letter from department employee Wilburn Fischer that stated:

> Rule 9. provides that a policy may be issued for a six month period at 50% of the annual rates or premiums. This office has consistently ruled that the annual premium is figured in the normal fashion, rounded to the nearest dollar (.50 or over). Then a 6 month policy would be figured at 50% of the annual rounder [sic] premium, and then rounded again.[37]

Pike also claimed that the agency's interpretations came after Allstate had told state regulators, as far back as the 1970s, that double rounding would result in overbilling.[38]

The plaintiffs attacked these "authorizations" in a number of ways. First, the 1981 letter specifically allowing double rounding was incorrect and had no official standing; second, the 1985 letters that supposedly authorized the insurers to double round, according to the plaintiffs, actually authorized them to round only the six-month premium. As to the assertion that the insurance regulators directed the defendants otherwise, Powers was quoted as saying:

> . . . that is just not true.
>
> The question is whether you should round two times or one time. The letter they have says you're supposed to round the six-month premium. That is all it says. It is so clear. I cannot fathom why they say they were told to double round.[39]

Plaintiffs also asserted that Corum, the one-time head of TDI's auto insurance division, would testify that since he came to TDI in 1981, the rules clearly prohibited double rounding and that he never told Allstate or any other company to double round. Moreover, plaintiffs argued, any affidavits of former TSBI staff members who assert double rounding is the correct method are suspect because, they alleged, TSBI was known at the time for its reluctance to enforce

legislatively enacted laws and rules and for the industry's undue influence upon its rulings. Even if the insurance companies were given authorization by low-level staffers, plaintiffs felt that the test was not whether insurers were misinformed by state regulators but rather whether they acted in accord with the applicable rules: "It's no defense to the violation of law that they got bum advice from a bureaucrat," said Cracken in one news article.[40] Moreover, even if the double rounding could be characterized as an innocent mistake, the overcharges collected should rightfully be returned to the policy holders.

The plaintiffs attacked arguments that double rounding was part of official policy on the grounds that only these two companies (and not other major insurers such as State Farm) employed the practice.[41] In response, the defendants pointed out that in all the states where they write insurance, only in Texas did they double round (thus lending credence to the argument of specific TDI authorization),[42] and moreover there was evidence that Allstate and Farmers were *not* the only major Texas insurers using the double-rounding method.[43]

Class counsel argued that because double rounding was not authorized by official TSBI/TDI policy, it constituted a breach of contract between the insureds and the defendants of an implied term to charge only a lawful rate for the coverage. Defendants countered that even if this were the case, class member claims for coverages purchased prior to August 31, 1991, were barred by the statute of limitations. Plaintiffs responded that statutes of limitations were not applicable because even with the exercise of reasonable care, the insureds did not and could not discover the overcharging until the underlying lawsuit was filed. Defendants dismissed this assertion of the "discovery rule" exception (i.e., for the clock to be permitted to tick away on a statute of limitations, there has to be actual or implied knowledge of the offending act) by contending that the class members could conceivably have determined the methods for premium calculations at any time from the public record.

The plaintiffs argued that the double-rounding method used by the defendants allowed an insurer to collect an extra dollar on one out of four rate-regulated, private passenger motor vehicle coverages they sold for a six-month period. In actuality, class counsel claimed, the Texas insurance rounding rules were supposed to be "revenue neutral" so that the result in the aggregate would closely approximate what would have been the result had no rounding taken place. Fairness and equity required that any application of rounding rules to individual policies would result in half of all policies going up and half going down (with a net effect of zero).

The defendants retorted that the concept of revenue neutrality was a fiction and had never been a part of TSBI/TDI policy. They argued that even if double rounding caused any one person to pay a bit more than he or she would have

otherwise, there was no windfall to the insurance companies since the rates were set on the aggregate amount of premiums collected from *all* policy holders.[44] Moreover, since March 1992, insurers had been able to charge rates within a "flex band" over or under the standard benchmark rate, and according to the defendants any overcharging would have been within the permitted band.[45]

Administrative Remedies

Which authority should decide questions regarding double rounding? If the insurers were found to have violated state law, which authority should order any remedies, refunds, or penalties? The defendants asserted that the Texas Legislature had conferred upon TDI the exclusive power and authority to regulate premiums:

> The Board shall have the sole and exclusive power and authority and it shall be its duty to determine, fix, and promulgate just, reasonable and adequate rates of premium. . . .[46]

and that the legislature had also authorized TDI to issue uniform rules:

> The State Board of Insurance may prescribe, promulgate, adopt, approve, amend, or repeal the standard and uniform manual rules, rating plan . . . for motor vehicle insurance . . . under the procedures specified in this article.[47]

Plaintiffs saw the matter differently. They contended that policy holders were not seeking rule-making but rather were looking for rate enforcement, a matter unquestionably within the court's jurisdiction.[48] The class counsel's position was that TDI might decide what happens in the future with regard to rule revisions and policies but it had no power to determine the contractual obligations of the parties to an insurance contract after the fact.

Choice of Venue

Defendants strenuously argued that the matter—if it had to be heard in a trial court at all—should be moved to another location. As they saw it, proper venue would be at the state capital in Austin and not in Crystal City because the lawsuit involved issues that were within the sole discretion and jurisdiction of a state agency. Moreover, defendants claimed to have little connection to Zavala County because their policy billings were generated elsewhere and only a handful of policy holders lived there. In addition, they said, Zavala County was an inappropriate site for a trial that would litigate issues affecting millions of Texans. The remoteness of Zavala County was a concern as well because parties, witnesses, and counsel were spread all over the state.

Plaintiffs characterized the litigation as involving only contracts between private parties and not involving any state agency as a named defendant. Thus, they argued, venue would be permissible in Zavala County even if it was somewhat inconvenient to the defendants; to hold otherwise would mean that "only consumers who live in big cities with big airports can recover when cheated by a big insurance company."[49]

Costs and Benefits of the Litigation

The defendants charged that the case was lawyer-driven and would provide only a few dollars per plaintiff while enriching their attorneys:

> Mr. Powers and other attorneys seek multi-million-dollar damages through a class-action lawsuit that would provide—if successful—multi-million-dollar fees for plaintiffs' counsel and, at best, a few dollars per plaintiff. [50]

Plaintiffs countered that it was the insurance companies who would be getting an unconscionable windfall if their practice of double rounding, characterized by the plaintiffs as tantamount to stealing a tiny amount from millions of policy holders at a time, were allowed to continue. Cracken called the use of double rounding "analogous to a bad banker who writes a computer software program that siphons six dollars a year from each account and builds a million-dollar account on the Cayman Islands."[51]

In response to the contention that the litigation was lawyer-driven, Cracken claimed that such suits are exactly what is needed to protect consumers from predatory practices:

> Entrepreneurial litigation is litigation where the trial lawyer discovers a massive wrong and spends a lot of time and money righting that wrong for a 25 percent to 30 percent share of the total recovery. . . Entrepreneurial litigation is vital to society because in absence of it, companies who do business with millions of consumers can tweak the math in calculating consumers' bills and build a huge cache of illegal cash. . . It ensures that someone is looking over the shoulder of big business as they deal with millions of consumers. [52]

EARLY DAYS IN THE LITIGATION

As the lawsuit progressed, TDI's past and current actions became increasingly germane to both the plaintiffs' claims and the defenses asserted by the two insurers. During the hiatus that occurred when the Allstate matter was in federal court, Cracken met with TDI's general counsel and discussed his findings and opinions on double-rounding practices and its effects on revenues. By the end of March, TDI Commissioner Bomer had ordered a review of the rounding rules and publicly stated that he had been made aware of the double-rounding prac-

tice only recently through a meeting with Cracken.[53] By early April, Bomer indicated that the agency did not currently endorse the practice of double rounding, although he admitted that there had been some confusion previously:

> There certainly is a difference of opinion at the department as to what the correct procedure should be. I've seen letters from the department telling them to double-round, but the staff's intent all along has been to single-round, and I believe single-round is correct.[54]
>
> Some [TDI staff members] have interpreted it one way. Some of them have interpreted it another way.[55]

From the time the public first learned of the suits, newspaper editorials, consumer advocacy groups, and industry spokespersons had much to say about the appropriateness of the lawsuits. The Consumers Union was outraged over the practice of double rounding and asserted that though the rounding rules might be complicated, they ought not to be confusing for insurance company attorneys or their actuaries. Rob Schneider, a senior staff attorney for the Consumers Union, asserted that, "The rules of common sense tell you you don't calculate in a way that allows you to gain a benefit."[56] Moreover, Schneider felt that even if the insurance companies thought they were complying with the law, they should return any overcharges:

> We are becoming aware, more and more, of companies overcharging by small amounts. But when you take those small dollar amounts over hundreds or thousands of people over a period of years, we are talking about real money.
>
> What is important is that the people get the money that is owed to them back.[57]

Schneider also thought that the companies should be punished so they and others would not have incentives to do anything like this again.[58]

On April 9, Judge Abascal denied defendants' various motions to dismiss the case for want of jurisdiction, to send the matter to TDI for resolution, or to transfer the case to another venue. He held that the matter could be adjudicated adequately in the courts, and though he did not rule on the substantive nature of the complaint, he wrote that "Defendants' evidence failed to fairly address double rounding and failed to support [their] contention that TDI 'advised and directed' [insurers] to double round."[59] Most critically, he also held that TDI did not provide an administrative remedy to the dispute, thus leaving the courts as the primary avenue to redress the situation.[60] The judge subsequently ordered that a class certification hearing would be held May 30, referred the matter to mediation, and told the parties to suggest three potential mediators. Two weeks later, defendants moved to have their denied motions regarding venue, jurisdiction, administrative remedies, and abatement reheard.

During April and May, newspapers across Texas commented on what they perceived to be the right way to address the issue:

- The *Fort Worth Star-Telegram* condemned the suit as the product of "creative lawyers" who filed in a "remote, sparsely populated, and plaintiff-friendly county." Moreover, the paper editorialized that the defendants had rounded in a matter required of them by the state regulatory agency and that the issue should properly be handled by TDI.[61]
- The *Austin American-Statesman* thought that while companies could have been fairer by not rounding twice, costs to policy holders overall would be great (but benefit to individuals small) if the suit forced the insurers to repay.[62]
- The *Dallas Morning News* wondered in whose interests the regulators were operating when they supposedly told the insurers to round twice; this "apparent complicity" was a major reason why the lawsuits seemed to have little merit. However, whether or not the insurers violated the law was for the court to decide.[63] A subsequent editorial thought that the proper venue for the dispute was a TDI administrative court, while the suit in Zavala County "could end up embarrassing Texas as a whole."[64]
- The *San Antonio Express-News* raised concerns about the suit's "drawing more ugly national attention as the latest episode in 'Texas Justice.'" It questioned Powers' role in the lawsuit, given his prior employment with the state insurance department. It also asked whether a giant corporate defendant could get a fair trial in a small county in south Texas. Even with a win, the editorial predicted, plaintiffs would get little more than enough to buy three bags of groceries while Cracken would make a fortune. TDI should be hearing this case, not a south Texas court.[65]

Other commentators expressed more pointed views. The *Wall Street Journal's* Max Boot thought that the case was the "latest and most monstrous example" of class action suits where the "lawyers reap millions and the plaintiffs pennies;"[66] and the *Houston Business Journal* thought that while most consumers would not bother to file for a refund that might total a few dollars, they would wind up seeing their premiums increased for the defendants' litigation expenses and settlement costs.[67]

A different angle was advanced by a consumer interest group. In an op-ed piece in the *Austin American-Statesman,* the acting director of the Southwest Regional Office of the Consumers Union, Reggie James, and senior staff attorney Schneider characterized the practice of overcharging as a "theft" that would be prohibitively expensive for the average consumer to recover through an individual suit. They said the litigation showed "why class action suits are a bul-

wark of consumer protection and how much consumers would lose if they were restricted."[68] The Consumers Union asserted that in many overcharging cases the regulatory system fails, and noted that in this particular case no regulator caught the overbilling. Class action settlements, though sometimes resulting in poor outcomes for victims and millions for the plaintiffs' lawyers, could force companies to return ill-gotten gains, penalize them for their improper activities, prohibit them from engaging in similar behavior, and "send a clear signal to unscrupulous businesses that they cannot profit from their illicit actions."[69]

As the media commentary continued, the Zavala County litigation moved forward. One of the three mediators suggested by the plaintiffs was Kenneth R. Feinberg, an attorney who had participated as a special master and mediator in numerous complex cases (including Agent Orange and silicone breast implant litigation). The defendants agreed to ask Feinberg to oversee the court-ordered alternative dispute resolution process, and in early May Judge Abascal appointed him as mediator.[70]

TDI and the Rounding Rules

Ever since the Zavala County case gained statewide publicity, public attention had been focused on questions regarding what state insurance regulators had advised the defendants in the past and what they would do about it now. On May 3, TDI's public information office issued a press release containing Commissioner Bomer's analysis of the history of the double-rounding interpretation and set forth his decision not to pursue punitive or corrective action against the insurers:

> "The existing rounding rules are confusing and unclear, particularly with respect to car insurance," Bomer said. "Information has now come to my attention that before 1991, former TDI Auto Section staff managers and technicians consistently advised companies to double-round. TDI staff today believes, as I do, that single rounding is the only correct procedure.
>
> "However, this interpretation in favor of single rounding never has been communicated to the industry. The current rounding rules were not amended, and staff acknowledges that questions about them simply have not arisen in recent years. It would be unfair, therefore, for the Department to take enforcement against any company for double rounding."[71]

This statement was welcomed by the defendants, derided by the Consumers Union, and dismissed as irrelevant by the plaintiffs. When Bomer released his statement that the insurers had been misinformed, Schneider stated that "Commissioner Bomer's decision amounts to a $100 million giveaway to Allstate and Farmers out of the pockets of their customers."[72]

In a May 7 letter, Bomer requested that the defendants stop double rounding in anticipation of the adoption of single-rounding rules. But he also reiterated his decision that it would be unfair to take enforcement action:[73]

> I have also indicated my belief that it would be unfair for this Department to take enforcement action against your company for past practices. However, TDI's information indicates that you and Farmers are the only major insurers in the State of Texas who use double rounding. I believe this to be wrong. This is not fair to those consumers who pay a different premium. [74]

Cracken applauded the demand for immediate cessation and the anticipated rule change that would prevent double rounding, and Bomer's reluctance to pursue any enforcement actions: "The commissioner is exactly correct in doing everything within his power to prevent double-rounding in the future, but leaving the issue of past overcharges to the court system."[75]

The official change in policy would not come until the fall (because of necessary rulemaking and other administrative procedures), but the commissioner requested that the defendants voluntarily cease double rounding immediately and not wait for a formal rule amendment. Schneider said that the request was a step in the right direction but that it would not solve the problem of getting the ill-gotten gains of the past returned to the consumers.[76] Within a few days, however, executives from both companies demurred to the request, stating that there were technical reasons why they would be unable to accommodate TDI immediately and indicating that because they had been correctly applying the rules and had calculated premiums consistent with TDI direction all along, they would wait for a formal change or at least until they had a chance to meet directly with the commissioner.[77]

The defendants' hesitation in immediately curtailing the practice drew criticism. On May 11, an editorial in the *Austin American-Statesman* opined that

> Allstate and Farmers, two large insurers, stand to make millions of dollars by ignoring Bomer's plea until such time as the new rule takes effect, probably later this year. But they are making that money at the cost of their reputations.
>
> Other insurers calculate premiums by rounding to the nearest dollar only once. Farmers and Allstate should do the same.[78]

The Class Is Certified

In May, Cracken announced that he had plans to begin airing commercials in the Fort Worth-Dallas and Austin markets to let potential class members know that "there's going to be a hearing and that they do not need to take any action at this time. We want to let them know they shouldn't be anxious; that their rights will not be prejudiced if they wait."[79] Cracken said the ads would state

that customers of Allstate and Farmers would learn more about becoming a party to the lawsuit if the case were certified as a class action.[80] Defendants moved to block these commercials as prejudicial, unprecedented, extremely odd, and as improper communication to potential but uncertified class members. In response, Cracken hired noted constitutional law attorney Alan Dershowitz (reportedly at $600 per hour) to argue that the move to block the ads violated the policy holders' First Amendment rights. After a May 16 hearing about the ads that included Dershowitz's presenting his arguments by phone, Judge Abascal ruled in favor of the plaintiffs and the ads began airing the next day. The 30-second ads notified potential claimants that there would be a certification hearing at the end of month and ran for two weeks at Cracken's expense (at a cost of about $200,000[81]). The Texas State Bar Advertising Review Committee determined that the commercials were not prohibited ads for clients and the Texas Supreme Court also refused the defendants' last-minute efforts to prevent them from being televised.

On May 30, the defendants' joint motions for rehearing on the April 9 jurisdiction, venue, and abatement orders were overruled, and the hearing on class certification took place.[82] The day-long hearing included testimony on the behalf of plaintiffs from noted procedural expert Professor Arthur R. Miller and from Professor Geoffrey Miller. Judge Abascal did not immediately rule on the matter.

Before learning of the judge's decision on certification, the defendants presented a motion on June 7 for leave to file a petition for writs of mandamus and prohibition with Texas's Fourth District Court of Appeals in regard to Judge Abascal's denial of their motions to dismiss on jurisdictional, venue, and abatement grounds. But one week later Judge Abascal denied them such leave. Undaunted, they filed a similar joint petition on June 17 with the Texas Supreme Court for leave to file writs of mandamus and prohibition. On the same day that the supreme court petition was filed, the parties met with mediator Feinberg for the first time.

Two days later, Judge Abascal issued his order certifying the plaintiffs' proposed class and defining it to include anyone who purchased at least one six-month private passenger motor vehicle insurance policy from either defendant between June 11, 1986, and June 11, 1996 (an estimated 4 million purchasers). As previously promised by the defendants, the certification decision was quickly appealed to the Fourth Judicial District in San Antonio[83] under their right of interlocutory appeal.[84]

The defendants' appeal of the certification had a significant impact on the litigation. The trial court deferred formal notice of certification to class members

until the court of appeals ruled on the defendants' request to overrule the order to certify the class.[85]

On June 27, TDI held public hearings on a clarified rounding rule[86] and, four days later, formally adopted single-rounding rules for auto insurance that would go into effect on November 1, 1996.[87] Insurers were given the right to "optionally apply" the amendments to policies issued from July 31 to November 1.[88] Simultaneously, TDI disclosed that on July 28 the defendants had entered into an agreement with the department to refund or credit all overages from double rounding charged on or after the May 7 informal, nonbinding TDI request. The agreement also restated Bomer's position that for almost 20 years before 1991 the agency and its predecessor interpreted the rules in a manner consistent with double rounding and that the insurers could have reasonably relied upon this advice.[89] Cracken and the Consumers Union reiterated that the agreement only affected future rounding practices; in their views, overages before May 1996 still needed to be addressed.[90]

While the defendants were appealing the certification order, Cracken contemplated a second round of commercials. A 30-second ad scheduled to be broadcast starting August 19 would inform insureds that a lawsuit was pending over the double-rounding issue and also that as the litigation moved forward (conceivably after a ruling for the plaintiffs from the court of appeals), the policy holders would get more information on how to become part of the lawsuit.[91] Defendants again blasted the ads as deceitful, dishonest, and misleading, but on August 12, the Fourth District Court of Appeals refused their request to block the commercials. Plaintiffs' counsel paid $501,000 to run the TV spots until August 30 in nearly all the state's major markets (San Antonio, Houston, Dallas, El Paso, the panhandle, and east and west Texas).[92] Class counsel characterized the TV advertisements, including the ones aired in May, simply as an attempt to combat the defendants' own "media campaign" to "secure editorials and opinion editorials in Texas daily newspapers advancing the Farmers and Allstate groups' false and misleading message. . . ."[93]

In a key victory for the plaintiffs, on August 19 the Texas Supreme Court refused to hear the defendants' requests to dismiss the case on jurisdictional grounds (class certification was not an issue in this appeal). Defendants had asked that the matter be pursued through the insurance regulatory agency and not through the courts. The last procedural chance for the insurers to prevent the case from proceeding to trial as scheduled occurred in late August when the defendants filed briefs on the pending interlocutory appeal of the class certification order.

MOVEMENT TOWARDS SETTLEMENT

Thirteen days of court-ordered mediation conducted by Feinberg took place from June 17 to September 25, 1996.[94] During the mediation process defendants provided confidential computer data to the plaintiffs that enabled them to estimate more accurately the size of the alleged overcharge.

As mediation began, the parties weighed the risks of continued litigation. The defendants' interlocutory appeals of certification at least had a chance of a favorable ruling, but they were concerned about the lack of a subsequent right of appeal to the Texas Supreme Court because the court of appeals was ruling only on an interlocutory decision, not a final one. Also, Texas law was somewhat unsettled on the standards for certification; few class actions ever reach an adjudicated outcome such as a trial verdict or a summary judgment dismissal, and few certifications had resulted in an appellate decision. The defendants were also concerned about the possibility of a "monster" verdict from Zavala County jurors, especially after what they felt was a media blitz by the Cracken team. There was also the matter of the continuing effect on the defendants' current business and public image; after all, the allegations were focused on just these two insurers.

On the other hand, TDI's public statements that the defendants had operated under the color of authority were persuasive and had arguably diminished the value of the case for Cracken. Moreover, premium data provided by the insurers during the mediation process appeared to halve the potential total damages that were claimed at the onset of the litigation. The case was also gaining a lot of national media attention as an example of the worst aspects of class actions, and the attention was increasingly focused on the aggressive prosecution of the case. The plaintiffs also recognized that the interlocutory appeal of the underlying class certification order concurrently under consideration by the state court of appeals might result in a defendant victory on this critical issue, place an expensive burden on the plaintiffs to prove damages for each individual policy holder, or bar all claims before the period set forth in the applicable statute of limitation.

All these factors amounted to a hotly contested—and presumably costly—litigation, and both sides badly wanted to settle. On August 30, 1996, the parties executed a Final Term Sheet that itemized the material terms of a proposed settlement; additional details of settlement were subsequently negotiated with the help of Feinberg. Word of the settlement spread and it soon was labeled as "unsatisfactory" by Reggie James, who said that it reflected poorly on regulators, insurance companies, and attorneys.[95] The Consumers Union felt that the insurers should not have used a "math gimmick" to take in millions of extra dollars, that TDI should have uncovered the practice and done more to com-

pensate consumers (and less to influence the outcome of the lawsuit), and that the settlement overcompensated the plaintiffs' lawyers and undercompensated consumers. The Consumers Union commended the TDI commissioner's actions in preventing future double rounding and the work of the plaintiffs' attorneys in uncovering the overcharge.

Despite these criticisms, on October 4 Judge Abascal preliminarily approved the settlement after a hearing lasting a few hours. He scheduled the final fairness hearing for December 13, 1996.[96]

Details of the Agreement

The parties' agreement contained a conditional class certification for settlement purposes only and covered "All persons who purchased and paid for six-month, rate-regulated, private-passenger motor vehicle insurance policies sold by [Farmers and Allstate] in the State of Texas between August 28, 1985 and October 4, 1996. . . ."[97]

Notice of the proposed settlement was to be made at the defendants' expense as part of the distribution process. Opt-outs were given until December 4, 1996, to serve notice of intent upon the defendants' claims administrators and could use any "reasonable written form" to give such notice.[98] Listings of all class members opting out were to be filed with the court by December 9, 1996. Class members not requesting exclusion were allowed to object to any term or condition in the settlement agreement provided they filed and served such objections by December 4, 1996. These objectors and their attorneys were required to fill out a lengthy questionnaire about the nature of their objections and their relationship with their counsel (or clients) and to submit themselves to depositions.[99] This last provision was inserted into the agreement at the class counsel's request and was reportedly designed by Issacharoff and Silver to discourage nonmeritorious or spurious objections to the settlement or fee request.

Calculation of the Settlement Fund and Method of Distribution

Originally the case was promoted as worth over $100 million, but the accuracy of this estimate depended on statutes of limitations, the estimation of the size of the policy holder class, and a statistical calculation of the frequency of overcharging. Based on data provided by the insurers during the settlement process, plaintiffs and defendants came up with different estimates of what the amount of overcharging might be. Two periods were at issue: the total time from August 28, 1985, to October 4, 1996 (the certified class period), and an alternative projection for August 28, 1991, to October 4, 1996, based on the assumption that claims from policies purchased before the arguable boundaries

of the statute of limitations (i.e., four years before the initial filing of the suit) might be barred. The Proposed Settlement Agreement noted that plaintiffs' evaluation placed the total amount of overcharges for both companies at $50 million for the longer period and $24 million for the shorter.[100] Without admitting that the amounts in question were indeed recoverable overcharges, defendants estimated the totals for both companies to be either $36 million or $18 million.[101]

A compromise was reached using a midpoint figure of $42 million for the ten-year class and then by reducing this amount by 15 percent to account for the plaintiffs' potential risks in litigation. The result of $35.7 million was labeled the total settlement fund and was to be made available by the defendants to class members who qualified for payment.

Three subgroups were created. The total settlement fund was to be distributed to each in proportion to their size (estimated from the defendants' data) as follows:

- Group 1 claimants were current policy holders with the defendants (as of October 4, 1996), estimated to constitute 1,426,230 total policies. Group 1 would receive 31.35 percent of the total settlement fund.
- Group 2 claimants were former policy holders who terminated coverage sometime within the year before October 4, 1996 (estimated to constitute 239,221 total policies). Group 2 would receive 5.26 percent of the total settlement fund.
- Group 3 claimants, the largest category, were former Allstate and Farmers policy holders who left the company up to ten years earlier (but before October 4, 1995); they were estimated to constitute 2,883,471 total policies. Group 3 would receive 63.39 percent of the total settlement fund.

In the Proposed Settlement Agreement, Farmers estimated that it had 771,230 Group 1 policy holders; 152,221 former customers in Group 2; and 1,583,471 in Group 3. Allstate estimated policy holders in Groups 1, 2, and 3 at 655,000, 87,000, and 1,300,000, respectively.[102]

Part of the reasoning behind the three-group subdivision of the class was that those with whom the defendants possessed a current business relationship (Group 1) might be most reliably contacted by first class mail. Also, the U.S. Postal Service would forward first class mail for up to a year after notification of a change of address, thus covering Group 2 members.

Because the case's interlocutory appeal was still under consideration when settlement was reached, no notice had been given of the original certification. Under the agreement, the defendants were responsible for the costs of notice of

the proposed settlement. Defendants also shouldered the costs of mailing and processing Groups 1, 2, and 3 members' checks or credits. Notice of the settlement class certification was to be sent to Group 1 and Group 2 members by first class mail within 30 days following preliminary approval. Mailing notice and checks to the current and recently terminated insureds (Groups 1 and 2) was estimated to cost about $900,000.[103] Group 3 members were to be notified by quarter-page advertisements in two consecutive Sunday editions of the 20 Texas daily newspapers with the largest circulations; the first publication was to take place within seven days of the Group 1 and 2 notice mailing. At the time of the preliminary settlement, defendants estimated that they would spend $110,000 to publish the notice to Group 3 in the Sunday editions.[104] The notice process anticipated for publicizing the settlement would be the first formal announcement to current and former policy holders that they were members of a class.

The total settlement fund included any amounts to be paid to the class counsel for fees, and as a result, the amount of fees awarded directly affected the size of the individual checks or credits. Proposed expenses to be recovered by class counsel would be paid in addition to the total settlement fund (so plaintiffs' costs would not affect individuals' refunds). A flat rate refund was to be given to qualifying class members after fees were deducted, and so was not to be based on the number of coverages any one individual had purchased over the years, nor on the number of groups to which a policy holder might conceivably belong.[105] Using a sample attorney fee award percentage of 28.99 percent, the Proposed Settlement Agreement estimated a net recovery to each class member of $5.57 (see Table 10.3).

Refunds would be made to Group 1 claimants either by credits toward their current policies or by checks, and to Group 2 by checks sent by first-class mail to their last known addresses.[106] Group 1 and 2 members did not need to request payments because the checks or credits would be issued automatically to anyone who did not opt out. Verified written reports of this distribution were to be

Table 10.3

Projected Settlement Distribution

Group	Estimated Number of Policies	Fund Allocation	Projected Attorney Fees	Net Funds	Net Recovery (Net Funds / Number of Policies)
1	1,426,230	$11,193,072	$3,244,872	$7,948,200	$5.57
2	239,221	$1,877,410	$544,261	$1,333,149	$5.57
3	2,883,471	$22,629,519	$6,560,297	$16,069,221	$5.57
Total	4,548,922	$35,700,001	$10,349,430	$25,350,570	$5.57

filed with the trial court 210 days after the effective date of the settlement[107] reporting the number of Groups 1 and 2 members paid, the amount of their net recovery, the total amount of payments made, and the outstanding balance of the groups' net funds. Any balance remaining in these net funds was to be paid to the Texas Chapter of the American Red Cross 30 days after the reports were submitted.

A different procedure was to be used for Group 3, the class members who were no longer with the defendants and who had ended their coverage more than a year before. These class members had to request a claim form by letter. After receipt of the claim form, they were required to properly complete and file the form by July 7, 1997. If the claim were accepted, the defendants would issue claimants a check for the net recovery amount.[108] A report similar to that used for Groups 1 and 2 was also to be filed with the court, but the balance of the net funds for Group 3 on the date of the report was to be retained by the defendants.[109] The court held that "such Tex. R. Civ. P. 42 notice by mail and publication shall be effective to inform millions of class members of their rights and obligations" under the settlement.[110]

The Preliminary Order found that the proposed agreement appeared fair because it

> (a) Provides a high level of recovery to settlement classes relative to their estimated actual damages;
>
> (b) Reasonably discounts the claims alleged by the settlement classes in light of the risks, uncertainties and delays associated with further prosecution of their claims; and
>
> (c) Provides a substantial cash recovery to the settlement classes.
>
> Further, the Court preliminarily finds that Plaintiffs' discovery of Defendants' subject methods of whole-dollar rounding and resulting prosecution of the claims made the basis of these lawsuits proved instrumental in the [TDI] adoption of amended [rules taking effect November 1, 1996].[111]

Calculation of Fees and Reimbursable Costs

Class counsel asserted that they had invested over 14,000 hours in the matter[112] and estimated their expenses to exceed $2.6 million through the end of November 1996 (plus projected additional expenses of more than $1.1 million to bring the litigation to a close).[113] However, the initial request was for $10,349,430 in fees and just $1,612,407 in costs.

To determine an appropriate fee in a class action, Texas trial courts have the discretion to choose between a percentage of the common fund or a lodestar of a reasonable hourly rate adjusted by a multiplier (for factors such as the risk in-

volved, the quality of the work, and the result).[114] While the trial courts had discretion over the amount of fees and costs, the defendants had agreed not to oppose the class counsel's requests as long as the fees did not exceed 28.99 percent of the $35.7 million total settlement fund and the reimbursable out-of-pocket expenses did not exceed $1,612,407.[115] These upper bounds were indeed what the court ordered in its preliminary approval of the settlement; the Preliminary Order approving the settlement awarded these exact figures.[116] Each of the defendants was to bear an equal amount of the attorney fees although Farmers would contribute $271,941 of the expenses and Allstate would pay $1,340,366.[117] The difference in these contributions was a matter determined privately between the two insurers.

The court found these awards to be reasonable in light of the total benefits made available to the class, the "millions of dollars in reduced, future premium charges," the $2 million or more the defendants might have to pay for the costs of notice and distribution of refund checks, and the $1.6 million in costs reimbursed to class counsel (out of the more than $2.5 million alleged to have been incurred).[118] Moreover, the court also found the award to be reasonable because the fee was at or below the prevailing rates paid to attorneys in common-fund class actions as well as the prevailing market rates for contingency-fee work in complex individual-client cases.

FINAL APPROVAL OF DISTRIBUTION AND FEES

Events Leading Up to the Fairness Hearing

In the interim between the preliminary and final settlement approvals, Lynne Liberato of Haynes Boone in Houston was appointed as a Special Master[119] to review the adequacy and reasonableness of the proposed settlement, the reasonableness of the fees and expense requests, and any objections filed. Liberato's fees were capped at $75,000 and were to be primarily paid out of the unallocated funds of the net recovery for Groups 1 and 2 before any distribution of the remainder to the Red Cross. Opt-outs were reported to be negligible and certainly were below the 10-percent threshold that would have allowed the defendants to terminate the settlement agreement. Allstate alone, for example, had only 1581 policy holders eventually opting out of a potential class of 695,406 Group 1 and 2 claimants (a 0.23 percent opt-out rate).[120]

The Parties Argue in Favor of Approval

The next step was to get Judge Abascal to put a final stamp of approval on the settlement and the fee arrangement. A Final Judgment approving fees in the amount proposed in the settlement agreement was justified on the basis of the

$35.7 million made available by the defendants as part of the total settlement fund, the $1,612,407 in out-of-pocket expenses that would be paid directly to class counsel and not taken out of the fund, and the nearly $3 million (or more) that was being made available by the defendants to cover the costs of notice and claims administration.[121] Moreover, the parties also argued that the fee was reasonable in light of the litigation's effect on prompting TDI to amend its regulations to clearly forbid double rounding. The plaintiffs estimated this benefit to be worth $31 million based upon assumptions that the defendants would have continued double rounding on current Group 1 members remaining with the defendants for the next decade.[122] When all of the above justifications are summed, plaintiffs asserted that the benefits to the class exceeded $71 million.[123]

The plaintiffs' request of $10,349,430 in fees as a proportion of the "settlement" differed depending on what figure was regarded as the size of the class benefit. According to the plaintiffs, the $10 million alternatively represented:

- 28.99 percent of the $35.7 million total settlement fund
- 15 percent or less of the total of the $31 million in estimated future savings, $35.7 million in the total settlement fund, $2.1 million in costs of notice borne solely by the defendants, $968,000 in costs of distribution borne solely by the defendants, and $1.6 million in reimbursed out-of-pocket expense
- 27 percent or less of the $35.7 million in the total settlement fund, $2.1 million in costs of notice borne solely by the defendants, and $968,000 in costs of distribution borne solely by the defendants.[124]

The class counsel asserted that "a fee based on a percentage of the benefits conferred upon the [class] is, thus, consistent with both the decisive trend in the Federal Courts and the uniform view of every major class-action legal scholar."[125] Class counsel described the proposed fee percent of 28.99 percent as being less than the going market rate:

> While plaintiffs' lawyers in Texas frequently contract for contingent fees of forty percent (40 percent), a one-third (1/3) contingency fee represents a clear, minimum benchmark established by a number of appellate court decisions. Thirty percent (30 percent) to thirty-three percent (33 percent) are commonplace common-fund, percentage-fee awards.
>
> The class-action experts upon whom Class Counsel rely in this litigation agree with Judge Posner that percentage fees awarded from a common fund in a class action should mirror the contingent-fee market. In fact, the evidence is mounting that on a national basis fee awards in class-action cases are approaching an average one-third (1/3) contingent-fee, representative of the clear, minimum contingent fee paid in individual cases. . . .[126]

Moreover, these percentages would be even smaller if $1.185 million in claimed unreimbursed expenses (that the plaintiffs claimed would normally to be paid by a client out of the recovery in a standard contingency-fee case) were included as well in the class benefit calculations.[127] As an alternative to a percentage calculation, a lodestar was proposed for the purpose of comparison. Depending on whether the unreimbursed expenses were included, class counsel's "hourly rate" would be in the range of $650 to $735 an hour for a lodestar multiplier of 2.5:1 to 3:1 (derived from a $250 per hour base).[128]

The settlement and fees were argued by the plaintiffs to be further justified by both the intensity of the proceedings and the return to the class members. Class counsel felt that they had aggressively litigated the suits.[129] Arthur Miller, appearing for the class counsel, attested to their thoroughness:

> Having been involved in numerous class actions, either on a consulting basis or on an actual representation basis for many, many years . . . [t]his case stands, in my mind, as sort of an incredible example of plaintiffs' class counsel being prepared to the nines, I would say to the elevens. I cannot personally think of stones left unturned and avenues not pursued and activities not engaged in. There was literally nothing left undone by these lawyers, and everything that was done by these lawyers was done with great skill, with great backup, and with great documentation.[130]

And litigation experts hired by the plaintiffs looked favorably upon the proposed settlement:

> Arthur Miller calls the proposed settlement "remarkable." John Coffee, one of the nation's leading experts on class-action practice and procedure, states, "this is a heroic settlement which is off the charts of the overall national data." Charles Silver, perhaps the leading expert on Texas class actions, calls the settlement "an extraordinarily good result."[131]

However, not everyone thought the proposed settlement was outstanding. A *Wall Street Journal* editorial decried the fact that the $5.50 net recovery would be "enough to buy a celebratory meal at McDonald's [while the] plaintiffs' counsel, meanwhile, are likely to get $10.3 million."[132] The editorial also characterized the settlement as "even more of a 'rip-off' than is obvious at first glance" because the Group 3 claimants would have to write in for compensation: "Few are expected to bother, for obvious reasons."[133]

Concerned with the possibility of a less-than-100 percent claiming rate for those consumers who would not be contacted directly, Bomer asked state Attorney General Dan Morales to intervene in the suit to make the settlement fairer. A petition for intervention was filed by the State of Texas on December 4 seeking to ensure that the proposed settlement was "reasonable and fair and . . . in the best interests of class members and potential class members and in the

public interest."[134] On December 13, it was announced that the state's intervention resulted in a $2 million separate settlement to be used by the attorney general's Consumer Protection Division for additional consumer education programs.[135] Allstate, Farmers, and the law firm of Cracken & Harkey would each contribute a third of the settlement amount to this fund.[136] Morales stated that the purpose was to obtain some compensation for the Group 3 members who might not complete the claiming process:

> Our separate agreement is an effort to sweeten the pot for all consumers . . . . It is much smarter and of more value to arm Texans with consumer information so that they may protect themselves in their daily transactions. Prevention is the key.
>
> Additional efforts to try to locate this third group would be cost-prohibitive, unproductive and not result in meaningful personal compensation for the consumers.[137]

Final Orders

Judge Abascal appears to have agreed with the parties' arguments. After a day-long fairness hearing on December 13, he gave the settlement final approval on December 18, 1996. The settlement class certified consisted of:

> All persons who purchased and paid for one (1) or more six-month, rate-regulated, private-passenger motor vehicle insurance policies sold by [defendants] in the State of Texas between August 28, 1985 and October 4, 1996, specifically excluding [the judge, class counsel, and the directors and officers of the defendants].[138]

Generally, aspects of the settlement agreement and provisions of the preliminary approval were continued in place with a few exceptions. Most notably, the total estimates of the class size in each of the subgroups was revised downward, although the attorney fee award and total fund remained at about the same levels. These adjustments meant that the individual net recovery to class members increased somewhat to $5.75, as can be seen in Table 10.4.

Each class member would be eligible for only one payment of $5.75 no matter how many insurance policies or coverages he or she had purchased over the 11-year period. Group 1 and 2 members were required to receive a credit or check for the net recovery amount within 30 days of the effective date of the settlement.[139] Because no appeal of the settlement was ever made, the effective date of 30 days after final approval was January 17, 1997. Group 3 members were to be paid within 30 days after the defendants received a properly completed and timely valid claim form or, at the latest, within 30 days of the effective date.[140]

Table 10.4

Final Settlement Group Counts, Allocations, Fees, and Net Recoveries

Group	Policy Holders	Fund Allocation	Attorney Fees	Net Funds	Net Recovery (Net Funds/ Policy Holders)
			All Defendants		
1	1,402,603	$11,383,739	$3,317,772	$8,064,967	$5.75
2	215,743	$1,726,802	$486,279	$1,240,523	$5.75
3	2,783,471	$22,550,337	$6,545,379	$16,004,958	$5.75
Total	4,401,817	$35,659,878	$10,349,430	$25,310,448	$5.75
			Allstate		
1	634,027[a]	$5,376,625	$1,730,970[b]	$3,645,655[c]	$5.75[d]
2	61,389[a]	$520,586	$167,599[b]	$352,987[c]	$5.75[d]
3	1,200,000[a]	$10,176,145	$3,276,145[b]	$6,900,000[c]	$5.75[d]
Total	1,895,416	$16,073,357	$5,174,715	$10,898,642	$5.75
			Farmers		
1	768,576[e]	$6,006,114	$1,586,802[f]	$4,419,312[g]	$5.75[h]
2	154,354[e]	$1,206,215	$318,679[f]	$887,536[g]	$5.75[h]
3	1,583,471[e]	$12,374,192	$3,269,234[f]	$9,104,958[g]	$5.75[h]
Total	2,506,401	$1,958,521	$5,174,715	$14,411,806	$5.75

[a]Final Judgment at 3.

[b]Final Judgment at 10. Attorney fees have been apportioned by group type as per the Proposed Settlement Agreement at 19–20.

[c]Final Judgment at 7.

[d]*Id.*

[e]*Id.* at 3.

[f]*Id.* at 10; see note 141.

[g]*Id.* at 7.

[h]*Id.*

The court further ruled that each defendant had to pay class counsel $5,174,715 in attorney fees and assessed expenses of $1.52 million against Allstate and $85,000 against Farmers.[141] An incentive award of $15,000 was granted to each of the six named plaintiffs in the two suits and was to be paid by the defendants through the class counsel (each defendant was responsible for only the plaintiffs in its respective actions).[142]

The Final Judgment dismissed the matter with prejudice and released the defendants from all claims arising out of the double-rounding method. Such claims might include any violation or failure to comply with the agreement between the defendants and TDI to refund or credit all overages resulting from double rounding taking place on or after TDI's May 7 informal, nonbinding re-

quest to do so in anticipation of formal adoption of a single-rounding rule. All claims by class members opting out were dismissed without prejudice.

The court retained jurisdiction over the settlement to "effectuate the fair and orderly administration of the settlement."[143] A verified report of the distribution of the settlement funds was to be filed with the court within 210 days after the effective date, but as this report was being written, no such report had been filed. This delay was apparently stipulated to by the parties after final approval had been granted.[144]

When the terms of the Final Judgment were released, along with the method of distributing the refunds and the amount of attorney fees, both TDI and the Consumers Union were concerned that the "best interests of the affected policy holders" were still not being addressed.[145] Bomer said that his actuaries projected only $10 million would be paid out under the terms of the agreement because not all affected consumers were to be contacted. Because any unpaid amounts of the Group 3 reimbursement pool would go back to the defendants, $1 of attorney fees might be needed to get $1 of recovery. Using the upcoming holidays as a motif for his reproof to the class counsel and the defendants, James criticized the settlement:

> Everybody involved should get lumps of coal and switches in their stockings. . . It is clear that no one was looking out for the best interests of the affected policy holders.[146]

Quoted in the same news story, Cracken viewed the result differently, indicating that consumers received the opportunity to recover $36 million in past overcharges and avoided $30 million in future double rounding.[147]

EPILOGUE

Although a verified report has not yet been filed with the court, correspondence between the defendants and TDI indicates how the funds have been distributed. As more information became available, the defendants made a number of slight revisions to their original calculations of the number of policy holders in each group. In August 1997, Allstate estimated that the number entitled to an automatic refund, exclusive of any opt-outs, was 624,855 and 70,551 for Groups 1 and 2, respectively (695,406 total).[148] In December 1997, Farmers estimated that there were 768,576 and 154,354 Group 1 and 2 members, respectively (922,930 total).[149] These numbers sum to a potential automatic liability for the two defendants of $9,305,432 (1,618,336 members of Groups 1 and 2 each receiving $5.75), a figure in line with the $9,305,490 net fund allocation for these groups in the Final Order. However, not all of this amount would actually be paid out for various reasons—opt-outs, mail returned for Group 1 and 2

members who did not give a forwarding address, checks received but not cashed, payments still in process, and other explanations. Using our best available data, we estimate that $8,911,769.75 was actually paid out to 1,549,873 class members in Groups 1 and 2. However, it is justifiable to assume that the overwhelming proportion of Group 1 and 2 class members have received or will eventually receive a check or credit.[150] Any funds allocated to Groups 1 and 2 that do not reach the intended recipients would first be used to pay the fees and expenses of the Special Master and thereafter turned over to the Texas Chapter of the American Red Cross.[151] We estimate that after deduction of the $75,000 Special Master fees and expenses, $318,720.25 will be remitted to the charity.

The situation with Group 3 is entirely different. While there is no doubt that the estimation of the size of a class of former policy holders who may have purchased coverage any time in a previous decade (but who, by definition, no longer maintain a business relationship with the defendants) is highly problematic, one would hope that claims made against Group 3 funds would be in the neighborhood of the original estimates. In the Proposed Settlement Agreement, Group 3 was estimated to consist of 1,583,471 former policy holders with Farmers and 1.3 million former policy holders with Allstate.[152] Class counsel's fee petition used this combined potential of 2,883,471 claimants to justify $6,560,297 of the $10.34 million in attorney fees.[153] By the time of the Final Judgment, there was some downward revision in the size of Group 3 to about 2.78 million. Exactly how many of the nearly 2.8 million class members in Group 3 became aware of the settlement from the ads in two Sunday editions of their local newspaper or other means, took the time to write for a copy of the claim form, received the form, correctly filled it out, and returned the form to the defendants for processing and the issuance of a check? Our best estimate, using correspondence supplied by the TDI under its open records laws, is that *fewer than 350 claim forms* were received by the defendants by the time of the cutoff date for a likely payout of *less than $2,000*.[154] This figure should be compared to the $16 million estimated Group 3 net recovery set forth in the Proposed Settlement Agreement and represents a successful claiming rate of around 0.01 percent. Unlike the allocations for Groups 1 and 2, there was no mechanism in place for redirecting the unclaimed compensation; as per the Final Judgment, all Group 3 funds not distributed to class members would be retained by the defendants.

Key Events	**Date**
D. J. Powers discovers double rounding in his analysis of auto insurance rating	July 10, 1995
Complaint filed	August 28–30, 1995

Allstate removes the suit against it to U.S. district court	October 20, 1995
Federal district court remands Allstate matter to Zavala County	February 13, 1996
Plaintiffs move for class certification	March 25, 1996
Judge Abascal denies defendants' requests to dismiss case and to send issue to TDI or to transfer venue	April 9, 1996
Allstate joins Farmers in refusing to stop double rounding immediately	May 9, 1996
Certification hearing	May 30, 1996
Fourth Judicial District Court of Appeals denies leave to file petition for writs of mandamus and prohibition	June 14, 1996
Defendants petition the Texas Supreme Court for writs of mandamus and prohibition to compel Judge Abascal to vacate the orders denying motions to dismiss on jurisdictional, venue, and abatement grounds	June 17, 1996
Parties meet with mediator for the first time	June 17, 1996
Certification order	June 19, 1996
Texas Supreme Court refuses to dismiss case on jurisdictional grounds	August 19, 1996
Settlement announced; agreement given preliminary approval	October 4, 1996
Distribution of notice of certification and settlement begun	October 1996
Amended Rule 7 goes into effect and prohibits double rounding for all policies issued thereafter	November 1, 1996
Opt-out deadline and objection deadline	December 4, 1996
State of Texas files petition for intervention	December 4, 1996
Separate agreement announced by Texas Attorney General Dan Morales for a $2 million settlement to be paid equally by Allstate, Farmers, and Cracken & Harkey	December 13, 1996
Fairness hearing	December 13, 1996
Final judgment	December 18, 1996
Effective date for settlement provisions (30 days after settlement was given final approval as no appeal was filed)	January 17, 1997

Date by which defendants were to have issued checks or credits to Group 1 and Group 2 class members	February 15, 1997
Cutoff for Group 3 claim forms to be received by defendants	July 7, 1997
Date by which defendants were to have filed a verified written report pursuant to the agreement	August 15, 1997

NOTES

[1]As part of our research on this litigation, we interviewed a plaintiffs' attorney, attorneys for the defendants, staff members of the Texas Department of Insurance, and representatives of a consumer interest group. We were unable to speak to the judge in this case prior to publication. We also reviewed the pleadings and papers filed in the case as well as other documents including newspaper and magazine articles, correspondence, press releases, and internet web site postings.

[2]*Martinez v. Allstate Insurance Co.*, No. 95-08-09169-CV (Tex. Dist. Ct. Zavala County filed Aug. 28, 1995).

[3]*Sendejo v. Texas Farmers Insurance Co.,* No. 95-08-09165-CV (Tex. Dist. Ct. Zavala County filed Aug. 30, 1995).

[4]John MacCormack, "Suits Attack Auto Insurance Rounding Practice," *San Antonio Express-News*, Apr. 2, 1996, at 8B; Max Boot, "A Texas-Sized Class Action Fraud," *Wall Street Journal*, May 22, 1996, at A23.

[5]"Personal Injury: For a Texas Lawyer, Misfortune's Big Bucks May Take a Big Dive," *Wall Street Journal*, Oct. 3, 1995, at A1; Homer Jones, "Lawsuits, Texas Style," *Texas Business*, Oct. 1996, at 46.

[6]Defendants characterized the association as "a concerted entrepreneurial scheme between [Cracken], [Powers], and others to manufacture a 'regulatory' class action lawsuit against insurance companies." Brief of Appellant Allstate (Aug. 22, 1996) at 4, *Martinez*.

[7]A similar desire during the 1960s and 1970s to reduce the number of characters needed in mainframe computer processing (when data storage space was relatively expensive) has now led to the so-called Year 2000 Millennium Bug. See, e.g., May Lucy, "Millennium Bug Zeroes In on Computers," *Cincinnati Enquirer*, Dec. 23, 1996, available on the internet at http://Enquirer.com/Editions/1996/12/23/loc-computer2000.html.

[8]Plaintiffs' Seventh Amended Original Petition and Formal DTPA Notice and Demand (June 28, 1996) at 5–6, *Martinez* (hereinafter Plaintiffs' 7th Amended Petition).

[9]Prior to the 1970s, the rule in Texas was to round down when the remainder was $.50.

[10]"Allstate Disputes Bilking Claims," *El Paso Times*, Apr. 4, 1996.

[11]Consolidated Brief in Support of Class Counsel's Application for (1) Attorney's Fee and (2) Reimbursement for Certain Out-Of-Pocket Expenses (Dec. 6, 1996) at 4, Nos. 95-08-09169-CV, 95-08-09165-CV (hereinafter Brief for Fee and Expenses; unless otherwise noted future references to court documents pertain to joint filings for the *Martinez* and *Sendejo* cases).

[12]Class Counsel's Application for (1) Attorney's Fee and (2) Reimbursement for Certain Out-Of-Pocket Expenses (Dec. 3, 1996) at 8 (hereinafter Application for Fee and Expenses).

[13]Brief of Appellant Allstate at 9–10; Jones, *supra* note 5.

[14]Zavala County's population of about 12,200 yields a density of 9.4 inhabitants per square mile compared to the overall rate for Texas of 64.9. U.S. Census Bureau, *Land Area, Population, and Density for States and Counties: 1990*, available on the internet at the U.S. Census Bureau home page, http://www.census.gov/population/censusdata/90den_stco.txt (Feb. 20, 1998).

[15]Based on the 1990 Census, 50.4 percent of Zavala County citizens live at or under the poverty level, a rate met or exceeded by only two others of the 254 counties in Texas. U.S. Census Bureau, *County Income and Poverty Estimates, 1990 Census Estimates: Texas 1989*, available on the internet at http://www.census.gov/hhes/www/saipe/90data/tab48_89.html (Feb. 20, 1998).

[16]"The place is a well-known romping ground for trial lawyers in search of plaintiff-friendly rulings." Editorial, "Insurance: Class-Action Suit Threatens to Embarrass Texas," *Dallas Morning News*, May 30, 1996, at 22A.

[17]The defendants asserted that the solicitation of these clients on Cracken's behalf was improper and in violation of Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct. Brief of Appellant Allstate at 42 (citing the Affidavit of Professor Michael Quinn of the University of Texas College of Law). However, Judge Abascal found that the allegation was not supported by the record. Order Regarding Class Certification (June 19, 1996) at 14, *Sendejo*.

[18]Before September 1, 1995, former Texas. Civ. Prac. & Rem. Code § 15.001 provided that venue was proper "in the county in which all or part of the cause of action accrued, or in the county of defendant's resident, if the defendant is a natural person." Former Tex. Civ. Prac. & Rem. Code § 15.036 provided that venue in a suit against a corporation was the county where its principal office is situated or in the county where the plaintiff resided when all or part of the cause of action arose (provided the corporation has an agency or representative in the county). Senate Bill 32, passed as part of a tort-reform package in the 1995 Texas legislative session, established the principal place of business for a corporate defendant to be where the firm's decisionmakers conduct daily affairs (and abolished the use of "agent or representative" venue) and allowed transfers of venue for the convenience of the parties to the lawsuit. Texas Acts 1995, 74th Leg., ch. 138, § 1 (codified at Tex. Civ. Prac. & Rem. Code § 15.002). Arguably, had the matter been filed after September 1, Tex. Civ. Prac. & Rem. Code § 15.002(a)(3) would have controlled and venue might have been proper in the counties of the principal offices of the defendants (Travis County for Farmers and Dallas County for Allstate) though venue might still have been permissible in Zavala County.

[19]Two cases were filed in Zavala County District Court: *Martinez*, No. 95-08-09169-CV and *Sendejo*, No. 95-08-09165-CV. These two cases were developed by the lead plaintiffs' counsel in lockstep, and the defenses tendered by Allstate and Farmers were highly coordinated. For the purposes of this description, the two cases are discussed as one because generally there were no material differences in the issues involved or their progress through the courts. There was a short-lived removal of the Allstate matter to federal court early in the suit, but after remand the cases were essentially litigated as one.

[20]Defendants Allstate Insurance Company and Allstate Indemnity Company are hereinafter collectively referred to as "Allstate" while defendants Texas Farmers Insurance Company and Mid-Century Insurance Company are hereinafter collectively referred to as "Farmers."

[21]According to Max Boot of the *Wall Street Journal*, Barrientos went to high school with Judge Abascal and had been previously hired as local counsel to represent out-of-state investors in a fraud suit against Prudential (also before Judge Abascal); the case resulted in a $20 million settlement offer. "A Texas-Sized Class Action Fraud," *Wall Street Journal*, May 22, 1996.

[22]"Personal Injury: For a Texas Lawyer, Misfortune's Big Bucks May Take a Big Dive," *supra* note 5.

[23]Juan B. Elizondo, Jr., "Judge Keeps Overcharge Case In Court," *Greenville Herald-Banner*, Apr. 11, 1996.

[24]At the time, Farmers insured about 1.2 million drivers in Texas and Allstate insured about 560,000. Terrence Stutz, "Insurance Chief Bans Practice of Double Rounding," *Dallas Morning News*, Aug. 1, 1996, at 21A.

[25]Allstate and Farmers (and their subsidiaries) insure nearly 30 percent of the state's private autos. John MacCormack, "Suits Attack Auto Insurance Rounding Practice," *San Antonio Express-News*, Apr. 2, 1996, at 8B.

[26]Plaintiffs alleged that Tex. Ins. Code Ann. art. 5.101 (since March 1, 1992) and Tex. Ins. Code Ann. arts. 5.01, 5.03, and 5.96 (prior to March 1, 1992) compelled insurance companies to strictly conform with the *Texas Automobile Rules and Rating Manual. Manual* Rules 7 and 9 cover the disputed references to rounding.

[27]MacCormack, *supra* note 4.

[28]See, e.g., *Zahn v. International Paper Co.,* 414 U.S. 291 (1983).

[29]*Watson v. Shell Oil Co.,* 979 F.2d 1014 (5th Cir. 1992).

[30]Class Counsel Fee Sharing Agreement (Feb. 16, 1996) at 6 n.4.

[31]MacCormack, *supra* note 4.

[32]Stuart Eskenazi, "Dershowitz Takes on Insurers in Case Likely to Enrich Lawyers," *Austin American-Statesman*, May 16, 1996, at A1.

[33]"We hired the best class-action experts in America to assist in our presentation to the court and they said this was a textbook class action." John MacCormack, "Insurance Firms Face Class Action," *San Antonio Express-News*, June 28, 1996, quoting John Cracken.

[34]At the time of the Final Judgment approving the settlement and dismissing the case, the court appointed the following attorneys as class counsel: Timothy Patton and Daniel V. Pozza of Pozza & Patton, San Antonio; Fidel Rodriguez, Jr., of San Antonio; Pieter M. Schenkkan and Robert J. Hearon, Jr., of Graves Dougherty Hearon & Moody, Austin; Rene R. Barrientos of San Antonio; James R. Snell of Houston; John R. W. Cracken and John D. Harkey, Jr., of Cracken & Harkey, Dallas; Samuel Issacharoff and Charles Silver of the University of Texas Law School, Austin; Gavin H. McInnis of Jacobson Guglielmi & McInnis, Houston; and D. J. Powers, Austin. Final Judgment (Dec. 18, 1996) at 4–6, *Martinez;* Final Judgment (Dec. 18, 1996) at 4–6, *Sendejo.*

[35]MacCormack, *supra* note 4.

[36]Susanne Sceafane, "Texas Auto Overcharges Prompt Suit," *National Underwriter,* Apr. 15, 1996, at 4.

A November 6, 1985 letter from the TSBI staffer Grover S. Corum to Allstate, in response to an insured's inquiry, pointed out that "all premiums other than Towing & Labor are to be rounded. The U/M premium was not rounded." In a November 22, 1985 letter, Allstate responded by explaining its understanding as to how they would calculate the Uninsured Motorist premium: "The annual premium is divided in half and the actual amount is charged. [In this case], the annual cost is $21.00. Therefore, the six-month cost is $10.50. We do not round up to the next dollar as this would be an over charge." Corum wrote back on December 4, 1985 and told Allstate, "I would suggest a review of Rule 7 of the Texas Automobile Manual. I do not see any exception for U/M Coverage." (Copies of letters on file with the authors).

[37]Letter from Wilburn Fischer, Automobile Office, Casualty Division, Texas State Board of Insurance, to J. M. Rowley, Jr., J. M. Rowley Agency (Oct. 15, 1981).

[38]Juan B. Elizondo, Jr., "Insurance Commission Proposes Change to 'Rounding' Rule," *Abilene Reporter-News*, Apr. 3, 1996; Juan B. Elizondo, "Insurance Overcharge Case Still in Court," *Harlingen Valley Star*, Apr. 11, 1996.

[39]Sceafane, *supra* note 36.

[40]"Allstate, Farmers Told to Change Formula," *Jacksonville Daily Progress*, May 8, 1996, quoting John Cracken.

[41]Plaintiffs' 7th Amended Petition at 11 n.17, 15 n.2.

[42]Sceafane, *supra* note 36.

[43]"[Commissioner Bomer] could not say whether there were smaller companies using the same method." "Judge Says Insurance Suit Class Action," *Houston Chronicle*, June 28, 1996, Business, at 2; Joint Petition for Writ of Mandamus and/or Writ of Prohibition and Brief in Support (June 17, 1996) at 12.

[44]In rate-regulated jurisdictions such as Texas, insurance companies have their premiums set by state agencies at levels that are adequate to earn a reasonable profit and encourage long-term stability. The defendants argued that any additional moneys received by the insurers would have been offset by the state imposing a corresponding reduction in the rates the companies would have been able to charge consumers.

[45]Defendant's First Amended Motion to Transfer Venue, and Subject Thereto, Motions to Dismiss, Plea in Abatement and Answer (Apr. 23, 1996) at 9–10, *Martinez.*

[46]Tex. Ins. Code Ann. art. 5.01. Statutory and regulatory references to the "Board" (State Board), the Commissioner, or the Department of Insurance are interchangeable. Tex. Ins. Code Ann. art. 1.01A.

[47]Tex. Ins. Code Ann art. 5.96.

[48]Plaintiffs' Consolidated Rule 42 Reply Brief (May 3, 1996) at 8–11.

[49]*Id.* at 51. As a matter of law, venue does not determine who can recover from a lawsuit.

[50]Statement of Allstate, quoted in Sceafane, *supra* note 36.

[51]Carlos Sanchez, "Insurer Policies Disputed," *Fort Worth Star-Telegram,* Apr. 11, 1996, at 1.

[52]Eskenazi, *supra* note 32.

[53]MacCormack, *supra* note 4.

[54]*Id.*

[55]Elizondo, *supra* note 38.

[56]Juan B. Elizondo, Jr., "Two Insurers Accused of Over-Billing," *Midland Reporter-Telegram,* Apr. 3, 1996, at 5C.

[57]Sceafane, *supra* note 36.

[58]Terrence Stutz, "Allstate, Farmers Accused of Overcharging," *Dallas Morning News*, Mar. 30, 1996, at 1F.

[59]Juan B. Elizondo, Jr., "Insurance Overcharge Case Still in Court," *supra* note 38.

[60]Sanchez, *supra* note 51.

[61]Editorial, "Insurance Catch-22," *Fort Worth Star-Telegram*, Apr. 15, 1996, at 20.

[62]Editorial, "Insurance 'Rounding,'" *Austin American-Statesman,* May 8, 1996, at A14.

[63]Editorial, "'Double Rounding' of Premiums Gouges Consumers," *Dallas Morning News*, May 10, 1996, at 34A.

[64]Editorial, "Insurance: Class-Action Suit Threatens to Embarrass Texas," *supra* note 16.

[65]Editorial, "'Texas Justice' Or Legal Shenanigans?" *San Antonio Express-News*, May 21, 1996, at 6B.

[66]Boot, *supra* note 4.

[67]Editorial, "Taking Pity on Insurance Companies," *Houston Business Journal*, May 31, 1996.

[68]Rob Schneider and Reggie James, "Public Forum, Class Action Suits an Efficient Tool in Quest for Fairness," *Austin American-Statesman*, Apr. 24, 1996.

[69]*Id.*

[70]Plaintiffs' Application for Preliminary Approval of Proposed (1) Settlement Classes and (2) Settlement (Oct. 4, 1996) at 11 (hereinafter Application for Preliminary Approval).

[71]Texas Department of Insurance, Press Release, "Proposed Rounding Rules to Be Revised," May 3, 1996; Stuart Eskenazi, "Insurance Chief Accused of Wrecking Consumer Suit," *Austin American-Statesman*, May 4, 1996, at 1.

[72]Terrence Stutz, "Insurers Reportedly Misinformed," *Dallas Morning News*, May 4, 1996, at 35A.

[73]Letter from Commissioner Elton Bomer, Texas Department of Insurance, to John Hageman, President, Texas Farmer's Insurance Company (May 7, 1996).

[74]Letter from Commissioner Elton Bomer, Texas Department of Insurance to Jerry D. Choate, Chairman of the Board and Chief Executive Officer, Allstate Insurance Group (May 7, 1996).

[75]"Allstate, Farmers Told to Change Formula," *Jacksonville Daily Progress*, *supra* note 41.

[76]Stuart Eskenazi, "Insurers Told to Stop 'Double-Rounding,'" *Austin American-Statesman,* May 8, 1996, at B1.

[77]Stuart Eskenazi, "Allstate Will Double-Round," *Austin American-Statesman*, May 10, 1996, at B10; Carlos Sanchez, "Change Your Figuring Method, Insurance Chief Tells 2 Firms," *Fort Worth Star-Telegram*, May 8, 1996, at B1. Terrence Stutz, "Insurers Seek Rate Increase," *Dallas Morning News*, May 14, 1996, at 15A.

[78]Editorial, "Stop Double Rounding," *Austin American-Statesman*, May 11, 1996, at A10.

[79]Carlos Sanchez, "Simpson-Team Lawyer Enters Insurance Suit," *Fort Worth Star-Telegram*, May 15, 1996, at C12.

[80]"Dershowitz Argues Insurance Suit," *McAllen Monitor*, May 16, 1996.

[81]Eskenazi, *supra* note 32; Notice of Intent to Publish Quarterly Consumer Update and Motion for Leave to Print Mailing Labels (Aug. 16, 1996) at 7 n.2 (hereinafter Notice of Intent to Publish).

[82]Texas Rule of Civil Procedure 42 is patterned after Fed. R. Civ. P. 23 and federal decisions and authorities are persuasive. See, e.g., *Ball v. Farm and Home Savings Association*, 747 S.W.2d 420 (Tex. Civ. App. 1988); *R.S.R. Corp. v. Hayes*, 673 S.W.2d 928 (Tex. Civ. App. 1984).

[83]*Allstate Insurance Co. v. Martinez,* No. 04-96-00597-CV (Tex. Ct. App. 4th Dist. 1996); *Texas Farmers Insurance Co. v. Sendejo,* No. 04-96-00598-CV (Tex. Ct. App. 4th Dist. 1996).

[84]Tex. Civ. Prac. & Rem. Code § 51.014(3). Note that state rules in Texas and other states contradict the general rule against interlocutory appeal in federal court.

[85]Order Regarding Class Certification at 19–20. Under Texas law, notice of certification is postponed during an interlocutory appeal of certification; the reasoning is that should the certification be overturned or modified, the putative class members would be confused by the premature announcement of the establishment of the class.

[86]Adoption of Amendments to the Texas Automobile Rules and Rating Manual Relating to Rate and Premium Calculation, Commissioner's Order No. 96-0841 (Tex. Dep't Ins. July 31, 1996).

[87]*Id*. "These rules will provide uniformity in premium computation and foster fairness and consistency in the market." Insurance Commissioner Elton Bomer, quoted in Texas Department of Insurance Press Release, "Bomer Implements New Rounding Provisions," July 31, 1996.

[88]Commissioner's Bulletin No. B-0056-96, Automobile Series Letter No. 699 (Tex. Dep't Ins. Aug. 21, 1996).

[89]Official Order of the Commissioner of Insurance of the State of Texas, No. 96-0832 (Tex. Dep't Ins. July 29, 1996).

[90]Carlos Sanchez, "Farmers, Allstate Alter Premium Calculations," *Fort Worth Star-Telegram*, Aug. 1, 1996, at C3.

[91]"The 30-second ad features a woman unloading groceries in her kitchen. She says the companies shouldn't be allowed to keep any money they over-collected. 'For most people, it's less than $50, but that will feed my family for a week. And if they overcharged me, they shouldn't get to keep my money.'" "Motorists Publicize Suit with Ad," *Houston Chronicle*, Aug. 13, 1996, Business, at 3.

[92]"Insurance Plaintiffs Release New TV Ad," *San Antonio Express-News*, Aug. 13, 1996.

[93]Notice of Intent to Publish at 3.

[94]Plaintiffs' Application for Preliminary Approval of Proposed (1) Settlement Classes and (2) Settlement (Oct. 4, 1996) at 11 (hereinafter Application for Preliminary Approval).

[95]Consumers Union, Southwest Regional Office, Press Release, "Consumers Union Criticizes Rounding Settlement," (Sept. 15, 1996).

[96]Preliminary Order Approving Proposed (1) Settlement Classes and (2) Settlement (Oct. 4, 1996) (hereinafter Preliminary Order of Approval).

[97]*Id*. at 12–13.

[98]*Id*. at 17; Proposed Settlement Agreement (Oct. 4, 1996) at 37.

[99]Standing Order on Proposed Settlement Agreement (Nov. 7, 1996) at 12–15.

[100]Proposed Settlement Agreement at 14–15. The plaintiffs' estimated figures changed somewhat to $46,253,736 and $29,207,940 by the time of the fee application. Application for Fee and Expenses at 11.

[101]Proposed Settlement Agreement at 15–16.

[102]*Id*. at 13–14.

[103]Preliminary Order of Approval at 26–27.

[104]*Id*.

[105]Proposed Settlement Agreement at 26–27.

[106]*Id*. at 20–24.

[107]The date upon which the Final Judgment in the case became final.

[108]Proposed Settlement Agreement at 36, 39. A procedure was also established for adjudicating any disputed claims.

[109]*Id*. at 25–26.

[110]Standing Order on Proposed Settlement Agreement at 21.

[111]Preliminary Order of Approval at 23–24.

[112]Plaintiffs' attorneys claimed they spent 14,082 hours. Application for Fee and Expenses at 28.

[113]*Id*. at 16. Of what the $1.1 million in plaintiffs' anticipated expenses after settlement would have consisted was not explained by the class counsel.

[114]See, e.g., *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996).

[115]Proposed Settlement Agreement at 30–32.

[116]Preliminary Order of Approval at 27–28.

[117]Proposed Settlement Agreement at 31–32.

[118]Preliminary Order of Approval at 25–27.

[119]Rule 171 of the Texas Rules of Civil Procedure authorizes such appointment.

[120]Letter from Larry F. York, Baker & Botts, to C. H. Mah, Associate Commissioner for Technical Analysis, Texas Department of Insurance (Aug. 15, 1997).

[121]Application for Fee and Expenses at 27–29.

[122]Application for Preliminary Approval at 27–28; Application for Fee and Expenses at 21–22.

[123]Application for Fee and Expenses at 23–24.

[124]*Id*. at 14–17.

[125]Brief for Fee and Expenses at 21.

[126]*Id*. at 32–33 (footnotes omitted).

[127]Application for Fee and Expenses at 26–27.

[128]*Id*. at 27–28.

[129]*Id*. at 14–17. The class counsel's estimates of defendants' costs of notice and distribution significantly differ from those set out in the Preliminary Order of Approval.

[130]Statement of Arthur R. Miller (Nov. 20, 1996), quoted in Brief for Fee and Expenses at 11.

[131]Brief for Fee and Expenses at 14 (footnotes omitted).

[132]Editorial, "Taken for a Ride," *Wall Street Journal*, Oct. 23, 1996.

[133]*Id*.

[134]Petition in Intervention of State of Texas (Dec. 4, 1996) at 3 (hereinafter Petition in Intervention).

[135]Texas Office of the Attorney General, Press Release, "Morales Negotiates Separate Agreement in 'Double Rounding' Insurance Case," Dec. 13, 1996.

[136]*Id*.

[137]*Id*.

[138]Final Judgment at 2, *Martinez;* Final Judgment at 2, *Sendejo*.

[139]Final Judgment at 8.

[140]Final Judgment at 8–9.

[141]Final Judgment at 10. In comparison, we have been informed by the defendants that their own estimated outside legal expenses related to this litigation were $950,000 in fees and $448,000 in costs for Allstate and $2.3 million in fees and $789,000 in costs for Farmers. We do not have an estimate of the in-house legal expenses incurred by the defendants.

[142]Final Judgment at 13.

[143]Final Judgment at 14.

[144]Telephone call from the authors to the Office of the Clerk of the Court, Zavala County (Feb. 20, 1998).

[145]Terrence Stutz, "Judge Approves Settlement in Suit Against Insurers," *Dallas Morning News*, Dec. 19, 1996, at 35A.

[146]*Id*.

[147]*Id*.

[148]Letter from Larry F. York, *supra* note 120. There was some shift in Allstate's estimated counts for Group 1 and 2 members from the numbers used in the Final Order but the total for the two groups remained roughly the same.

[149]Texas Farmers Insurance Company and Mid-Century Insurance Company of Texas, *Report to Texas Department of Insurance, Reporting Period: November '97* (1997).

[150]For example, as of mid-August 1997, Allstate had sent out checks out to nearly 100 percent of their estimated number of Group 1 and 2 members. Letter from Larry F. York, *supra* note 120.

[151]Final Judgment at 9.

[152]Proposed Settlement Agreement at 13–14.

[153]*Id.* at 20.

[154]As of mid-August 1997, 117 members of Group 3 had returned claim forms to Allstate and as of December 1, 1997, 164 Group 3 claims had been submitted to Farmers. Letter from Larry F. York, *supra* note 120; Texas Farmers Insurance Company and Mid-Century Insurance Company of Texas, *supra* note 149. We use estimated upper bounds of 350 claimants and $2000 payout to account for an unknown amount of forms received and processed by Allstate after mid-August 1997 and Farmers after November 1997.

BLOOD CLOTTING PRODUCTS FOR HEMOPHILIACS:[1] *IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS* [2]

PROLOGUE

In the early 1980s, at the advent of the AIDS epidemic, the supply of plasma used to manufacture factor concentrate, a blood product used by hemophiliacs to facilitate clotting, became infected with human immunodeficiency virus (HIV). Eventually, factor concentrate transmitted the virus to more than half of the 16,000 persons with hemophilia in the United States.[3] Soon after, lawsuits against the manufacturers of factor concentrate arose across the country in state and federal courts, as both individual cases and class actions. The case presented here was intended to resolve all of the nationwide litigation in a single class action, and it has followed a particularly complicated course. After the initial complaint was filed, this lawsuit was certified as a class action, decertified by the Seventh Circuit Court of Appeals, and once again certified as a class action for purposes of settlement.

A Medical Breakthrough

Hemophilia, a disease afflicting males that is inherited from their mothers, is marked by spontaneous, uncontrollable internal and external bleeding that is caused by a lack of the proteins necessary for blood clotting. Internal bleeding into joints or organs may result in death or disability. External bleeding can also be fatal if the sufferer loses an excessive amount of blood.

In 1964, a process was developed to extract clotting agents from healthy human blood. The resulting extract, known as cryoprecipitate, is administered by transfusion to facilitate the clotting necessary to prevent excessive blood loss and permanent damage to the nerves, muscles, and organs.[4] The development of cryoprecipitate was a step forward in the treatment of hemophilia, but there were drawbacks to its use. To prevent excessive blood loss, the patient needed to receive an injection of cryoprecipitate at the first sign of a bleeding spell; however, patients could not self-administer the treatment. If a bleeding spell

occurred, the patient would have to head immediately to a hospital for an injection.

Four years later a new clotting product, antihemophilic factor concentrate, was developed by researchers at the American Red Cross and Hyland Laboratories, a division of Baxter Healthcare Corporation. Commonly called factor concentrate, the product revolutionized the treatment of hemophilia because it is as effective as cryoprecipitate and also convenient; patients can self-administer it.[5] The introduction of factor concentrate dramatically raised the life expectancy of persons with hemophilia from 39 to 60.[6]

The manufacturing process for factor concentrate requires the plasma of up to 20,000 donors.[7] In a process known as fractionating, plasma donations are pooled in large vats before Factors VIII and IX, two blood proteins that facilitate clotting, are separated from the body of the plasma. The factors are then stabilized, freeze-dried, and bottled. Because the plasma of so many donors is intermingled, a virus present in the blood of any one donor potentially infects the entire vat.

By the early 1980s, factor concentrate was used by the majority of hemophiliacs in this country. Virtually all of those who were seriously afflicted with hemophilia—as well as many with only mild or moderate hemophilia—infused the product. Doctors prescribed factor concentrate liberally, encouraging patients to infuse a dose at the earliest sign of a bleeding spell as a preventive measure.

Because the use of factor concentrate was so widespread, the pharmaceutical companies could not rely on voluntary donations of plasma to meet the demand for their product. The companies set up clinics where donors were paid $10 to $20 per visit. Some clinics were located in inner cities, within federal prisons, along the Mexican border, and in Central and South America, including Haiti.[8] Although it was not known at the time, these clinics collected plasma from many persons who would later be classified as at high risk for carrying the AIDS virus.

Symptoms of the disease we now know as AIDS were first identified in homosexual men in June 1981, and were assumed to be passed through sexual contact. Not until January 1983 did the Centers for Disease Control conclude that the disease was also blood-borne.[9] It has been alleged (but not proven) that at the worst of the crisis, HIV was present in every vial of factor concentrate offered for sale. By 1989, the life expectancy for a person with hemophilia had fallen to 40 years.[10]

The four major pharmaceutical companies that manufactured factor concentrate—Alpha Therapeutic Corporation (Alpha); Armour Pharmaceutical Com-

pany, Inc. (Armour); Bayer Corporation (Bayer); and Baxter Healthcare Corporation (Baxter)—were the defendants in this case.[11]

EARLY FACTOR CONCENTRATE LITIGATION

Lawsuits began to appear in 1985. Hemophiliacs brought the first cases in California state courts only to see them dismissed before they could reach a jury.[12] The first class action was brought that year in a federal court in Palo Alto, California. It also failed to reach trial.[13] In large part, the plaintiffs' difficulty in these cases can be attributed to the blood shield laws in effect in California.

The Application of Blood Shield Laws

Blood shield laws were adopted in most jurisdictions in the 1950s and 1960s, and remain on the books today in every jurisdiction but New Jersey, Vermont, and the District of Columbia. The statutes prohibit the treatment of blood and blood derivatives as "products" for the purposes of strict liability and implied warranty claims.[14] They are based on the premise that the transfusion of blood from one person to another is an inherently risky yet necessary practice. If blood banks, hospitals, and the Red Cross faced strict liability for injuries caused by a defective blood product, there would be a disincentive to provide the service. Thus, the blood shield laws were enacted to prevent a shortage in the blood supply by protecting the suppliers.[15]

In factor concentrate litigation, the blood shield laws bar a claim for damages based on the allegation that the product was defective.[16] Rather, plaintiffs are required to prove that the defendants were actually negligent in the manufacture or distribution of the product—a much more difficult burden to meet. To establish negligence, plaintiffs must show that the defendants either knew or should have known of the risk of transmitting a deadly virus through the sale of factor concentrate. AIDS was a new disease in the early 1980s, and its sources and etiology were the subject of debate in the medical community. Therefore, it is difficult to prove what the defendants knew, or even what they should have known, about the transmission of HIV.[17] One of the early lawsuits was brought by Ryan White, then 13.[18] In November 1985, a federal judge in Indianapolis ruled that White's strict liability claims were barred by the Indiana blood shield law.

Class Litigation Begins

By the close of 1993, factor concentrate lawsuits were common—but often unsuccessful. Of 40 cases nationwide, approximately half had settled,[19] but

almost all of the others resulted in court action favorable to the defense. There had been 13 jury trials. The respective juries had found for the plaintiffs only twice, and one of those verdicts was set aside by the trial judge.[20] The other, *Christopher v. Cutter*, was reversed on appeal,[21] though the parties reached a settlement before it was retried by a jury. Despite this discouraging record, hemophiliacs who contracted HIV from factor concentrate were not deterred from filing lawsuits against the manufacturers. One newspaper estimated that approximately one hundred cases were pending in state and federal courts around the country at the end of 1993.[22] Within one year that number had tripled.[23]

Florida was a hotbed for factor concentrate litigation. That was the locale of the *Christopher* case in which a Tampa jury sitting in federal court initially awarded $2 million to the family of 11-year-old Jason Christopher of Clearwater. Florida was also the home state of Ricky Ray and his two brothers, all of whom had contracted HIV from factor concentrate. In 1987, someone set fire to the Ray home in Arcadia, an event that galvanized the previously silent hemophiliac community. Perhaps as a result of the subsequent publicity, the Florida plaintiffs' bar was, and remains, particularly active in factor concentrate litigation.[24] By 1993, the plaintiffs' bar was considering options for class certification or other methods of aggregation.

At that time an individual factor concentrate case, *Poole v. Alpha*, was awaiting jury trial in a Chicago federal court.[25] The plaintiffs were represented by Leonard Ring, a leading personal injury attorney. Ring conferred with David Shrager, another nationally known personal injury attorney, about the possibility of pursuing a class action against the defendant pharmaceutical companies.[26] As chairman of the AIDS litigation committee of the Association of Trial Lawyers of America, Shrager was quite familiar with the factor concentrate cases.[27] Shrager and Ring agreed that these cases should be aggregated, which would allow plaintiffs to pool resources and present a formidable case against the defendant pharmaceutical companies. The two attorneys assembled a team of plaintiffs' attorneys to serve as class counsel, including Shrager and Dianne M. Nast, who served as co-lead class counsel, plus five attorneys from Florida.[28]

The team of attorneys agreed to pursue certification of a national class action under Federal Rule of Civil Procedure 23, as well as multidistrict litigation (MDL) status for all federal factor concentrate cases under 28 U.S.C. §1407. The team also decided to request that the MDL be assigned to Judge John F. Grady, who presided over *Poole,* because they had been pleased with his handling of that case.

THE *WADLEIGH* CLASS ACTION

On September 30, 1993, the first day of the *Poole* trial, a complaint was filed in federal court for the Northern District of Illinois commencing the factor concentrate litigation known as the *Wadleigh* class action.[29] From its inception *Wadleigh* was intended to serve as a nationwide class action, and a motion for certification was filed on October 20.

Legal Allegations and Defenses

The complaint alleged numerous claims based on negligence rather than strict liability, to avoid application of the blood shield laws. These claims relied primarily on three theories of liability—two of negligence and one of misrepresentation.[30] First, the plaintiffs alleged that even before the emergence of AIDS, it was well known that other blood-borne viruses, including hepatitis B, were transmitted through factor concentrate. Therefore (they alleged), the defendant pharmaceutical companies were negligent when they failed to screen their donors or heat-treat their product. This negligence resulted not only in the spread of hepatitis B but also AIDS.[31] HIV is deactivated by the same heat treatment as hepatitis, and high-risk donors for the two diseases share the same characteristics; thus, the plaintiffs argued, the transmission of HIV was a consequence of the defendants' negligence in preventing the transmission of hepatitis.[32]

Second, the complaint alleged that the defendants bypassed early opportunities to protect hemophiliacs from contracting AIDS. Specifically, the plaintiffs argued that the defendant pharmaceutical companies neglected to provide adequate warning to their consumers, screen their donors, or heat-treat the product even after the medical community became suspicious that AIDS was blood-borne. Instead, the defendant pharmaceutical companies continued to pool the plasma of thousands of donors, including those known to be at high risk of viral infection, even after the first cases of AIDS were reported in 1980.[33]

Finally, the plaintiffs alleged that the four pharmaceutical companies gave false assurances that factor concentrate was safe and that the National Hemophiliac Foundation (NHF), "influenced by the financial contributions it received from the defendant pharmaceutical companies, gave similar unfounded assurances of the safety of the defendant pharmaceutical companies' products."[34]

The defendants countered these arguments in their answer to the complaint. Specifically, they asserted that there was a window of time when they were unaware of the risk of AIDS, that they could not have been expected to know of the risk during that time, that no available test could detect it, and that therefore they could not have prevented the risk of spreading HIV to the patients who re-

lied on factor concentrate to treat the symptoms of hemophilia. Furthermore, the defendants noted that they followed FDA regulations, including new standards for blood collection that were promulgated in March 1983, and that they utilized the first screening test as soon as it was available in 1985.[35]

Jonathan Wadleigh and the Committee of Ten Thousand

The choice of Jonathan Wadleigh as the named plaintiff for the class was not arbitrary. Wadleigh is a computer marketer who lives in Massachusetts. He was born with hemophilia and contracted HIV from factor concentrate in the early 1980s. He has been an active advocate for the hemophiliac community with HIV since 1985, when his brother, who also suffered from hemophilia, died of AIDS.

In 1988, Wadleigh met Thomas Fahey in a support group organized for men with hemophilia and HIV. Fahey, a mental health therapist, also lives in Massachusetts. Frustrated with the NHF, the two men organized the Committee of Ten Thousand (COTT) to provide a support system and to promptly distribute news and information to hemophiliacs with HIV.[36] COTT then became involved with David Shrager and the team of plaintiffs' attorneys who eventually filed the *Wadleigh* suit in Chicago. Throughout the litigation, COTT remained the outspoken voice of the hemophiliac community. In 1993, both Wadleigh and Fahey were honored by the AIDS Action Committee of Massachusetts for their efforts.[37]

Today, Wadleigh and COTT remain strong advocates for infected hemophiliacs; in particular, both support the Ricky Ray Relief Act, a federal bill proposed to establish a $900 million fund for hemophiliacs who contracted HIV from factor concentrate.[38] If passed, the legislation will compensate each of these persons with $125,000 for the perceived failure of the Food and Drug Administration to protect the blood supply.

Multidistrict Litigation

In November 1993, class counsel filed a petition to unite the *Wadleigh* case with all other federal factor concentrate cases under the MDL statute.[39] The purpose of MDL consolidation is to save courts and parties time and resources at the pretrial stage. However, MDL status may also provide plaintiffs added leverage in litigation against large corporations, such as the defendant pharmaceutical companies in this case. In traditional individual litigation, the plaintiff attorney has limited time and resources to invest in conducting discovery. Once a family of cases is classified as MDL, all of the plaintiff attorneys working on similar cases are able to pool their resources during the pretrial discovery period. As a

result, their discovery may be much more effective. Furthermore, an MDL may receive more press coverage than an individual case, which may also benefit the plaintiffs. Defendants who shy away from negative publicity may be more willing to settle when ordinary litigation is given MDL status.

A panel of seven federal trial and appellate judges (the Judicial Panel on Multidistrict Litigation, more commonly known as the "MDL panel") makes the decision to transfer multidistrict cases to a single court. Because both MDL status and class certification require that the plaintiffs' claims have common features, the arguments that defendants make against transferring cases under the MDL statute often resemble those made against class certification. But the standard for MDL is easier to meet than the standard for class certification.[40]

In this case, the defendants argued that collective discovery would be inefficient because of factual differences underlying the plaintiffs' claims. For example, the question of liability rested in part on whether the defendants knew or should have known that there was a risk that their product carried a deadly virus. However, the extent of the defendants' knowledge changed in the years between 1978 and 1985. AIDS was not identified until 1981. No one, including the defendants, knew or could have known of its existence before that year. From 1981 to 1983, medical authorities speculated about whether the disease was blood-borne. Whether the defendants knew or should have known that factor concentrate could transmit the virus is a factual question that—under law—is presented to a jury to decide. By the end of 1983, the Centers for Disease Control concluded that HIV is a blood-borne virus. From then on, the defendants arguably knew that the disease could be transmitted by blood and blood products. Thus, the defendants argued that uniting the factor litigation cases under the MDL statute was impractical because each case was determined in part by the date of infection.

The MDL panel, which included Judge Grady, did not accept the defendants' arguments. On December 6, 1993, an order was issued to transfer every federal factor concentrate case to Judge Grady's courtroom in Chicago where the *Wadleigh* class action was pending. At that time there were only 20 to 30 federal cases, and approximately 45 cases filed in state courts. Within three years 192 federal cases would be in the MDL, and 300 cases would be pending in state courts across the country.[41]

Discovery

The *Wadleigh* case was included in the MDL and all discovery was conducted through MDL procedures. Judge Grady set forth core subjects that were common to the consolidated cases and that were subject to discovery.[42] The core subjects were "the use of, source and identification of blood and blood deriva-

tives; viral infectivity of blood and blood derivatives used by plaintiffs; laboratory tests and results regarding plaintiffs' HIV infection; general nature and treatment of hemophilia; knowledge concerning the risk of viral infectivity and HIV; warnings and information regarding viral infectivity and HIV; plasma collection practices, including donor screening; and viral inactivation."[43] Discovery was protracted, extensive, and contentious. After three years the majority of discovery was completed and the motion for class action status was still pending. At the end of this time, there were more than 1.5 million pages of documents and 850 deposition and trial transcripts filed in the plaintiffs' document depository. Close to 100 discovery motions had been heard. The court's docket (the listing of all papers and pleadings filed in the matter as well as notations of all matters heard before the court) exceeded 70 single-spaced pages.

Class Certification of *Wadleigh*

In the meantime, the participants in the *Wadleigh* case awaited Judge Grady's decision on class certification. As the months passed, the parties—still not knowing what the judge's decision would be—directed their efforts toward settlement negotiations. In August 1994, a tentative settlement was reached between class counsel and two of the defendants, Baxter and Armour.[44] The agreement provided each class member an award of $30,000 in exchange for a release of claims against Baxter and Armour, who together constituted 40 percent of the factor concentrate market. Although class counsel were not enthusiastic about the offer, they tentatively accepted because the future of the class action was uncertain.

The parties presented the tentative settlement to Judge Grady for preliminary approval. At that time, the judge asked class counsel whether they would have accepted the settlement offer if the class were certified, implying that it was his intention to grant the certification. Class counsel acknowledged that they could not recommend the settlement to their clients if the class were certified because they believed the class's claims were worth more than the two defendants had offered. When, later in the conversation, Judge Grady announced that he intended to certify the class, class counsel withdrew from the settlement.[45]

Judge Grady certified the *Wadleigh* class on November 3, 1994, pursuant to subsection (c)(4)(A) of Rule 23.[46] That subsection provides for class certification limited to the determination of particular issues. In this case the class was certified only for the purpose of resolving two questions: (1) whether the pharmaceutical companies were negligent in the collection of plasma and the manufacture and sale of factor concentrate; and (2) whether the NHF breached a fiduciary duty to the class in the promotion of factor concentrate. No other issues, including causation and damages, would be litigated in the class action.

At the end of a trial (if the case were not settled beforehand) the jury would issue a special verdict, and if the ruling were for the plaintiffs the class members would then litigate their claims individually in the appropriate courts across the country. These courts would determine causation and damages for each plaintiff, but could avoid rehearing the questions addressed in the class action trial under to the doctrine of collateral estoppel, which provides that a factual issue that has been determined in a prior proceeding cannot be reopened between the same parties in a subsequent proceeding.

The Decertification of *Wadleigh*

Displeased with the prospect of a class trial, even on limited issues, the defendants turned to the appellate court to seek a review of the certification order.[47] On March 16, 1995, the Seventh Circuit issued a writ ordering Judge Grady to rescind the certification order. In an opinion written by Chief Judge Posner, the court held that class certification would provide the plaintiffs undue leverage against the defendants and could potentially serve to bankrupt the entire industry.[48] Noting the defendants' winning record for defending individual factor concentrate suits, Judge Posner elaborated:

> Consider the situation that would obtain if the class had not been certified. The defendants would be facing three hundred suits. More might be filed, but probably only a few more, because the statutes of limitation in the various states are rapidly expiring. . .
>
> Three hundred is not a trivial number of lawsuits. The potential damages in each one are great. But the defendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well. . .
>
> [Compare] the situation that will face the defendants if the class certification stands. . .
>
> And suppose the named plaintiffs in *Wadleigh* win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not be willing to roll these dice. That is putting it mildly. They will be under intense pressure to settle.[49]

The opinion—from which one member of the three-judge panel dissented—was controversial.[50] Posner placed emphasis on the potential to bankrupt the defendants and the "undue and unnecessary risk of a monumental industry-busting error in entrusting the determination of potential multi-billion dollar liabilities to a single jury." Yet there was no evidence of the defendants' financial

status or the potential compensation for each plaintiff in the record or in oral argument.

The opinion also questioned whether it is constitutional to subject the defendants to a lawsuit based on a composite of the laws of each jurisdiction, rather than that of any particular state. Although the plaintiffs had argued that the negligence standards of the different states "differ only in nuance," Posner was not persuaded, particularly because the plaintiffs' case rested on the determination of a novel question of law, informally known as the "serendipity theory." Generally, the theory holds that if the defendants were negligent because they failed to take precautions to protect their consumers from Hepatitis B, and if such precautions would also protect against HIV, the defendants then should be held liable for all of the consequences of their negligence, even if the risk of HIV were unforeseeable. Posner held that it was impossible to set forth a single standard of liability that would accommodate the common law of all jurisdictions when none had had the opportunity to rule on the serendipity theory:

> [The trial judge] proposes to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world. . .
>
> The assumption is that the common law of the fifty states and the District of Columbia, at least so far as bears on a claim of negligence against drug companies, is basically uniform and can be abstracted in a single instruction. . .
>
> We doubt that it is true in general, and we greatly doubt that it is true in a case such as this in which one of the theories pressed by the plaintiffs, the "serendipity" theory, is novel. If one instruction on negligence will serve to instruct the jury on the legal standard of every state of the United States. . . one wonders what the Supreme Court thought it was doing in the *Erie* case when it held that it was unconstitutional for federal courts in diversity cases to apply general common law rather than the common law of the state whose law would apply if the case were being tried in state rather than federal court. . . [51]

Posner continued with a quote from Justice Holmes:

> "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.[52]

The Aftermath of Decertification

Having lost the certification battle, plaintiff attorneys prepared to try the *Wadleigh* case as an individual lawsuit. Even though it would be legally binding on only a single case, the determination of negligence in *Wadleigh* would affect factor concentrate litigation nationwide. If the plaintiffs were successful in the

Wadleigh trial, the defendants would be more likely to settle future cases. On the other hand, if the *Wadleigh* plaintiffs lost the trial, other hemophiliacs would be discouraged from bringing suit.

The trial was scheduled to commence in October 1995. Lead counsel for the plaintiffs did not want to postpone the trial date even though they had not exhausted every option for review of Posner's writ. A petition for rehearing already had been denied by the Seventh Circuit. It seemed unlikely that the Supreme Court would agree to review the writ, and asking it to do so would delay the trial for months. In this case, time was not expendable: Hemophiliacs were dying of AIDS at a fast rate. Lead counsel argued that they should proceed with trial immediately so that some of the plaintiffs would be compensated in their lifetimes.

COTT disagreed. Its leaders strongly objected to decertification and insisted that their counsel exhaust every option to achieve justice for the class as a whole. Accordingly, lead counsel filed a petition for writ of certiorari with the U.S. Supreme Court on July 25, 1995.[53] The petition argued that Posner's decision was inconsistent with the use of mandamus; that the decertification was based on the merits of the case, rather than the appropriate use of the class vehicle; and that there was no evidence in the record to support the contention that a class action could bankrupt the defendants.[54] In January 1996, the Supreme Court denied the petition and the parties were back to square one—but with no trial date pending.

THE *WALKER* SETTLEMENT

Settlement negotiations resumed in March 1996. The defendants were not averse to a class settlement at this time even though they had objected strenuously to certification of the *Wadleigh* class. The likely reason for their change of mind was that a class settlement promised "universal peace" on the issues and limited the defendants' exposure, whereas the prospect of litigating a class action that was bound for trial was much more unappealing. Now that the Seventh Circuit had effectively eliminated their exposure to an expensive, highly publicized class action trial, the defendants could choose to address the cases individually or settle with the plaintiffs en masse and conclude the factor concentrate litigation permanently. Remembering the *Wadleigh* case, David Shrager noted:

> The manufacturers had all sorts of reasons at that time to claim that a class action was not appropriate. Now, almost two years later, the defendants have decided that they should attempt a class action settlement after all. What may have changed in the interim is their awareness that they now face legal exposure in hundreds of individual cases.[55]

For a settlement to bind every potential plaintiff, Judge Grady would have to agree to certify a settlement class of the same group of plaintiffs that the Seventh Circuit had decertified as a trial class. Assuming this could be done, the parties continued to negotiate. On April 19, 1996, the defendants made an offer valued at $640 million, which would be open for acceptance until May 24. Forty million dollars of this fund would be set aside for legal fees and costs, and the remaining $600 million would constitute a fund to compensate the class. The latter fund would be capped at $600 million regardless of the size of the class. While the parties estimated the class size to be 6000, it was impossible to establish with certainty how many persons would be eligible to make a claim.[56] It was also impossible to determine exactly how many of those persons would elect to join in the settlement rather than opt out. If 6000 were an accurate estimate, each member of the class would receive $100,000. If that number underestimated the size of the class, however, each participant would receive a smaller share. This possibility posed some concern for class counsel. Defendants, on the other hand, were concerned that too many plaintiffs would opt out, so their offer required that 95 percent of the potential class members take part in the settlement.[57]

These provisions were not acceptable to class counsel or to COTT, who strongly opposed the amount of the settlement as too little and noted that persons with hemophilia in Japan had recently received a much better offer from the same defendants. Infected Japanese hemophiliacs had received $420,000 each for identical claims, 44 percent of which was paid by the Japanese government. The defendants had paid $235,200 per claimant in Japan—more than twice the amount offered to Americans.[58]

Despite the passing of the May 24 deadline, the parties continued to negotiate. An agreement was reached in August 1996. The value of the new settlement was also estimated at $640 million, $40 million of which still was set aside for attorney fees and costs and other settlement-related expenses. The limitation on opt-outs was eliminated, however, and there was no cap on the total amount of compensation to the class. Each member would receive an award of $100,000 regardless of class size, meaning that the settlement could exceed $640 million if more claimants came forward. These concessions brought the parties to agreement.

To provide a vehicle for the settlement, counsel filed the *Walker* class action on August 14.[59] The complaint, a motion for certification, and the proposed settlement were filed simultaneously. Judge Grady immediately granted preliminary approval of the settlement and certified the class for settlement.

The description of the *Walker* class members was exactly the same as for the prior *Wadleigh* class, and therefore the certification was dubitable. Although

Walker was certified for settlement purposes only, it was not clear whether the Seventh Circuit would approve certification of essentially the same class it had decertified previously in essentially the same litigation.

Details of the Agreement

The *Walker* settlement defined the class members as follows:

> [P]ersons with hemophilia who used Factor Concentrates, processed or distributed by any of the Defendant pharmaceutical companies during the period from 1978 through 1985, and who are or were HIV infected.[60]

In addition, the class definition included the monogamous partners of persons with hemophilia who contracted the virus as a result of sexual relations as well as children who contracted the virus from a hemophiliac parent. Family members who were not infected with HIV but who have suffered the death or illness of a loved one (and might have had a viable legal claim for the loss) were also included in the class. If a class member were deceased, his estate could make a claim on his behalf.

The settlement provided $100,000 *only for those class members who were infected with HIV*. Family members who were not infected with HIV would be bound by the settlement but would not receive an award for their claims. The agreement allowed only a single $100,000 award for each class member who was actually infected, regardless of the number of people who had claims related to the death or illness of the infected class member.

The Release of Third-Party Claims

Because private and public health insurers paid for a large share of the medical bills incurred by hemophiliacs with HIV, these insurers would normally be entitled to recoup their expenditures from class members if the defendants compensated them for their injuries. The medical costs for HIV-infected hemophiliacs could easily exceed $100,000, leaving the class members with nothing. To prevent insurers from claiming class members' awards, the settlement required the defendants to resolve insurers' claims directly, so that the class members would receive their awards free and clear.

This independent resolution of insurers' costs was an expensive condition for the defendants to meet. Nonetheless, they agreed to pay the federal government $12.8 million for the release of third-party claims against class members whose health-care costs were covered by Medicare, Medicaid, the Federal Employees Health Benefits Program and the Department of Veterans Affairs.[61] A similar arrangement was made with most private insurers on an individual

basis. The defendants spent between $30 million and $40 million to compensate insurers in exchange for a release of third-party claims against the class.[62]

Cost and Fee Fund

The parties to the settlement addressed costs and fees in an unconventional manner. The agreement did not set forth specific amounts to compensate class counsel for their work and expenditures. Instead, it provided for a cost and fee fund of $40 million. Notice costs, the cost of administering the settlement (including the fee for a settlement administrator, the cost of processing the claims forms, and the costs associated with dispute resolution), reimbursement for litigation costs, as well as the fees for class counsel, members of the MDL steering committee, and any other attorneys purporting to represent members of the class were to be paid exclusively from this fund.[63]

Plaintiffs' attorneys were barred from collecting fees directly from class members, including those with preexisting contingency-fee contracts.[64] To collect from the fund, attorneys had to petition Judge Grady for their fees and costs. Every disbursement would be subject to his approval. This fee-award procedure is somewhat unusual; in a typical class action, plaintiffs' attorneys decide among themselves how and among whom the fee fund is to be divided. As will be seen, this provision has been at the heart of the subsequent controversy surrounding the settlement.

The Market Share Doctrine

The defendants agreed to allocate financial responsibility for the settlement in the following manner: 15 percent would be borne by Alpha, 20 percent by Armour, 20 percent by Baxter, and 45 percent by Bayer.[65] These proportions were determined according to the "market share doctrine," which dictates that each defendant in a defective product lawsuit bears responsibility for a percentage of liability equal to its share of the market for that product.

The market share doctrine was first applied to apportion liability among the manufacturers of the drug diethylstilbestrol (DES). Throughout the 1950s and 1960s, DES was prescribed for pregnant women to prevent miscarriage.[66] In 1971, the FDA determined that DES may cause vaginal and cervical cancer in the daughters of women who took the drug during pregnancy. In the litigation that ensued, it was impossible to determine which of 11 pharmaceutical companies manufactured the DES administered to a given woman; each company produced an identical version of the drug. Some courts apportioned liability among the defendants according to each company's share of the market for DES.[67]

The market share doctrine has not been universally accepted, and has been rejected in an individual factor concentrate case brought in Florida state court.[68] A hemophiliac who filed a complaint against the manufacturers of factor concentrate would face a formidable obstacle in a jurisdiction that rejects the market share doctrine because it is often impossible to determine which of the defendant pharmaceutical companies sold the vial that caused a particular person's infection. Under the settlement, however, the defendants assumed a share of the liability equal to their market share, regardless of the variations of the law in the 51 jurisdictions.

Although the final numbers are not yet in, it is estimated that 6200 class members will receive $100,000 awards, for a total outlay of $620 million to the class. Thus, Alpha Therapeutics will contribute approximately $93 million, Armour and Baxter will each contribute approximately $124 million, and Bayer will contribute approximately $279 million. The market share theory was also applied to finance the cost and fee fund. Thus, Alpha Therapeutics was responsible for $6 million, Armour and Baxter were each responsible for $8 million, and Bayer was responsible for $18 million of the $40 million in the fund.

Notice and Final Approval of the Settlement

Judge Grady approved a plan to notify the class of the proposed settlement via announcements in *USA Today* (on August 20, September 3, and September 6, 1996), a press release to the electronic media, and direct mailing from lists provided by plaintiff and defense attorneys who were familiar with individual litigation across the country and the NHF. The plan also required posting the announcements on the appropriate internet bulletin boards.[69] The announcements instructed potential class members to file a claim (i.e., opt in) or a request to opt out before October 15, 1996. Objections to the settlement were also due on that date.[70]

The response deadline was set so that the defendants would have full information regarding class participation in the settlement before they made a final commitment. If a substantial number of potential class members filed a request to opt out, the defendants could have decided that the settlement was not worth pursuing. On the other hand, if the settlement would terminate the bulk of factor concentrate litigation, the defendants would choose to follow through on their offer.

The defendants have claimed that they received 7500 responses to notices. Of those, 600 were requests to opt out[71] and 400 were claims from individuals deemed ineligible to take part in the settlement. The remaining 6500 responses appeared to be valid claims, 800 of which were submitted by plaintiffs already named in individual suits pending against the defendant pharmaceutical com-

panies.[72] This number was satisfactory to the defendants and they chose to stand by the agreement.

Though the fairness hearing began on November 25, 1996, a ruling did not come immediately. Judge Grady gave his final approval to the settlement on May 8, 1997, more than eight months after it was initially presented. He rejected arguments set forth by attorneys Charles R. Kozak and Thomas W. Mull, members of the plaintiff attorneys' steering committee who objected to the settlement on behalf of COTT.[73] Kozak and Mull argued that class counsel failed to pursue every viable theory of liability against the defendant pharmaceutical companies, thereby decreasing the potential for settlement recovery.

The judge also rejected the objections of family members who argued that every class member with a viable claim for the loss or illness of a loved one should also be eligible for an award (recall that estates of decedents were already allowed to receive compensation).

In his order approving the agreement, the judge retained continuing jurisdiction over the implementation of the settlement provisions. Though the final order does not require regular reports of the distribution to the court, Judge Grady is continuing to personally supervise the disbursement of the fund.

IMPLEMENTING THE SETTLEMENT

Last-Hour Appeals

Two separate appeals were filed with the Seventh Circuit in the summer of 1997, temporarily delaying the administration of the settlement. The first was filed on June 6 by attorney Philip Fife on behalf of two Californians with hemophilia; the second was filed by Paul Hedlund on June 19 on behalf of 19 other class members. The two appeals presented the same request to the court: The appellants wanted to opt out of the agreement although they had planned to take part when the deadline arrived in October 1996. Fife and Hedlund argued that new information had emerged since October that strengthened the hemophiliacs' case, and as a result the settlement offer was no longer satisfactory. Cutter Laboratories (a subsidiary of Bayer) issued a stipulation in January 1997—after the opt-out date but prior to final approval of the settlement—admitting that it "obtained plasma from some plasma collection centers that it knew were located in areas with populations whose plasma was at a higher risk for carrying the hepatitis virus."[74] With access to this stipulation the appellants now wanted their day in court. They did not want Judge Grady to withdraw his approval of the settlement, however, or otherwise prevent other hemophiliacs from taking part.[75] Both appeals were dismissed after an agreement was

reached with the defendants allowing the appellants to opt out of the settlement and pursue individual lawsuits.[76]

Pending Appeal of the Fee Order

The future of the *Walker* settlement was further complicated by the long-awaited Supreme Court opinion in the case of *Amchem Products v. Windsor*, an asbestos class action. In that case, the Supreme Court held that a global settlement of asbestos-related claims could not be enforced because it failed to provide adequate representation of future claimants. Many practitioners believe the opinion also requires that settlement claims meet the more rigorous standards for certification of traditional trial classes.[77]

In the factor concentrate litigation, some attorneys who represented class members but were not on the steering committee were unhappy with the settlement's provision for attorney fees. Although they could not yet know if, or how much, Judge Grady would award them for their efforts, they suspected that their fee awards would be less than they would have received under their retainer agreements, which commonly provided for a contingency fee of one-third, and sometimes as much as 40 percent.[78] Because the settlement provided that the $100,000 payments to class members would be *net* of any attorney fees, their fears were not groundless. Assuming all claimants had contracts with their attorneys for an average contingency fee of 33 percent, a net compensation fund of $620 million would mean that the gross fund would be one-third larger, or about $930 million. The attorney fee portion of the gross fund then would be about $310 million—a far cry from the $40 million set aside for all fees and costs. Four of these attorneys attempted to claim their standard fee against the cost and fee fund, and alternatively, against the defendants.[79]

Judge Grady had enjoined lawyers from attempting to enforce their contingent-fee contracts (or liens based upon them) and declared that any such contracts would be void to the extent that they conflicted with the settlement provisions.[80] To circumvent this obstacle, the four objectors to the fee limits argued that the class settlement did not pass muster under *Amchem*; therefore, it should be decertified and exist only as a mass settlement with many signatories. The attorneys would then have been able to collect contingency fees.

Judge Grady rejected these attorneys' argument in an order dated February 18, 1998. The attorneys requested that the Seventh Circuit review his order—the same court that decertified the class for trial three years previously. Judge Posner, noting that the appellants were groundlessly accusing counsel for both the class and the defendants of "defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism," ruled that the objections to the attorney fee portion of the

settlement had not been made in a timely fashion.[81] While Judge Posner labeled the settlement compensation scheme whereby all claimants received the same payment regardless of the strength of their individual cases or the amount of their individual damages as "downright weird" and noted that the "consent decree may well be questionable, both in its form (cf. *Amchem Products, Inc. v. Windsor* . . .) and its terms," he indicated that the district court was within its jurisdiction in entering the decree.[82] Dismissing as "fantastic" allegations that one of the appellants was on the verge of negotiating a $1.8 billion settlement but for the fraudulent actions of class counsel, the Seventh Circuit ruled that a lawyer who failed to object to the settlement at the time of the fairness hearing, especially if he or she were in attendance, would be barred by the principals of waiver and equitable estoppel.[83]

EPILOGUE

As of May 26, 1998, 4364 claimants had received compensation. Before a check was issued, every person falling within the class definition who might have had a claim related to an infected person (for example, noninfected family members) were required to sign a final release form. This requirement caused some delay in the administration of the settlement; however, the various appeals did not. The defendants and class counsel continue to process claims and issue checks to this day. Because the challenges pertained only to opt-out rights of some objectors and to limits on fee awards, the settlement appeared invulnerable for the large majority of plaintiff class members who had not opted out.

The final number of successful claimants will be less than the 6500 responses submitted prior to final approval. About 20 class members received special exemptions to pursue individual litigation even after the opt-out period had expired, and settlement administrators estimate that approximately 300 responses appear to be based on the HIV status of a family member or a loved one for whom a valid claim was already submitted; therefore these claims are duplicative. Thus it is estimated that $100,000 payments will eventually be made to about 6200 class members for a total of $620 million in compensation.

As of September 1998, an estimated $3 million to $4 million had been paid for the costs of administering the settlement from the $40 million set aside for expenses. Consequently, $36 million to $37 million remained available to be divided among the plaintiffs' attorneys for their fees and expenses.

Key Events	Date
CDC concludes that AIDS is a blood-borne disease	June 1983
Screening test available for HIV-infected blood products	1985
Wadleigh complaint filed in federal court in the Northern District of Illinois	September 30, 1993
All federal factor concentrate cases transferred to Judge Grady's courtroom in Chicago	December 6, 1993
Tentative settlement reached between *Wadleigh* class counsel and Baxter and Armour	August 1994
Judge Grady certifies *Wadleigh* class	November 3, 1994
Seventh Circuit orders Judge Grady to rescind certification	March 16, 1995
Wadleigh trial scheduled to begin	October 1995
U.S. Supreme Court denies class counsel's appeal	January 1996
Settlement negotiations between parties resume	March 1996
New *Walker* class action certified for settlement and preliminary settlement approval granted	August 14, 1996
Notice of settlement published	August and September 1996
Opt-out and objection deadline for class members	October 16, 1996
Initial fairness hearing	November 25, 1996
Settlement reached for third-party claims with the federal government and private insurers	April 30, 1997
Second fairness hearing	May 6, 1997
Final settlement approval granted	May 8, 1997
Two appeals filed; these claimants are released from class	June 1997
Judge Grady dismisses motion that would allow objecting plaintiffs' attorneys to collect contingency fees	February 18, 1998

NOTES

[1]As part of our research on this litigation, we interviewed the primary defense attorneys, lead counsel for the class, and the trial judge. We also reviewed the pleadings and papers filed in the case, law review articles, the legal press, the general press, internet web site postings, and *Andrews*, *Mealey's* and *Bureau of National Affairs (BNA)* reporters.

[2]This litigation was conducted in the U.S. District Court for the Northern District of Illinois. It was known as *Wadleigh v. Rhone-Poulenc Rorer Inc.,* No. 93 C 5969 (N.D. Ill. filed Sept. 30, 1993), until January 1996, when the U.S. Supreme Court declined to review a Seventh Circuit writ to decertify the class. *In the Matter of Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293 (7th Cir. 1995), *cert. denied, Grady v. Rhone-Poulenc Rorer Inc.,* 516 U.S. 867 (1995). The litigation continued as part of a larger multidistrict litigation known as *In re Factor VIII or IX Concentrate Blood Products Litigation*, MDL-986, No. 93 C 7452, until August 1996. At that time, a tentative class settlement was reached, known as *In re Factor VIII or IX Concentrate Blood Products Litigation*, No. 96 C 5024 (the *Walker* Settlement).

[3]This fact is not at issue in the litigation, as the defendants have conceded that their products were capable of transmitting HIV. John Bacich, president of Baxter's Hyland Division, has stated, "We deeply regret that early versions of the therapies that were designed to save lives unknowingly carried the AIDS virus. The virus had entered the blood supply before it was identified and this tragedy could not have been predicted or prevented." "Pharmaceutical Firms Offer $640 Million to Settle Hemophilia HIV Lawsuits," *Andrews AIDS Litigation Reporter*, Apr. 26, 1996, at 15408.

[4]Cryoprecipitate was developed by Dr. Judith Poole at Stanford University.

[5]Institute of Medicine, U.S. Department of Health and Human Services, "HIV & the Blood Supply: An Analysis of Crisis Decision Making" (Washington, D.C.: National Academy Press, July 13, 1995).

[6]Irene Sege, "He Will Not Go Gentle," *Boston Globe*, June 27, 1995, at 58.

[7]Institute of Medicine, *supra* note 5, at 2.

[8]Michael McLeod, "Bad Blood: Every Day, A Hemophiliac Dies of AIDS. It Didn't Have to Happen," *Orlando Sentinel*, Dec. 19, 1993, at 10. According to a defense attorney we interviewed, fewer than 10 percent of the clinics were located in these areas.

[9]*Id.*; Institute of Medicine, *supra* note 5, at 3.

[10]Noreen Marcus, "Victim's Difficult Choice; HIV-Positive Hemophiliacs Must Decide: Accept Cash Payments or Pursue Lawsuits," *Miami Daily Business Review*, Aug. 26, 1996, at A1.

[11]The National Hemophiliac Foundation (NHF) was also named as a fifth defendant.

Alpha is in the business of developing and producing plasma-based pharmaceutical products, and was responsible for the manufacture and sale of 15 percent of the blood factor concentrate market from 1978 through 1985. Alpha is a California corporation based in Los Angeles and a subsidiary of the Green Cross Corporation (Green Cross), a Japanese entity doing business in the United States as a Delaware corporation also based in Los Angeles. Green Cross was not named in the original complaint but is a party to the settlement.

Armour is a Delaware corporation based in Pennsylvania that manufactured and sold 20 percent of the blood factor concentrate marketed in the relevant time period. Armour is a subsidiary of Rhone-Poulenc Rorer, Inc. (Rhone-Poulenc), a pharmaceutical company based and incorporated in Pennsylvania. Rhone-Poulenc was named as a defendant in the original complaint and is a party to the settlement. Aside from factor concentrate, Rhone-Poulenc and its subsidiaries manufacture a large variety of pharmaceutical products, including respiratory and allergy medications, thrombosis and cardiology medicines, hormone replacement and cancer therapies, and over-the-counter preparations such as Maalox.

Miles is an Indiana corporation based in Pennsylvania. Through a division known as Cutter Laboratories, Miles manufactured and sold 45 percent of the factor concentrate marketed in the relevant time period. In 1994, Miles merged with Bayer A.G. (Bayer), a German multinational pharmaceutical company doing business in the United States as an Indiana corporation based in Pennsylvania. Bayer was not named in the original complaint but is a party to the settlement. Aside from factor concentrate and the well-known Bayer aspirin, Bayer and its subsidiaries produce a variety of chemical and medical products, including polyurethane, crop protection products, animal health products, and coating materials.

Baxter is a Delaware corporation based in Illinois that is responsible for manufacture and sale of 20 percent of the blood factor concentrate marketed in the relevant time period. Aside from factor concentrate, Baxter produces a variety of products primarily related to the blood and circulatory system such as intravenous delivery systems, blood collection and separation products, and products and services for the treatment of late-stage heart and renal disease. Baxter's Hyland Therapeutics division is largely responsible for the research and development of factor concentrate.

[12]See, i.e., *Hyland Therapeutics v. Superior Court*, 175 Cal. App. 3d 509 (1985), issuing a peremptory writ of mandate to the trial court in *Gallagher v. Cutter Laboratories*, No. 548947 (Cal. Super. Ct. Santa Clara County 1985). The California Court of Appeal held in the *Hyland* case that the blood shield law in California prevented the plaintiffs from pursuing claims based on strict liability. Despite this adverse ruling, the *Gallagher* case continued and was settled on the third day of trial. Blood shield laws are explained in the subsequent section.

[13]*Gannon v. Cutter Laboratories*, No. C-8520078 (N.D. Cal. 1985). The attorney who represented this class is W. Robert Morgan, of San Jose's Morgan, Morgan, Towery, Morgan & Spector. Morgan also represented the plaintiffs in the Gallagher case; in both cases he argued that an exception to blood shield laws should arise when blood products are made commercially available, rather than provided as a nonprofit service. Mary G. Galante, "Blood Liability Theory Rejected," *National Law Journal*, Apr. 8, 1985, at 3.

Another class complaint was filed on July 30, 1986, in a state court in Seattle, Washington. The complaint, which was filed on behalf of an anonymous plaintiff, was never certified. "AIDS Fear Could Taint Blood Industry," *United Press International*, Nov. 24, 1986, AM cycle.

[14]For example, the Hawaii blood shield statute reads as follows:

> "No physician, surgeon, hospital, blood bank, tissue bank, or other person or entity who donates, obtains, prepares, transplants, injects, transfuses, or otherwise transfers, or who assists or participates in obtaining, preparing, transplanting, injecting, transfusing, or otherwise transferring any tissue, organ, blood or component thereof, from one or more persons, living or dead, to another person, shall be liable as a result of any such activity, save and except that each such person or entity shall remain liable for the person's or its own negligence or willful misconduct." Haw. Rev. Stat. § 327–51.

[15]Institute of Medicine, *supra* note 5, at 2.

[16]For a complete discussion of the application of blood shield laws in factor concentrate cases, see Jay M. Zitter, Annotation, "Liability of Blood Supplier or Donor for Injury or Death Resulting from Blood Transfusion," 24 A.L.R. 4th 508 (1997).

[17]In at least two cases, individual plaintiffs have successfully presented negligence claims against defendant pharmaceutical companies. See *Christopher v. Cutter Laboratories*, 53 F.3d 1184 (11th Cir. 1995) (reversing jury verdict in favor of plaintiffs), and *JKB v. Armour Pharmaceutical Co.*, No. 49A02-9506-CV-341 (Ind. Sup. Ct. July 19, 1996). See also *Rogers v. Miles Laboratories, Inc.*, 116 Wash. 2d 195 (1991). In the last case, the court held that the Washington state blood shield law applies only to nonprofit blood donations. Thus, it did not bar a lawsuit against the defendant pharmaceutical companies because they purchased plasma from "donors" to produce factor concentrate. The plaintiffs were still required to prove actual negligence, however, because the court also found that blood is an inherently unsafe product; therefore the defendant pharmaceutical companies could not be held to a strict liability standard.

[18]Ryan White is famous for his lawsuit against an Indiana public school district that had banned him from campus due to his disease.

[19]According to the parties we interviewed, these early individual cases settled generally in the range of $10,000 to $50,000, a small amount of money considering the losses claimed.

[20]*Jones v. Miles Laboratories, Inc.*, 705 F. Supp. 561 (N.D. Ga. 1987), *aff'd*, 887 F.2d 1576 (11th Cir. 1989).

[21]The Eleventh Circuit held that the trial judge did not properly instruct the jury about the role of the private physician as a "learned intermediary" between the patient and the pharmaceutical companies. The parties settled the case before it was retried. *Christopher v. Cutter Laboratories*, 53 F.3d at 1194–95.

[22]McLeod, *supra* note 8, at 10.

[23]*Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 415 (N.D. Ill. 1994) (noting in decision to certify class action that 300 cases were pending nationwide).

[24]Attorney William L. Earl and his firm, Earl Blank Kavanaugh & Stotts, had handled more than thirty individual suits in Florida state court by the end of 1996. Robert Parks, of Haggard Parks and Stone, was also very active in factor concentrate cases. Five Florida attorneys, including Earl and Parks, are on the 15-lawyer steering committee for the *Walker* class. They handled more than one-fourth of the 800 cases pending nationwide in 1996. Altogether, approximately 500 Floridians were eligible for the eventual settlement of the class action.

[25]*Poole v. Alpha*, No. 86 C 7623 (N.D. Ill. 1993).

[26]David S. Shrager is a founding partner of Shrager, McDaid, Loftus, Flum and Spivey, a plaintiffs' firm based in Philadelphia.

Leonard Ring died before any action was taken to aggregate the factor concentrate cases.

[27]Shrager had represented a group of persons with hemophilia who were infected in the late 1980s (years after the plaintiffs in this case were infected) by factor concentrate that had been inadequately heat-treated.

[28]Dianne M. Nast is a name partner at Roda & Nast in Lancaster, Pennsylvania, and a leading class action practitioner.

[29]*Wadleigh v. Rhone-Poulenc Rorer, Inc.,* No. 93 C 5969 (N.D. Ill. filed Sept. 30, 1993) (Rhone-Poulenc Rorer, Inc., Armour Pharmaceutical Company, Inc., Miles, Inc., Baxter Healthcare Corporation, Alpha Therapeutic Corporation, and National Hemophilia Foundation named as defendants).

[30]*In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1296 (7th Cir. 1995).

[31]These allegations are supported by the Institute of Medicine, which states in its final report: "Shortly after the development of the technology to manufacture AHF concentrate it was recognized that these products carried a substantial risk of transmitting hepatitis B. Although some blood derivative products had been treated with heat to destroy live viruses since the late 1940's, Factor VIII and IX concentrates in the United States were not subject to viral inactivation procedures until 1983 and 1984. If this technology had been developed and introduced before 1980 . . . fewer individuals with hemophilia might have been infected with HIV." *Institute of Medicine, supra* note 5, at 5.

[32]*Wadleigh v. Rhone-Poulenc Rorer, Inc.,* 157 F.R.D. at 414.

[33]*Id.*

[34]*Id*. These allegations are supported by the Institute of Medicine report, which states that "the plasma fractionation industry, and the FDA, accepted with little question estimates that the risk of AIDS was low . . . and they accepted advice that control strategies (such as automatic withdrawal of AHF concentrate lots containing blood from donors suspected of having AIDS, or a switch from AHF concentrate to cryoprecipitate in mild or moderate hemophiliacs) would be ineffective, too costly, or too risky. During this period, there were missed opportunities. . . " Institute of Medicine, *supra* note 5, at 4.

[35]The Food and Drug Administration has regulatory authority over the supply and use of blood and blood products. Standards for the collection and use of plasma have been in effect since 1973, and there is a licensing system for those who meet the standard.

[36]Sege, *supra* note 6.

[37]Martha Young, "AIDS Action Committee Honors 16 for Their Fight Against Disease," *Boston Globe*, Jan. 31, 1993, Metro section, at 26.

[38]H.R. 1023, 105th Cong., 1st Sess. (1997). The bill was approved by the House of Representatives in May 1998, after receiving unanimous approval from the House Committee on the Judiciary in October 1997. A companion bill in the Senate was pending. S-358, 105th Cong., 1st Sess. (1997).

[39]28 U.S.C. § 1407 states: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."

[40]For example, the defendants argued that factor concentrate may not necessarily be the cause of infection for each plaintiff. This would be a strong argument against class certification because it implies that the causation issues are not common across the class. It was not enough to prevent MDL status, however, because causation could be argued for each plaintiff individually at trial, after the force of the MDL has ended. (In practice, however, most MDL cases settle without trial.)

[41] *In re Factor Concentrate VIII or IX Concentrate Blood Products Litigation,* 169 F.R.D. 632, 634 (N.D. Ill. 1996).

[42] See Case Management Order (May 5, 1994), *In re Factor VIII or IX Concentrate Blood Products Litigation,* MDL-986, No. 93 C 7452.

[43] Final Order and Judgment Relating to the Settlement (May 8, 1997) at 9–10, *Walker v. Bayer Corp.,* No. 96 C 5024 (N.D. Ill. filed Aug. 14, 1996).

[44] "Pharmaceutical Firms Offer $640 Million to Settle Hemophilia HIV Lawsuits," *supra* note 3.

[45] Parties on both sides agree that the question Judge Grady posed to class counsel dramatically altered the dynamics of the negotiations, and eventually caused the collapse of the tentative settlement.

[46] That subsection states: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Fed. R. Civ. P. 23(c)(4)(A).

[47] Class certifications are not final orders; thus, at the time of this litigation they were not subject to appeal absent certification by the trial judge. The defendants filed a petition for a writ of mandamus, which is appropriate only in extraordinary circumstances. Two conditions must be met before a writ of mandamus will be issued. First, the petitioner must establish that only immediate review will prevent irreparable harm. Second, the writ of mandamus must be directed at an order issued by the trial judge that is, at the very least, patently erroneous. *Kerr v. United States,* 426 U.S. 394, 403 (1976); *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 289 (1988), both cited in *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1295. Subsequently, Rule 23 was amended to permit interim appeals under some conditions.

[48] Posner's published opinion is located at *In the Matter of Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir. 1995).

[49] *Id.* at 1298.

[50] See Recent Case, "Class Actions—Class Certification of Mass Torts—Seventh Circuit Overturns Rule 23 (b)(3) Certification of a Plaintiff Class of Persons with Hemophilia," 109 *Harvard Law Review* 870 (1996); David M. Scott, "Non-Traditional Resolutions to Mass Tort Disputes Take a Hit as AIDS-Infected Persons with Hemophilia Bear the Cost of Judge Posner's 'Economic Justice'," 12 *Ohio State Journal on Dispute Resolution* 159 (1996).

[51] *In the Matter of Rhone-Poulenc Rorer, Inc.,* 51 F.3d at 1300, citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 78–80 (1938) (holding that federal courts must apply substantive law in diversity cases).

[52] 51 F.3d at 1301, quoting the dissent written by Justice Holmes for *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (footnote omitted).

[53] *Grady v. Rhone-Poulenc Rorer Inc.,* No. 95-47 (U.S. filed July 25, 1995), *cert. denied* 516 U.S. 867 (1995).

[54] "Judge Grady, Hemophiliac Plaintiffs Seek Supreme Court Review of Mandamus Ruling," *Andrews AIDS Litigation Reporter*, Aug. 25, 1995, at 14,175.

[55] "Pharmaceutical Firms Offer $640 Million to Settle Hemophilia HIV Lawsuits," *supra* note 3.

[56] *Id.*

[57] "Talks on Offer to Settle Hemophilia Suits Continue Despite May 20 Deadline," *Andrews AIDS Litigation Reporter*, May 24, 1996, at 15,551.

[58] "Baxter Takes Part in Settlement with Infected Japanese Hemophiliacs," *Andrews AIDS Litigation Reporter*, Mar. 22, 1996, at 15,250; "Pharmaceutical Firms Offer $640 Million to Settle Hemophilia HIV Lawsuits," *supra* note 3.

[59] Susan Walker is a fictitious name for the actual class representative, who was the widow of a person with hemophilia who contracted HIV from factor concentrate. A fictitious name was used to protect her privacy.

[60] Factor Concentrate Litigation Settlement Agreement (Aug. 13, 1996) at 13, *Walker v. Bayer Corp.* (hereinafter Settlement Agreement).

[61]The agreement was reached between the defendants and the tort branch of the Civil Division of the Department of Justice on April 30, 1997. "Hemophilia Settlement Memorialized by Judge Grady in Final Order," *Andrews AIDS Litigation Reporter*, May 23, 1997, at 17,377.

[62]Each insurer individually agreed to release all claims against the class members for medical expenses in exchange for compensation from the defendants. For ease of administration, the amount of compensation each insurer received was calculated according to its number of insureds rather than the number of class members it had covered. Specifically, each insurer received a payment equal to ten cents for every person covered under its health plan.

[63]Settlement Agreement at 37–39.

[64]"The parties shall request that the court enter an order providing that no attorneys' fees shall be payable by any class member other than those fees approved by the court to be payable from the cost and fee fund. . . " The settlement goes on to provide one exception. If a class member consults an outside attorney for advice on the decision to take part in the settlement, the class member is responsible for the fee. *Id*. at 38–39.

[65]*Id.* at 7.

[66]*Sindell v. Abbott Laboratories,* 26 Cal. 3d 588 (1980).

[67]The court stated that "we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage of DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. . . . Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." 26 Cal. 3d at 303–04.

[68]In 1996, a Florida court of appeal affirmed the dismissal of a factor concentrate case, holding that the market share doctrine did not apply. Specifically, the court noted that "Factor VIII concentrate products do not share a uniform composition. Factor VIII is collected from various plasma donors at various sites across the nation. Thus, each plasma pool from which the concentrate is processed is different. Each manufacturer uses a different proprietary method to prepare its concentrate." *King v. Cutter Laboratories,* 685 So. 2d 1358, 1360 (Fla. App. 1996). In 1998, the Florida Supreme Court held that the market share doctrine may still apply if the defendants' products were equally infectious, and remanded *King v. Cutter Laboratories,* noting, "the trial court must determine if the scientific evidence establishes that the blood product produced by each of the named defendants were sufficiently uniformly infectious to justify the application of the market share alternate theory." 714 So. 2d 351 (Fla. 1998), distinguishing *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985).

[69]"Judge Grady Okays Latest $640 Million Hemophilia Settlement Package," *Andrews AIDS Litigation Reporter*, Aug. 23, 1996, at 16,007.

[70]*Id.*

[71]These requests included 50 requests from individuals who did not appear to have valid claims.

[72]"Pharmaceutical Firms Net 7,500 Claims for $100,000 Settlement," *Andrews AIDS Litigation Reporter*, Oct. 25, 1996, at 16,317. Of the 600 opt-outs, 550 would have been eligible to take part in the settlement, and 380 were already involved in pending litigation.

[73]Judge Grady removed Kozak and Mull from the steering committee in an order dated May 13, 1997.

[74]"Nineteen Class Members Wishing to Exit Settlement File Second Appeal," *Andrews AIDS Litigation Reporter*, July 11, 1997, at 17,599.

[75]The appellants also argued that the settlement did not conform with the Seventh Circuit's ruling to decertify the *Wadleigh* class, and questioned whether the settlement would pass muster under a new Supreme Court ruling in the case of *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997) (holding that a settlement class is not necessarily appropriate for certification merely because the proposed settlement is fair).

[76]"Challenge to Hemophilia Settlement Resolved, Funds Available by Month's End," *Andrews AIDS Litigation Reporter*, Aug. 8, 1997, at 17,691.

[77]In our interviews, many practitioners have suggested that the effect of *Amchem* "in the trenches" has been to eliminate settlement classes unless the same class could be certified for trial.

[78]Order Concerning Certain Claims For Attorneys' Fees (Feb. 18, 1998) at 6, *Walker v. Bayer Corp.*

[79]*Id.* at 6. The four attorneys are Thomas W. Mull, Charles R. Kozak, Roy G. Spece, and Rose Ibanez. The attorneys who eventually appealed the fee provisions in the settlement appear to have laid claim to $15 million of the $40 million fund. See *In re Factor VIII or IX Concentrate Blood Litigation*, 159 F.3d 1016, 1020 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1488 (1999).

[80]Order Concerning Certain Claims for Attorneys' Fees (Feb. 18, 1998) at 10, citing *Skelton v. General Motor Corporation*, 860 F.2d 250, 259 (7th Cir. 1988).

[81]*In re Factor VIII or IX Concentrate Blood Products Litigation,* 159 F.3d at 1018.

[82]*Id.*

[83]*Id.* at 1019–20.

Chapter Twelve

TOXIC CHEMICAL FACTORY LITIGATION:[1] *ATKINS v. HARCROS*[2]

PROLOGUE

In 1931, the Thompson-Hayward Chemical Company purchased one acre of property in Gert Town, a neighborhood in New Orleans, Louisiana, and began building a chemical factory.[3] At that time, Thompson-Hayward was a Missouri-based company that manufactured pesticides, and the residents of Gert Town were predominantly white, working-class families.[4] The factory opened for production in 1941.[5] At first, it only produced dry pesticides and all manufacturing took place indoors. But by the end of the 1940s, Thompson-Hayward was mixing wet pesticides in large outdoor vats; by the late 1950s, the company was also mixing wet and dry herbicides outdoors.[6] This level of production continued for 20 more years. According to local residents, the outdoor kettles occasionally overflowed and the buildings emitted dust and fumes.[7]

In 1961, the factory and the name Thompson-Hayward were sold to T H Agriculture and Nutrition Company, Inc. (THAN), a subsidiary of the Netherlands-based North American Philips Corporation (Philips).[8] In 1975, activity at the factory began to slow. Production of wet pesticides and wet herbicides ceased, and for two years the factory produced only dry products.[9] Manufacture of dry products ended in 1977, and the building was used solely as a warehouse for the remainder of the decade. In 1981, the factory and the name Thompson-Hayward were sold to Harcros Chemicals, Inc.[10] Harcros first used the building to store industrial chemicals, dry-cleaning supplies, and pest-control supplies. Finally, the facility was closed entirely in 1986.

The factory housed a large variety of chemicals over the five decades it was operative, including aldrin, dieldrin, chlordane, and DDT; the herbicide 2,4,5,-T (the main constituent of Agent Orange, which contains dioxin); the fungicide pentachlorophenal, which contains dioxin; and the dry-cleaning solvent perchloroethylene.[11] Even after production ceased, there were perchloroethylene and pesticide spills, and generally lax containment of toxins.[12] Table 12.1 illustrates the factory's complicated history.

Table 12.1

Ownership and Production Activities at the Harcros Chemical Facility

Time Period	Owner	Indoor Activity	Outdoor Activity
1941–1949	Thompson-Hayward Chemical	Production of dry pesticides	No activity
1949–1955			Production of wet pesticides*
1956–1960		Production of wet pesticides, dry herbicides, and wet herbicides	Production of wet and dry herbicides
1961–1974	THAN / Philips		
1975–1976		Dry herbicides only	
1977–1980		Storage only	Storage only
1981–1986	Harcros Chemical		
1987–1988		No activity	No activity
1989–present		Remediation	

*Thompson-Hayward commenced outdoor production of wet pesticides sometime before 1955; however, the exact date is not known.

The demographics of Gert Town also changed over the years. It is now a predominantly African-American neighborhood; some areas are impoverished, while others are working-class. Many of the factory's closest neighbors complained among themselves of the dust and odor; however, economic considerations prevented them from taking significant action. The factory provided jobs for the residents and brought outside business into the community.

In 1987, employees of the New Orleans Sewage and Water Board were struck by noxious fumes while conducting a routine maintenance inspection of the storm sewers near the facility.[13] They reported the incident to the Water Board environmental enforcement office, and a preliminary investigation conducted in October 1987 revealed that the sewer system adjacent to the factory was contaminated with high levels of trichloroethane and tetrachloroethane—the components of the toxic dry-cleaning chemical, perchloroethylene.[14] A cleanup of the facility's drain lines into the local sewers commenced on October 30.[15]

On March 3, 1988, the Louisiana Department of Environmental Quality (DEQ) issued an order requiring Harcros to halt the release of chemicals from the facility and also to remove and dispose of chemical wastes that remained in the sewer system.[16] Eight months later, the DEQ and the Louisiana Department of Agriculture issued a joint order that required additional cleanup of the sewer system and the submission of a plan to remediate the site.[17] Remediation services contracted by Harcros began in May 1989.[18]

The first step in remediation was to remove all toxic substances to a hazardous waste dump.[19] Most of the buildings on the site had to be torn down because the bricks and cement had absorbed DDT and chlordane. This task was complicated by the presence of asbestos in the walls of the older structures. After

the remediation crews tore the buildings down, they removed four feet of soil and the site was paved over with asphalt. The entire effort was estimated to cost $4 million and lasted four months. During this period the crews removed 75,000 gallons of toxic liquids along with millions of pounds of soil and concrete. The remediation was not entirely successful, however; 2600 tons of herbicide-contaminated soil reportedly could not be removed because it was so toxic that it could not be legally disposed of in any state.[20]

The remediation process caused quite a stir in Gert Town, particularly when government workers began to arrive in protective gear that resembled "moon suits."[21] Neighbors who had lived adjacent to the factory for years became concerned when they noted that the government's workers would not approach the property without special gear.

CLASS LITIGATION BEGINS

As the cleanup continued, the residents of Gert Town became increasingly concerned that the dust and odors released from the facility might be more than unpleasant. They feared that the pollution was hazardous to their health and contacted a local attorney named Leonard Crooks about the possibility of legal action. He advised the group to hold a neighborhood meeting to build community cooperation and support for a lawsuit.

Soon after, a Gert Town resident informed a friend, Frank Edwards, of these events. Edwards had previously been sheriff in a nearby community and was now an attorney with the firm of Domengeaux & Wright in Hammond, Louisiana. Edwards agreed to work with Crooks on the case and elicited the cooperation of other Louisiana attorneys. Together, Edwards and Crooks assembled a team with expertise in personal injury law, large-scale litigation, class actions, and environmental issues to represent the plaintiffs.[22]

On September 28, 1989, the plaintiffs' attorneys filed a complaint on behalf of Gracie S. Atkins as a representative plaintiff in Louisiana state court.[23] Harcros, Thompson-Hayward, and Philips were named as defendants along with six individuals who had worked as managers at the plant. Based solely on Louisiana state law, the complaint alleged that the Thompson-Hayward facility was a nuisance and that the defendants were negligent in the management of the plant, the handling of toxic chemicals, and the failure to warn their neighbors of the potential risk posed by the plant.[24] As a result of this alleged negligence, toxic chemicals escaped from the factory through the air, ground water, and surface run-off of rain water.[25] According to the complaint, exposure to these toxins caused the plaintiffs to suffer a myriad of health problems including cancer, heart problems, liver and kidney damage, lung disease, headaches, emotional distress, nausea, and dermatitis. In some cases these conditions allegedly re-

sulted in death, birth defects, and miscarriage.[26] Furthermore, the plaintiffs' attorneys argued that the value of plaintiffs' property had decreased substantially as a result of the alleged pollution. The complaint sought compensatory, special, and punitive damages.

The defendants filed an answer to the complaint on December 26, 1989.[27] In the document, the defendants denied all of the plaintiffs' allegations. The response further argued that even if the plaintiffs had suffered injuries, they were either caused by forces outside the defendants' control or by the residents' own contributory negligence. Moreover, the defendants argued that the residents assumed the risk of injury by choosing to live in such close proximity to the chemical plant, and that the statute of limitations had passed to present these claims.[28]

Removal from and Remand to State Court

The defendants sought to remove the case to federal court. The federal court initially agreed to assert jurisdiction based on diversity of citizenship, and on April 2, 1990, U.S. District Court Judge Henry A. Mentz denied a motion made by the residents to remand the case back to state court.[29] For the time being, *Atkins v. Harcros* would be litigated in front of Judge Mentz.

The team of plaintiffs' attorneys filed five other complaints in Louisiana state court in response to the defendants' removal motions. They did not intend for these cases to compete with each other; rather, they filed multiple suits to ensure that overall litigation would proceed expeditiously if one or another of the cases were delayed. However, all of the cases were consolidated in federal court, where the litigation remained until January 1991.

A motion to remand the lawsuit to state court was then pending in one of the consolidated cases, *Adams v. Harcros*. The motion argued that the federal court could not properly maintain jurisdiction over the case because the defendants had not shown that the amount in controversy exceeded $50,000 for each class member. Judge Mentz noted before hearing the motion that his decision would apply to all of the consolidated cases.[30]

Generally, one does not expect to find *defendants* arguing that their cases are worth more than plaintiffs are requesting. But in this instance, defendants—seeking to remain in federal court—argued that the plaintiffs' claims for personal injury, property damages, and punitive damages exceeded the amount required for federal jurisdiction. In fact, the plaintiffs had not asked for specific amounts in their complaint for damages (in Louisiana, plaintiffs do not plead for a specific amount of damages in their complaint).[31] The defendants also argued that even if the amount in controversy were not sufficient to meet the

threshold for diversity jurisdiction, the case presented issues of federal environmental law; therefore, the case would be properly heard in federal court.[32]

Judge Mentz did not agree with the defendants' arguments and the case was remanded to Louisiana state court on January 11, 1991. In a published opinion, the judge held that the defendants were required to prove "to a legal certainty that the plaintiffs' claims are not less than the jurisdictional amount."[33] The judge noted that the Louisiana state pleading requirements presented difficulties for the defendants in this case, as well as for other defendants who are sued in Louisiana. The judge also noted that defendants' difficulties multiplied when a class action was alleged because to succeed in removing a case to federal court the defendants are required to show that each member of the class alleges damages in excess of the diversity threshold (then $50,000).[34] The opinion concluded, however, that the court was bound by the burden of proof set forth by federal law. The defendants were required to establish that if the plaintiffs proved their case, each member of the class would be awarded at least $50,000. In this case, the judge ruled, the defendants failed to meet this burden.

Back in state court, the case was assigned to Judge Preston H. Hufftt, who stepped down from the position of presiding judge in Plaquemine Parish, Louisiana, so that the case could receive his undivided attention. The parties commenced settlement negotiations but did not neglect the possibility that the case would go to trial. The defense attorneys approached the case with a two-tier scheme: one team of lawyers prepared for trial, while the others worked full time at negotiating a settlement.

CLASS CERTIFICATION

A plaintiffs' motion for class certification had been pending since November 1989, soon after the case was filed. Now, four years later—and two years after the case was sent back to state court—the court turned to the certification issue. After a contentious hearing that lasted eight days, Judge Hufftt granted the motion on March 24, 1993. His order defined a class comprising all persons who had owned or rented property within three blocks of the facility. The class was divided into three subclasses, based on proximity to the factory, and each subclass was further subdivided based on the time period that property was owned or rented within the specified boundaries.[35]

The defendants appealed the certification immediately.[36] The appeal stated that the class did not meet the requirements of the class action rule set forth in Articles 591 and 592 of the Louisiana Code of Civil Procedure.[37] Specifically, the defense argued that there was not a common character to the class's claims, and the class members' rights were not adequately represented on a class basis. The defense contended that the class lacked a common character because the

types of injuries and illnesses they claimed to suffer were so varied and because the extent of activity—as well as the types of chemicals present at the facility—changed frequently over the years while residents were moving in and out of the neighborhood.

Despite the defendants' arguments, the court of appeal upheld the certification in a published opinion.[38] The court noted that the requirement for a "common character" is "essentially a balancing test," and that the "objective of this requirement is 'to identify the cases where a class action promises important advantages of economy of effort and uniformity of result. . .'"[39] In other words, there could be variation among the class members as long as the benefits of efficiency and consistency outweighed the difficulty of aggregating the claims. Citing the Louisiana Supreme Court's opinion in *McCastle v. Rollins Environmental Services*,[40] the appellate court stated:

> Like McCastle, the instant case involves a large group of potential class members who live within a certain geographic area surrounding a facility whose chemical emissions allegedly have caused unreasonable inconvenience and personal injury to the class representatives and those similarly situated. In McCastle, despite the defendant's argument that the variations in the plaintiffs' injuries should preclude class certification, the Supreme Court found that the common issues predominated over the individual issues, stating:
>
> "That individuals may have been injured or unreasonably inconvenienced by noxious gases on varying dates by the defendant's land farm operations does not constitute a material variation in the elements of the class members' claims. With respect to the question of damages, individual questions of quantum do not preclude a class action when predominant liability issues are common to the class."
>
> In the instant case, we conclude that the common issues predominate over the individual ones. These common issues include: whether or not the substances produced and/or stored at the facility were toxic; whether or not such toxins were released or escaped and if so when and in what amounts; whether or not these toxins were of a sufficient concentration to endanger human health within the geographic area of the release; whether the defendants had a legal duty to anticipate and take steps to prevent the risk; and whether or not punitive damages are applicable. We therefore find the prerequisite of a "common character" among the rights of the plaintiffs is satisfied.[41]

The appeal also stated that the named plaintiffs did not adequately represent the class as required by Article 592 of the Code of Civil Procedure. Specifically, the defendants argued that the factual circumstances underlying each class member's claim varied to such an extent that no one class member, or subset of class members, could fairly represent the entire class. The court disagreed, noting that the representatives must only reflect a cross-section of the entire class, and that generally the appellate courts should defer to the trial court's determination of this question.

The defendants petitioned the Louisiana Supreme Court to review the appellate court's decision. The petition was denied on November 11, 1994.[42] Judge Hufftt's certification order was maintained. By now, five years had passed since the initial filing of the lawsuit.

THE ROAD TOWARD SETTLEMENT

Organizing the Class: Notice, Opt-Out, and Claims Registration

Around this time, Judge Hufftt fell ill and *Atkins v. Harcros* was transferred to Judge Frank V. Zaccaria. Now retired from the Louisiana bench, Judge Zaccaria had served as a trial judge in Jefferson Parish.

Immediately after the class certification issue was resolved, Judge Zaccaria issued an order mandating that all class members opt out of the litigation within 60 days or be bound by the resolution of the action. Class members were given notice through publication in the *New Orleans Times-Picayune* and the *Louisiana Weekly;* however, most class members apparently were notified through an informal word-of-mouth system. A claims office was set up in the neighborhood, and its staff took advantage of the close ties among the residents of Gert Town to ensure that potential class members were identified and contacted. The plaintiffs' attorneys also employed other informal techniques to reach potential class members: Signs were posted, and announcements were made in the local churches that served as community centers in Gert Town. The attorneys also attempted to locate all of the past owners and tenants of property in Gert Town, relying on property records, tax records, and the memory of present residents to trace the history of each unit in the neighborhood.

After approximately 25 persons elected to opt out of the class, the remaining class members were given an additional 60 days to file claims for compensation, including supporting information. In most class actions, claims are submitted after a settlement or trial verdict is reached, when class members know something about what they will gain as a result. In this case, however, the deadline for filing a claim preceded resolution of the action—hence no such details were forthcoming. This early filing deadline would be critical once the litigation was resolved because any person who had not filed a claim was precluded from receiving a share of the settlement fund, even if he or she had not opted out previously. A person who did not affirmatively respond during the opt-out period or the claim period would be denied any compensation.

The unusual strategy was intended to facilitate a settlement; without full information about the number of claimants, their injuries, and their individual circumstances, the attorneys were unsure whether an appropriate settlement agreement could be fashioned. The claim forms provided pertinent informa-

tion for the settlement negotiations, including when, where, and for how long each class member lived in Gert Town, how many suffered illnesses that could be caused or worsened by toxic exposure, and whether such illness could have been caused or exacerbated by other factors such as smoking tobacco, drinking alcohol, or using illicit drugs. Thirty-eight hundred class members completed claim forms.

Reaching Settlement

Settlement negotiations were difficult and lengthy. At no time were the parties confident that a settlement could be reached, so both sides continued to prepare for trial. The defendants believed that the causal connection between the plaintiffs' injuries and exposure to the chemicals released from the factory was tenuous at best. A Louisiana Department of Health survey of the neighborhood, conducted by Dr. LuAnn White, an epidemiologist from Tulane University, suggested that residents of Gert Town were more likely to suffer from noncancerous skin conditions, but that otherwise Gert Town residents did not have a higher incidence of disease than any other community.[43] But the defendants were still concerned about their liability exposure. The plaintiffs had lined up an expert with a Ph.D. in anatomy who was planning to testify, to the contrary, that there *was* a greater incidence of disease in Gert Town. The trial would be reduced to a battle of expert witnesses. Furthermore, the tax records revealed that property values in Gert Town had declined since the toxic exposure was discovered, and the litigation began to receive attention from local newspapers. Moreover, the defendants feared that the civil district court in New Orleans would be biased in favor of the plaintiffs because the jury pool was likely to reflect the demographics of Gert Town.

A multiphase trial was scheduled for the spring of 1996. The first phase would determine liability and damages for 25 bellwether plaintiffs who would serve as representatives for the remainder of the class. The first phase would also include a determination of whether defendants would be liable for punitive damages. If defendants were found liable, a single multiplier would be determined by the jury that would be used to calculate the appropriate level of punitive damages for each claimant. This prospect of punitive damage awards was particularly frightening to the defendants because this single decision would have far-reaching effects, potentially bringing huge financial exposure. The defendants immediately brought the issue to the attention of the appellate court, which instructed them to hold the objection until a verdict was reached.

On April 22, 1996, with a jury chosen and the multiphase trial scheduled to begin the next day, the case settled. The initial agreement was struck between the

class and two defendants, THAN and its parent, North American Philips Corporation. THAN had owned and operated the factory from 1961 through 1980, 20 of the facility's most active years. The court granted preliminary approval on May 31 and eventually Harcros Chemicals Inc., Chemical Waste Management, Inc., and Gulf South Systems, Inc. joined in the agreement as well.[44]

DETAILS OF THE SETTLEMENT

The parties agreed that the defendants would pay $51.575 million into a single fund that would compensate the plaintiffs, pay class counsel fees, reimburse court and administrative costs, and administer the settlement (see Table 12.2). As Table 12.3 illustrates, the bulk of this fund was financed by Philips on behalf of itself and its subsidiary, THAN (formerly Thompson-Hayward Company). Subject to court approval, class counsel would receive fees equal to one-third of the fund, plus 15 percent for reimbursement of costs. A sum of $500,000 was set aside to pay the expenses of administering the settlement, and $1 million that

Table 12.2

Uses of the Settlement Fund*

Uses of Fund	Amount
Class counsel fees	$17,200,000
Litigation costs	$4,600,000
Class action costs	$3,100,000
Administration of fund	$500,000
Exemplary damages	$1,000,000
Compensatory damages	$25,175,000
Total	$51,575,000

*"Judge Approves $51.6 Million Accord for Neighbors of New Orleans Facility," *BNA Chemical Regulation Daily,* Oct. 30, 1996.

Table 12.3

Sources of the Settlement Fund*

Defendant	Amount
Harcros	$7,000,000
Philips/THAN	$42,750,000
Chemical Waste Management	$1,625,000
Gulf South	$200,000
Total	$51,575,000

*Supplemental Preliminary Settlement Agreement (May 30, 1996) at §§ 5.1.1–5.1.4.

was earmarked as "punitive" or exemplary damages would be donated to a local charity. The remainder, approximately $25.175 million, remained in the fund to compensate class members for their injuries. In exchange, the class members relinquished any claim against the defendants regarding the escape of toxic chemicals from the Thompson-Hayward factory.

The $1 million allocated in lieu of punitive damages was set aside for the Greater New Orleans Foundation, which was required to reserve the sum specifically for projects in the Gert Town neighborhood. The issue of punitive damages had been critically important to the defendants in the settlement negotiations. They strongly believed that punitive damages were not applicable in this case, for two reasons. First, they did not believe that the conduct at issue warranted a punitive award because (they believed) there was no intentional or reckless behavior. Second, under state law, punitive damages were not available in Louisiana until 1984, three years after the primary defendants, Philips and THAN, sold the plant to Harcros Chemical, and eight years after production of herbicides or pesticides ceased. Philips, who financed the bulk of the settlement fund, strongly argued that punitive damages should not constitute a large portion of the settlement. Moreover, they insisted that, if punitive damages were part of the fund, the court should set a separate mandatory non-opt-out class for punitive damages. Class counsel conceded both these points, agreeing that payments in lieu of punitive damages would be paid to charitable organizations in Gert Town and that all potential plaintiffs would be barred from pursuing individual claims for punitive damages, including those who had chosen to opt out of the settlement initially.

Disbursement of the Fund

Under the settlement, the court had the responsibility of ensuring that the fund was distributed to the class members equitably. On May 31, 1996, the court appointed A. Shelby Easterly III as a Court Appointed Expert[45] to develop a distribution plan. Four principal categories of damage elements were identified: fear and fright, exposure to toxic chemicals, major and minor medical disease, and diminution of property value. The total award received by individual claimants would be the sum of four awards calculated to compensate each type of damages. The total received by *all* claimants would be capped at $25.175 million.

Fear and Fright

The fear and fright allocation included four suballocations. First, fear was compensated with a lump-sum payment that varied according to the distance from a claimant's home to the plant. Zone A residents received $600, those in Zone B

Table 12.4

Gert Town Exposure Zones

Zone	Proximity to Factory
A	Within 1 block
B	Within 2 blocks but not within 1 block
C	Within 3 blocks but not within 2 blocks

received $400, and $200 went to residents of Zone C (see Table 12.4). For purposes of this allocation, a person qualified for the most dangerous zone he or she ever lived in. Thus, someone who no longer lived in Gert Town but used to live in Zone B qualified for the Zone B lump payment. A class member who lived in Zone C at the time of the settlement but who had also once lived in Zone A qualified for the Zone A lump payment.

Second, the class members were compensated for their fear and fright during the seven months of remediation. The cleanup or "moon suit" award was calculated as $9 per month for each month a person lived in any of the three zones during the remediation.

Third, past fear was compensated with $2 per month for every month of residence in any of the three zones between January 1990 and May 1995.

Finally, future fear was compensated with an annuity of $2 per month for the remainder of one's life expectancy, as determined by the Louisiana State tax actuarial tables. The total award for fear and fright was equal to the sum of the four awards for each subcategory of fear and fright, according to the following formula:

Fear and fright award = Lump sum zone payment
+ Award for fear during remediation
+ Award for fear prior to remediation
+ Award for future fear

Compensation for Exposure to Toxic Chemicals

Each class member's award for exposure to toxic chemicals was determined according to a point system—the more points, the larger the award. The number of points afforded to a claimant was a function of the proximity of the class member's residence to the factory, how long he or she lived at that residence, and the level of activity at the Thompson-Hayward facility during that period. Table 12.5 depicts the number of points a person was awarded for a month of living in Gert Town. The total award for exposure was calculated from the sum

Table 12.5

Exposure Points per Month

Time Period	Zone A	Zone B	Zone C
1949–1955	36	24	12
1956–1974	45	30	15
1975–1976	9	6	3
1977–1988	6	4	2
1989–present	3	2	1

of points for each month the claimant lived in Gert Town. Claimants were compensated at $.90 per point.

Compensation for Illness

Class members were further compensated if they suffered from health problems that may have been related to exposure to toxic chemicals.[46] To qualify for the additional award, a claimant was required to show that he or she suffered from one of these afflictions and that he or she was exposed to toxins for an amount of time adequate to cause or exacerbate the particular problem. The point system for exposure to toxic chemicals was used to assess exposure for illness compensation as well. The level of exposure required for compensation varied according to the type of health problem.[47] Similarly, the size of the additional award varied according to the type of disorder, and in each case it was subject to adjustment if the claimant smoked tobacco, drank alcohol, or used illicit substances that were known to affect the particular condition. Furthermore, the size of the award was adjusted to reflect the claimant's age if the disorder was age-related.

For example, a person suffering from heart disease must have lived in Gert Town long enough to accrue 1000 exposure points, according to the exposure score chart, to receive compensation for that illness (see Table 12.6). The number of points was then adjusted for age because older people are more likely to develop heart conditions (see Table 12.7). The size of the award would then be decreased by 75 percent if the person had smoked tobacco. A person's exposure points were readjusted according to an additional table for purposes of compensating illness (see Table 12.8).

A person suffering from asthma was not required to meet a minimum level of exposure, because asthma is quickly triggered. Similarly, because the disease is not related to age, there was no age adjustment. A claimant was merely required to show that he or she had the condition in order to receive the award of $4000. The award would be reduced by 50 percent, however, if the claimant smoked tobacco.

Table 12.6

Compensation for Illness

Illness	Threshold Exposure Points	Base Amount	Percent Adjustment Downward for Age and Health-Related Practices			
			Age	Smoking	Alcohol	Drugs
Cancer	1000	$50,000	X			
Heart	1000	$5,000	X	75		
Liver disease	1000	$20,000	X		50	
Kidney disease	1000	$20,000	X			50
Allergy	None	$3,000				
Skin cancer	None	$4,000				
Skin disease	None	$4,000				
Asthma	None	$4,000		50		
Nervous system	100	$5,000				
Immune system	100	$3,000	X			
Anemia	100	$5,000				

Table 12.7

Adjustments of Exposure Points by Age

Age Range (years)	Multiplier
0–15 years	4
16–25	2
26–40	1
41–79	.5
80 +	.25

Table 12.8

Adjustments Based on Point Score

Score	Adjustment
0–3,750	25%
3,751–7,500	50%
7,501–11,250	75%
11,251–15,000	100%

Compensation for Property Value Losses

Property in Gert Town was devalued as a result of the alleged toxic leakage and the publicity associated with the class action. Claimants who owned property in Gert Town were compensated for this loss under the settlement.[48] Expert consultation suggested that the property closest to the plant was much more

Table 12.9

Award for Devaluation of Real Property in Gert Town

Zone	Award
A	81% of 1988 assessed value
B	36% of 1988 assessed value
C	9% of 1988 assessed value

devalued than property slightly farther away. Records of Gert Town property assessments corroborated this expert testimony. Thus, the size of a diminished-value award depended on the location of the property. Owners of property in Zone A were compensated with an award equal to 81 percent of the value of the property as assessed in 1988, before remediation began. Similarly, owners of property in Zone B were compensated with an award equal to 36 percent of their property value in 1988, and owners of property in Zone C were compensated with an award equal to 9 percent of the value of the property in 1988 (see Table 12.9).

Settlement Approval

Each claimant received notice of his or her calculated award by mail. Approximately 675 claimants (of the 3800 class members who filed claims) objected to the preliminary settlement, the majority of whom objected to the calculation of damages in their own cases. Also, hundreds of people who lived near the factory but outside of the three zones—no doubt having heard of the size of awards promised to class members—objected to the boundary lines that excluded them from the class. Consistent with an order of the court, the Court Appointed Expert scheduled eight days of hearings to address objections, but even eight days was insufficient. Judge Zaccaria rescheduled the remainder of objections to be heard during the fairness hearing.

The fairness hearing was held in the Superdome in September 1996. According to the parties whom we interviewed, the large number of participants, as well as the size of the proposed settlement, resulted in a highly publicized, somewhat emotional event. Because objectors could register their complaints right up to the start of any fairness hearing, there was a potential for a relatively large number of challenges. Also, approximately 4500 written objections had to be addressed at the hearing, the bulk of which were from people who were not claimants. Many of these were related to the boundaries that defined the class; many others were related to the denial of compensation to class members who neglected to file a claim before the claims office closed in May 1995.

A 30-page protocol was issued to organize the schedule of hearings. Fourteen tables were staffed, each with a team of court reporters, data entry personnel, and interrogators to register the objectors.[49] Each objector was assigned a return date when his objection would be heard. By midnight of the first day, each objector was registered and scheduled. Nine days later, all objections had been heard. At the conclusion of the hearing, 635 of the claimants' original 675 objections had been withdrawn, some after correction and adjustment, and others with no change. Except for the most unusual cases, late claimants were not allowed compensation nor were the boundary lines changed. Judge Zaccaria felt that Judge Hufftt's designation of the boundaries, set forth in the certification order, was fair.

Final approval of the settlement was granted on October 17, 1996. The judge noted that he had approved the settlement because of the "complexity, expense and likely duration of the litigation" and because "the chances of success were more likely on the part of the plaintiffs than the defendants with regard to fault."[50] On the other hand, the judge noted that the plaintiffs were also wise to accept a compromise, as "questions of causation with regard to specific and substantial damages in individual cases would likely have been disturbing to the trier of fact" as there was a "paucity of expert medical evidence to definitely link any specific disorder to the chemicals contained in and emanating from the Thompson-Hayward facility."[51] The court retained jurisdiction over the settlement fund and further ordered annual accounting reports from the settlement administrator.

EPILOGUE

At the present time, almost all of the class members have received their award checks.[52] Plaintiffs received an average of $6658 in compensation for their injuries. This average is somewhat misleading, however, because many claimants received much less, because of their subclass designations and other individual factors. Judge Zaccaria approved class counsel's request for fees equal to one-third of the fund, approximately $17 million, as well as other provisions of the settlement agreement. "Costs of litigation" and the "costs of managing the class action" were allowed at 15 percent of the fund (approximately $7.7 million) and reimbursed to class counsel, and an additional $500,000 was set aside for settlement administration.[53] According to the Court Appointed Expert's report, class counsel accrued 27,368 hours on this case—the equivalent of one person working eight hours a day, 261 weekdays a year for 13.1 years. Furthermore, assistants and staff worked 112,339 hours on the case.[54]

Despite the massive resources spent on litigating this action, not all residents were pleased with the results. The attorney fees were a particular source of

frustration; some claimants complained when they discovered that only one-half of the fund was available for compensation.

Key Events	Date
Toxic chemicals detected in the Gert Town sewer system	October 1987
Louisiana Department of Environmental Quality orders Harcros to dispose of chemical waste in sewers	March 3, 1988
Remediation of Harcros site begins	May 1989
Complaint filed	September 28, 1989
Defendants seek removal to federal court	December 26, 1989
Judge Mentz denies motion to remand case to state court	April 2, 1990
Judge Mentz remands case to Louisiana state court	January 11, 1991
Preliminary class certification	March 24, 1993
Defendants' petition to Louisiana Supreme Court for review of jurisdiction denied	November 11, 1994
Deadline for submission of claim forms	May 1995
Settlement reached	April 22, 1996
Preliminary approval of settlement	May 31, 1996
Cutoff for objections	September 9, 1996
Nine-day fairness hearing begins	September 9, 1996
Final approval order	October 17, 1996

NOTES

[1]As part of our research on this litigation, we interviewed attorneys on both sides of the case as well as the Court Appointed Expert. We also reviewed court documents, newspaper accounts, litigation reporters, and records from the federal Environmental Protection Agency and the Louisiana Department of Environmental Quality.

[2]*Atkins v. Harcros Chemicals, Inc.,* No. 89-23976 (La. Dist. Ct. Orleans Parish 1996).

[3]*In the Matter of Thompson-Hayward Chemical Co.,* WP-88-032 (La. Dep't of Environmental Quality decided Jan. 23, 1995) (hereinafter Slip Opinion).

[4]The characterizations of Gert Town provided here and throughout the chapter are taken from descriptions given in our interviews.

[5]*Atkins v. Harcros Chemicals, Inc.,* 638 So. 2d 302, 303 (La. Ct. App. 1994), *cert. denied,* 644 So. 2d 396 (La. 1994).

[6]Proposed Zone/Phase Point System, Appendix C to Report of Court Appointed Expert on Issues of Allocation (Sept. 17, 1996).

[7]Mark Schleifstein and Tara Young, "Gert Town Victims Get $6,658 Apiece; Lawyers Share $25.2 Million," *New Orleans Times-Picayune,* Oct. 19, 1996, at A1, citing comments made by residents in interviews and court depositions.

[8]North American Philips Corporation has since changed its name to Philips Electronics North America Corp.

[9]Some repackaging of wet products continued.

[10]Slip Opinion.

[11]Mark Schleifstein, "Danger at the Doorstep," *New Orleans Times-Picayune,* Jan. 29, 1995, at A1.

[12]Appendix C to Report of Court Appointed Expert on Issues of Allocation (hereinafter Expert's Report), describing "perchloroethylene/pesticide spill(s) & general poor housekeeping" from January 1977 through December 1988.

[13]James O'Byrne, "Pesticide Plant Cleanup Has Neighbors Worried," *New Orleans Times-Picayune,* May 10, 1989, at A1. See also Slip Opinion. Note that Harcros commenced a voluntary investigation of the property in July 1987, before the DEQ was involved. *Id.*

[14]*Id.*

[15]Harcros commissioned a private enterprise, Peterson-Reidel Services, to perform the cleanup.

[16]Compliance Order No. WC-88-032 (La. Dep't of Environmental Quality filed Mar. 3, 1988).

[17]Compliance Order No. WC-88-175 (La. Dep't of Environmental Quality filed Nov. 3, 1988), superseded by No. WC-89-076 (La. Dep't of Environmental Quality filed May 10, 1989).

[18]O'Byrne, *supra* note 13.

[19]The carcinogens benzene and vinyl chloride; trichloroethane and tetrachlorethane; and the banned pesticides DDT, chlordane, and heptachlor were reported to be present on the grounds.

[20]Schleifstein, *supra* note 11.

[21]Expert's Report at 3.

[22]The team included Crooks; Edwards; Bob Wright, also of Domengeaux and Wright; John Cummings and Richard Martin of Cummings, Cummings & Dudenhefer of New Orleans; Hugh Lambert of Lambert & Nelson of New Orleans; W. Hugh Sibley of Greensburg; Calvin Fayard of Denham Springs; and Louis Unglesby of Baton Rouge, who was brought in to prepare for a classwide trial.

[23]Complaint (Sept. 28, 1989).

[24]"Current Report: Litigation," *BNA Chemical Regulation Reporter,* Apr. 20, 1990, at 67.

[25]Specifically, the plaintiffs alleged nuisance, absolute liability, violations of state safety laws, and violation of state environmental laws. They asked for exemplary damages as well as compensation.

[26]"Current Report: Litigation," *supra* note 24.

[27]Lead counsel for Thompson-Hayward and Philips were Gary Bezet and Charles S. McCowan, Jr. of Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, of Baton Rouge, LA. Harcros's interests were represented by Burt K. Carnahan of Lobmon, Carnahan & Batt, Metairie, LA.

[28]"Current Report: Litigation," *supra* note 24.

[29]Order (Apr. 2, 1990), *Atkins v. Harcros Chemicals, Inc.,* 761 F. Supp. 444 (E.D. La. 1991). The removal petition argued that the federal court had jurisdiction over the case based on diversity of citizenship between the plaintiffs and the defendants. Although six individual defendants were Louisiana citizens, the defendants alleged fraudulent joinder, claiming that the plaintiffs did not have a valid case against these defendants and that they were joined solely to destroy diversity. At this time, the court did not determine whether the amount in controversy reached the then-requisite threshold of $50,000 per class member.

[30]Minute Entry (Nov. 21, 1990). The judge also noted in this entry that the remand motion should be heard before class certification was granted or denied.

[31]La. Code of Civ. Proc. art. 893 ("No specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand. The prayer for relief shall be for such damages as are reasonable in the premises.").

[32]This argument was rejected out of hand. The court noted that "the plaintiffs have asserted no cause of action arising under the constitution and laws of the United States." *Atkins v. Harcros Chemicals, Inc.,* 761 F. Supp. at 445 n.3.

[33]*Id.* at 446.

[34]In the case of *Zahn v. International Paper,* 414 U.S. 291 (1973), the Supreme Court held that the claims of class members cannot be aggregated to meet the jurisdictional requirement. See Chapter Three for discussion of jurisdictional issues.

[35]The subclasses are explained in detail in a later section.

[36]Interestingly, defendants can immediately appeal the certification of a class in Louisiana. In most states and until recently in the federal system, appeal is not allowed because certification is not considered a final judgment. In those jurisdictions, defendants must file for a writ of mandamus to take up the issue with the appellate court before trial or a final settlement.

[37]Article 591 reads as follows: "A class action may be instituted when the persons constituting the class are so numerous as to make it impracticable for all of them to join or be joined as parties, and the character of the right sought to be enforced for or against the members of the class is: (1) Common to all members of the class, or (2) Secondary, in the sense that the owner of a primary right refuses to enforce it, and a member of the class thereby becomes entitled to enforce the right." La. Code of Civ. Proc. art. 591.

Article 592 reads: "One or more members of a class, who will fairly insure the adequate representation of all members, may sue or be sued in a class action on behalf of all members." La. Code of Civ. Proc. art. 592.

[38]*Atkins v. Harcros Chemicals, Inc.,* 638 So. 2d 302 (La. Ct. App. 1987).

[39]*Id.* at 304, citing *Brown v. New Orleans Public Service Inc.,* 506 So. 2d 621 (La. Ct. App. 1987).

[40]*McCastle v. Rollins Environmental Services,* 456 So. 2d 612, 620 (La. 1984).

[41]*Atkins v. Harcros Chemicals, Inc.,* 638 So. 2d at 304–05 (citations omitted).

[42] *Atkins v. Harcros Chemicals, Inc.,* 644 So. 2d 396 (La. Nov. 11, 1994).

[43]This study is unpublished.

[44]Chemical Waste Management, Inc., and Gulf South Systems, Inc. were not named as defendants in the original complaint but were included in the final agreement as settling parties. See Supplemental Preliminary Settlement Agreement, signed May 30–31, 1996 (hereinafter referred to as Supplemental Agreement, §2.10). The City of New Orleans and its insurers were the only defendants not to join in the settlement. They had been named as defendants after the initial pleadings and had also countersued the corporate defendants. The city was dismissed from the suit as a part of the settlement though plaintiffs reserved their rights for any future proceedings.

[45]In 1996, Louisiana state law did not provide for a special master. The Court Appointed Expert was the functional equivalent.

[46]Specifically, the plan compensated class members for cancer (including skin cancer), heart disease, liver disease, kidney disease, allergies, miscarriage, stillbirth, skin disease and rashes, asthma, central nervous system disorders, immune system disorders, and aplastic anemia.

[47]See Appendix A to Expert's Report.

[48]Tax records suggest that devaluation occurred as a result of remediation, probably because of the publicity and the spectacle created by the moon suits.

[49]Except for objectors to the boundary line. They were dealt with en masse.

[50]"Current Report: Pesticides," *BNA Chemical Regulation Reporter,* Nov. 1, 1996, at 1073.

[51]"Judge Approves $51.6 Million Accord for Neighbors of New Orleans Facility," *BNA Chemical Regulation Daily,* Oct. 30, 1996.

[52]Based upon information contained in published media reports, we believe that 3877 valid claims were submitted prior to the opt-in cutoff date and another 54 claims were allowed in as a result of objections heard at the Superdome fairness hearing. Thus, a total of 3931 claims were eligible for awards.

[53]About 20 to 22 claims have not been disbursed because of delays in locating the class member, but the amounts involved are believed to be small relative to the average class payment.

[54]See also Mark Schleifstein and Tara Young, "Long Wait Nearly Over," *New Orleans Times-Picayune*, Oct. 19, 1996, at A1.

ORIENTED STRAND BOARD HOME SIDING LITIGATION: [1] *IN RE LOUISIANA-PACIFIC INNER-SEAL SIDING*[2]

PROLOGUE

Louisiana-Pacific Corporation is a leading forest products firm headquartered in Portland, Oregon. In about 100 facilities throughout the United States, Canada, and Ireland, it manufactures lumber, pulp, structural and other panel products, hardwood veneers, and cellulose insulation. In the early 1980s, Louisiana-Pacific began developing alternatives to lumber for use as home siding. The idea was to develop materials that could be constructed cheaply from wood manufacturing by-products and lower-grade wood.[3] These alternative products were intended to be competitive with the numerous nonwood construction products that were beginning to increase in market share, such as aluminum siding and plastic construction products that are less expensive than more conventional wood products.[4]

The product created by Louisiana-Pacific was called "oriented strand board" (OSB). OSB is a composite product similar to Masonite and is manufactured from wood wafers.[5] OSB panels can be shaped and finished into a variety of end products such as flooring, sheathing, beams, and siding.[6] The base materials for Louisiana-Pacific's OSB are a variety of softwoods, including fast-growing, low-grade aspen; the product therefore has the potential to reduce demand for rarer old-growth fir or pine trees. The wood is cut into razor-thin chips four inches long by one-half-inch wide. These chips are dried, mixed with wax and resin, laid onto large mats, and formed into panels or strips. As the mixture is laid onto mats, the strands are placed (or oriented) in all directions, giving the board strength and flexibility in all dimensions.

Initially, OSB was used primarily for structural support panels in roofs, floors, and walls. However, Louisiana-Pacific soon developed the product for use as exterior siding.[7] OSB siding has a resin-saturated, preprimed paper overlay on the exposed face (facing the outside environment) that is fused to the core material by heat and pressure. Beginning in 1995, resin-soaked paper was also

applied to the backs of the boards. As the material emerges from the press, it is embossed to resemble cedar siding and cut and shaped into appropriate sizes.[8] Louisiana-Pacific produces two varieties of exterior siding: panel and lap. The latter consists of strips that are installed to resemble clapboard. In a final production step, a sealer is applied to all edges.

Originally, Louisiana-Pacific called the siding "waferboard," but the company soon decided to market it as "Exterior Inner-Seal Siding"[9] and promoted it as offering the strength and character of plywood without the irregularities that limit plywood's uses.[10] The company also promoted the siding as an environmentally friendly alternative to redwood or cedar siding because it was not made from first- or old-growth lumber. Inner-Seal's target market was residential construction and, to a lesser extent, commercial construction; it was distributed through home centers, construction distributors, and through Louisiana-Pacific's own distribution centers.[11]

Since its introduction, Inner-Seal has been a successful product, constituting roughly a third of Louisiana-Pacific's sales.[12] Between 1985 and 1995, approximately 2.7 billion square feet of siding was sold.[13] Its largest market is in the northwest, where Louisiana-Pacific is based, although it is sold nationwide.[14]

Inner-Seal sales have always included a warranty. Initially the warranty provided protection to the consumer against manufacturing defects for 25 years from the date of installation, and against blistering and peeling for five years from the date of installation.[15] The warranty limited any payment by Louisiana-Pacific to twice the cost of the original siding material. This cap applied to the first five years of the warranty period; after the fifth year Louisiana-Pacific's liability would be reduced by five percent per year, finally ending after the 25th year. For homeowners to collect payment under the warranty, they had to demonstrate that the Inner-Seal was "installed according to Louisiana-Pacific's published installation and application instructions and properly maintained."[16] If Louisiana-Pacific determined that the siding had not been installed or maintained correctly, it had the option of refusing any application under the warranty program.[17]

The installation requirements and age deduction were controversial aspects of the warranty because both features limited Louisiana-Pacific's liability for failed siding. Indeed, Louisiana-Pacific has strenuously argued that most of the complaints that arose out of OSB siding resulted from faulty installation or maintenance. Consequently, the company argued that it should not be liable for any damages, either under its warranty program or as a result of the litigation that eventually arose. In addition, Louisiana-Pacific argued that siding that failed was older siding, and so any liability it might have would be reduced by the age-deduction provisions of the warranty.

Another controversial aspect of the warranty was the calculation of amounts consumers would receive. The "cost of the original siding material" was interpreted by Louisiana-Pacific as being the amount of the sale of the siding from Louisiana-Pacific to a distributor, typically $0.52 per square foot.[18] Therefore, maximum recovery under the warranty, which was limited to twice the original cost, amounted to about $1 per square foot. According to our interviews, the actual cost incurred by consumers to replace defective siding was usually considerably more than this amount.[19] This difference reflects the difference in purchase prices available to builders and distributors, on the one hand, and to consumers on the other, as well as the additional cost of removing old and installing new siding.[20] According to critics, even without the age deduction, the full warranty provided about one-fourth of the expense of remedying a problem with OSB siding. In addition, critics of the warranty have noted that it did not provide compensation for damages to a home's framing that might be caused by compromised OSB siding, and that such collateral damage increased as the damaged siding remained in place. Thus, according to these critics, the age deduction resulted in a warranty that provided the least amount of money to those with the greatest damage.

BEGINNING OF LITIGATION

Consumer complaints against Louisiana-Pacific OSB products began in the early 1990s. The first complaints arose out of the use of OSB panels on the roofs of houses in Florida. During Hurricane Andrew in 1993, many Florida homes lost shingles off their roofs, exposing the roof panels to the elements. In the aftermath, there were reports that OSB, when used as roofing, began to deteriorate rapidly.[21] While no one expected building materials to survive a hurricane, the rapid deterioration of OSB panels after exposure to the heavy rains accompanying it was remembered when consumer complaints arose later.

Within a short time Florida consumers who had not been affected by the hurricane began complaining that Inner-Seal was deteriorating much more rapidly than it should—within two or three years of installation.[22] Generally, the complaints alleged that when OSB siding comes into contact with water, it soaks up moisture. As the siding absorbs water, it expands. While wood typically regains its natural shape, the siding does not. This expansion causes a number of problems: paint flakes or peels off; nails driven through the material are forced out, loosening the panel. One indication of damaged siding is "puffed marks that look like halos around the nail heads."[23] In addition, the expansion promotes further water intrusion, eventually causing the panel to deteriorate and fall apart. One homeowner described her siding as "corn flakes being held together by [a] layer of paint."[24] As the surface adherent loosened and the panel deteriorated, it became fertile ground for airborne spores and

pollens. According to one account, a homeowner found that "mushroom-like growths have broken out on several spots on the . . . house, the longest measuring five inches."[25]

Louisiana-Pacific told consumers who complained that most of their problems were the result of improper installation and maintenance. If the siding had been properly installed, the deterioration of the product would not have occurred.[26] Periodic painting and caulking after installation are necessary, the company asserted; either homeowners were not made aware of, or ignored, instructions regarding maintenance.[27]

In our interviews, company representatives said that homeowners who followed the recommended maintenance regime did not have problems with their siding. However, they also acknowledged that the humid climate of Florida and Georgia requires diligent adherence to the installation and maintenance procedures.[28] Louisiana-Pacific argued that only a small portion—less than 2 percent—of all Inner-Seal Siding actually failed and that over 90 percent of these failures were caused by errors in installation or maintenance by defective components.[29]

The Sawmill subdivision of Ocoee, Florida, was one of the first sources of public policy debate over Inner-Seal Siding. In March 1994, residents of this subdivision sought to have OSB siding banned by the local city commission.[30] Although this attempt failed, the growing number of complaints led to additional formal complaints to local authorities in Ocoee and other communities across the state.[31] By the fall of 1994, consumer complaints were being filed in other states as well.[32]

Initially, Louisiana-Pacific responded by offering compensation under the warranty program. If homeowners felt that payments offered under the warranty were insufficient to compensate their damages, the company gave them the option of entering into binding arbitration or pursuing their complaint in court.[33] But Louisiana-Pacific soon realized that it could not afford to arbitrate all potential claims. Furthermore, the warranty program did not prevent consumers from bringing lawsuits and did not address the growing tension between Louisiana-Pacific and its primary customers—the home builders and developers who also might be held liable in lawsuits brought for damages associated with OSB deterioration.

Despite Louisiana-Pacific's position that only a minute fraction of siding failed for reasons other than improper maintenance or installation, it received about 30,000 claims under the warranty program.[34] In its required Securities and Exchange Commission filings for the year ending 1994, Louisiana-Pacific indicated that claims were pending involving approximately 1300 dwellings. It had also "paid approximately $37 million to settle claims relating to siding war-

ranties on approximately 15,000 dwelling units.[35] This total includes claims of approximately $10 million paid in 1994, $5 million in 1993, and $5 million in 1992."[36] By the end of the first half of 1995, Louisiana-Pacific had paid an additional $5 million in claims.[37]

On October 21, 1994, Walter S. McLin III, of McLin, Burnsed, Morrison, Johnsen, Neuman & Roy, P.A., of Leesburg, Florida, filed a class action—*Anderson v. Louisiana-Pacific Corp.*—in Florida state court on behalf of all Florida homeowners whose homes were constructed using Inner-Seal Siding and were claiming compensation for defective siding.[38] McLin and his associates were general business litigators located in central Florida who had no significant consumer or class action practice. Within a year, *Anderson* was settled as a statewide class action. Under the settlement, claimants received either $2.82 or $3.40 per square foot of damaged siding, depending on whether they had panel or lap siding, respectively. As of October 31, 1997, approximately 31,700 claims forms had been requested by *Anderson* class members, and approximately 21,000 claims had been paid by Louisiana-Pacific at an aggregate cost of about $48.7 million.[39]

Attorneys General Investigations and Other Regulatory Action

The rash of OSB consumer complaints led to investigations of the allegations against Inner-Seal Siding by attorneys general in several states. By late 1994, Louisiana-Pacific faced attorney general investigations in Florida, Minnesota, Oregon, and Washington.[40]

In January 1996, Oregon and Washington attorneys general settled their complaints with the company. In Washington, Louisiana-Pacific agreed to pay $250,000 in civil penalties and $100,000 in attorney fees and costs to the state, and to contribute $1,000,000 to Washington State University's Department of Wood Materials.[41] In Oregon, Louisiana-Pacific agreed to pay $505,000 to the Oregon Department of Justice for the Consumer Protection and Education Revolving Account.[42]

The Washington and Oregon settlements also resulted in Louisiana-Pacific's agreeing to an injunction prohibiting the company from engaging in a number of business practices regarding OSB. The company agreed not to

- represent OSB as suitable for exterior use without substantiation
- condition the availability of warranty remedies on adherence to installation procedures that cannot be met in accordance with industry norms or on adherence to unreasonably stringent maintenance procedures, and

- sell Inner-Seal lap siding without first conducting sufficient tests and research to confirm the appropriateness of the product for its intended purposes.[43]

The Florida attorney general took no formal action against Louisiana-Pacific; however, by 1996 Louisiana-Pacific had agreed to donate funds to Florida A & M University as part of an informal agreement. Louisiana-Pacific gave $600,000 toward a chair in the school's education department, which was matched by $400,000 in state funds. Louisiana-Pacific also agreed to provide another $250,000 to the schools' scholarship fund for the School of Business. In addition, Louisiana-Pacific agreed that any Florida resident who settled with Louisiana-Pacific as part of *Anderson*, and who would have received more in compensation under a subsequent agreement, could obtain the difference between the two settlements.[44]

NATIONWIDE CLASS LITIGATION BEGINS

The nationwide class action had its genesis in three different cases. Table 13.1 provides an overview of these actions and includes *Anderson* for comparative purposes. These cases originated separately; in fact, our interviews indicated that even though the attorneys were aware of the existence of other pending litigation, there was little or no contact between them before complaints were filed. Ultimately, it was the Sandpiper Village case that was the vehicle for settling the litigation nationwide.

Matherly, et al. v. Louisiana-Pacific Corp., et al.

In November 1994, Seattle attorney Christopher Brain of Tousley Brain began to consider litigation against Louisiana-Pacific. According to our interviews, Brain was a commercial litigator with some previous class action litigation experience. However, the bulk of his practice did not consist of either class action litigation or plaintiff representation. The case was brought to his attention by an

Table 13.1

Louisiana-Pacific Inner-Seal Siding Litigation

	Anderson	*Matherly*	*Sandpiper Village*	*Hudlicky*
Location	Florida	Washington	Oregon	Oregon
Jurisdiction	State	State	Federal	Federal
Extent of class	Florida	Nationwide	Nationwide	Nationwide
Filing date	Oct. 21, 1994	April 28, 1995	June 19, 1995	Sept. 15, 1995
Settlement date	July 25, 1995	Oct. 18, 1995	Oct. 18, 1995	Oct. 18, 1995

unidentified client of the Tousley Brain law firm who had damaged siding and was dissatisfied with the remedy offered by the Louisiana-Pacific arbitration program. Dale Matherly was associated with the unidentified client and volunteered to act as class representative.

Because of the potential size and significance of the litigation, Brain determined it would be appropriate to associate with Foster Pepper and Shefelman, a Seattle firm with class action litigation experience. Brain and Ben McConaughy of Foster Pepper and Shefelman filed suit in Washington state court on April 28, 1995 on behalf of a nationwide class of plaintiffs under the name of *Matherly, et al., v. Louisiana-Pacific Corporation, et al.*[45] In their complaint, they alleged as causes of action violations of the Washington state Unfair Business Practices Act,[46] breach of express warranties, breach of implied warranties, and negligent representation.[47] In addition to damages, they sought rescission of the warranty (with all its limitations) and an injunction preventing Louisiana-Pacific from obtaining releases in connection with the warranty.[48]

The representative plaintiffs originally included Dale and Joan Matherly and Douglas Meckling, all Washington homeowners whose Inner-Seal Siding had deteriorated.[49] The putative class was defined as "all persons who own or have purchased or used Inner-Seal Siding material" manufactured by Louisiana-Pacific. One subclass of this class (the "Releasing Subclass") consisted of all persons who had previously released claims (i.e., waived any rights to litigate against Louisiana-Pacific related to Inner-Seal Siding).[50]

Sandpiper Village, et al., v. Louisiana-Pacific Corporation, et al.

Media reports of homeowner complaints in the southeast had prompted Tallahassee attorney William Garvin to investigate Louisiana-Pacific siding for its litigation potential early in 1994. Unlike Brain, Garvin was an experienced plaintiffs' attorney specializing in class actions and aggregate litigation. Based in Florida, he was aware of the *Anderson* class action although he was not associated with the *Anderson* attorneys. In May 1995, Garvin filed an action seeking statewide class action status in Florida state court under the name *Terrell, et al., v. Louisiana-Pacific Corporation, et al.* The class action in *Anderson* had been under way since October 1994, and the parties were already negotiating a statewide settlement in that action, which was reached two months later in July. Garvin consulted with the *Anderson* attorneys but was not able to become a part of that action and settlement.

Nonetheless, Garvin and his associates moved forward. Recognizing the potential for a nationwide class action, they dismissed the Florida statewide class action they had filed and in June 1995 refiled a nationwide class action, *Sandpiper Village, et al. v. Louisiana-Pacific Corporation, et al.,* in federal district

court in Oregon.[51] It was this action—alleging the same set of claims against Louisiana-Pacific as the *Matherly* case that had been filed two months earlier—that eventually became the basis for the settlement of the entire litigation. Garvin and his associates chose this court for strategic reasons; in the event all Louisiana-Pacific siding cases were consolidated, it was likely that they would be moved to this court because Louisiana-Pacific was headquartered in Portland. The *Sandpiper Village* attorneys would be well positioned to be chosen as lead counsel if they filed there. The case was initially assigned to Magistrate Judge John Jelderks for pretrial proceedings and was subsequently transferred to Judge Robert E. Jones.[52] In their complaint, the *Sandpiper Village* attorneys alleged only breach of warranty.[53] The complaint was amended in late September to include a cause of action for violation of RICO statutes.[54]

The class representative in the complaint was the Sandpiper Village Condominium Association, Inc., the residents' association of a 73-unit condominium development located in Destin, Florida.[55] Importantly, the complaint limited the putative class to building owners with damage over $50,000, a limitation necessary to obtain diversity jurisdiction and to bring the case in federal court.[56]

Hudlicky, et al., v. Louisiana-Pacific Corporation, et al.

Meanwhile, other attorneys were investigating the potential for a nationwide class action against Louisiana-Pacific. A group of experienced plaintiffs' attorneys specializing in class action and aggregate litigation were already pursuing a class action against International Paper, Inc., the manufacturers of Masonite, for similar product defects.[57] That action, *Naef v. Masonite Corp.*, was filed and settled as a nationwide class action in Alabama state court and was an even higher stakes case, because Masonite had been installed on four times as many homes as Louisiana-Pacific's Inner-Seal Siding. The lead plaintiff firms for the Masonite action were McRight, Jackson, Dorman, Myrick & Moore of Mobile, Alabama; the San Francisco law firm of Lieff, Cabraser, Heimann & Bernstein; and Doffermyre, Shields, Canfield, Knowles & Devine of Atlanta.[58]

In the course of investigating Masonite, plaintiff attorneys engaged in extensive discovery, including an examination of corporate documents. They compared Masonite to its competitors' products, and discovered the similarities with Louisiana-Pacific's Inner-Seal Siding.[59]

On September 15, 1995, the Masonite class counsel filed a nationwide class action in U.S. District Court in Oregon—the same court in which *Sandpiper Village* had been filed two months earlier—under the name of *Hudlicky, et al., v. Louisiana-Pacific Corporation., et al.*, against Louisiana-Pacific and its president and chairman of the board, Harry A. Merlo.[60] In their complaint, the

Hudlicky attorneys alleged numerous causes of action including violation of RICO statutes;[61] violation of consumer protection statutes in each of the 50 states and the District of Columbia; fraud; intentional, reckless, and negligent misrepresentation; negligence; strict liability, breach of express warranty; and breach of implied warranty.[62] In addition to seeking damages, the plaintiffs sought injunctive relief preventing Louisiana-Pacific from obtaining releases in connection with its warranty.[63] By seeking injunctive relief, the *Hudlicky* attorneys may have been setting the stage for a mandatory non-opt-out subclass.

The complaint named Ben Hudlicky, Douglas G. and Tamarack K. Dixon, and David Startzel as representative plaintiffs. All were homeowners whose siding had deteriorated. Hudlicky and Startzel lived in Washington; the Dixons lived in Idaho. The putative class definition included "All parties or entities that presently own structures in the United States on which Louisiana-Pacific Inner-Seal exterior siding manufactured since January 1, 1980, has been installed."[64]

THE PRESSURES TO SETTLE

Both the defendants and the various plaintiffs' attorneys had good reasons to settle the litigation instead of pursuing it to trial. Louisiana-Pacific Corporation was enduring particularly tough times. Between March 1994 and March 1995, the company's stock price dropped over 50 percent in value, from a high of almost $46 per share to approximately $23 per share. On May 25, 1995, Louisiana-Pacific disclosed that it was facing a grand jury indictment regarding violation of environmental laws in Colorado.[65] This disclosure contributed to an additional $4.25 drop in Louisiana-Pacific's share price.[66] It also resulted in a shareholder class action against the company, filed in U.S. district court in Colorado, on July 31, 1995.[67] On July 31, 1995, codefendant Harry Merlo resigned from the company. Finally, with the *Sandpiper Village* action, Louisiana-Pacific faced the potential of defending competing nationwide class actions in more than one court, a 25-year exposure under its existing warranty, and negative media exposure brought on by the lawsuits.

Although Louisiana-Pacific was convinced that it would win all Inner-Seal suits on the merits at trial, it felt that the best possible outcome was to settle all disputes as quickly as possible. Vinson & Elkins, the Houston, Texas, law firm that had represented Louisiana-Pacific in *Anderson,* also represented the company as the nationwide class actions mushroomed. The *Anderson* settlement that Vinson & Elkins had negotiated seemed to provide a good model for the settlement of the larger dispute.

For their part, the various plaintiffs' attorneys faced a daunting prospect in pursuing the dispute either as individual litigation or as a nationwide class action. First, they faced difficult substantive legal issues. It was uncertain that any

plaintiff camp could establish a valid case against Louisiana-Pacific under either contract or tort theories of liability. Second, it was unclear whether the plaintiffs could successfully achieve class certification of their cases. Because the claims underlying any class were subject to the laws of the different states where plaintiffs lived and where the products were sold, a class action jury might have to render a decision under as many as 49 separate legal standards (Florida claims were already settled).[68]

LITIGATION AND SETTLEMENT NEGOTIATIONS

During the summer of 1995, all of the parties engaged in settlement negotiations that began virtually as soon as the various cases were filed. Indeed, pleading papers filed by objectors to the settlement suggest that the *Hudlicky* attorneys were engaged in negotiations two months before they filed their complaint.[69] Although the settlement discussions were all aimed at settling the entire litigation, the competing factions within the plaintiff community negotiated separately with the defendant. In all our interviews, we were told that the different factions of plaintiff attorneys were vying for control of the plaintiff class. Our interviews also suggested that Louisiana-Pacific attempted to take advantage of the divisions within the plaintiff community by playing each group off against the others. One source likened the situation to the holding of a "reverse auction" where defendants can easily inform competing counsel that they would settle first with the lawyers who offer them the best opportunity to resolve all their liabilities in one case.

Discovery

Because these cases settled relatively quickly, only limited discovery took place. *Matherly* class counsel had the most opportunity to pursue discovery, however, since it was filed before the other cases. They collected an extensive number of documents, took numerous depositions, and reportedly interviewed and obtained documents from many third-party witnesses, contractors, and product distributors. No formal discovery took place in any of the other actions before the settlement. The parties engaged in "confirmatory discovery" after the settlement, and in our interviews parties said that considerable time was devoted to post-settlement production of documents and depositions to establish the ability of Louisiana-Pacific to satisfy settlement provisions.

Jurisdiction

By the summer of 1995, the various plaintiff attorneys had filed two actions, *Matherly* in Washington state court and *Sandpiper Village* in federal court in

Oregon; *Hudlicky*, also filed in federal court in Oregon, would follow in September. Consequently, there was a question as to which court was most appropriate to resolve the dispute. All parties preferred to reach a settlement of the action in federal court, because they felt that a nationwide class action filed in a state court might provide potential objectors with an argument against a settlement.

Federal jurisdiction, however, was problematic. For one thing, most of the homeowner disputes involved damages of less than $50,000, which at that time was the monetary floor for federal diversity litigation. In addition, the case did not clearly depend on a federal question such as breach of a federal statute or an issue that has original federal jurisdiction. Apparently, the *Hudlicky* attorneys suggested violation of federal RICO statutes as a means of establishing federal jurisdiction;[70] RICO ultimately became the basis for jurisdiction in the Second Amended Complaint in *Sandpiper Village*, as well as for the overall settlement. Plaintiffs claimed that Louisiana-Pacific and Harry Merlo "engaged in a pattern or practice of racketeering conduct by making untrue and fraudulent statements in advertisements and reports filed with governmental authorities regarding the performance of LP siding."[71]

Class Certification

The issue of class certification was never completely argued in any of these cases. Motions for class certification were filed and briefed in *Matherly* and *Sandpiper Village*, but never argued. Because the parties were moving quickly toward settlement, a motion for class certification was never even filed in *Hudlicky*.[72]

TERMS OF INITIAL SETTLEMENT

On October 5, 1995,[73] all of the plaintiff attorneys reached a settlement agreement with Louisiana-Pacific on a nationwide basis, which was preliminarily approved on October 18, 1995, by Magistrate Judge Jelderks. *Hudlicky* was consolidated with *Sandpiper Village*, and the *Matherly* plaintiffs were allowed to intervene. Magistrate Judge Jelderks preliminarily certified the class defined as follows:

> Settlement Class means all Persons who owned, own, or subsequently acquire property on which exterior Louisiana-Pacific Inner-Seal Siding has been installed prior to January 1, 1996 and who are given notice in accordance with the due process clause of the U.S. Constitution.

Excluded from the Settlement Class are:

(1) All Persons who, in accordance with the terms of this Agreement, properly execute and file a timely request for exclusion from the Settlement Class;

(2) All Persons who are members of the certified class in the Florida action entitled *Anderson v. Louisiana-Pacific Corp.*, No. 94-2458-CA-01.[74]

Finally, Magistrate Judge Jelderks approved a notice program designed to apprise the settlement class of the existence of the class action and the terms of the settlement. Objections to the proposed settlement had to be received at least 15 days before the final fairness hearing.

Attorney fees and costs were not included in the Settlement Agreement.[75] They were to be established by subsequent negotiations between the parties and then submitted for court approval.[76] The defendants would pay fees and costs from a separate fund.

Creation of a Common Fund

The settlement provided for a minimum fund of $275 million funded periodically by Louisiana-Pacific with payments between $100 million and $15 million over seven years.[77] Any interest earned by the fund also would become available for distribution. The minimum size of the fund was established after lengthy and difficult negotiations because no one knew the amount needed to satisfy possible claims. According to class counsel, "[u]nlike the typical class action the exact number of class members cannot be calculated with precision as no one can say with absolute certainty the exact number of homes with damaged siding and some of the damage has not occurred yet."[78] As we have seen, such problems are common in mass tort class actions.

Table 13.2 provides the schedule of Louisiana-Pacific's funding commitments. An initial payment of $100 million would be due within 30 days of the entry of the Final Order (i.e., settlement approval) and subsequent payments would be due in years two through seven on the anniversary date of the Final Order. These first eight payments were known as the Initial Funding Obligation. Additionally, Louisiana-Pacific had the option of making additional payments to the compensation fund to cover any claims that exceeded the amounts already paid through the Initial Funding Obligation.

All class members would be bound by the agreement for the first four years after the entry of the Final Order, regardless of whether the Initial Funding Obligation was adequate to satisfy all filed claims.[79] If, however, at any time after this first four years the claims administrator notified Louisiana-Pacific that the

Table 13.2

Louisiana-Pacific's Contributions to the Common Settlement Fund*

Period	Payment
Initial payment	$100m
Year 2	$55m
Year 3	$40m
Year 4	$30m
Year 5	$20m
Year 6	$15m
Year 7	$15m
Second Funding Obligation	Up to $50m
Third Funding Obligation	Up to $50m
Final Funding Obligation, "Year 8"	Up to $50m if sum of outstanding claims and expenses are $100m or less; otherwise could exceed $50m cap
Final Funding Obligation, "Year 9"	Up to $50m if sum of outstanding claims and expenses are $100m or less; otherwise could exceed $50m cap

*Settlement Agreement § 4.10.

amount of approved (paid or pending) claims—and any allowable administrative expenses—exceeded the $275 million Initial Funding Obligation, any still-unfunded claims would be released from all provisions of the settlement agreement *unless* the defendant chose, within 60 days of such notification, to provide additional funding (an Additional Funding Election).[80] If Louisiana-Pacific made such a decision, it would then have 12 months to provide the lesser of $50 million or the aggregate sum of any unfunded claims. Once the defendant made this Additional Funding Election (known as the Second Funding Obligation), all class members would be bound for an additional 12 months beyond the point at which the claims administrator notified the defendant of excessive claims. If the Second Funding Obligation turned out to be insufficient to pay all claims filed prior to the expiration of the additional 12-month period, the defendant could elect to satisfy a Third Funding Obligation (payment of the lesser of $50 million or the sum of the still-unfunded claims). If the defendant made such a funding election, class members would again be bound by the terms of the agreement for an additional year.[81]

If, at the end of the first seven-year period, there still remained unsatisfied but approved claims or administrative or other allowed expenses, the defendant could elect to make two Final Funding Obligation payments at the end of each of the next two years.[82] The amount of each additional year-end funding payment would be dependent on the size of outstanding claims and expenses at the end of the period. If this sum were $50 million or less, then there would be a single payment of the full amount in the first year; if the aggregate sum were between $50 million and $100 million, the first year payment would be capped at $50 million and the second would be the full amount of the remainder. If the

aggregate sum exceeded $100 million, then each of the two year-end payments need only be 50 percent of the aggregate sum (but would therefore be at least $50 million). If the Final Funding Obligation payments were made as required, class members would be bound by an additional 24-month period beyond the original seven-year term as anticipated in the settlement agreement.

Thus, at least $275 million, and as much as $375 million, might be paid into the settlement fund over the first seven years but, as explained above, if unsatisfied claims remained at the end of this period, the defendant could provide additional funding to prevent unsatisfied claimants from seeking compensation outside the settlement provisions. How much would be required from the defendant for the Final Funding Obligations would depend upon the size of the outstanding claims and expenses, but conceivably two additional payments of $50 million or more might be made. The uncertainty regarding the ultimate amount of funding (beyond the $275 million Initial Funding Obligation) makes it somewhat difficult to determine what exactly was being offered to the class in the aggregate. However, parties to the litigation have consistently used a benchmark of $475 million as a potential upper bound to the range of the defendant's obligations.[83] In any event, all amounts remaining in the settlement fund—after the claims administrator determines that all claims have been paid and processed—would revert to Louisiana-Pacific.[84]

Under the settlement agreement, if the defendant made all required and optional payments specified, class members would be deemed to have released Louisiana-Pacific from all claims for damaged siding (except for claims arising under their existing 25-year limited warranty after termination of the settlement agreement).[85] As anticipated in the settlement agreement, should Louisiana-Pacific decide not to make the optional payments, unsatisfied class members (if any) could pursue any available legal remedies without restriction.[86] This "walk away" provision, apparently modeled on a similar mechanism used in the polybutylene pipes litigation settlement (in which many of the *Hudlicky* attorneys participated), was thought by class counsel to make the issue of accurately estimating the aggregate class loss and its relationship to the settlement funds moot.[87] They claimed that even if the allocated fund later proved inadequate, despite the best predictions of the parties' experts, uncompensated class members would not be hurt because they would be free to initiate individual litigation if need be.[88] As we shall see, both sides failed to anticipate the cost of settling claims, and the settlement fund and provisions for claiming were subsequently modified.

Potential class members could opt out of the settlement by sending an exclusion request to the claims administrator by March 7, 1996.[89] Up to ten days before the fairness hearing, Louisiana-Pacific had the option of terminating the settlement agreement if the remaining class pool were too small.

Individual Recovery Amounts

Claimant compensation was to be calculated according to a formula that accounted for the damage sustained by the structure's siding and age. (Maintaining the aging provision in the compensation formula had been a deal-breaking condition for Louisiana-Pacific in the settlement negotiations.) The compensation program did not compensate physical damage to property or bodily harm to persons resulting from the deterioration of Louisiana-Pacific siding. However, individuals with claims for physical damage to property or bodily harm were free to pursue these claims elsewhere.[90]

The settlement stipulated that an independent adjuster would determine the amount of OSB siding on a wall and the amount and specific location of damaged siding. All fees related to the adjustment process, including training and inspection, would be paid directly by Louisiana-Pacific and were not drawn from the settlement fund. The adjusters were to be trained through a course developed by Louisiana-Pacific with the assistance of class counsel.

The inspection protocol, possibly the most controversial aspect of the settlement, was the result of lengthy negotiations between the parties and the subject of vociferous objection by intervening class members at the fairness hearing.[91] The protocol established (1) the method by which the evaluation was to take place; (2) the criteria by which damage or degradation was to be determined; and (3) the compensation that claimants were to receive. Instead of relying on visual inspection, the inspector was required to use a moisture meter, calipers, and an edge check probe to determine damage to each panel. According to the adjusters' training manual, damage could be deemed to exist if the adjuster saw fungal degradation, buckling, or physical deformation.[92] In addition, damage existed if any two of the following three conditions were found: thickness of the product in excess of 0.54 inch; moisture content in excess of 28 percent; or gaps in the panel edges.[93] An entire panel was to be deemed damaged if any portion of the panel was damaged.[94] Panel siding was evaluated and replaced panel by panel. For lap siding, if more than 70 percent (later reduced to 65 percent) of a wall were damaged and the damage appeared dispersed throughout the wall, then the claimant would be compensated for the actual cost of replacing the damaged siding; in the event that the owner went ahead and replaced the entire wall, he or she would be compensated for the additional costs of replacing undamaged Louisiana-Pacific siding. If the damage to the wall were less than the cutoff percentage, the claimant would be compensated for replacing the damaged lap siding only.[95]

The information gathered by the inspector[96] was relayed to the claims administrator, who in turn calculated the amount of compensation using information that included replacement costs prepared by an outside consulting firm.

Square-foot compensation amounts ranged from \$2.20 to \$6.40[97] and were keyed to the geographic location of the structure and the type of product.

If a class member had previously submitted or resolved claims under any of the defendant's other warranty or claims programs, he or she would be entitled to recover the difference resulting from increased compensation from the settlement claims process.[98] Of utmost importance to many class members, the settlement prevented the defendant from asserting any defenses against claims that were based on improper installation or maintenance of the product, or based on the expiration of any applicable statute of limitations.[99]

Notice

The extensive notice program launched prior to final approval was reported to have cost at least \$4.9 million, though the actual cost is not public information.[100] The agreement required that, within three business days after preliminary court approval of the settlement agreement, Louisiana-Pacific deposit enough money to finance the initial notice program in an account set up by class counsel. With the assistance of Louisiana-Pacific, the class administrator compiled a list of potential class members at their last known addresses.[101] In November 1995, these individuals were mailed a notice of the class action, the terms of the settlement, a claim form, an exclusion request form, and information to assist a homeowner in determining whether he or she had Louisiana-Pacific siding and whether that siding was deteriorating. As might be expected, this direct mailing was quite small, reaching only about 27,000 households. For the most part, Louisiana-Pacific supplied its materials through contractors and had little contact with the eventual property owner. A supplemental mailing to additional, newly identified individuals in the four states (California, Florida, Oregon, and Washington) with the highest Inner-Seal Siding sales was conducted on March 11, 1996.

Louisiana-Pacific also implemented a print media advertising campaign. Full and abbreviated notices appeared in the national edition of the *Wall Street Journal* on December 7, 1995; in *USA Today* on both November 17, 1995, and January 12, 1996; in seven major newspapers on January 14, 1996; and in almost 300 other daily and weekly newspapers on January 18, 1996. Notice also appeared in eight major weekly or monthly periodicals in January and February 1996 and in seven construction-industry periodicals. A news release was also sent to wire services and news programs.

The third part of the preapproval notice campaign was a television advertisement describing the class action and its settlement. This advertisement was aired on national television in prime-time slots January 6–14, 1996. The television advertisement was also broadcast in targeted local markets for a week in

December 1995 and again for another week in January 1996. In addition, a radio announcement was broadcast 792 times on 611 stations across the country. Finally, class counsel established a toll-free telephone information hot-line for the purpose of receiving requests for class notice and other materials.

The settlement also provided for a subsequent notice program to take place no later than the end of the third and sixth years of the settlement.[102] This program would include direct mailings to all prior claimants and advertisements designed to reach new class members and publicize the existence of a toll-free telephone number to request more information. The anticipated or actual costs of the subsequent notice were not shared with us, though it appears that such costs, as well as the costs of providing ongoing information to claimants, class members, or other parties after the final approval, may come from the common fund.[103]

NOTICE PERIOD, ADDITIONAL NEGOTIATIONS, AND OBJECTIONS TO SETTLEMENT

On March 29, 1996, the case was reassigned to Judge Jones for all further proceedings.[104] Procedurally, Judge Jones—not Magistrate Judge Jelderks—would be required to sign any dispositive order such as the final judgment. Important details of the settlement, such as the plaintiff attorney fees and the inspection protocol, were to be negotiated before the final fairness hearing set for April 15, 1996.

Negotiation of Class Counsel Attorney Fees

Days before the final fairness hearing, the parties attempted to reach agreement on the amount of fees to be paid to the plaintiffs' attorneys. After much negotiation, the issue was submitted to mediation by agreement of the parties. The mediator was former Judge Terrence Carroll, a member of JAMS/Endispute, one of the largest for-profit providers of arbitration and mediation services in the country and one with whom both defense and plaintiffs' counsel had prior experience. After a day of mediation, the parties agreed that $26.25 million would be paid by the defendants to the entire group of class counsel; this amount would be separate from and in addition to the settlement fund.[105] Distribution of the fees among the class counsel was left to them and is not part of the public record.

Opt-Outs, Objections, and Interventions

By early April 1996, a relatively small number of class members had requested to be excluded from the settlement. As of April 8, 1497 valid exclusions out of a

potential class of 700,000–900,000 homes had requested to be excluded.[106] However, small but vocal groups of objectors had organized to oppose the settlement. Collectively, they objected on the grounds that (1) the amount of compensation was inadequate,[107] (2) the inspection protocol was unfair,[108] (3) class members should have the option of arbitrating compensation if they were dissatisfied with the fund administrator's offer,[109] and (4) the settlement fund was inadequate to meet the claims. In their motion for final approval of the settlement agreement, counsel noted these objections, but stated that they were either invalid or irrelevant. However, by the time of the final fairness hearing, three groups—builders, a collection of class members who became knows as the Gronvold Intervenors, and an independent attorney—were still actively opposing the settlement.

One group of objectors comprised builders who—although they were not part of the settlement process—occupied a precarious position in relation to this litigation. Homeowners usually have no interaction with a manufacturer like Louisiana-Pacific but may have considerable contact with the developers of their property. Therefore, homeowners often look to their builders for compensation for any property damage. Because the settlement did not include the builders, homeowners could seek compensation from the builders for remaining uncompensated damage. Builders then would have legal rights against Louisiana-Pacific for any amount they paid out for damages caused by Louisiana-Pacific products. However, the builders wanted Louisiana-Pacific to assure them that they would not be harmed in future actions.

Another objector group that appeared at the settlement hearing was organized by Richard Rosenthal, a California attorney representing homeowners in central California who eventually joined the class settlement.[110] Rosenthal and his associates felt that the settlement did not adequately compensate the class.[111] The group of class members Rosenthal represented became known as the Gronvold Intervenors; they included Richard and Darcy Gronvold, Reginald and Beverly Meyer, Timothy J. and Colleen Kelly, and David Startzel.

Another motion to intervene was filed by Lawrence Schonbrun, a well-known critic of class counsel attorney fees who often appears in class actions to object to fees.

FINAL FAIRNESS HEARING AND SETTLEMENT

By all accounts, the April 15 fairness hearing was highly contentious. The final terms of the settlement had only recently been completed, and the objectors had outstanding complaints about both the terms of the original settlement and the additional provisions. The judge was presented with estimates of the adequacy of the settlement by experts in economics and statistics retained by

counsel for Louisiana-Pacific. An economics consulting group projected future claims by using available claims and sales information; it concluded that the anticipated cost of remediation could be as much as $168 million, with an assumed remediation cost of $4 per square foot.[112] A statistical consulting firm reviewed the work of the economists and concluded that "the 2002 end year is sufficient to capture future claims. . . with a risk of missing 0.3% of all potential claims, and the total $475 million settlement fund will be adequate to cover the cost of all projected claims through year 2002. . ."[113]

At the hearing, Judge Jones raised questions and expressed concerns regarding those homeowners who were dissatisfied with the amount of compensation calculated by inspectors under the adjustment protocol. In general, fairness hearings allow parties to present their arguments in favor of any particular settlement, and objectors to present their complaints. Sometimes the hearings are very brief, but in this instance, the judge gave the objectors considerable time to present their arguments.[114]

At the end of two days, Judge Jones disapproved the settlement as presented.[115] First, he wanted the opt-out date to be extended to May 27, 1996, with notice of opt-out rights mailed to the individuals who already had been sent a claim form. Second, he indicated his dissatisfaction with details of inspection protocol, including the age deduction and total replacement limit. He then continued the hearing for one week to allow the parties to negotiate amendments to the settlement agreement that would satisfy both him and the objectors. Intervenors were allowed to participate in the ongoing settlement negotiations, but only with regard to issues raised at the fairness hearing; they could not raise any new issues.

During the next week, the parties worked to address the judge's concerns. They obtained the assistance of Judge Carroll in mediating some of the more contentious issues.[116] Judge Jones contacted Judge Carroll and advised him that, in addition to the protocol and opt-out date, Judge Jones also thought there should be a provision for arbitration for dissatisfied class members.[117] By the next week, the parties had made all the changes identified by Judge Jones.

The most important agreement reached during this week was the addition of an arbitration provision. Any claimant who was dissatisfied with the amount of compensation offered under the inspection scheme would have the option of submitting his or her claim to arbitration.[118] Once the claimant chose arbitration, he or she would abandon the option of claiming benefits under the administrative claim process. At arbitration, the claimant could assert any and all claims and theories of liability, and Louisiana-Pacific could assert any and all defenses available to it. Thus, the claimant could get nothing, or more or less than offered originally. The arbitration decision would be binding on the par-

ties, barring both from subsequent appeal. The alternative dispute resolution firm of JAMS/Endispute was chosen to arbitrate such disputed claims.

At the resumed fairness hearing, the judge indicated that he was still dissatisfied with a number of aspects of the settlement. One concern involved counsel's inability to tell class members exactly what they might be getting under the settlement. Because the inspection protocol for adjusters was still being negotiated, the judge felt that "[a]s of this moment, none of you can agree as to what constitutes what should be replaced or what replacement costs means."[119]

The judge also stated that he felt homeowners should be allowed to replace an entire wall of siding if 50 percent of the lap siding were bad.[120] (Originally, the parties had negotiated a provision that allowed total replacement of a wall if 70 percent of lap siding panels installed were bad.[121]) This provision was not a trivial issue; for instance, dropping the cutoff figure from 65 percent to 60 percent would cost another $110–$120 million.[122]

Because a number of terms of the settlement agreement had changed significantly—or, like the inspection protocol and training manual, had been created since preliminary approval—the judge thought it necessary to notify the class of the new terms and to provide an additional opportunity to opt out, even though that might entail an "enormous expense."[123] The existence of an arbitration option for those who were dissatisfied by the adjuster's decision was not enough in the judge's view to eliminate the need for an extended opt-out period, especially since the defendant would be able to assert additional defenses at the arbitration, such as improper installation.[124] As a compromise, the judge indicated that he would consider dropping the idea of extending the opt-out period if the 70 percent lap siding damage threshold were reduced to 50 percent and if the defense of improper installation at arbitration were eliminated.[125]

The judge also wanted the plaintiffs' attorneys to be paid incrementally over the following four years because they would have continuing obligations to monitor settlement provisions.[126] The judge likened the situation to how building contractors are compensated with incremental payments as the work progresses while withholding final payment until the work is finished and satisfactory.

Finally, the judge was concerned about the impact of using part of the settlement fund to cover administrative expenses because he was of the opinion that the minimal obligation of the defendant to the fund ($275 million) might already be too low.[127]

The hearing was recessed for 40 minutes after testimony. When the hearing resumed, the parties had agreed to a 65 percent cutoff for replacing an entire wall but retained the ability of the defendant to assert improper installation as a defense at arbitration. Judge Jones then approved the settlement but ordered

that class members would have a new opt-out period in which to consider the modified agreement.[128] Other changes to the initial settlement are discussed below.

Terms of Final Order

In regard to provisions for funding the settlement, the agreement that was approved on April 26, 1996, is substantially the same as the initial agreement put forward on October 18, 1995. Homeowners had until May 27, 1996, to opt out of the settlement, after which anyone opting out could pursue his rights in court. If a homeowner chose to be part of the settlement, he or she would submit a claim to an inspector who would calculate the amount of damage and compensation. A homeowner dissatisfied with the inspection amount had the option of submitting the issue to an arbitrator. Claimants would contribute $300 to the costs of arbitration with Louisiana-Pacific covering any additional fees (the defendant's contribution would not come from the settlement fund).[129] At arbitration, all claims and defenses would be available to the parties and the decision of the arbitrator would be binding without the right of appeal. One noteworthy difference between the Final Order and the original agreement is that claimants were not required to waive their rights to pursue claims of consequential damage, including those for personal injury and death.[130]

Class counsel would receive $26.25 million over the first four years of the settlement period, which would be paid separately by the defendant.[131] On the settlement date, the class attorneys received 60 percent of the fee ($15.75 million).[132] The remaining 40 percent ($10.5 million) was placed in an interest-bearing account. On each of the first, second, third, and fourth anniversaries of the settlement date, the class attorneys were to receive 25 percent of the money originally deposited in this account.

The court found that a percentage recovery was appropriate for the case and that the agreed-to fees and costs award, when compared to the total of the class compensation fund, counsel fees, and administrative expense recoveries, was less than 8.5 percent of the total and "well within the typical range of fee awards."[133] With respect to claims protocol issues, intervenors were given permission to apply for reasonable attorney fees.

The settlement agreement approved by the court also provided that incentive payments of $3000 were to be made to each of the nine married couples or individuals named in the three underlying actions; in addition, a $10,000 payment was made to the Sandpiper condominium association. These payments were to

come out of the common fund.[134] Furthermore, it is our understanding that in response to Schonbrun's objections regarding attorney fees and notice, the parties added a supplemental notice program and paid $100,000 to Schonbrun for his fees and costs. This payment did not come out of the common fund but was paid by class counsel and the defendant.[135]

Originally, the settlement agreement provided that "[a]ll expenses incurred in administering this Agreement, including cost of the Class and Subsequent Notices and costs of implementing and administrating the claims process and the costs of the Independent Adjusters, shall be paid from the Settlement Fund,"[136] but an amendment to the agreement (executed by the parties on the day of final approval of the settlement by the court) provided that Louisiana-Pacific would directly pay for costs of administration and the adjusters (though not notice expenditures).[137] At the time of the approval of the settlement, Louisiana-Pacific's costs of administering the claims process were estimated between $13 million and $15 million; we were subsequently informed by the defendant's representatives that the actual amounts have not been publicly released, are presently under a protective order, and were greater than originally anticipated.[138]

The court retained continuing jurisdiction over the action and parties including the implementation of the settlement and distribution of class benefits. Subsequently the court, citing the burdens involved in the "constant surveillance and attention" needed, appointed Justice Richard L. Unis, a retired Oregon Supreme Court judge, as Special Master to oversee the administration and implementation of the settlement. Justice Unis's duties included administration of the fund, coordinating Louisiana-Pacific's contributions, paying claimants, and oversight of the arbitration program established under the settlement. As a Rule 53 Special Master, Justice Unis's compensation was borne equally by the defendants and the class counsel (and not deducted from the settlement fund); the court's order appointing the Special Master indicated that his fee would be $200,000 per year for a five-year period.[139]

POST-FAIRNESS HEARING EVENTS

This settlement was the result of considerable negotiation among many parties. As Judge Jones stated, "[T]his is a settlement agreement. That means a compromise. That means that realistically, nobody is happy with it. You [the defendant] paid more than you wanted to. You [the class] got less than you wanted."[140] The period after the fairness hearing was as contentious as the period leading up to the settlement.

Appellate Record

Builders are Louisiana-Pacific's most important customers, and the company cared about trying to preserve its market among this group. One builder, perhaps unhappy that the settlement did not provide any concessions to builders who might be held liable for damages, filed a notice of appeal from the entry of final judgment.[141] Although this appeal was not made on behalf of all builders, it reflected concern about how the settlement would affect them. Louisiana-Pacific responded by agreeing to indemnify builders for any payment that a builder incurred resulting from Louisiana-Pacific Inner-Seal Siding. Consequently, the appeal was dismissed. [142]

A second appeal was filed on behalf of the Gronvold Intervenors. During interviews, we were told that Judge Jones had asked the Gronvold Intervenors if they were satisfied with the settlement and if they planned to appeal. Although they replied that they would not appeal, they filed a notice after the order and final judgment in which they proposed four issues for appeal. They argued that: (1) jurisdiction was improper; (2) class counsel fees were excessive; (3) notice to the class of the amended settlement was inadequate; and (4) the action was not properly maintained as a Rule 23(b) class.[143] The parties settled with the intervenors in late August 1996, agreeing to allow the intervenors' counsel the right to participate in the "review, structure and implementation of the settlement program. . . " but only insofar as to matters relating to arbitration and subsequent notice.[144] The attorneys for the Gronvold Intervenors received $1 million for fees and costs related to their intervention into the litigation; this cost was shared equally by the class counsel and by the defendants.[145] Like the representative plaintiffs in the main action, each of the four named Gronvold intervenors received $3000. This amount was to be paid out of the common fund and was approved by the court.[146]

Arbitration

After the final settlement, as claimants began opting for arbitration, it became clear that the arbitration program as administered was not proceeding as anticipated. According to our interviews, certain parties felt that the arbitrators were not following the instruction of the court to determine liability conclusively and were "splitting the baby." They complained to Judge Jones about the process, which led Judges Jones and Unis to attend a number of arbitration hearings.

After observing some arbitrations, Judge Jones reportedly stated that the JAMS arbitrators were "simply mediating damages and were not requiring proof of liability."[147] As discussed above, the process as originally conceived required parties to prove all elements of their claims and allowed them to introduce all

available evidence in support of those claims.[148] Under the rules, in some cases a claimant might go to arbitration and receive no compensation because the facts of the case did not result in liability on the part of Louisiana-Pacific. If the arbitrators were indeed not requiring claimants to prove liability and were merely mediating damages, then claimants would have an incentive to arbitrate claims that were otherwise invalid. This trend would result in more arbitrations than anticipated, bogging down the claims resolution process and escalating costs. At the extreme, Louisiana-Pacific might be forced into bankruptcy.

Ultimately, a confrontation arose between the arbitration administrators and the court, which became public in May 1997.[149] Judge Jones sent a letter to Judge Carroll, the JAMS/Endispute official who headed the panel of arbitrators—and who had helped class counsel and the defendants mediate the attorney fee issue—reminding him that any arbitrator who viewed his or her decision simply as a matter of an equitable reevaluation of damages would be in violation of his or her oath.[150] In response to Judge Jones's attempt to directly reassert the principle that arbitration claimants were required to meet their burden of proof regarding all elements of the claim—over and above the issue of whether the siding was indeed damaged—JAMS/Endispute terminated its relationship with the Louisiana-Pacific settlement process in view of what they termed as Judge Jones's "demonstrated lack of respect for the independence and impartiality of the arbitrators."[151] Judge Carroll and JAMS/Endispute general counsel Michael Young asked that Judge Jones recuse himself from overseeing the Louisiana-Pacific arbitrations. In addition, JAMS/Endispute referred the matter to the chief judge of the U.S. District Court for the District of Oregon.[152] The decision of JAMS/Endispute to withdraw from the arbitration program was not a trivial one, because at that time there were several Louisiana-Pacific claim arbitrations pending and the potential for many more fee-producing hearings existed.

After JAMS/Endispute terminated its participation, arbitration was provided on an as-needed basis by other arbitrators. Very few claimants have chosen the arbitration option. As of June 18, 1998, only 316 of approximately 89,000 claimants had sought arbitration.[153]

EPILOGUE

Experience

Two years into the settlement period (June 1998), Louisiana-Pacific had paid claimants a total of approximately $165 million. Based on these figures, claimants received approximately $4367 as an average settlement amount.[154] Because the settlement was intended to pay claimants for their losses as calcu-

lated by an adjuster, we can assume that these figures generally reflect the losses actually incurred by the claimants as a result of the Louisiana-Pacific product (though those losses involve the costs of replacing the siding only and not those related to collateral damage to the structure or surrounding property).[155]

In addition to the information provided by the Special Master in his year-one and year-two reports, Securities and Exchange Commission filings from Louisiana-Pacific provide some information about expenditures. As of June 18, 1998, 164,046 claim forms had been requested from the claims administrator,[156] and 88,891 of these had been returned to the claims administrator for compensation.[157] Incomplete claims were returned to the claimants and modified. Almost 67,000 inspections had been performed.[158] Of this group, 37,781 claimants had been mailed checks.[159]

Recent statistics regarding claimant compensation suggest that the parties underestimated the potential liability resulting from damaged OSB siding. By December 1997, the $155 million available in the common fund as a result of the initial and year-two payments was almost exhausted.[160] In order to ensure that claims would be paid in a timely manner, Louisiana-Pacific advanced its contribution of $40 million due in June 1998 for a total of $195 million in the settlement fund.[161] The defendant was required to add in another $30 million in June 1999 for its year-three contribution.

In his year-two report Judge Unis stated that claims were being paid at the rate of approximately $5 million per month from January through June 1998. By September 30, 1998, after accruing interest on the settlement fund account and after deducting costs of notice and all claims paid to date, approximately $8.6 million remained in the fund.[162] These numbers implied that the initial, year-one, and year-two payments to the common fund might well be exhausted by late 1998 and that Louisiana-Pacific would once again have to decide whether to contribute additional moneys to the settlement fund in advance of its obligations. If it did not make such accelerated contributions, class members with claims approved but not yet paid by the end of 1998 would have to wait until at least June 1999 and perhaps longer.

At this time, it is unclear if the settlement fund will be able to compensate all class members who might file claims through the end of 2002, even if optional funding potentially worth $200 million is added to the initial funding obligations. The quarterly report filed with the Securities and Exchange Commission for the period ending September 30, 1998, states:

> The claims submitted to the claims administrator to date substantially exceed the $275 million of payments that L-P is required to make under the settlement agreement. As calculated under the terms of the settle-

> ment, as of September 30, 1998, claims submitted and inspected exceeded $457 million.[163]

Settlement Augmentation

According to the defendant, there is insufficient data available to project the future volume or dollar value of claims that might be made against the settlement fund, and in Fall 1998 the defendant had not yet decided whether to provide the optional funding in excess of the initial $275 million after the fourth year of the settlement (a decision that must take place by August 2000, assuming immediate notification of fund depletion in June 2000).[164] Under the settlement agreement, the defendant could allow class members with unsatisfied claims to pursue available legal remedies by failing to provide sufficient optional funding payments, thus exposing itself to the potential of significant future litigation. But instead, in October 1998, Louisiana-Pacific and class counsel entered into an agreement that instituted an Early Payment Program for the original settlement fund and established a Second Settlement Fund.[165] This agreement, characterized by the parties as augmenting rather than altering or amending the original court-anointed settlement, was approved by the Special Master on November 9, 1998.

The Early Payment Program offers all claimants who would be entitled to receive compensation—from the remaining $80 million in four initial funding obligation payments (scheduled for June 1999, 2000, 2001, and 2002), as well as the two $50 million optional payments resulting from the second and third funding obligations (perhaps as late as the summer of 2001 and 2002)[166]—the opportunity to receive payment prior to the scheduled funding dates. To do so, claimants have to agree to accept a payment that is discounted according to the date the funds would have been required to have been paid under the original funding obligation schedule. That discount is 9 percent per year from the initial funding obligation dates in 1999–2002 and 12 percent per year from the potential second and third funding obligation dates in 2001 and 2002. For example, a class member with an approved claim of $6000 existing on November 1, 1998, that would not normally be paid until June 1999 under the current funding structure would be offered $5694. Besides agreeing to the reduction, early claimants are *not* able to arbitrate their award (an option available to initial claimants). Those class members who decline to participate in the Early Payment Program continue under the terms of the settlement as negotiated. When the date of the previously scheduled funding opportunity arrives, the defendants will be credited with the undiscounted value of the claims paid under the program.

In addition, the parties agreed to establish a "second settlement fund." The defendant agreed to establish a $125-million account to cover all claims filed

prior to the end of 1999 that exceeded the $375 million in initial, second, and third funding opportunities (thus, these claims would not be eligible for the early payment program). In early 2000 (after the filing cutoff), all claims filed by class members who agree to participate in the second settlement fund program will be aggregated and a pro rata award will be granted from the $125 million in the fund. Like the early payment program, there will be no right of arbitration; however, claimants dissatisfied with their pro rata share can exercise their "back end opt-out right" and reject the share. If they accept their share, they will be prohibited from submitting additional claims under the settlement. Also similar to the early payment program, class members who decline to opt into the second settlement fund program (or who choose to opt out) continue under the current rules of the settlement.

The use of the second settlement fund mechanism depends both on Louisiana-Pacific's choosing to provide the $100 million in second and third optional funding opportunities as well as declining to exercise its right to withdraw from the new program if it feels the level of participation by class members is inadequate. If the defendant does choose to withdraw from the second settlement fund program, the rights and obligations of the parties will be governed by the originally approved settlement (except as modified by the early payment program).[167] It remains to be seen how class members will react to the new programs and how their implementation will affect the ultimate liabilities of the defendant.

Other Issues

Subsequently, and separate from the siding dispute, Louisiana-Pacific has had other problems with its OSB product. Recently, Louisiana-Pacific settled claims in California over the deterioration of OSB used as structural panels for roof and wall sheathing as well as for floor underlayment and subfloors in residential and commercial construction.[168]

Our interviews indicate that Inner-Seal Siding is still available for use as an exterior siding material. However, the manufacturing process has been continuously modified during the 12-year production life of the product. About the time of the settlement, Louisiana-Pacific began adding a fungicide to the mixture. Since then (for siding installed after January 1, 1996) the failure claiming rate has been lower than during the previous five-year period.

Key Events	**Date**
Problems with Inner-Seal Siding become public	Spring 1994
Anderson case filed in Florida state court	October 21, 1994

Louisiana-Pacific faces attorney general investigations in four states	Fall 1994
Matherly complaint filed in Washington state court	April 28, 1995
Sandpiper Village complaint filed in Oregon federal court	June 19, 1995
Anderson settled as statewide class action	July 25, 1995
Shareholder class action against Louisiana-Pacific filed because of decline in stock prices; President and Chairman of the Board Harry Merlo forced out of the company	July 31, 1995
Hudlicky complaint filed in Oregon federal court	September 15, 1995
Settlement agreement reached between all parties in the *Matherly*, *Sandpiper Village*, and *Hudlicky* class actions	October 5, 1995
Settlement preliminarily approved	October 18, 1995
Notice published, broadcast, and distributed to potential class members	November 1995–February 1996
Initial opt-out deadline	March 7, 1996
Case reassigned from Magistrate Judge to District Judge Jones	March 29, 1996
Objector cutoff	March 31, 1996
Final fairness hearing	April 15, 1996
Amendment to settlement agreement accepted that established the inspection protocol	April 22, 1996
Final settlement approval	April 26, 1996
Final opt-out deadline (extended during final fairness hearing)	May 27, 1996
Special Master appointed; year-one payouts to claimants begin	June 1996
JAMS terminates its involvement with the settlement	May 1997
Louisiana-Pacific advances year-three money six months early because common fund is nearly exhausted	December 1997
Year-four money scheduled to be added to the common fund	June 1999
Final installment (year-seven money) due	June 2002

NOTES

[1]As part of our research on this litigation, we collected information from the primary plaintiff and defense attorneys, defendant spokesmen, representatives of attorneys general, and judicial officers. We also reviewed the pleadings and papers filed in the case as well as other documents including newspaper and magazine articles, press releases, and internet web site postings.

[2]*In Re Louisiana-Pacific Inner-Seal Litigation,* Civ. No. 95-879-JO (LEAD), United States District Court for the District of Oregon, filed June 19, 1995.

[3]Memorandum of Points and Authorities in Support of Motion for Final Approval of Settlement and for an Award of Attorneys' Fees and Expenses (Apr. 10, 1996) at 3–4 (hereinafter Motion for Final Approval). See also David Dobbs, "What's the Best Material for Your Home's Exterior?" *Seattle Times*, May 16, 1993, at G1.

[4]Dobbs, *supra* note 3.

[5]Motion for Final Approval at 7.

[6]*Id.*

[7]When used as a structural panel OSB is not exposed to the elements, but instead is incorporated into the interior of the wall, floor, or roof.

[8]Motion for Final Approval at 7.

[9]Class Action Complaint for Money Damages, Declaratory Relief, and Injunction at 2, *Matherly v. Louisiana-Pacific Corp.*, No. 95-2-10740 (Wash. Super. Ct. King County filed Apr. 28, 1995) (hereinafter *Matherly* Complaint).

[10]*Id.* at 2–3; Class Action Complaint at 5–7, *Hudlicky v. Louisiana-Pacific Corp.*, No. CV95-1453-JES (D. Ore. filed Sept. 15, 1995) (hereinafter *Hudlicky* Complaint).

[11]Motion for Final Approval at 4.

[12]All OSB products, including structural panels, constituted 33 percent of Louisiana-Pacific sales in the 1993 fiscal year. Louisiana-Pacific Corp, *Form 10-K for the Fiscal Year Ending December 31, 1993* (1994).

[13]Motion for Final Approval at 6.

[14]*Id.* at 6–7.

[15]*Id.* at 4–6.

[16]*Id.* at 5.

[17]*Id.* at 4–6.

[18]*Id.* at 4, 6, 15.

[19]See, e.g., Gronvold Objectors' Fairness Hearing Memorandum (Apr. 11, 1996) at 7–8 (hereinafter Objectors' Memorandum).

[20]Motion for Final Approval at 15.

[21]T. Gauntt, "Louisiana-Pacific Takes Heat over Soggy Siding," *Business Journal-Portland*, Dec. 16, 1994, at 1.

[22]See, e.g., Sandra Pedicini, "Ban Asked for Type of Siding," *Orlando Sentinel*, Mar. 1, 1994, at C3, and Will Wellons, "Subdivision Residents Boil Over Soggy Siding; Dozens of Complaints Gain State's Attention," *Orlando Sentinel*, July 21, 1994, at I1.

[23]Shelley Emling, "Homeowners Furious About Crumbling Siding," *Atlanta Journal and Constitution*, Sept. 8, 1994, at F1.

[24]Pedicini, *supra* note 22.

[25]Jeanette Steele, "A Matter of Mushrooms," *Columbian* (Vancouver, Wash.), July 23, 1995, at F1.

[26]Pedicini, *supra* note 22; Debra Durocher, "Siding Spat Results in Protective Ruling; The New Rule Requires Siding Manufacturers and Builders to Do Their Jobs Correctly," *Orlando Sentinel*, July 14, 1994, at I3.

[27]A discussion of the recommended maintenance regimen would be lengthy; however, it includes periodic painting and caulking. In humid climates these procedures should be applied every two years. Wellons, *supra* note 22.

[28]*Id.*; Pedicini, *supra* note 22.

[29]Motion for Final Approval at 8.

[30]Pedicini, *supra* note 22.

[31]See, e.g., Durocher, *supra* note 26; Will Wellons, "'People Are Panicking' Over Rotten Siding, So Oviedo Drafts Ordinance" *Orlando Sentinel*, Sept. 1, 1994, at I1.

[32]Emling, *supra* note 23.

[33]See, e.g., Wellons, *supra* note 22.

[34]Motion for Final Approval at 8 n.8.

[35]Louisiana-Pacific Corporation, *Form 10K for the Fiscal Year Ended December 31, 1994.*

[36]*Id.*

[37]Motion for Final Approval at 8.

[38]*Anderson v. Louisiana-Pacific Corp.*, No. 94-2458-CA-01 (Fla. Dist. Ct. Lake County 1995). The attorneys responsible for this settlement will be referred to hereinafter as the "*Anderson* attorneys." According to our interviews and our review of available media resources, no other individual or class action was filed prior to October 21, 1994. Because this case study describes the settlement of claims arising out of Inner Seal Siding installed in the remaining 49 states, we do not discuss the settlement of the *Anderson* action in detail.

[39]Louisiana-Pacific Corporation, Form 10Q for the Quarterly Period Ended September 30, 1997.

[40]See, e.g., Louisiana-Pacific Corp., Form 10-Q for the Quarterly Period Ended March 31, 1995. See also Rachel Zimmerman, "States Opening L-P Probes," *Business Journal-Portland*, June 23, 1995, at 1.

[41]Consent Decree (Jan. 25, 1996), *State of Washington v. Louisiana-Pacific Corp.*, No. 96-2-02388-4SEA (Wash. Super. Ct. King County 1996) (hereinafter Washington Consent Decree).

[42]Assurance of Voluntary Compliance (Jan. 25, 1996), *In re Louisiana-Pacific Corp.,* No. 96C10299 (Ore. Cir. Ct. Marion County 1996) (hereinafter Oregon Assurance of Compliance).

[43]Washington Consent Decree; Oregon Assurance Compliance.

[44]*St. Petersburg Times*, Apr. 27, 1996, at 8B.

[45]*Matherly* Complaint. The attorneys filing this complaint will be referred to hereinafter as the "*Matherly* attorneys."

[46]Revised Code of Washington section 19.86. The complaint alleged that the defendant's marketing, warranting, and claims handling constituted unfair or deceptive acts or practices and that class members would be entitled to up to $10,000 in treble damages for each statutory violation as well as attorney fees and costs.

[47]*Matherly* Complaint at 8–14.

[48]*Id.*

[49]*Id.* at 5–6. Stephen H. Smith, Michael L. Watts, and James W. Gilles were added later as representative plaintiffs.

[50]*Id.* p. 6.

[51]Complaint, *Sandpiper Village v. Louisiana-Pacific Corp.,* No. CV-95-879-JE (D. Ore. filed June 19, 1995) (hereinafter *Sandpiper Village* Complaint). The attorneys filing this complaint will be referred to as the "*Sandpiper Village* attorneys." The lead attorney of this group was William Garvin, currently of the Tallahassee, Florida, law firm of Weller, Green, McGown & Toups. Garvin associated the law firm of Ness, Motley of South Carolina, a leading personal injury and class action firm, which played an important role in the litigation, and associated Oregon counsel Jeffrey Mutnick of Pozzi Wilson Atchison, among others.

[52]Judge Jones is a U.S. District Court Judge for the District of Oregon. He is a veteran of the bench, having been appointed to the federal bench in 1990 and having sat on the Oregon State Supreme Court from 1983 to 1990 and Oregon Circuit Court from 1963 to 1982.

[53]*Sandpiper Village* Complaint.

[54]Second Amended Complaint Based Upon Breach of Warranty and RICO and Demand for Jury Trial (Sept. 28, 1995) at 8–13. RICO refers to the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. § 1962(a), (c), (d) and 18 U.S.C. § 1964(c), which provides for treble damages and attorney fees when an enterprise conducts its affairs through a pattern of racketeering activity.

[55]*Sandpiper Village* Complaint at 2–3. The complaint was later amended to include Craig and Cheryl Ostergren. The Ostergrens are identified as coconservators for Keith Ostergren. The house on which the allegedly defective siding is installed is held in trust for Keith Ostergren. They are included on the complaint by local counsel for the *Sandpiper Village* attorneys to provide potential class representatives for both community housing developments and individual family owners.

[56]The statutory dollar minimum for diversity jurisdiction was subsequently raised to over $75,000. 29 U.S.C. § 1332(a).

[57]Masonite had been manufactured from the 1960s by Masonite Corporation until 1988 when International Paper, Inc. acquired the company.

[58]The lead attorney from McRight, Jackson, Dorman, Myrick & Moore was Richard Dorman; he is now with the Atlanta firm of Cunningham, Bounds, Yance, Crowder & Brown.

[59]In addition to investigating other siding products as part of the development of the *Masonite* case, news reports of consumer complaints against Louisiana-Pacific were appearing in newspapers in Florida and were probably seen by the *Masonite* class counsel.

[60]*Hudlicky* Complaint. The attorneys filing this complaint will be referred to hereinafter as the "*Hudlicky* attorneys."

[61]18 U.S.C. § 1962(a).

[62]*Hudlicky* Complaint at 33–59.

[63]*Id.* at 57–59.

[64]*Id.* at 26.

[65]"L-P Expects to Be Indicted," *Sacramento Bee*, May 26, 1995, at D1.

[66]"News of Inquiry Drops Louisiana-Pacific," *New York Times*, May 26, 1995, at D3.

[67]B. Scanlon, "Shareholders Sue Louisiana-Pacific; 5 Officials Named," *Rocky Mountain News*, May 26, 1995, at F10A.

[68]In practice, some states may have identical legal standards, and others may have in common many elements necessary to prove liability under various standards. In *Masonite,* the jury was given special instructions that asked them to reach a decision on the various elements. These elements would be combined to render an overall decision under different legal regimes. But see *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

[69]See Objectors' Memorandum at 3–4.

[70]This observation is based on information gained from our interviews; on the *Hudlicky* Complaint, in which violation of RICO was first alleged; and on the Objectors' Memorandum at 4–5.

[71]Motion for Final Approval at 32. These serious allegations, of course, never proceeded beyond the pleadings stage. Indeed, one source informed us that they believe the RICO claim was "cooked up between class counsel and a compliant defendant to allow the federal court to have a 'legitimate' basis of jurisdiction only so that a national class could be settled."

[72]See Objectors' Memorandum at 3–4.

[73]The timing of the settlement is interesting. A motion for class certification in *Matherly* had to be heard 90 days after parties have answered the complaint according to the local court rules. King County Local Ct. R. 23(b). Our interviews suggested that this impending deadline provided the parties with some urgency in their negotiations.

[74]Order Consolidating Actions, Granting Preliminary Approval to Proposed Settlement, and Approving Class Action Notice Program (Oct. 18, 1995) at 2–3 (hereafter Order of Preliminary Approval).

[75]Settlement Agreement (Oct. 18, 1995) § 24.

[76]*Id.*

[77]*Id.* at § 9.

[78]Motion for Final Approval at 13.

[79]Settlement Agreement § 4.5.

[80]Settlement Agreement §§ 4.6–4.7.

[81]Settlement Agreement § 4.8.

[82] Settlement Agreement § 4.9.

[83]See, e.g., Declaration of Richard Kakigi in Support of Final Approval of Proposed Settlement, (Apr. 9, 1996) at 11 (". . . the total $475 million settlement fund . . ."); Motion for Final Approval at 1 ("Louisiana-Pacific has agreed to pay a minimum of $275 million, and up to $475 million or more . . . ."); *id.* at 59 [". . . the total settlement funding (up to $475 million). . . ."]; *id.* at 60 ("[$26.25 million requested for counsel fees and expenses] constitutes between 5 and 9% of the settlement amount . . . ."); Declaration of Bennett A. McConaughy in Support of Settlement (Apr. 10, 1996) at 13 (". . . a total fee and expense agreement of $26.25 million, or about 5 to 9% of the settlement amount at various funding levels."); Declaration of Steve W. Berman in Support of Motion to Approve the Settlement (Apr. 10, 1996) at 6 ("Thus any attempt to establish a 'fixed' number, even if higher than $275–$475 [million], presents a risk that some class members will not be compensated.")

[84]Settlement Agreement § 4.12.

[85]The net present value of the settlement as it was originally structured would be between $242 million and $381 million, using a discount rate of 5 percent (and assuming a minimum contribution of $275 million and a maximum contribution of $475 million as a result of $50 million in optional funding obligation payments in each of years six through nine). However, because the actual funding rates have been significantly accelerated from what was originally anticipated (see text), the net present value of the settlement fund would be higher.

[86]Louisiana-Pacific Corp., *Form 10-Q for Quarterly Period Ended September 30, 1998*. Claims regarding consequential damages (such as personal injury) or for any siding purchased after January 1, 1996, would not be released by the settlement. Settlement Agreement at 6.

[87]Motion for Final Approval at 13–15.

[88]Declaration of Steve W. Berman in Support of Motion to Approve the Settlement (Apr. 10, 1996) at 3. Counsel for plaintiffs, executed April 10, 1996, page 3.

[89]This date was extended to May 27, 1996, pursuant to the Amendment to the Settlement Agreement (Apr. 26, 1996) and the Final Judgment.

[90]Settlement Agreement § 1; Amendment to the Settlement Agreement § 1.3. Damage to property aside from the product itself does not appear to have been a common complaint (although one interviewee asserted that collateral damage to wood framing and base plates from rot, mildew, and similar problems would be a likely consequence of siding failure). Bodily harm resulting from the product was also rare, perhaps nonexistent. Because these contingencies were so unusual, Louisiana-Pacific felt comfortable excluding them from the settlement.

[91]See, e.g., Transcript of Fairness Hearing, Apr. 16, 1996, at 220–311. This portion of the settlement was negotiated after the Order of Preliminary Approval was entered on Oct. 18, 1995, and is contained in the Amendment to Settlement Agreement.

[92]*Independent Adjuster Training Manual* at 16, Exhibit B to Amendment to the Settlement Agreement.

[93]*Id.* at 15–16.

[94]*Id.* at 16.

[95]This rule is applicable to replacement of lap siding only and not to replacement of panel siding. To receive this compensation, the claimant would have to replace all of the siding.

[96]Memorandum of Agreement as to Testing Protocol, Exhibit A to Amendment to the Settlement Agreement.

[97]Louisiana-Pacific Corp., Form 10-Q for Quarterly Period Ended September 30, 1998.

[98]Settlement Agreement § 5.10.

[99]Motion for Final Approval at 19. Such defenses would, of course, still be available against claims from class members who opt out of the agreement or who have unpaid claims at the expiration of the settlement period and subsequently choose to pursue individual litigation.

[100]Motion for Final Approval at 24; Letter from Michael H. Simon, Perkins Coie LLP, to RAND (Nov. 13, 1998); State of the Settlement Report—Year Two (June 18, 1998) at 3.

[101]Affidavit of Wayne Pines (Apr. 5, 1996) at 4–6; Class Action Settlement Notice Program, Exhibit A to Order of Preliminary Approval.

[102]Settlement Agreement §§ 8.1–8.4.

[103]The latest SEC 10-Q filing from the defendant indicates the deducting of "class notification costs" from the settlement fund. Louisiana-Pacific Corp., Form 10-Q for Quarterly Period Ended September 30, 1998. See also Settlement Agreement § 15.1.

[104]Docket entry 175 (Mar. 29, 1996), Civil Docket for *Sandpiper Village v. Louisiana-Pacific Corp.,* available on PACER (Oct. 16, 1997).

[105]Motion for Final Approval at 60–65.

[106]*Id.* at 47. It was also estimated that the product was used in some 7500 to 8500 multifamily projects and an unknown "small" number of commercial projects such as mini-malls and clinics. See, e.g., Declaration of Christopher I. Brain, Co–Lead Counsel, In Support of Approval of Settlement Agreement (Apr. 9, 1996) at 8–9. However, the estimated class size based on homes with OSB may not have been the best measure of the number of potential claimants. These estimates were based on the total number of board-feet manufactured by Louisiana-Pacific divided by the number of board-feet in an average single family dwelling or multifamily unit and do not take into account the extent to which problems arose (and were noted) in actual use.

As of April 8, 1996, the toll-free phone number established to provide information regarding the settlement and a claim form to all who request one, had received approximately 190,000 calls. Exclusions represent less than one percent of this population. *Id.*

[107]This objection included a number of more specific objections: (1) only damaged siding was compensated, not the entire residence; (2) the amount of compensation did not reflect the devaluation of the residence because of the use of Inner Seal Siding; (3) the payment per square foot of damaged siding was too low; (4) consequential damages were waived (the defendants subsequently agreed *not* to release consequential damage claims); and (5) compensation did not reflect devaluation of the property. Motion for Final Approval at 50–60.

[108]This objection also included a number of more specific objections such as: (1) the age deduction was too dramatic; (2) the inspection protocol did not adequately describe damages; and (3) inspection timing was vague. *Id.*

[109]The objectors felt that in the absence of additional money for the compensation fund and changes in the inspection protocol, the option of an arbitration would allow homeowners to obtain sufficient compensation.

[110]Rosenthal associated F. Gordon Allen, a Portland attorney, to appear in the action.

[111]See, e.g., Objectors' Memorandum. Intervenor Startzel was originally a class representative in the *Hudlicky* action.

[112]Declaration of Randall J. Pozdena, Ph.D. (Managing Director of ECONorthwest) (Apr. 7, 1996) at 8–9.

[113]Declaration of Richard Kakigi in Support of Final Approval of Proposed Settlement (Apr. 9, 1996) at 11. These conclusions were based in part on the assumptions that the product would not start to fail at an increasingly higher rate after nine years of use, that customers would not respond to future publicity campaigns in greater numbers than in the past, that the underlying claims data used by Dr. Pozdena were accurate, that the higher-than-expected claims experience for products of 1986 vintage was atypical of other years, and that Louisiana-Pacific has already paid out $30 million in claims. *Id.* at 8–11. Two scenarios were presented that did exceed the potential upper bound of $475 million in funding obligations. First, if the known claims experiences of 1987 vintage siding were typical of the entire production run and if remediation costs were indeed $4 per square foot, there might be $504 million in total claims. However, the $475 million mark would not be breached if either the costs of remediation were less than $4 per square foot or if, as reported to the statistician, $30 million worth of claims had already been paid by Louisiana-Pacific. A more serious problem would occur if 1986 vintage product claim experience was used as the model for all siding.

Depending on whether computed at $2 or $4 per square foot, total claims could be between $1 billion and $2 billion. However, Dr. Kakigi felt that the known claims experience suggested that ". . . the 1986 vintage was [an] unusually bad product. . . " and might not be an appropriate basis for a model estimating claims for the entire production. *Id.*

[114]See, e.g., Transcript of Fairness Hearing, Apr. 16, 1996, at 220–416.

[115]*Id.* at 469.

[116]*Id.* at 4–5.

[117]*Id.*

[118]Amendment to the Settlement Agreement at 7.

[119]Transcript of Fairness Hearing, Apr. 16, 1994, at 5. Many significant details about the inspection program and the factors that would go into the adjuster's calculations were negotiated after the preliminary approval of the settlement. The Memorandum of Agreement as to Testing Protocol and Independent Adjuster Training Manual set forth the parties' understandings as to how the process of adjustment was to take place.

[120]Transcript of Fairness Hearing, Apr. 22, 1996, at 7.

[121]Memorandum of Agreement as to Testing Protocol, Exhibit A to Amendment to the Settlement Agreement. The initial version of the Testing Protocol required damage to greater than 70 percent of an entire wall of lap siding before total replacement would be considered.

[122]Transcript of Fairness Hearing, Apr. 22, 1996, at 7.

[123]*Id.* at 9.

[124]*Id.* at 8–9.

[125]*Id.* at 9.

[126]*Id.* at 7–8.

[127]*Id.* at 10–11.

[128]*Id.* at 34–40.

[129]Amendment to the Settlement Agreement § 9(c). Each side would bear its own attorney fees, if any.

[130]Section 1.3 of the Amendment to the Settlement Agreement also excludes claims for consequential damage to other structural components caused by the failure or repair of the siding product.

[131]Order, Final Judgment, and Decree § 11 (Apr. 26, 1996) (hereinafter referred to as Final Judgment).

[132]*Id.*

[133]*Id.*

[134]Letter from Michael H. Simon, *supra* note 100.

[135]*Id.*

[136]Settlement Agreement § 15.1.

[137]Amendment to the Settlement Agreement § 10.

[138]Robert Ablon, "Lieff, Cabraser's New Deal Stands Up to the Elements," *San Francisco Recorder,* Apr. 23, 1996, at A2; Letter from Michael H. Simon, *supra* note 100.

[139]Order (June 12, 1996) at 2. Justice Unis's service may be lengthened or shortened by the court, depending on the demands and needs for special master participation. *Id* at 3.

[140]Transcript of Fairness Hearing, Apr. 22, 1996, at 39–40.

[141]Notice of Appeal of Lexington Development (May 14, 1996).

[142]We do not have any information about payments made to the attorneys representing the builders as part of their agreement to dismiss the appeal.

[143]Notice of Appeal (July 3, 1996).

[144]Agreed Stipulation and Order Regarding Attorney Participation and Waiver of Appeal (Aug. 26, 1996) at 1–2.

[145]Letter from Michael H. Simon, *supra* note 100. It was reported to us that the court was informed of the payment to the Gronvold attorneys but its approval was neither necessary nor sought.

[146]*Id.* We assume that one named intervenor who was also a named plaintiff in the three underlying actions received only one incentive fee. Thus, there would have been twelve total payments to individuals or couples of $3000 each and one $10,000 payment to the Sandpiper Condominium Association.

[147]Victoria Slind-Flor, "Judge and Arbitrators Lock Horns," *National Law Journal*, June 30, 1997, at B1.

[148]Amendment to the Settlement Agreement at 8.

[149]Slind-Flor, *supra* note 147.

[150]*Id.*

[151]See also *Id.* at B2. There was a parallel controversy about comments Judge Jones made to claimants at one of the observed arbitration hearings; reportedly, the judge advised the claimants to reconsider their decision to arbitrate because of the difficulty of proving their claims in light of Louisiana-Pacific's potential defenses.

[152]It was reported to us that the chief judge found no impropriety and declined to take any action in the matter.

[153]State of the Settlement Report—Year Two (June 18, 1998) at 7. The first arbitrations were held in April 1997. State of the Settlement Report—Year One (May 17, 1997) at 19. Of the 316 requests for arbitration, 255 were withdrawn and the claimants elected to receive their settlement check, 43 have been resolved, and 18 were still in progress as of June 18, 1998. The report does not describe the outcome of completed arbitrations. State of the Settlement Report—Year Two at 7.

[154]This average figure is somewhat misleading. The majority of claimants were the owners of single family dwellings but the relatively fewer number of commercial property claimants with typically larger structures (or more structures per property) received significantly higher payments per claim than homeowners. Thus, the average is shifted upward from what a typical claimant would have received.

[155]This assumption is of course subject to disagreement. In fact, the original Settlement Agreement was later amended to allow that if a claimant is dissatisfied with an inspector's conclusions, the claimant has the option of adjudicating the issue in an arbitration procedure described previously. Amendment to the Settlement Agreement at 7–8.

[156]State of the Settlement Report—Year Two at 8.

[157]*Id.*

[158]*Id.*

[159]*Id.*

[160]*Id.* p. 5.

[161]*Id.*

[162]Louisiana-Pacific Corp., Form 10-Q for Quarterly Period Ended September 30, 1998.

[163]*Id.*

[164]*Id.*

[165]Supplemental Funding Agreement (Oct. 26, 1998).

[166]Assuming that the defendant is immediately notified of fund depletion by the claims administrator, that the $50 million in payments added each year is insufficient, and that the defendant takes the full 12 months allowed to makes its optional deposits. According to the Supplemental Funding Agreement, these dates would be August 2001 and 2002.

[167]Supplemental Funding Agreement at 7–8.

[168]*In re Louisiana-Pacific Corp. Inner-Seal Oriented Strand Board (OSB) Trade Practices Litigation*, Master File No. MDL 1114, Civil Action No. C-95-3178 VRW. The court preliminarily approved the settlement of these complaints on October 22, 1997. The terms of this settlement appear to be substantially similar to those of the siding settlement.

POLYBUTYLENE PLUMBING PIPES LITIGATION:[1] *COX v. SHELL OIL*[2]

PROLOGUE

Beginning in the late 1970s, polybutylene plastic plumbing systems—touted as being cheaper and more durable than copper pipe systems—were installed in new homes nationwide, particularly in the sunbelt states, which were experiencing a housing boom. Over the years, several million homes, many of them mobile homes, were built with polybutylene plumbing systems.[3] Before long, the plumbing systems began to experience failures of the fittings and of the pipe itself. Consumers nationwide attributed the failures to various causes, including inadequate design, defective manufacturing, improper installation, and degradation of the materials from chemicals in the drinking water.[4] More than ten years of litigation, and bankruptcy for one company, would follow, and hundreds of millions of dollars would be spent before reaching a final class action resolution.

In 1977, Shell Oil Company began manufacturing polybutylene resin—the raw material for the pipes. Until it withdrew the product from the U.S. market in 1996, Shell was the sole manufacturer of polybutylene resin. Shell has continued to manufacture the resin, which has undergone modifications over the years, for overseas sales. Hoechst Celanese Corporation manufactures an acetal compound under the brand name Celcon that, until 1990, was used to manufacture fittings for the plastic plumbing systems.[5] DuPont manufactures a competing acetal product called Delrin that, from 1983 through 1988, was also used for manufacturing fittings. Both Celcon and Delrin were and continue to be used in a wide range of consumer products such as automotive components. United States Brass Corporation bought polybutylene resin from Shell and Celcon from Hoechst Celanese; it then designed and manufactured plumbing systems using the material, which it sold under the Qest brand name. Together, Shell and U.S. Brass conducted an advertising and sales campaign that established the market for the plastic plumbing systems. Vanguard Plastics, a com-

petitor of U.S. Brass, also designed and manufactured plumbing systems using both Celcon and Delrin for its fittings.

Litigation over leaking plumbing systems began in the early 1980s in California and Texas, but it was sparse and typically involved homebuilders or municipalities.[6] No significant homeowner litigation occurred until mid-1987, when James Moriarty, of Houston's Moriarty & Associates, filed a lawsuit in Houston against General Homes Corporation (a developer and homebuilder), U.S. Brass, Shell, and Hoechst Celanese. Moriarty, who had previously brought suit against General Homes for other reasons, was approached by one of the homeowners in a subdivision in La Porte—a small, predominantly middle-class city east of Houston—about the leaking pipes. At that time, Moriarty had a small plaintiff consumer litigation practice, but he also had small-scale mass tort experience. Moriarty filed suit on behalf of about 100 homeowners in the development, alleging that their plumbing systems' failure caused property damage and mental anguish, seeking damages based on negligence, fraud, and violations of the Texas Deceptive Trade Practices Act (DTPA).[7] Moriarty represented these plaintiffs individually, and he filed cases only on their behalf, not as a class action. He succeeded in getting an early trial date for the summer of 1988, and won a $3.4 million verdict.[8]

Moriarty's research into the La Porte case quickly led him to believe that there was a vast potential market for polybutylene plumbing litigation. To pursue the litigation, he formed a partnership with George Fleming, an expert in aviation accident law whose Houston-based firm, Fleming, Hovenkamp & Grayson, handled personal injury mass tort litigation. Moriarty and Fleming met at a social function and realized that they shared a common interest in complex litigation as well as in the use of technology to gain an edge against opponents. They joined forces during the La Porte case and—until a reportedly bitter split in 1992—the partnership actively recruited and represented thousands of clients with polybutylene plumbing complaints, consolidating many individual claims for each trial. Moriarty said he had two goals in this litigation: Every one of his clients would get a premium over and above resolution of their plumbing problems, and the defendants would "replumb America." Despite these far-reaching goals, neither Moriarty nor Fleming initiated class actions in the early years of litigation.[9]

Because the DTPA allowed for treble damages, and because Texas had liberal rules allowing out-of-staters to bring cases in Texas state courts, the trial environment there in the late 1980s and early 1990s was very favorable for consumer litigation. The early pipes cases were brought as consumer fraud cases with allegations typically including some combination of negligence, fraud, strict liability, and violations of the DTPA. Plaintiffs almost always won the cases that went to trial and, with the DTPA claim, judgments for the homeown-

ers were often in the range of $25,000–$50,000 each (out of which were paid attorney fees and expenses). However, the claims often encountered trouble on appeal, and many of the plaintiffs settled with the defendants during the appeals process for less than the original judgment but significantly more than they might have retained after appeal.

One of the defense counsel we interviewed said that he employed a tripartite strategy during this period. He first challenged the DTPA claims. He also tried to limit—on the grounds of due process—the number of cases that were tried at one time. Finally, he argued that people were not legally entitled to a full replumb, even if they were entitled to have their leaks fixed. The cost of fixing leaks was, of course, much less than a replumb. For example, in our interview, Moriarty noted that many people sustained only about $250 in losses—less than he sought in litigation. Another feature of this early litigation was the substantial amount of finger-pointing among the named defendants as they attempted to demonstrate that their product or role in the process was not responsible for the failures that consumers were experiencing.

During this period Moriarty employed two settlement schemes. Early on he used a one-size-fits-all approach where each plaintiff got the same amount, which meant that his initial negotiating position was set by the value of larger claims. But over time (as both he and the defendants acquired more experience in this litigation), Moriarty realized that an individualized approach to calculating damages benefited both sides; it was less expensive for the defendants—thus making it easier to reach a settlement—and it resulted in at least as much client satisfaction as the one-size-fits-all approach because it appealed to most clients' sense of fairness and desire to be treated as individuals. Moriarty developed an algorithm that distinguished the value of his clients' claims according to whether a home was mobile or site-built; expensive or average, if it was site-built; contained a full polybutylene pipe system or just polybutylene yard line; and was located in Texas or not. Texas claims had greater value because the state's favorable consumer laws increased the likelihood of larger judgments at trial. In contrast, many Florida claims would have been worth nothing if litigated individually because Florida had a two-year statute of limitations, meaning that the defendants would have won at trial by claiming that the homeowner had waited too long to bring his claim. The only reason for defendants to settle the latter claims would be to save legal expenses; by bundling them together with claims that would prevail at trial, Moriarty was able to leverage their value.[10]

In 1988, U.S. Brass (with assistance from Shell and Hoechst Celanese) established an 800 number to respond to consumer complaints about leaky plumbing. Known as the Qest repair line, the toll-free number represented the first effort by the defendants to craft an industry response to the polybutylene pipes

problem. The program subcontracted with local plumbers and builders to repair or replace leaky plumbing systems. Reportedly, early in the program the company had difficulty developing a base of reliable contractors, leading to customer satisfaction problems. In 1991, with U.S. Brass facing financial trouble as a result of the mounting polybutylene litigation, Shell, Hoechst Celanese, and DuPont took over and, according to reports, significantly improved the consumer complaint operation, which they renamed the Plumbing Claims Group (PCG). According to a July 1993 news article, the PCG would pay for reasonable documented repairs and evaluate whether to take further action, which could include the replacement of the entire system. About 12,000 homeowners reportedly called the toll-free number between 1991 and 1993.[11] According to a March 1993 segment on the news program *Good Morning America*, the PCG received approximately 500 calls a month, a number consistent with the overall reported figure of 12,000.[12] Although the existence of the PCG was well known within the plumbing and building communities, the defendants did not actively promote it to the general public. One defendant told us this was for fear of "opening the floodgates"; another said that it was more cost-effective to reach people who had polybutylene plumbing problems through service providers.[13] Press reports indicate that consumer complaints and this early litigation may have also triggered a probe by the Federal Trade Commission, but we found no indication of any outcome either in the press or from the parties we interviewed.[14]

As the litigation evolved, the DTPA claims continued to encounter trouble on appeal, and Texas trial courts began to limit the number of cases that could be tried at one time. The decreased probability of a verdict for the plaintiff and increased costs to try cases reduced the value of the later plaintiffs' cases; often they settled for a replumb plus some modest financial premium. Against this backdrop, Moriarty believed he detected a softening in the stance of Shell (which had offered the staunchest defense) and, in early 1993, decided to try to settle his remaining claims. As a long-time student of mass torts, he knew that Kenneth Feinberg of Washington, D.C.'s Feinberg and Associates had mediated numerous major mass tort cases including the Agent Orange litigation, a case considered by many to be a watershed event in mass tort class actions. Moriarty persuaded defense counsel for Shell and Hoechst Celanese to hire Feinberg to facilitate settlement of his cases.

Altogether, Moriarty told us, he litigated about 15,000 cases for a total value of about $160 million. Therefore, on average, his clients grossed about $11,000 apiece.[15] Of that, they would pay 40 percent in fees and another 1–1.5 percent in expenses, which would leave them with about $6500. To put that figure in context, Shell indicated in a court document that "the average cost to replumb varies from something like $800 for a single wide mobile homes [sic], to approximately $4,000 for the average single family dwelling."[16]

On May 24, 1994, U.S. Brass filed for bankruptcy protection. The 1994 Securities and Exchange Commission Form 10-K Annual Report for its parent, Eljer Industries, states that U.S. Brass and its insurance companies had paid out $61 million in settlements of 202 suits and 11,000 nonlitigated homeowner claims by the end of 1993.

CLASS ACTION LITIGATION BEGINS

The first nationwide polybutylene plumbing class action, *Robert Beeman, et al. v. Shell Oil Company, et al.*, was filed in September 1993 in state court in Houston.[17] A staff lawyer with Trial Lawyers for Public Justice (TLPJ)—a public interest group funded by plaintiffs' lawyers—had experienced a leak in her condominium and was referred to Marc D. Murr, a Houston solo practitioner who was handling some individual polybutylene cases. As a result, TLPJ lawyers soon learned of the extent of the polybutylene plumbing problem and began to think that the best way to obtain prompt relief for all individuals with leaky pipes would be to bring a class action.[18] As is TLPJ's usual practice, it put together a team of lawyers with the necessary expertise; in this instance, it brought in Philadelphia class action specialist David H. Weinstein of Weinstein, Kitchenoff, Scarlato & Goldman to complement Murr's polybutylene expertise. Then Murr asked an old friend, Michael Caddell of Houston's Caddell & Chapman—a small firm that specializes in complex litigation—to join the team.[19] None of these lawyers had the benefit of the by-now extensive discovery and substantive knowledge possessed by Moriarty and Fleming. Not long after filing, *Beeman* counsel invited both Moriarty and Fleming to join them, but only on the condition that they first settle their individual cases to avoid any potential conflict of interest in representing both individuals and the class. Moriarty agreed and proceeded to settle his cases; Fleming declined.[20]

Meanwhile Feinberg, mediating the Moriarty cases, saw three related but distinct ongoing groups of litigants: Moriarty's clients, Fleming's clients (now distinct from Moriarty's), and the *Beeman* class members. Drawing on his extensive mass tort experience, Feinberg outlined a three-pronged approach to settlement—a replumb, payment for damages, and prompt relief—and suggested that the parties meet to see if they could negotiate a nationwide settlement and reduce some of the transaction costs of the litigation.[21] At their first meeting, Arthur Bryant, executive director of TLPJ, put forward a negotiating position that arguably represented a departure from the strategy used to settle many previous mass torts. Bryant said that the only settlement that would be acceptable to *Beeman* class counsel would be one in which all eligible class members received full relief, no matter how much money that required.[22] In other words, in the face of uncertainty about the amount of damages, the plaintiffs would not agree to a lump-sum settlement that effectively capped the defendants'

liability to the class. TLPJ felt that such an approach would be the only way to effect a polybutylene settlement that would serve the public interest. Bryant also stated that class counsel would not be willing to discuss fees until after both sides had reached a settlement that an independent committee of TLPJ foundation board members had reviewed and agreed would be in the public interest.[23]

The defendants knew that their companies' boards would never approve a completely open-ended settlement, so the parties eventually agreed on the novel concept of a "soft cap" for the settlement fund as a way to satisfy concerns on both sides.[24] Eligible claimants would receive full relief but the parties would agree on the initial size of the fund as a condition of the settlement. Then, if the fund were exhausted before all the claimants received the relief to which they were entitled, the defendants could choose under the settlement either to provide additional funding or walk away. In return, the class members who had not yet received full relief would have their rights preserved (including extensions of any statutes of limitations) to pursue any legal and equitable claims against the defendants either individually or as a class. So, essentially, any uncompensated class members would lose time but nothing else.[25] In negotiating the amount of the soft cap, plaintiffs' attorneys say that they were looking for a sufficient funding commitment from the defendants to make it difficult for them to walk away if the funds were exhausted (rather than to provide the necessary additional funds). The defendants, in turn, wanted a safety valve that would allow them *to* walk away—even though they would face additional litigation—if the number and value of claims proved overwhelming.

To provide some perspective on the parties' negotiating positions, the worst-case estimate of the class size was that six million units had polybutylene plumbing systems, so the defendants were potentially looking at a multibillion-dollar problem. But no one knew exactly how many units had such plumbing, or how many were actually experiencing problems. The raw material for the pipe had undergone modification over the years, as had the procedures for installation, and the type and amount of chemicals in the water varied from location to location. Also, a significant number of the systems had metal fittings, thus avoiding one potential source of leaks.

The parties spent almost a year hammering out what became the *Beeman* settlement. Reportedly, one of the most difficult issues that emerged during the course of the mediation involved the defendants, who needed to work out an agreement among themselves over their respective shares for funding the settlement. They ultimately agreed to submit this issue to binding arbitration.[26] The proposed settlement was previewed to Public Citizen, a consumer advocacy group, to identify any features it might consider objectionable. A motion to approve the settlement preliminarily was presented to Harris County District

Court Judge Mary Katherine "Katie" Kennedy on October 24, 1994. When the settlement was presented to the court, a previously filed motion for class certification under Rule 42 of the Texas Rules of Civil Procedure was still pending.

The *Beeman* settlement contained most of the major features (summarized in Table 14.1) of what would later become the final class resolution of the polybutylene litigation. The soft-cap amount of the total fund was set at $750 million. For leaks and property damage that occurred after the settlement's initial notice date, eligible claimants would be entitled to recover the full amount of unreimbursed repair and property damage costs. Claimants would be eligible for relief if a qualifying leak occurred within one year after the initial notice date (no matter how old the plumbing system), or if a leak occurred within 10, 13, or 16 years after the date of installation of the plumbing system (depending on the type of system).[27] Furthermore, any eligible claimant who experienced one leak after the initial notice date, or two leaks before the initial notice date, would be entitled to an automatic replumb. The settlement also allowed for ad-

Table 14.1

Major Features of *Beeman* Settlement

Category	Provisions
Total fund (soft cap)	$750M
Past expenses (soft cap)	$50M (subset of total fund)
Eligibility for repair and full reimbursement of unreimbursed costs of repair and property damage	• If leak occurs within 1 year after initial notice date regardless of plumbing system's age *or* • If leak occurs within 10, 13, or 16 years after date of installation (depending on type of system) • Provisions for additional or accelerated relief in special circumstances
Eligibility for replumb	Automatic replumb if one leak occurred after initial notice date or two leaks occurred before initial notice date (if claimants meet other eligibility criteria)
Mechanism	• Establishment of a Consumer Plumbing Recovery Center with operational responsibility shared by plaintiff and defendant representatives • Program continues about 13 years through September 10, 2007 • Four subsequent notice and opt-out periods at three-year intervals
Payments to representative plaintiffs	$3000 to each single representative plaintiff or each representative plaintiff married couple; to be paid in addition to settlement fund
Fees to class counsel (application never formally presented to the court)	About $24 million with no additional claims for expenses (not including interest and potential expenses for additional legal work); to be paid in addition to settlement fund

ditional or accelerated relief in special cases. Eligible claimants were allowed one year from the initial notice date to claim unreimbursed past expenses that had been incurred before that date. If past expense claims exceeded the allocated funding of $50 million, then—as with the overall fund—the defendants could either add funding or the claimants would have their rights preserved to pursue those particular claims outside of the *Beeman* class.

Another innovative feature of the settlement provided for recurring notice to the class—every three years for the first 13 years of the program.[28] Anybody acquiring a unit with a polybutylene plumbing system after the initial notice date would be given an opportunity to opt out of the settlement class during the subsequent notice period. The program would be administered through the establishment of a Consumer Plumbing Recovery Center (CPRC), a nonprofit, tax-exempt corporation with both defendants and plaintiffs' class counsel having equal representation on the board of directors. The proposed CPRC organization included an ombudsman to facilitate the process of appeal and authorize additional or accelerated relief in special circumstances.

Defendants were to pay $3000 to each representative plaintiff or representative plaintiff married couple in addition to the settlement fund. Fees to class counsel of about $24 million (not including potential interest payments) were reportedly negotiated between the parties after the settlement and were to be paid by the defendants in addition to the settlement fund. There was to be no additional application by class counsel for expenses other than potential exceptions for additional legal work.[29]

In February 1995, four months after the settlement was presented, Judge Kennedy denied the motion for its preliminary approval. Judge Kennedy's order listed, but—as is common in Texas state court practice—did not comment on, the factors she had considered in her ruling, including whether her court was an appropriate jurisdiction for a national class action. The ruling puzzled and dismayed counsel for both sides.[30] Published reports, court documents, and our interviews indicate that a group of lawyers led by Fleming vigorously opposed *Beeman*; other lawyers and academics questioned whether a Texas state court could properly exercise jurisdiction over a national class. Judge Kennedy was elected to the bench in 1992 and had little, if any, prior class action experience. Some sources speculated that she may have wished to avoid what had become highly charged litigation.

THE CLASS ACTION FLOODGATES OPEN

After Judge Kennedy's decision, statewide class actions were filed in rapid order around the country.[31] Key participants told us that most of the state class actions were filed by two competing groups of lawyers (neither from *Beeman*),

and were filed in most of the 50 states. Defense counsel told us that they were served in 20–30 class actions, with two often competing in a single state. They noted that their transaction costs significantly increased during this period; one corporate counsel told us that his company had to retain about a dozen additional law firms to deal with the spurt of litigation.

Beeman counsel refiled in federal district court in Galveston (adding warranty charges under the Magnuson-Moss Warranty Act for federal jurisdiction) because U.S. District Judge Samuel Kent had a reputation for moving his docket quickly.[32] Judge Kent, however, transferred the case to the backlogged federal court in Houston (where the state case had been litigated); once there, it languished until it was overtaken by the final class settlement.

TWO COMPETING NATIONWIDE CLASS ACTIONS

Two nationwide class actions emerged on the post-*Beeman* landscape. In November 1994, before the *Beeman* decision, a group of plaintiffs' lawyers led by solo practitioner J. L. Chestnut, Jr., of Selma, Alabama; T. Roe Frazer II of Jackson, Mississippi's Langston Frazer Sweet & Freese; and Joe R. Whatley, Jr., of Birmingham's Cooper, Mitch, Crawford, Kuykendall & Whatley, had filed a nationwide class action, *Spencer, et al. v. Shell Oil Company, et al.*, in the Circuit Court of Greene County, Alabama.[33] Our sources claimed this group obtained a copy of the *Beeman* petition (which was publicly available), changed the names and a couple of other minor details, and filed a class action in order to have an edge on any competition in the event that the *Beeman* deal did not go through. After the collapse of *Beeman*, *Spencer* counsel served the defendants and then contacted them, offering essentially the same deal that was worked out in *Beeman*. A hearing on class certification of *Spencer* was scheduled for June 1995.

Meanwhile, the informal but hard-won agreement by the defendants to seek a joint resolution of the litigation seemed to be falling apart: DuPont, which found being sued in Alabama a particularly risky prospect, decided to go its own way and agreed in mid-May to settle with the *Spencer* counsel. In the settlement, DuPont agreed to reimburse homeowners 8 percent (derived from its estimated share of the market) of the cost of any replumb up to a total fund of $120 million. It also agreed to pay $8.4 million in attorney fees. On May 19, the *Spencer* court certified a class action for settlement purposes only and as to DuPont only, and granted preliminary approval of the DuPont settlement. DuPont reportedly spent about $7 million on a notice campaign. The opt-out deadline was October 27, 1995.

On June 13, 1995, with *Spencer* still awaiting certification rulings as to Shell and Hoechst Celanese, another group of plaintiffs' lawyers including John "Don"

Barrett of Barrett Law Offices in Lexington, Mississippi; solo practitioner Gordon Ball of Knoxville, Tennessee; Michael Hausfeld of Washington D.C.'s Cohen, Millstein, Hausfeld & Toll; Robert Lieff of San Francisco's Lieff, Cabraser, Heimann & Bernstein; and Bruce Conley of Union City, Tennessee's Conley, Campbell, Moss and Smith filed a nationwide class action, *Cox, et al. v. Shell Oil, et al.*, in the Chancery Court of Obion County, Tennessee.[34] To sidestep the DuPont settlement, the complaint named only Shell and Hoechst Celanese as defendants. Lest there be any question about how the cases were originating at this point, the complaint—after describing the plaintiff, Tina Cox, as owning a mobile home located in Obion County, Tennessee, having a defective plastic water delivery system—states that the plaintiff was "unaware of the misrepresentation of the defendants until June 1995, when contacted by her attorney."[35] Unlike *Spencer*, *Cox* did not seek punitive damages.

The presiding judge, Chancellor Michael Maloan, granted immediate (ex parte) preliminary certification of the class on the day that *Cox* was filed.[36] At this point, *Cox* was the only certified nationwide class action that named more than one of the major defendants in the polybutylene litigation. However, Judge Hardaway in Alabama certified the *Spencer* class with Shell and Hoechst Celanese as defendants later that month, on June 30, and scheduled a trial date for November 27. Because Hardaway did not cede priority to *Cox*, the two actions proceeded in competition with each other; in fact, *Spencer* counsel sought to intervene in *Cox* and asserted that *Spencer* had priority because it had been filed first.

Cox class counsel, with defendants acting as matchmaker, invited the *Beeman* class counsel to join them in the hopes of securing a settlement that would not unravel under challenges from competing plaintiffs' attorneys. On July 31, 1995, Shell, Hoechst Celanese and *Cox* class counsel presented a preliminary settlement to Judge Maloan to which he granted preliminary approval. The settlement fund, still with a soft cap, had been increased by $100 million to a total of $850 million to try to head off opposition from potential objectors and intervenors as had earlier greeted the *Beeman* settlement; the amount for past damages was increased to $75 million from $50 million but was changed to a hard cap.[37] Otherwise, with the notable absence of DuPont, the fundamentals of the agreement were essentially that of *Beeman*. However, whereas nine lawyers or law firms appeared on behalf of the *Beeman* plaintiffs, 23 came forward on behalf of *Cox* plaintiffs—the nine from *Beeman* plus 14 more. With so many more lawyers involved, the fee application for class counsel was now $45 million, up from the reported $24 million in *Beeman*, even though the settlement was presented barely a month after the case was initially filed.[38] Table 14.2 lists class counsel for *Beeman* and *Cox*.

Table 14.2

Plaintiffs' Class Counsel for *Beeman* and *Cox*

Beeman Settlement	*Cox* Settlement
Michael A. Caddell, Esq., Caddell & Conwell, P.C., Houston, TX	Michael A. Caddell, Esq., Caddell & Conwell, P.C., Houston, TX
David H. Weinstein, Esq., Weinstein Kitchenoff Scarlato & Goldman Ltd., Philadelphia, PA	David H. Weinstein, Esq., Weinstein Kitchenoff Scarlato & Goldman Ltd., Philadelphia, PA
Trial Lawyers for Public Justice, P.C., Washington, D.C.	Trial Lawyers for Public Justice, P.C., Washington, DC
Moriarty & Associates., P.C., Houston, TX	Moriarty & Associates, P.C., Houston, TX
Kohn, Nast & Graf, P.C., Philadelphia, PA	Kohn, Swift & Graf, P.C., Philadelphia, PA
Law Offices of Marc D. Murr, P.C., Houston, TX	Law Offices of Marc D. Murr, P.C., Houston, TX
Bristow, Hackerman, Wilson & Peterson, P.C., Houston, TX	Bristow, Hackerman, Wilson & Peterson, P.C., Houston, TX
Law Offices of Dennis C. Burns, Dallas, TX	Law Offices of Dennis C. Burns, Dallas, TX
Law Offices of Charles E. Dorr, P.C., Duluth, GA	Law Offices of Charles E. Dorr, P.C., Duluth, GA
	Don Barrett, Esq., Barrett Law Offices, Lexington, MS
	Gordon Ball, Esq., Knoxville, TN
	Michael D. Hausfeld, Esq., Gary E. Mason, Esq., Cohen, Milstein, Hausfeld & Toll, Washington, DC
	Bruce Conley, Esq., Damon Campbell, Esq., Conley, Campbell, Moss & Smith, Union City, TN
	Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA
	Hagens & Berman, Seattle, WA
	Heins Mills & Olson, P.L.C., Minneapolis, MN
	Jackson, Taylor & Martino, Mobile, AL
	Patrick Pendley, Esq., Plaquemine, LA
	Phillip Feliciano, Esq., Kensington, MD
	Moore & Brown, Washington, DC
	Thomas Jessee, Esq., Johnson City, TN
	Carey & Danif, L.L.C., St. Louis, MO
	Levin, Fishbein, Sedran & Berman, Philadelphia, PA

The settlement provided for an extensive notice program from August through October. Characterized by Judge Maloan as one of the most comprehensive class notice campaigns ever undertaken, notice was designed and administered as a joint venture of Rust Consulting and Kinsella Communications.[39] Printed notice included advertisements in consumer publications such as *TV Guide* and *People* magazine; in newspapers and newspaper magazines such as *Parade* and

USA Weekend; in newspapers targeted geographically and ethnically; and in trade and professional magazines. Other forms of notice included television advertisements on national networks and cable television targeted to ethnic audiences. A home page was set up on the internet and public service announcements were posted on appropriate bulletin boards of America Online, CompuServe, and Prodigy. All forms of notice advertised a toll-free 800 telephone number (staffed by both English and Spanish speakers because of the high concentration of potential class members in the Southwest). People who called this number could receive additional information and a complete notice package. Finally, direct notice was mailed to all potential class members presently identified or identifiable, such as mobile homeowners, who are required to register their homes as vehicles.[40] The complete notice package described the terms of the settlement in detail as well as the amount of the application for attorney fees.[41] The notice program cost $12 million (including the 800 line).[42] The opt-out and objection deadline for *Cox* was October 20, 1995, extended from September 13. The fairness hearing was scheduled to begin on November 8, 1995.

Fleming, who had joined with *Spencer* counsel after the settlement with DuPont, fought *Cox* every step of the way.[43] He filed a number of statewide class actions with the intention of opting those entire classes out of the *Cox* settlement. He also had individual clients with over 100,000 claims whom he opted out of the *Cox* settlement. His action led to legal wrangling about whether his opt-outs were legitimate or whether he had misrepresented the deal to some clients and not had recent contact with many others; apparently, Fleming's clients did not personally sign exclusion requests as required by the court. He also sent letters to millions of mobile homeowners whom he did not represent, urging them to opt out and be a part of the *Spencer* class action. Press reports refer to consumers' confusion trying to sort out the barrage of information related to the competing actions and settlements.[44] For example, Florida homeowner Herbert Conner was quoted as saying, "I guess both sides want to sponsor me. . . I don't know what to do," when he received claiming information from both *Cox* and *Spencer* attorneys.[45]

THE FINAL CHAPTER

In October, amid the competition and resulting confusion generated by the *Cox* and *Spencer* actions, Judge Richard Silver, who was presiding over an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California, offered to broker a global settlement.[46] Judges Maloan (of the *Cox* court) and Hardaway (of the *Spencer* court) concurred that this move would further the cause of final resolution of polybutylene litigation and agreed to issue a joint order for a mandatory settlement

conference to take place on the beautiful Monterey peninsula with Judge Silver presiding. On October 10, Judge Silver conducted a "telephone conference call with all concerned attorneys and orally advised them of this joint order."[47] He then issued an October 12, 1995 Order Setting Settlement Conference to convene the coordinated settlement process (that order was also issued as a joint order by the *Cox* and *Spencer* courts).[48] From October 23 through November 7, one day before the fairness hearing had been scheduled in Tennessee, negotiations were conducted and settlement finally reached among *Cox* class counsel, *Spencer* counsel, and defendants' counsel and representatives.

By agreement of the parties, the global settlement was presented to the *Cox* court in Tennessee for approval. The final order approving the class settlement was dated November 17, 1995, after the fairness hearing on November 8–9, with the court retaining continuing jurisdiction throughout the administration of the settlement. The class was defined as:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The main changes in the final *Cox* settlement, compared to the preliminary *Cox* settlement presented on July 31, 1995, were:

- The total fund, still a soft cap, was increased from $850 million to $950 million.
- Eligibility was extended to anyone who suffered a leak within a *two*-year period from date of notice, no matter how old the plumbing system (post-1978); otherwise the same 10-, 13- and 16-year limitations from date of installation held.
- The parties agreed that any funds received from U.S. Brass Corp. or Eljer (its parent company) after bankruptcy proceedings were concluded would be added to the $950 million settlement fund.[49]

The final order noted that Shell and Hoechst Celanese were assigned the right to pursue all claims against DuPont for its contested share of the responsibility to the class, but the order also stipulated that the defendants assumed full obligation for paying the $950 million in the event that no funds were forthcoming from DuPont.[50]

What was the price of these improvements to the final settlement? In addition to the $45 million in fees paid to *Cox* counsel (which did not change), defendants paid $30 million in fees to *Spencer* counsel on top of the $8.4 million that DuPont had already paid them. None of the fees was to come out of the settlement fund; they required additional payments by the defendants. The original *Cox* settlement provided for the defendants to pay $3000 to each of four representative plaintiffs. The final settlement provided for similar payments to the 12 representative plaintiffs in *Spencer*. Table 14.3 compares the major features of the *Beeman*, initial *Cox*, and final *Cox* settlements.

Unlike fees, costs of notice and administration were to come out of the settlement fund. Because the program extends over 14 years and includes recurring notice, these costs may be substantial. Total costs of notice are shown in CPRC financial documents as capped at $28 million (not including $2 million that the defendants spent on the toll-free telephone line during the first notice period). The CPRC has made no formal projection of administration costs, but our interviews suggest that an estimate of 10 percent of claims' costs, or about $84 million, is not unreasonable.[51] These calculations suggest that about $838 million will be available for claims, not including any contributions forthcoming from U.S. Brass.

Table 14.3

Comparison of the *Beeman*, Initial *Cox*, and Final *Cox* Settlements

Category	*Beeman*	Initial *Cox*	Final *Cox*
Total fund (soft cap)	$750M soft cap	$850M soft cap (ambiguous as to how any proceeds from U.S. Brass/Eljer would be applied)	$950M soft cap (with any proceeds from U.S. Brass/Eljer additive to fund)
Past expenses (subset of total fund)	$50M soft cap	$75M hard cap	$75M hard cap
Eligibility for repair and full reimbursement of unreimbursed costs of repair and property damage	• If leak occurs within 1 year after initial notice date no matter how old the plumbing system *or* • If leak occurs within 10, 13, or 16 years after date of installation (depending on type of system) • Provisions for additional or accelerated relief in special cases	Same	• If leak occurs within 2 years after initial notice date, regardless of plumbing system's age • Otherwise same

Table 14.3 (continued)

Category	*Beeman*	Initial *Cox*	Final *Cox*
Eligibility for replumb	• Automatic replumb if one leak occurs after initial notice date or two leaks occurred before initial notice date (if other eligibility met)	Same	Same
Mechanism	• Establishment of a Consumer Plumbing Recovery Center with operational responsibility shared by plaintiff and defendant representatives • Program continues about 13 years through September 10, 2007 • Four subsequent notice and opt-out periods at three-year intervals	Same	Same except program continues about 14 years through July 31, 2009
Payments to representative plaintiffs	$3000 to each representative plaintiff to be paid in addition to settlement fund	Same	Same; includes representative plaintiffs for *Cox* and *Spencer*
Fees to class counsel	About $24M with no additional claims for expenses (not including interest and potential expenses for additional legal work); to be paid in addition to settlement fund	$45M with no additional claims for expenses (not including interest); to be paid in addition to settlement fund	$45M to *Cox* counsel, $30M to *Spencer* counsel; to be paid in addition to settlement fund (not including interest; not including DuPont's $8.4M to *Spencer* counsel)

The *Cox* court decided that, because the terms of the settlement had improved in all respects for the class members, no additional notice was necessary for those who had not opted out. The court approved a supplemental notice program to those who had previously opted out in order to give them a chance to opt back in. Earlier court documents indicated that, as of September 29, only 1632 persons had submitted opt-out requests.[52] We were told by the CPRC that the final number of opt-outs totaled 32,000 out of several million mailings.[53] Many of the opt-outs are reportedly commercial property owners whose claims for commercial damages, such as lost rent and work stoppages, may be better served by individual settlement. These individuals, as well as many of the other opt-outs, were typically represented by individual counsel. The court, in its final order approving the settlement, noted that it was "greatly comforted by the small number of individual opt outs."

On November 17, 1995, the same day the Tennessee court gave final approval to the *Cox* settlement, the Alabama court gave final approval to a modified *Spencer* settlement in which DuPont increased its rate of reimbursement to 10 percent (up from 8 percent). DuPont then contractually agreed with Shell and Hoechst Celanese to pay 10 percent of the cost of replacing systems for the *Cox* class (with exceptions for yard lines and systems with metal fittings that had no connection with DuPont's product). DuPont's contribution would reduce the obligation of Shell and Hoechst Celanese.[54]

In the three years since the settlement was approved, the CPRC has processed and replumbed more homes than in the entire previous ten years. Information regarding claims administration is available because the court-approved settlement agreement provides for periodic reporting of CPRC activities. As of June 1998, it has spent 59.7 percent of the fund for claims and performed over 220,000 replumbs.[55] The deadline for submitting claims for past expenses has passed, and about $31 million in claims have been paid. (The remainder of the $75 million set aside for past expenses became part of the total fund.) The CPRC also reports a high level of homeowner satisfaction—over 90 percent in 1997—from homeowner survey cards.[56] While the CPRC has not made any formal projections, general expectations are that the total funding will be sufficient to cover most, if not all, claims so that the defendants are likely to provide any modest additional funding that may be needed rather than face additional litigation.

On March 19, 1998, the U.S. Brass Corporation bankruptcy plan of reorganization became effective.[57] In late 1997, the U.S. Bankruptcy Court for the Eastern District of Texas approved the disclosure statement and the proposed plan of reorganization and set January 5, 1998 as the date by which creditors could vote for or object to the plan. *Cox* class members were also provided notice of the proposed plan of reorganization; those who wished to vote on the plan had to request a ballot. Under the terms of the reorganization, U.S. Brass and its parent companies will contribute about $53.4 million in cash, any net funds recovered from their insurance carriers, and $20 million in notes to fund polybutylene plumbing repairs and compensation. Eighty percent of these funds will go into the *Cox* settlement and 20 percent will stay in a separate trust fund set up to pay people with claims against U.S. Brass who are not members of the *Cox* class.[58]

EPILOGUE

And what happened to Fleming and his clients? According to one defense attorney, Fleming's many motions and objections regarding jurisdiction, the ade-

quacy of the settlement, notice, and related issues actually ended up strengthening the legitimacy of the final settlement because the *Cox* court reexamined, in a public forum, each of the issues he raised. However, once the global settlement was approved, Fleming's negotiating position was seriously weakened—the defendants no longer faced the threat of open-ended litigation, the Texas courts were imposing more stringent limits on the number of cases that could be tried at one time, and it appeared that the Texas Supreme Court would not uphold the DTPA charges.

About a month after the global settlement was approved, Fleming reached his own settlement with Shell and Hoechst Celanese. About 50,000 of his clients—who were either no longer responding to his mailings or had not supplied sufficient information to substantiate their claims—would become part of the *Cox* settlement. More than 37,000 clients with close to 68,000 claims would be covered by Fleming's separate agreement.[59] Under its terms, Shell and Hoechst Celanese would provide up to 60,000 replumbs and put $150 million into a settlement fund, out of which would come additional payments to Fleming's clients and his attorney fees. The defendants would also pay up to $20 million of Fleming's expenses. As part of the settlement agreement, the defendants insisted that a court-appointed special master oversee the division of the settlement fund among Fleming's clients and between Fleming and his clients. The settlement agreement was presented to Judge Russell Lloyd, 334th District, Harris County, Texas, who was overseeing all of the polybutylene cases pending in Harris County.[60] Fleming submitted his proposed fee allocation to the special master appointed by Judge Lloyd. On the basis of his contingency-fee contracts with his individual clients, his proposed allocation called for $88.8 million in fees for Fleming, other lead counsel, and his network of about 48 referring firms (i.e., 40 percent of the $150 million settlement fund plus an estimated $72 million in replumbing services).[61] His clients would receive, on average, a replumb plus about $1600 per client, or about $900 per claim. In spite of the enormous attorney fees, those clients who had not incurred previous large out-of-pocket expenses would likely be better off under this agreement than under the *Cox* settlement, which provided repair and replumb costs only, with no additional premium. Nonetheless, at a March 26 hearing, Judge Lloyd said that he thought Fleming's 40 percent proposed fees were excessive for a settlement that was resolved on a mass (or wholesale) basis. He asserted the authority of the court to review the distribution of attorney fees and expenses in a mass tort settlement (even though it was not a class action), and set a hearing date for April 26 to consider Fleming's fee application.

In April, Public Citizen learned of the settlement and the questions raised by Judge Lloyd and filed an amicus brief supporting the court's jurisdiction in reviewing Fleming's fees. It also filed on behalf of one of Fleming's clients who,

after reviewing the court file, had asked Public Citizen to represent him in his objection to the fee request. Alan Morrison of Public Citizen said,

> It is unlikely that the clients understood, or would have any reason even to suspect, that their cases would be resolved in a large class action, in which huge economies of scale would be enjoyed by all involved. But given these circumstances, it is wholly inappropriate to hold the clients to their contracts, which assumed a retail transaction, if those contracts in fact impose an unreasonable fee where the settlement is on a wholesale basis.[62]

On November 18, 1996, about a month after a two-day hearing, Judge Lloyd awarded Fleming $33.1 million in fees and $10.4 million in expenses, and required him to pay for any replumbs that might be required over the 60,000 provided for in the settlement.[63] Fleming filed an appeal, and the district court allowed him to take the approved portion of the fee award and place the disputed portion in an interest-bearing escrow account. While the appeal was pending, Fleming sent his clients a settlement offer for the disputed portion of his fee award that essentially offered each client 15 cents on the dollar. Many of Fleming's clients accepted the offer and Fleming asked the appeals court to approve these settlements. Public Citizen filed a brief in opposition to Fleming's settlements, saying that the district court had jurisdiction over this question, that Fleming's offer was "barely above nuisance value," and that the settlement letter was misleading and essentially coercive.[64] The appeals court remanded the litigation back to Judge Lloyd in October 1997. In turn, Judge Lloyd appointed a special master to review the process Fleming's firm used to communicate the settlement offer, review the documents of plaintiffs accepting the settlement, and review the amounts requested to be released by Fleming. After a February 6 hearing to review the report of the special master, Judge Lloyd approved Fleming's settlements with his clients, which provided Fleming with roughly another $25 million in fees. For those clients who did not accept Fleming's settlement, the fee dispute went back to the court of appeals.

And in yet another twist, in early February 1998, Houston legal malpractice specialist Larry Doherty reportedly filed a third-party action in *Adkins* on behalf of 21 of Fleming's clients, asserting negligence, gross negligence, breach of contract and fiduciary duty, fraud, deceit, misrepresentation and breach of state disciplinary rules. This suit asks for forfeiture of the escrowed funds and for punitive damages.[65]

On January 27, 1998, according to press reports, the U.S. District Court in Camden, New Jersey, certified a class action on behalf of 38 insurance companies asserting subrogation claims against Shell, Hoechst Celanese, DuPont, and the Plumbing Claims Group.[66]

Key Events	**Date**
Beeman filed in Harris County, Texas	September 1993
Beeman settlement presented	October 1994
Spencer filed in Greene County, Alabama	November 1994
Court denies *Beeman* settlement; 20 to 30 state class actions initiated	February 1995
Court grants preliminary approval to Dupont settlement in *Spencer*	May 19, 1995
Cox filed in Obion County, Tennessee, and preliminary certification granted	June 13, 1995
Spencer certified	June 30, 1995
Preliminary approval order of *Cox* settlement	July 31, 1995
Cox order approving forms of notice, scheduling fairness hearing, and setting opt-out and objection dates	August 24, 1995
Cox notice program	August–October 1995
Order setting settlement conference	October 12, 1995
Cox opt-out deadline	October 20, 1995
Global settlement conference	October 23–November 7, 1995
Opt-out deadline for *Spencer*	October 27, 1995
Fairness hearing on global settlement in *Cox* court	November 8–9, 1995
Cox final approval order to global settlement; *Spencer* final approval order of DuPont settlement	November 17, 1995
Agreement reached with Fleming	December 1995
Public Citizen objection to Fleming's fees	April 1996
Fleming's fees and expenses cut	November 18, 1996
Fleming's settlements approved	February 6, 1997
Third-party action filed on behalf of 21 of Fleming's clients asserting negligence, breach of contract, fraud and similar claims	February 1998

NOTES

[1]As part of our research on this litigation, we conducted interviews with a number of the key plaintiff attorneys, and attorneys and corporate counsel for the defendants. We also interviewed representatives of public interest groups. Finally, we reviewed many of the pleadings and papers filed in the class actions cited here, as well as other documents including newspaper and magazine articles, newsletters, press releases, and internet web site postings.

[2]*Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct. Obion County 1995) and related cases *Beeman v. Shell Oil Co.*, No. 93-047363 (Tex. Dist. Ct. Harris County filed Sept. 1993); *Spencer v. Shell Oil Co.*, No. CV-94-074 (Ala. Cir. Ct. Greene County filed Nov. 1994).

[3]Six million units is a commonly cited "worst-case" figure and comes from a U.S. Brass advertisement. In a response to an interrogatory, outside counsel for Shell Oil Company stated, "Based on limited information, using a variety of assumptions, it is our best estimate that approximately three million mobile homes, one million single family dwellings and 700,000 units in multiple unit structures were built from 1978 through 1993 containing polybutylene pipe and acetal insert fittings." Answers and Objections of Shell Oil Company to Intervenors' Second Set of Interrogatories, Exhibit A to Intervenors' Memorandum Specifying the Incomplete Nature of the Settlement Agreement (Aug. 21, 1995) (hereinafter Intervenors' Memorandum).

[4]See, for example, the Texas Supreme Court's decision in *Amstadt v. U.S. Brass,* 919 S.W.2d 644, 647 (Tex. 1996) discussing failures of the fittings. The court notes, "Cracks developed in the Celcon fittings that eventually caused leaks. At trial, the parties vigorously disputed what caused the fittings to fail. Some of the experts testified that degradation of the Celcon from exposure to the households' chlorinated water caused the cracks in the fittings. Others testified that inadequate design, defective manufacture, and improper installation, or a combination of these problems along with chemical degradation. . . caused the fittings to crack."

[5]Hoechst Celanese stopped selling Celcon for use in plumbing systems in site-built homes in 1986.

[6]A number of these municipalities were experiencing quite extensive problems. For example, a *Chicago Tribune* article reported that San Antonio had installed about 60,000 plastic service pipes between 1966 and 1978 and was experiencing failures at the rate of 1500 a month. Casey Bukko, "Suit Adds Twist to Plastic-Pipe Issue: $50 Million San Antonio Case May Give City Lawmakers Pause," *Chicago Tribune*, Nov. 13, 1986, at 3.

[7]*Michael Diehl v. General Homes Corp.,* No. 87-21479 (Tex. Dist. Ct. Harris County 1988).

[8]The trial court ruled that the statute of limitations barred the negligence claim of many of the homeowners, but rendered judgment for most households under the Deceptive Trade Practices Act. Appeal of the DTPA claims in this and two other polybutylene actions went all the way to the Texas Supreme Court. It found, in 1996, for the defendants on the grounds that the DTPA was designed by the legislature to protect consumers from any deceptive trade practices made in connection with the purchase or lease of any goods or services, but was not intended to reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer. *Amstadt v. U.S. Brass*, 919 S.W.2d 644 (Tex. 1996). Many of the homeowners settled their claims with the defendants early in the appeals process.

[9]Both Moriarty and Fleming later participated in polybutylene class actions, and Fleming brought some statewide class actions.

[10]One of our interviewees noted that algorithms are often used in mass torts to help determine the aggregate settlement. But he also noted that if the underlying values of the individual claims are wrongly estimated because of missing or inaccurate information about those claims or about the population that would be covered by the settlement (such as in many class actions where the number of potential claimants is not known with any certainty), the aggregate settlement dollars may end up not being a good reflection of the true aggregate value of the injury.

[11]Lorie Hearn, "Problem Pipes Trace Suspect Plastic Plumbing in Attic, Garage and Bath Walls," *San Diego Union-Tribune*, July 11, 1993, at H-1.

[12]We requested, but did not receive, records of the activity of the PCG, such as how many claims were handled a month, how many leaking systems were repaired, and how many systems were actually replaced.

[13]The PCG still exists and responds to consumers with polybutylene plumbing problems who are not covered by the main class action settlement of the polybutylene litigation. It subcontracts

directly to the Consumer Plumbing Recovery Center, the repair and replumb operation established under the main class action settlement.

[14]See Karen Weintraub, "FTC Joins Inquiry into Pipe: Homeowners Blame Product for Damage," *Houston Post*, Aug. 3, 1991, at A23; and Ruth Piller, "Federal Probe Focuses on Four Manufacturers: FTC Responds to Complaints of Faulty Plumbing Systems," *Houston Chronicle*, Dec. 16, 1991, at 17.

[15]Of course, there was large variation around that average figure, depending on such factors as the clients' actual damages and the time period when the case was tried or settled. According to Moriarty, every client did receive—at a minimum—a settlement sufficient to replace his or her plumbing system with the system (and plumber) of the client's choice.

[16]Answers and Objections of Shell Oil Company to Intervenors' Second Set of Interrogatories, Exhibit A in Intervenors' Memorandum.

[17]*Beeman v. Shell Oil Co.,* No. 93-047363 (Tex. Dist. Ct. Harris County filed Sept. 1993). Shell Oil Company, Hoechst Celanese Corporation, and E.I. DuPont de Nemours & Company were named as defendants.

[18]TLPJ's charter normally leads them to take on cases that are not currently being served by the private legal marketplace. This seemed like a natural case for them because private litigation had been serving only a subset of a potentially huge population. However, after assembling a group to undertake a class action, it became clear that TLPJ had served as a catalyst for the private market and that the lawyers involved would continue the class action with or without TLPJ's involvement. This turn of events led to some soul-searching by TLPJ about whether to remain involved, but it concluded that, as a public interest organization, it could help set some precedents for how this type of mass-tort litigation should be approached.

[19]Murr did not know at the time that Michael Caddell also happened to be on the board of directors of TLPJ's foundation, a nonprofit membership organization that helps fund TLPJ's work. Caddell's firm was then known as Caddell & Conwell.

[20]The most widely cited and detailed press account of the polybutylene class action litigation (with a focus on George Fleming and his fees) was written by Alison Frankel. See Alison Frankel, "Greedy, Greedy, Greedy," *American Lawyer*, Nov. 1996, at 70. Both Richard B. Schmitt of *The Wall Street Journal* and Brenda Sapino of *Texas Lawyer* provided extensive coverage over the course of the polybutylene litigation.

[21]Shell's in-house counsel team included vice president and general counsel S. Allen Lackey, senior litigation counsel Hugh H. Saum III, and staff attorney Kathleen A. Phillips. Outside counsel for Shell was provided by the large, nationally prominent Houston firm of Vinson & Elkins, rated 20th on the *American Lawyer's* 1996 list of the 100 highest-grossing law firms. "The AM Law 100," Special Supplement, *American Lawyer*, July/Aug. 1997, at 39.

The Vinson & Elkins team representing Shell included partners Daniel A. Hyde, David T. Harvin, D. Ferguson McNiel III, and Mary Lou Strange. Hoechst Celanese's in-house team comprised David A. Jenkins, vice president and general counsel, and Frank Israel, associate general counsel. Outside counsel for Hoechst Celanese was the New York firm, Kasowitz, Benson, Torres & Friedman, an 18-partner firm that has been engaged in high-profile mass and class actions (including representing the Liggett Group, Inc. in the tobacco litigation) since its inception in 1993. Hoechst Celanese was and is a long-time client of founding partner Marc Kasowitz. The team comprised Kasowitz and partners Dan Benson, Paul M. O'Connor, Michael Fay, and Jerry L. Mitchell, Jr. DuPont was assisted by the Richmond, Virginia office of McGuire, Woods, Battle & Boothe, rated 75th on the *American Lawyer's* 1996 list of the 100 highest-grossing law firms. DuPont's in-house counsel team was led by John F. Kane. *Id*. at 42.

The names of the defense lawyers involved in this litigation come from our interviews and an article by Brenda Sapino, "Big Deals; Big Suits," *Texas Lawyer*, Nov. 27, 1995, at 11.

[22]This position, as well as a "no coupon" position, had been previously communicated to Feinberg by *Beeman* counsel Michael Caddell.

[23]TLPJ obtains such reviews from a "Case Evaluation Committee," a standing committee of independent volunteer lawyers who sit on the board of directors of TLPJ's foundation and who have no personal involvement in the case under consideration or its outcome.

[24]The mediator Kenneth Feinberg developed the concept; class counsel Michael Caddell and Shell counsel Daniel Hyde convinced their initially skeptical constituencies to adopt the approach.

[25]The structure of this settlement was similar to that later negotiated in the oriented strand siding (Louisiana-Pacific) case (see Chapter Thirteen).

[26]The defendants' respective shares of the settlement fund remained an unresolved issue in what was to become the ultimate class resolution of the polybutylene litigation. Shell and Hoechst Celanese agreed to binding arbitration to determine their respective shares.

[27]Shell did not start manufacturing the polybutylene resin until late 1977, so the earliest installation date applicable to any class action settlement described in this case study is January 1, 1978.

[28]The concept of recurring notice was developed by mediator Kenneth Feinberg as a mechanism for resolving future claims. It was subsequently used in at least one other class action when the firm of Kasowitz, Benson, Torres & Friedman (outside counsel for Hoechst Celanese in the pipes litigation) incorporated recurring notice into a tobacco settlement class on behalf of its client Liggett Group.

[29]A formal fee application was never presented to the court because the process never got that far. The *Beeman* fee agreement was reported to us by both plaintiff and defense counsel whom we interviewed. A more specific figure of $24.25 million was included in the Agreement Concerning Plaintiffs' Attorney's Fees (Dec. 1994), Exhibit B to Intervenors' Memorandum.

[30]Brenda Sapino, "Polybutylene Pipe Settlement Rejection Puzzles Both Sides," *Texas Lawyer*, Feb. 27, 1995, at 1.

[31]Some suits were also filed in *anticipation* of a possible adverse ruling.

[32]Brenda Sapino, "Pipe Plaintiffs Refile in Galveston," *Texas Lawyer*, Apr. 24, 1995, at 2.

[33]*Spencer v. Shell Oil Co.*, No. CV-94-074 (Ala. Cir. Ct. Greene County filed Nov. 1994). Shell Oil Company, Hoechst Celanese Corporation, and E.I. DuPont de Nemours and Company were named as defendants. The legal allegations were common law fraud, misrepresentation and omission, negligence and gross negligence, unfair trade practices, civil conspiracy to commit fraud, the Uniform Commercial Code's protection against breach of implied warranties, and common law strict liability.

Langston, Frazier, Sweet & Freese is a four-member, plaintiff's personal injury firm, with a practice including product defect and environmental liability and other high-stakes complex cases including class actions; Cooper, Mitch, Crawford, Kuykendall & Whatley is a seven-member firm established in 1950 that has been principally engaged in labor and employment law, but that has more recently diversified into other areas including personal injury and product liability as well as class actions.

[34]*Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct. Obion County 1995), Shell Oil Company, doing business as Shell Chemical Company, and Hoechst Celanese Corporation, defendants. The legal allegations were breach of the duty of good faith and fair dealing, breach of implied warranties, breach of express warranties, violations of the Tennessee Consumer Protection Act, misrepresentation, negligence, strict liability, and civil conspiracy. Unlike *Spencer*, which additionally sought punitive damages, *Cox* plaintiffs sought only compensatory and statutory damages.

Cohen, Millstein, Hausfeld & Toll, and Lieff, Cabraser, Heimann & Bernstein are both nationally prominent class action firms. Barrett Law Offices is a small firm with a general regional practice including personal injury, product liability, environmental torts, and class actions. Conley, Campbell, Moss and Smith is one of the largest plaintiff firms in this rural county; they specialize in personal injury cases but had no class action experience prior to the pipes litigation.

[35]The term "misrepresentation" refers to the defendants' representing the plastic plumbing system as being suitable, reliable, and long-lasting plumbing material for use in domestic potable water systems.

[36]Tennessee reportedly has no state rules or local rules for Obion County governing ex parte certification; it is left to the discretion of the judge.

[37]Under the hard cap, if $75 million were not sufficient to cover all past damage claims, then claimants had the option of either accepting a known, prorated share of the $75 million, or opting out of the class with respect to their past damage claims. When he approved the settlement, Chancellor Maloan expressed some concern about whether the $75 million would be sufficient.

[38]Class counsel did not apply for a separate award for expenses. However, the application for attorney fees submitted by class counsel in *Cox* notes that class counsel collectively spent more than 20,000 hours of the professional time of lawyers and legal assistants; incurred more than $594,000 in expenses; and expected to expend at least 2500 additional hours in connection with

settlement administration. Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (Oct. 1995) at 24, 31.

[39]Kinsella Communications, Ltd., Washington, D.C., is one of the leading companies specializing in mass tort and class action notice programs. Rust Consulting, Inc., Minneapolis, MN, specializes in class action claims administration services.

[40]The final order approving the *Cox* settlement noted that the national media campaign alone was estimated to have reached 92 percent of adults in the U.S. aged 35 years and over with an average exposure of four times apiece. See Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (Nov. 17, 1995) at 13 (hereinafter Final Order).

[41]See http://www.kinsella.com/polybutylene/propset.htm for a copy of the Notice of Class Action and Proposed Settlement (Aug. 24, 1995).

[42]For costs of notice not including the toll-free line, see Consumer Plumbing Recovery Center, Financial Statements and Management Reports (July 31, 1997). Plaintiff counsel told us that the phone line cost an additional $2 million.

As with *Beeman*, the *Cox* settlement provided for four subsequent notice and opt-out periods. The cost cap for the four additional periods is $18 million.

[43]Fleming had settled about 50,000 individual cases with DuPont in 1994 for $20 million, out of which he received 40 percent in fees plus $2.7 million in expenses. See Brief of Appellees-Intervenors James and Rosalie Park and Dannell Miller and Public Citizen as Amici Curiae, *Adkins v. Hoechst Celanese Corp.,* No. 01-96-01528-CV (Tex. Ct. App. filed May 16, 1997) (hereinafter Public Citizen Amicus Brief).

[44]See, e.g., Judith Evans, "Plastic Pipes Push Owners to Breaking Point; Corrosion-Prone Plumbing Prompts Worries Over High Repair Costs," *Washington Post,* Oct. 28, 1995, at EO1; and Erik Milstone, "Lawsuit Pipeline: Dueling Polybutylene Class Actions Make Choices Plumb Difficult for Homeowners," *American Bar Association Journal*, Dec. 1995, at 20.

[45]Milstone, *supra* note 44.

[46]*Meers v. Shell Oil Co.,* No. M 30590 (Cal. Super. Ct. Monterey County 1995).

[47]Minute Order Setting Settlement Conference (Oct. 12, 1995), *Meers v. Shell Oil Co.*

[48]The order refers to similar or related actions pending in approximately 21 other states, many of which had either been stayed or whose presiding judges were considering motions to stay proceedings pending the resolution of the *Cox* and *Spencer* cases. Judge Silver or the parties contacted those courts to apprise them of the settlement conference and ask them informally to stay any planned proceedings for the duration of that effort.

[49]Final Order at 15. We were not able to locate such a statement in Shell and Hoechst Celanese's Principles of Agreement (Nov. 7, 1995), to which Chancellor Maloan refers in his final order, but we have been assured by representatives of both sides that the agreement of the parties is that the funds are additive to the $950 million soft cap. Financial statements from the CPRC show that the cap has already been raised by funds that have been forthcoming to date from U.S. Brass/Eljer. As the U.S. Brass/Eljer funds come in, they are being expended before additional sums from the CPRC are added to the fund, so if total claims are less than $950 million plus the U.S. Brass/Eljer contribution, the defendants may end up paying less than $950 million. But if total claims are greater, the defendants are obligated to pay the entire $950 million, after which they may choose to add additional monies to the fund or face litigation from those class members who have not received full relief.

[50]Final Order at 16.

[51]Administration costs early in the program have averaged about 7 percent of claims costs, but our interviews indicate that the fixed component of administrative costs will increase, as a percent of claims, as the number of claims decreases over time.

[52]Memorandum of Points and Authorities in Support of Motion for Final Approval of Settlement (Oct. 5, 1995).

[53]The CPRC is required to maintain a current list of opt-outs.

[54]DuPont's obligation is to Shell and Hoechst Celanese, not to the *Cox* class.

[55]The June 30, 1998 Financial Statements and Management Reports of the CPRC show cumulative expenditures of $567.5 million for claims, $34.9 million for administration, and $10.9 million for notice (not including the toll-free telephone line). About 396,000 claims have been processed since the program began. Based on actual CPRC experiences in 1997, the average costs of a replumb for a site-built home was about $3700; the cost of replumbing a mobile home was about $1200.

[56]Consumer Plumbing Recovery Center, Financial Statements and Management Reports (Feb. 28, 1998).

[57]Dates from "Zurn Announces Consummation of US Brass Plan of Reorganization," *PR Newswire* (Mar. 23, 1998), and voice message at the toll-free number established for the Brass Trust.

[58]*Id.*

[59]See Appellants' Brief, *Adkins v. Hoechst Celanese Corp.,* No. 01-96-01528 (Tex. Ct. App. filed Sept. 18, 1997) (available at http://www.fhg-law.com/briefs.html). The settlement covered claimants and claims in 18 cases in Harris County courts and 13 cases in ten other counties and in one court of appeals.

[60]*Adkins v. Hoechst Celanese Corp.,* No. 92-024674 (Tex. Dist. Ct. Harris County filed Nov. 18, 1996). All of the Harris County polybutylene cases were consolidated with *Adkins.* See Appellants' Brief, *Adkins v. Hoechst Celanese Corp.*

[61]The settlement had specified that the maximum value Fleming could assign to the replumbs for the purpose of estimating his fees was $1200 per unit up to a maximum of 60,000 units. See Public Citizen Amicus Brief at 6.

[62]Quoted in "Greedy, Greedy, Greedy," *supra* note 20, at 16.

[63]Judge Lloyd allowed 40 percent fees on several hundred claims whose cases were either tried or arbitrated, and 20 percent fees on all other claims. He also disallowed about $9.5 million in expenses (that amount would go back into the general settlement fund from which Fleming would get his 20 percent fee). See Public Citizen Amicus Brief at 11–12.

[64]Opposition of James and Rosalie Park, Dannell Miller and Public Citizen to Motion of Appellants to Effect Partial Settlement (Sept. 18, 1997); *Adkins. v. Hoescht Celanese Corp., supra* note 59.

[65]Brenda Sapino Jeffreys, "Plastic Pipe Case Erupts; Malpractice Suit Targets Plaintiffs' Counsel Over Fees," *Texas Lawyer,* Feb. 2, 1998, at 1.

[66]"Insurers Win Class-Action Status in Plumbing Case," *BestWire*, Feb. 4, 1998.

Section III

Chapter Fifteen

THE GREAT BIG QUESTION ABOUT CLASS ACTIONS

> For all our effort, we do not know whether this is a good or a bad thing. The great big question is whether the social utility of the large class action outweighs the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court system.
>
> *John Frank, 1966 Civil Rules Advisory Committee Member, in a memorandum to the Chair of the 1995 Committee*[1]

When we peered into the class action fishbowl, we found a murky picture of Rule 23(b)(3) damage class actions. In the ten class actions we studied closely, plaintiff attorneys seemed sometimes to be driven by financial incentives, sometimes by the desire to right perceived wrongs, and sometimes by both. They sometimes devoted substantial resources to investigating case facts and law, but at other times moved quickly to negotiating settlements. Some of these settlements served class members' interests better than others. Most produced substantial fees for the lawyers themselves. Judges sometimes used their authority to ensure that settlements provided more for class members and the public than for the lawyers, but at other times seemed reluctant to do so. Objectors sometimes contributed to improving the quality of settlements, but at other times they appeared on the scene seemingly only to collect fees for themselves. Is there any way to sort out this mix of practices and outcomes to answer the "great big question" about damage class actions: Do they, on balance, serve the public well?

From ten case studies, we cannot extrapolate to the universe of damage class actions, or even to all consumer class actions or all mass tort class actions. To determine whether, on balance, Rule 23(b)(3) damage class actions do more good than harm we would need to survey a large, statistically representative sample of class actions and reliably measure their outcomes. Such a study would require a list of the universe of damage class actions and detailed information about their direct and indirect consequences, neither of which is easy to obtain at present. But even if we could conduct that study, there is no guarantee that we could agree on how to interpret the results. Without a consensus on what the social utility of damage class actions *should* be, there can be no

consensus on how to weigh the social benefits of class actions against their costs.

What the ten case studies do provide is a concrete basis for considering the claims that underlie the “great big question” about damage class actions: that these lawsuits are solely the creatures of class action attorneys’ entrepreneurial incentives; that it is easy to detect nonmeritorious class actions—and that most suits fit in that category; that the benefits of class actions accrue primarily to the lawyers who bring them; that transaction costs far outweigh benefits to the class; and that existing rules are not adequate to insure that class actions serve their public goals. By arraying the facts of the ten class actions that we studied closely alongside the claims of critics, we can better understand the public policy dilemmas posed by damage class actions.

A. HOW DAMAGE CLASS ACTIONS ARISE

The notion that Rule 23(b)(3) class actions are “lawyer-driven” is at least as old as the rule itself. The claim is not that it takes a lawyer to bring a class action—that is self-evident—but rather that class actions turn our whole concept of civil litigation on its head. Instead of an injured individual finding a lawyer to help her obtain a legal remedy, and paying that lawyer for his time and expenses, the lawyer looks for instances in which individuals may have been injured, finds a representative plaintiff, and files a class action to obtain fees for himself, giving short shrift to the question of whether the claims he brings have merit.[2] As one prominent class action critic put it,

> The class action suit. . . is the deputation of the nation’s lawyers as “bounty hunters” to sue whomever they can legally assert has engaged in conduct injurious to large groups of individuals. In practice, it amounts to the lawyers suing whomever they believe vulnerable to a settlement and capable of paying large attorneys’ fees.[3]

Our case studies of ten damage class actions tell a more textured tale of how damage class actions arise. Class actions are complex social dramas. Plaintiff class action attorneys play a crucial role, but so do individual consumers, regulators, journalists, and ordinary lawyers. Defendants’ roles in the litigation vary: They contest some suits vigorously, but pursue certification when it appears to offer an efficient means of capping liability exposure. The choreography of the litigation is often complicated: Class action attorneys seek out jurisdictions where they think their suits will fare well, but cases move from jurisdiction to jurisdiction and new actors appear and disappear from the stage. Although lawyers drive the drama to its conclusion, it is American society and culture that provide the ingredients for the story.

1. The Role of Class Action Attorneys

In the ten lawsuits we studied closely, class action attorneys played myriad roles. Sometimes they uncovered what they thought was a legal violation, either on their own or in response to queries from consumers or clients, and pursued defendants on behalf of the class of individuals who allegedly had been harmed. Sometimes the lawyers followed up on information produced by regulators or the media, seeing in this information an opportunity for initiating a financially beneficial series of class actions. Sometimes the attorneys jumped onto a litigation bandwagon that was constructed by other class action attorneys. Sometimes they brought resources and expertise that enabled them to conclude the case successfully for the class. Sometimes they arrived on the scene seemingly simply to claim a share of the spoils.

Although lawyers dominated these class actions, nonlawyer individuals were often involved as parties to individual lawsuits that started a chain of events that led to the class action, or as consumers who brought their complaints to companies, regulatory agencies, the press, or to the lawyers themselves. Regulators—in their official and unofficial capacities—also often played key roles in the unfolding of the cases.

The conventional view of damage class actions is that consumer cases arise as representative actions, without any prior individual litigation, and that mass tort cases arise out of individual litigation. Among the ten class actions we studied, however, we found two consumer cases in which individual litigation preceded the class action, and two mass torts in which the litigation first arose as a class action, without any preceding individual litigation (see Table 15.1).

In the *Great Western Brokerage Products* case, the class action was preceded by a non-class suit brought by Michael Linfield on behalf of his elderly relative, Ruby Rosenthal, and two dozen other Great Western depositors like her who had traded their savings for mutual funds. In the *Heilig-Meyers credit life insurance* litigation, the chain of events was more complicated: Initially, Cindy McCullar went to attorney J. O. Isom for help in dealing with a suit that was brought against her for default on her automobile loan. Isom filed a lawsuit on her behalf, claiming she had been the victim of fraudulent business practices. But as he investigated the case, Isom became interested in the credit life insurance policy that she had purchased when she financed her automobile purchase. Ultimately, he filed a suit against the credit life insurer and the automobile dealership, claiming they had violated Alabama's truth-in-lending law. When he shared his legal complaint with consumer attorney Garve Ivey, the latter saw a potential for large-scale litigation against Heilig-Meyers and other similarly situated defendants.

Table 15.1

How the Ten Class Actions Began

	Was there prior individual litigation?	Did individual(s) seek legal assistance?	Did class action "piggy-back" on prior class action?	Did regulatory attention help stimulate the class action?
		Consumer Class Actions		
Roberts v. Bausch & Lomb	No (complaints)	Yes	No	Yes, FDA and state attorneys general
Pinney v. Great Western Bank	Yes	Yes	No	No
Graham v. Security Pacific Housing	None reported	Yes	Yes	No
Selnick v. Sacramento Cable	No (complaints)	No	Yes	Yes, cable commis-sion investigation
Inman v. Heilig-Meyers	Yes	Yes	Yes	No
Martinez v. Allstate/Sendejo v. Farmers	No	No	No	No
		Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	Yes	Yes	No	No
Atkins v. Harcros	No	Yes	No	Yes, state EPA re-mediation
In re Louisiana-Pacific Siding Litigation	None reported (complaints) (arbitration)	In at least one instance	Yes (4 similar actions were filed by dif-ferent sets of attorneys)	State attorneys general investiga-tions helped pub-licize complaints
Cox et al. v. Shell et al.	Yes	Yes	Yes	No

Turning to mass torts, often thought to emerge from individual suits, the *Harcros chemical factory* toxic exposure litigation and the *Louisiana-Pacific home siding* product defect litigation both began as class actions, without prior individual litigation.

Often when individual litigation did not precede class action lawsuits, individuals other than lawyers nevertheless played a role in stimulating the litigation. It was California optometrist Dr. Robert Pazen's dismay over the notion of charging his patients different prices for physically equivalent contact lenses that set off the chain of events that ultimately led to the *Bausch & Lomb contact lens pricing* class action. Pazen pursued the question first with the company's management, then with a local assistant district attorney whose office, in turn, contacted the federal Food and Drug Administration (FDA). Attorney Linfield invited attorney friends with employment law and civil rights experience to join him in a class action only after hundreds of *Great Western brokerage products*

purchasers called him in reaction to his press conference discussing Ruby Rosenthal's suit. Individual consumer complaints against *Sacramento Cable's late fee* policy led to an investigation by the Sacramento Metropolitan Cable Television Commission, which, in a somewhat circuitous fashion, attracted the attention of local consumer attorney Mark Anderson. Individual consumer complaints concerning *Louisiana-Pacific's home siding* led to mass media coverage, to efforts to adopt local ordinances banning the siding, and to attorneys general investigations in Florida, Oregon, and Washington state.

Sometimes individual consumers went directly to lawyers with their complaints. The *Harcros chemical factory* class action arose when residents of the Gert Town neighborhood approached a local lawyer. One of the four class actions that were ultimately filed in the *home siding* case was stimulated by a consumer who was dissatisfied with the outcome of Louisiana-Pacific's arbitration of his complaint and contacted his attorney.

In some instances, the lawyers litigants turned to were class action attorneys. Rick Ellis, the lead counsel in the *Bausch & Lomb contact lens pricing* class action, was contacted by Boston-area contact lens wearers. In the *Security Pacific collateral protection insurance* case, John Graham, a former client of lead counsel John Deakle whom Deakle had represented on a workers compensation claim, asked the lawyer to review documents pertaining to Graham's mobile home loan from Security Pacific. Deakle is a class action attorney, and Graham's decision to seek his assistance was apparently stimulated in part by the news that he had settled a class action against another bank, alleging that it had overcharged borrowers for collateral protection insurance.

Sometimes the lawyers to whom litigants first turned contacted class action practitioners—even, on occasion, when they themselves had class action experience. Ellis turned to Ralph Knowles, a personal injury lawyer with whom he had become acquainted in the course of the silicone gel breast implant class action, and together they assembled a team of class action practitioners based in different parts of the country to bring the *contact lens pricing* lawsuit against Bausch & Lomb. Linfield first turned to employment and civil rights attorneys Stormer and Frank. Then, after federal district court Judge Irving Hill indicated that he did not believe the three of them could adequately represent the class in the *brokerage products* class action, Linfield called on Milberg, Weiss, Bershad, Hynes & Lerach, one of the nation's leading plaintiff securities class action firms. The lawyer whom Gert Town residents talked to about environmental remediation around their neighborhood chemical factory contacted local class action practitioners on their behalf. The class action phase of the *polybutylene pipes* litigation began when a lawyer on the staff of Trial Lawyers for Public Justice (TLPJ) sought out solo practitioner Marc Murr to assist her in collecting damages for leaky pipes in her condominium; working with him, TLPJ assem-

bled a team of class action practitioners who filed a class action lawsuit in state court in Houston.

In all the cases we studied, whatever the role of nonlawyers in stimulating the litigation, the idea of bringing a class action came from, not surprisingly, the lawyers. Had it not been for the press conference Linfield organized—and the attendant publicity—other *Great Western brokerage product* purchasers would likely never have learned that they might have a legal claim. John Graham may have believed that he was bringing John Deakle the ingredients for a class action against *Security Pacific,* or he may simply have been seeking individual legal assistance; Deakle, however, knew a class action when he saw it. It was the plaintiffs' lawyers who petitioned the Judicial Panel on Multidistrict Litigation to transfer all pending *blood products* cases to Judge John Grady in the federal district court of northern Illinois and then asked Judge Grady to certify a nationwide class action. All three sets of lawyers involved in the *home siding* litigation had some class action experience, and two of the lawsuits were litigated by teams of class action specialists.

Among the ten class actions, the only one that appears to have been wholly lawyer-driven—meaning that we could find no evidence of prior individual litigation, individuals initiating the action directly by contacting lawyers, or individuals initiating the litigation indirectly by pursuing complaints with lawyers, regulators or the press—is the *Allstate/Farmers' insurance premium double rounding* case. Were it not for Dallas personal injury lawyer John Cracken's hiring of former Texas Department of Insurance General Counsel D. J. Powers as a consultant to investigate the potential for developing class actions against the insurance industry, how the Allstate and Farmers insurance companies were calculating premiums would likely never have attracted public attention.

Lawyers seem to have been prepared, if not looking, for class actions in five others among those we studied—*Security Pacific collateral protection insurance, Sacramento Cable TV late fees, Heilig-Meyers credit life insurance* and the *Louisiana-Pacific home siding* and *polybutylene pipes.* In each of these, class action attorneys modeled their cases after other class actions that either they or other attorneys had litigated previously. Deakle had brought a class action against a different financial institution, alleging that the defendant had imposed excessive charges for collateral protection insurance; Ivey had brought prior credit life insurance class actions; Anderson had brought a class action against a different cable TV company in a different court, alleging that the defendant charged excessive late fees; and one group of class action lawyers in the *home siding* case had brought a similar class action against a different wood product manufacturer.

Attention from regulators, which sometimes led to an enforcement action against the defendants, directly or indirectly stimulated class actions in four of the cases. Media coverage of the FDA's *refusal* to sanction Bausch & Lomb, as well as statements by some state attorneys general that they were investigating Bausch & Lomb's pricing practices, apparently attracted the attention of Boston-area consumers who, in turn, contacted the class action attorneys who filed a lawsuit against that company. Anderson apparently found out about Sacramento Cable TV's late-fee policy from a lawyer acquaintance who was assisting the Sacramento Metropolitan Cable Commission. Louisiana's Department of Environmental Quality's order for remediation measures against toxic contamination on the *Harcros chemical factory's* property stirred concern among neighborhood residents. Media coverage of state attorneys general investigations of consumer complaints regarding *home siding products* may have helped attract the attention of the attorneys who filed lawsuits against Louisiana-Pacific.[4]

2. The Role of Defendants

Although public commentary frequently depicts damage class actions as *plaintiff lawyers'* suits, an alternative view is that they are the creature of *defendants'* desires to forestall more costly forms of litigation or continued consumer complaints. Indeed, in the qualitative interviews we conducted with attorneys before we conducted the case studies, some respondents claimed that *defendants,* rather than plaintiffs, sometimes initiate damage class actions. Among the class actions we studied, we did not find any in which the available evidence suggests that it was defendants who *initiated* the action, but defendants' efforts to *contest* the class actions varied from case to case (see Table 15.2).

In seven of the ten cases, defendants engaged in at least some activity directed at ending class litigation. Often, they opposed class litigation vigorously, not only seeking to have the case dismissed on substantive legal grounds but also contesting certification, sometimes all the way up to the highest appellate courts. For example, in the Texas *insurance premium double rounding* case, defendants Allstate and Farmers insurance companies sought (variously) removal to federal court, change of venue from one state court to another, and dismissal of the complaint on the grounds that the proper method of calculating premiums was a matter for administrative law proceedings. They opposed certification at the trial level, and under Texas state law filed an interlocutory appeal of certification.

Rather than pursue these cases to trial, however, defendants in these seven cases ultimately joined plaintiff attorneys in seeking approval of a class settle-

Table 15.2

How Defendants Responded to the Ten Class Actions

	Did defendants attempt to shift case to another court?	Did defendants contest the class action?	Did defendants try to narrow or broaden the class definition?
		Consumer Class Actions	
Roberts v. Bausch & Lomb	No	Yes, moved for summary judgment, petitioned for writ of mandamus but were denied; argued motion to decertify to trial court	Class was expanded, apparently to ensure competing class actions were dropped
Pinney v. Great Western Bank	No	Yes, filed motion to dismiss, opposed initial certification, argued motion to decertify	Defendants agreed to expand class to all of California
Graham v. Security Pacific Housing Services, Inc.	No	No, never answered complaint. Joined plaintiff attorney in requesting temporary certification even before settlement was reached	Supported expanding class to nation to close off litigation. Negotiated non-opt-out provision for Mississippi class members with punitive claims (later dropped)
Selnick v. Sacramento Cable	No	Yes, opposed certification	Agreed to plaintiff attorneys' expanded definition of class, which included some members who had no opportunity to opt out
Inman v. Heilig-Meyers	No	Yes, opposed certification, sought summary judgment, moved for reconsideration of certification	Agreed to expand non-opt-out class to all Alabama residents who had ever purchased credit life or disability insurance from them
Martinez v. Allstate/Sendejo v. Farmers	Yes, tried to remove to federal court, but they were unsuccessful. Sought change of venue to another state court	Yes, filed motion to dismiss on grounds that matter was administrative, opposed certification, appealed certification	No
		Mass Tort Class Actions	
In re Factor VIII or IX Blood Products	No	Yes and no. Opposed MDL, sought mandamus, resulting in decertification of first class, did not oppose certification of new class	Initially, conditioned settlement on limiting the number of opt-outs, but this condition was later dropped

Table 15.2 (continued)

	Did defendants attempt to shift case to another court?	Did defendants contest the class action?	Did defendants try to narrow or broaden the class definition?
Atkins v. Harcros	Yes, tried to re-move to federal court, but were unsuccessful	Yes, unsuccessfully appealed certification to appellate courts	Negotiated non-opt-out class for punitive damage claims
In re Louisiana-Pacific Siding Litigation	No	Not much. Moved for dismissal, but then joined plaintiff attorneys in seeking certification for settlement 4 months after filing	Sought global settlement, and conditioned settlement on limiting the number of opt-outs
Cox et al. v. Shell et al.	No	No, all defendants joined with *Beeman* class attorneys in seeking certification; one defendant subsequently sought certification in another court; other defendants sought certification in third court, and facilitated cooperation among competing class counsel	Sought global settlement

ment. For example, defendant Heilig-Meyers initially sought to have the *credit life insurance* overcharge claims against them dismissed, and then opposed certification. But after the Alabama Supreme Court held that the way they and other retailers had been pricing credit life policies for years contravened the plain language of the relevant statutes, they joined with plaintiff attorney Ivey in seeking approval of a class settlement. Defendants in the *blood products* mass tort case, who succeeded in derailing certification for trial of an earlier class action by petitioning the Seventh Circuit for mandamus and decertification, ultimately joined with plaintiff attorneys in seeking *settlement* class certification.

In three of the ten cases, defendants seemed about as eager as plaintiff attorneys to settle the litigation against them by means of a class action, which followed either extensive individual litigation or previous class actions or both. In the *collateral protection insurance* case, the defendant—who had previously been the target of similar class actions—never answered the complaint, never engaged in formal discovery, and joined with the plaintiff attorney in seeking certification of a settlement class less than a year after the lawsuit was filed. In the *home siding* case, a defendant who had previously attempted to satisfy con-

sumers' complaints through both a warranty program and an arbitration program reached settlement with the plaintiff attorneys just six months after the first of several class actions was filed. In the *polybutylene pipes* case, defendants who had been the targets of individual litigation for more than a decade actually helped plaintiff attorneys who had filed competing class actions get together, so that they could join forces in seeking a global resolution of the litigation.

Once defendants decided to support class action treatment of the litigation against them, they (not surprisingly) favored as broad a definition of the class as possible. Defendants also sought to bind class members definitively, by seeking certification of non-opt-out classes or subclasses.[5] In four cases—*collateral protection insurance premium*, *cable TV late fees, credit life insurance,* and the c*hemical factory* toxic exposure litigation—defendants negotiated a settlement that had a "no opt out" provision for all or some class members. (In the *collateral protection* lawsuit, objectors subsequently forced the defendant and plaintiff attorneys to drop the "no opt out" provision.) In the *cable TV late fee* lawsuit, the plaintiff attorney and defendant agreed to expand the class definition (and provided no opportunity for the newly eligible class members to opt out).

In sum, in all ten class actions, defendants decided it was in their interest to negotiate a classwide settlement at some stage of the litigation. When they did, they often pursued class certification as vigorously as the class action attorneys.

3. Deciding Where to File

Another recurrent complaint about Rule 23(b)(3) damage class actions is that plaintiff attorneys file lawsuits in courts where they believe the judges are more likely to grant certification. As with many other aspects of damage class actions, deciding where to file a damage class action lawsuit turns out to be more complicated than the general critique suggests.

In ordinary civil litigation, plaintiff attorneys decide what *forum* (i.e., state court or federal court, a California state court or an Arizona state court) in which to file a lawsuit. Within a state, attorneys sometimes also have a choice among different *venues* (i.e., geographic locations, typically counties). In the federal court system, attorneys can sometimes choose as their venue any one of the nearly one hundred federal districts. These choices can give a plaintiff attorney great latitude in deciding where to file a lawsuit. If defendants are unhappy with the plaintiff attorney's choice, they may be able to move the case to an alternative forum (e.g., from state to federal court) or venue.

Class action attorneys often have greater latitude in their choice of forum or venue than their counterparts in traditional litigation: Under some circumstances, an attorney filing a statewide class action could file in any county of a state and an attorney filing a nationwide class action could file in virtually any state in the country, and perhaps any county in that state as well. Class action attorneys may also be able to file duplicative suits and pursue them simultaneously. These are powerful tools for shaping litigation, providing opportunities to seek out favorable law and positively disposed decisionmakers, as well as to maintain (or wrest) control over high-stakes litigation from other class action lawyers.

Historically, public policymakers have tried to discourage lawyers from "forum shopping" by maximizing the likelihood that cases and litigants will be treated in the same fashion by every judge in every court within a jurisdiction.[6] But differences in states' *substantive* law—which not only applies to cases filed in state courts but also to cases filed in federal courts under diversity jurisdiction[7]—as well as differences between federal and state courts, and among states in court *procedural* rules, offer incentives for both plaintiff and defense attorneys to seek out jurisdictions that may be more friendly to them. Lawyers may also believe (rightly or wrongly) that certain judges will be more or less favorably inclined toward their claims or clients,[8] and that juries in certain jurisdictions are "pro-plaintiff" or "pro-defendant." And sometimes lawyers choose a jurisdiction or venue because they think that a lawsuit may move more quickly—or slowly—there than it would if they filed it elsewhere, which may have important implications for their suit. Although courts formally frown on forum shopping, plaintiff and defense lawyers who ignore the potential effects of forum selection on case outcomes are failing their clients.

Class action attorneys' choices are shaped by all these factors and others as well. Plaintiff class action attorneys may seek out states whose law is more inviting of class actions generally or more amenable to nationwide class actions, in particular, or whose procedural rules provide for quicker and, perhaps, easier certification. Defendants may counter by removing cases from state courts to federal courts, where—in recent times—defendants have hoped that judges appointed by conservative presidents would be less amenable to class actions.

Some jurisdictions have local rules specifying that when cases are identical (as most statewide and nationwide class actions arising out of the same circumstances tend to be), the first case filed has priority over others filed within that jurisdiction. Other rules give priority to the first case certified. In some jurisdictions, cases can be preliminarily certified as class actions on the very day that they are filed. How quickly a court moves its cases toward conclusion may also be important, because once a case is settled and approved by the judge in a

particular jurisdiction, it binds all members of the class who have not opted out, including those putatively included in class actions filed elsewhere by other class action attorneys.[9]

Our analysis of class action activity in 1995–1997 (reported in Chapter Three) suggested that there is some truth to the notion that certain states are more popular venues for consumer class actions, and that mass toxic exposure class actions are found in higher numbers in some states, than we would expect simply on the basis of the population of those states. Among the ten class actions we studied—which we did not choose because of their jurisdiction or locale—two were filed in Alabama and two in California; the other six were filed in Illinois, Louisiana, Mississippi, Oregon, Tennessee, and Texas (see Table 15.3). What strategic preferences might have contributed to plaintiff attorneys' choices of these jurisdictions and venues?

Half of the cases were filed in the states where we would expect to find them, because the class actions were local or statewide (rather than nationwide) and the class members lived in those states (see Table 15.3). For example, the *Sacramento Cable TV late fee* case was filed in Sacramento County, California. In the other five instances, attorneys could have filed their lawsuits elsewhere because they were nationwide classes; their choices of jurisdiction were clearly strategic.

Table 15.3

Forum Choice in the Ten Class Actions

	Jurisdiction and scope of class action	Did class action attorneys file elsewhere?	Were there competing class actions?	Did similar or competing class actions affect resolution?
		Consumer Class Actions		
Roberts v. Bausch & Lomb	Federal court, Alabama, nationwide	No	Yes, 2 nationwide suits, 1 filed in CA and 1 in NY state courts	Yes, class somewhat expanded and attorneys in later cases were paid unknown amount of fees by the defendant to settle
Pinney v. Great Western	Federal court, California, statewide	Yes, parallel case later filed in state court	Yes, multistate case filed in Florida	No
Graham v. Security Pacific Housing Services, Inc.	Federal court, Mississippi, nationwide (initially filed as statewide class)	Yes, filed in 6 state courts and 2 other federal courts	No, *Graham* attorneys spearheaded all litigation	NA

Table 15.3 (continued)

	Jurisdiction and scope of class action	Did class action attorneys file elsewhere?	Were there competing class actions?	Did similar or competing class actions affect resolution?
Selnick v. Sacramento Cable	State court, California, metro-area subscribers	No	Yes, in same state court	No, competing class action was settled for a minimal amount
Inman v. Heilig-Meyers	State court, Alabama, statewide	No	No	NA
Martinez v. Allstate/Sendejo v. Farmers	State court, Texas, statewide	No	No	NA
		Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	Federal court, Illinois, nationwide	No other class actions were brought by these attorneys	None significant	NA
Atkins v. Harcros	State court, Louisiana, neighborhood residents	Yes, filed 5 other similar suits in Louisiana courts that were subsequently consolidated	No	NA
In re Louisiana-Pacific Siding Litigation	Federal court, Oregon, nationwide	No	1 previously settled statewide class action; 2 competing nationwide class actions	3 nationwide class actions joined. All attorneys participated in separately negotiated fee award
Cox et al. v. Shell et al.	State court, Tennessee, nationwide	Yes	3 competing attorney groups filed nationwide class actions in multiple federal and state courts. Other statewide class actions were also filed in various states	From first proposed settlement to final settlement, class expanded, settlement fund increased by 12 percent, and plaintiff attorney fees increased by 67 percent

Sometimes, lawyers who filed state court cases made strategic decisions about what venue *within* the state to file in. For example, the lawyers who filed the *insurance premium double rounding* case chose Zavala County—in rural and remote southwest Texas, rather than Dallas or Austin—as the site in which to pursue their litigation, and the attorneys in the *polybutylene pipes* litigation chose rural Obion County in Tennessee, rather than Memphis or Nashville.

Sometimes, the plaintiff attorneys' choice of jurisdiction was based, in part, on that jurisdiction's law. For example, in the *collateral insurance protection* case, although John Deakle lived in Mississippi, he filed his lawsuit there in part because he believed that Mississippi law was particularly favorable toward his claims against Security Pacific.

In some instances, plaintiff attorneys' forum selection strategy seemed to reflect a desire to have a particular judge preside over their case or to try the case to a jury in a particular locale. Plaintiff lawyers in the *contact lens pricing* case told us that among the factors affecting their choice of the Northern District of Alabama was that they believed they would get a fair shake from that district's judges and that a jury from that area would be favorably inclined toward their claims. John Cracken chose Zavala County—renowned locally as a plaintiff-friendly venue—for the *insurance premium double rounding* case, and hired a Zavala County lawyer to assist him who had been a high-school classmate of the presiding judge. Garve Ivey's choice of venue for the *credit life insurance* class action was fortunate; his local counsel was a judge who had recently retired from that county's bench and was reputed to have personally selected his successor. Plaintiff attorneys in the *blood products* class action wanted federal Judge John Grady to be assigned to the multidistrict litigation that ultimately led to the class action because they had been impressed by his handling of an individual liability suit against blood product manufacturers.

But often, plaintiff attorneys' jurisdiction or venue choice was driven by a desire to maintain control over their class action in the face of competition from other class action lawyers. Although Deakle preferred the federal court in Mississippi for the *collateral protection insurance* class action, he filed other class actions in other states to protect against the possibility that he would be unsuccessful in Mississippi. The plaintiff attorneys in the *chemical factory* class action took the unusual step of filing five other essentially identical class actions in local courts in the hopes of finding one court that would move the matter quickly. One set of attorneys in the *home siding* litigation filed their class action in the federal district of Oregon in expectation that, if all the class actions that had been filed in federal courts were transferred to a single federal district by the MDL panel, they would most likely be transferred to the defendant's home state, and attorneys who had already filed there would have an edge when it was time for the judge to appoint lead counsel. In the *polybutylene pipes* litigation, the first nationwide class action lawsuit, *Beeman,* was filed in Texas state court in Houston, where it progressed for 17 months until the judge presiding over the matter rejected a proposed settlement. Meanwhile, another group of attorneys who had copied the original Houston complaint almost verbatim had filed a competing nationwide class action in state court in Greene County, Alabama; they were able to get preliminary approval of a settlement class just six months later, three months after the Houston settlement was turned away by the judge. The

Beeman attorneys tried to maintain their own case by refiling it in federal court in Galveston, Texas, where they hoped to have the matter heard quickly—before the competing Alabama case was resolved—by a judge with a reputation for a fast docket. Unfortunately for them, that federal judge transferred the case to Houston, where the federal court was backlogged and moving slowly. When yet another set of class action attorneys was ready to file a third competing national class action (*Cox)*, they selected a state court in Union City, Tennessee, where they could get a class certified the day they filed the complaint.

As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues at once. But defendants then may also choose among competing lawyers—and among jurisdictions, venues, and judges—by deciding to negotiate with one set of class action attorneys rather than another.

Sometimes, attorney competition may produce a better deal for class members—but at a price. For example, in the *contact lens pricing* class action, the filing of "tag-along" cases in California and New York eventually resulted in the expansion of the class in the Alabama action to include another line of lenses and a longer purchase period. In return, the attorneys in those tag-along cases received an unknown amount of fees from defendants. When the *Cox* attorneys agreed to settle the *polybutylene pipes* litigation against Shell Oil Company and Hoechst Celanese, they initially bargained for an increase of $100 million in the settlement fund for future claims (and later added another $100 million) and an increase of $25 million in the fund to pay past claims, as compared to the settlement that had been proposed by the *Beeman* attorneys. When the defendants—fearing the tentative settlement might unravel—brokered an invitation for the *Beeman* attorneys to join with the *Cox* attorneys, attorney fees also increased, from a reported $24 million proposed in the *Beeman* case to $45 million proposed by the *Cox* group. When the third group of attorneys, who had filed a competing class action in Alabama, was brought into the *Cox* settlement, total attorney fees increased to $75 million.

In other instances, there may be no benefits to the class from the forum selection dance, but it is not clear that there are costs to the class, either. In the *collateral protection insurance* class action, the attorneys who collaborated with Deakle in filing similar cases in other jurisdictions—arguably precluding competitive class actions—received an unknown share of *his* fees, rather than an additional share of the compensation fund.

Whether forum choice ought to be constrained in damage class actions poses another dilemma for public policymakers. On the one hand, broad forum choice for class actions derives from our federal system of laws, which has deep historic roots and is a central feature of our democratic system of government. Moreover, the availability of multiple fora may sometimes provide access to

compensation through the courts to consumers who would not otherwise have redress. Whether one views this access as good or bad depends, of course, on one's perspective on the merits of using damage class actions for such redress.

On the other hand, the pursuit of multiple class actions arising out of the same facts and law increases the private and public costs of litigation, which are ultimately passed on to consumers in the price of products and services, and to taxpayers whose dollars support federal and state courts. The availability of multiple fora also dilutes judicial control over class action certification and settlement, as attorneys who are unhappy with the outcome in one jurisdiction move on to seek more favorable outcomes in another. Broad forum choice enables both plaintiff class action attorneys and defendants to seek better deals for themselves, which may or may not be in the class members' or the public's interest.

B. QUESTIONS OF MERIT

A central theme of the testimony before the Civil Rules Advisory Committee in 1996 and 1997 was the notion that a large fraction of such lawsuits "just ain't worth it"[10] because the alleged damages to class members are "trivial,"[11] "technical," or just plain make-believe. The evidence critics cited to support this claim usually concerned the amounts individual class members were offered in various class action settlements. But a class action that arose as a result of significant harm to class members could lead to very low recoveries because the lawsuit was compromised by class action attorneys and defendants. Hence, we cannot judge the seriousness of the underlying claims in class actions merely by looking at the amounts class members obtain.

To counter the notion that damage class actions involve disputes over trivial amounts, class action supporters who testified before the Advisory Committee pointed to large *total* settlement amounts, which they argued indicated the power of class actions to enforce regulations and deter the manufacture of unsafe products. But if defendants agree to pay large sums simply to cap their risks and get on with their business, without much regard to the validity of the underlying claims, aggregate payouts are not a good measure of the deterrent power of damage class actions, either.

To gauge the seriousness of the claims that underlie class actions lawsuits, we looked at the claims themselves and the allegations that parties made about practices and products, rather than at the way the claims were settled. We could not systematically evaluate the validity of every assertion or counter-assertion by the parties. But we did examine the materials in court records, and in some cases we talked not only with the litigators but also with consumer

advocates and regulators about plaintiffs' charges and defendants' counter-assertions.

The proposal to institute a "just ain't worth it" test for certification implied that deciding the value of a class action to class members might be easy. But after reviewing information about the claims underlying the ten class actions we felt like a member of the audience at a production of the Japanese drama "Rashomon." Viewed from one perspective, the claims appear meritorious and the behavior of the defendant blameworthy, but viewed from another, the claims appear trivial or even trumped up, and the defendant's behavior seems proper. The complexity of the stories behind these lawsuits and the ambiguity of the facts underlying them provide a partial explanation of why it is so difficult to reach consensus over what sorts of damage class actions should be entertained by the courts.

1. Monetary Claims

A common approach to assessing the worth of class actions is to look to the monetary values of class members' claims. Among the ten class actions we studied closely, the alleged losses to individuals ranged from less than $5 per person to death (see Table 15.4).

Table 15.4

Claims Underlying the Ten Class Actions

	Nature of alleged harm[a]	Regulators' assessment of whether practice violated the law	Estimated alleged loss to individual class members[b]	Estimated alleged gain to defendants[b]
		Consumer Class Actions		
Roberts v. Bausch & Lomb	Labeled same product differently and sold at different prices	FDA held that labeling complied with regulations; state attorneys general held practice unlawful	At retail price, loss ranged from $7 to $62 per pair; over the period covered by suit approximately $210–$310 per lens wearer	Estimated at $33.5 million by plaintiff attorneys and defendant, based on wholesale price differences
Pinney v. Great Western Bank	Encouraged depositors to convert savings to riskier investments while implying FDIC insurance	SEC reportedly conducted investigation; no public record available	Approx. $4550 per eligible claimant	Not estimated in lawsuit; Great Western reportedly drew $2.8 billion into the mutual funds

Table 15.4 (continued)

	Nature of alleged harm[a]	Regulators' assessment of whether practice violated the law	Estimated alleged loss to individual class members[b]	Estimated alleged gain to defendants[b]
Graham v. Security Pacific Housing Services, Inc.	Purchased more coverage than necessary for loan-holders, increasing premium	No regulatory action	Representative plaintiffs claimed damage ranging from several hundred dollars to nearly $1000	Not estimated. Plaintiff attorneys alleged that insurance charges were 10 times market rate
Selnick v. Sacramento Cable	Charged excessive late fees	Cable commission investigation led to change in policy	$5 per late payment; could have totaled $250 if all payments were late	$5 million
Inman v. Heilig-Meyers	Sold more coverage than needed	Insurance and banking dept. staff said practice was in compliance; supreme court held practice contravened "plain meaning" of statute	$3.83 on average	Not estimated in settlement, but probably less than $1 million
Martinez v. Allstate/Sendejo v. Farmers	Overcharged for policies	Insurance commission said current regulations were ambiguous; refused to take action but issued order requiring single rounding in future	$3 per year on average, with a maximum of $14; could have totaled $30 on average over ten years, or a maximum of $140	Estimates ranged from $18 million (defendants') to $46 million (plaintiffs'); parties compromised on $42 million
		Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	Sold HIV-contaminated products	No dispute that blood products were HIV contaminated	At time of suit, HIV infection was viewed as invariably fatal	No allegations re defendants' gain
Atkins v. Harcros	Chemical factory contaminated property around site	La. Dept. of Environmental Quality required remediation	Illnesses due to exposure, diminished property value, and fear	No allegations re defendants' gain

Table 15.4 (continued)

	Nature of alleged harm[a]	Regulators' assessment of whether practice violated the law	Estimated alleged loss to individual class members[b]	Estimated alleged gain to defendants[b]
In re Louisiana-Pacific Siding Litigation	Product deteriorated, requiring replacement	Defendant settled attorney general complaints in Oregon and Washington by paying penalties and revising advertising and warranty practices	$4367 per structure[c]	No allegations re defendants' gain
Cox et al. v. Shell et al.	Product deteriorated, requiring replacement and property repairs	Federal Trade Commission reportedly conducted investigation. No record of outcome	Costs to replumb: $1200 per mobile home; $3700 per single home[c]	No allegation re defendants' gain

[a]Based on plaintiffs' complaints. Defendants never admitted liability in any of these cases.

[b]Alleged losses and gains were the subject of contentious litigation. The numbers in this table indicate the general magnitude of losses and gains alleged by the parties in settlement negotiations and are presented to provide some general sense of the economic values at stake. In the *credit life insurance* case, individual losses were not estimated on the record; we estimated the average alleged overcharge based on public reports of class size and the total value of all premiums paid. In most of the mass tort cases, plaintiffs' claims of personal injury or property damage were disputed by defendants. For bases of parties' estimates, see case studies and Appendix E.

[c]Average value of claims paid to June 1998.

Among consumer suits, the alleged individual dollar losses ranged from an average of $3.83 in the *credit life insurance* class action[12] to an average of $4550 in the *brokerage products* class action. But averages can be deceptive. Some of those who purchased *brokerage products* allegedly lost more than $4500 and some less. Some *cable TV* subscribers may have paid a single $5 late fee, and others may have paid penalties on multiple occasions. The total amount of overcharges would have depended on how many times the subscriber paid her bill late and how much of the late fee was unjustified. Assuming that all of the $5 fee was excessive, the maximum amount of alleged overcharges would have been $250 for the 50-month period involved in the lawsuit. Some *credit life insurance* policy holders may have paid less than $1 in additional premiums. The average *Allstate/Farmers' insurance* policy holder might have paid $3 per year more than he allegedly should have, over a period of ten years, for a total of

$30 in alleged overcharges. But in some circumstances—because of the way premiums were calculated—individual per year overcharges may have been as high as $14, totaling $140 over ten years. On the other hand, some policy holders may have paid only $1 more in premiums than they allegedly should have been charged. We do not know—nor could plaintiff attorneys or defendants estimate—the total additional cost that contact lens purchasers incurred as a result of buying the higher-cost packages of Bausch & Lomb lenses. Consumers who purchased the more expensive lenses probably paid from two to nine times the price of the less expensive lenses, but they also purchased their lenses less often. Over the five-year period, consumers could have spent several hundred dollars more than they might have, had they known that the differently priced lenses were identical. We do not know the range of losses suffered by Security Pacific borrowers as a result of alleged *collateral protection insurance* overcharges. Judging from the claims of the representative plaintiffs, those who borrowed from Security Pacific incurred additional charges ranging from several hundred to nearly one thousand dollars.

When one closely examines the claims underlying the six consumer class actions we studied, it is a matter of judgment whether alleged losses to individuals are "trivial"—e.g., $3 per average class member in the Texas *double rounding* case in a single year—or *not* so trivial—e.g., $140 for Texas insurance policyholders over a ten-year period in the worst-case scenario. Whatever one's assessment of the alleged individual losses underlying the lawsuits, it is clear that, absent a class action, consumers would not have been able to obtain compensation through the courts. In all of the consumer cases the average loss was less than $5000, and in five of the six cases the average was probably less than $1000. It is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense.[13]

The individual losses alleged in the mass tort class actions that we studied varied more, in quality and quantity, when compared with the consumer class actions. In the *polybutylene pipes* case, the claims facility paid in 1997 an average of about $1200 to replumb mobile homes and $3700 to replumb site-built homes. (Defendants had estimated the costs to replumb mobile homes at $800 and site-built homes at about $4000.) In the *home siding* case, the claims facility has paid an average of about $4400 to replace a structure's siding. The claims facilities' payments are based on inspections by contractors hired by the facilities; we have no information on how well they accord with class members' own estimates of loss. Actual dollar losses were never estimated in the *blood products* and the *chemical factory* class actions, the two personal injury class actions that we studied. In the *blood products* litigation, the average damages in individual litigation—if plaintiffs had prevailed—would have been in the

hundreds of thousands or millions of dollars. If plaintiff attorneys had thought that the injured hemophiliacs had a significant chance of prevailing on liability, it is likely that those individuals would have been able to secure legal representation on a contingency-fee basis. In cases like the other three mass tort class actions that we studied, however, securing individual legal representation on a contingency-fee basis would have been more problematic, unless plaintiff attorneys were prepared to pursue individual claims in a mass but nonclass litigation. (In the *polybutylene pipes* litigation, individuals' claims were litigated successfully in mass actions, before the class action settlement.)

Small losses to consumers may add up to large gains to defendants, and (in the absence of full information for consumers) illegal, unfair, or shoddy practices may produce a competitive advantage for businesses that are willing to engage in such practices. Forcing defendants to return ill-gotten gains may send powerful deterrent signals to businesses contemplating illegal practices. But the parties made public estimates of the gains to defendants from their allegedly illegal practices in only three of the ten cases we studied—*contact lens pricing, cable TV late fees,* and the *insurance premium double rounding* litigation. The amounts varied from $5 million in the *cable TV late fee* case to $46 million (estimated by the plaintiffs) in the Texas *insurance premium double rounding* case. Whether these *were* "ill-gotten gains," of course, was never established, since the plaintiffs' claims that defendants' practices violated relevant laws and regulations were never tried.

2. Substantive Claims

As we discussed in Chapter Three, many supporters of damage class actions argue that—particularly in consumer cases—their primary objective is deterring illegal practices. Hence, in the class actions we studied, we also considered the behavior of defendants of which the class complained. The defendants' practices that led to the consumer class actions ranged from modest overcharges on individual transactions to sales practices that were allegedly calculated to deceive. Three of the mass tort class actions alleged manufacturing defects, and the fourth concerned disposal of toxic factory waste products. Whether defendants' practices violated applicable statutes, regulations, and case law was the most contentious issue in the consumer class actions we studied, an issue that was never fully resolved because none of these cases went to trial.

Depending on how one tells the story of what defendants did, they appear more or less culpable. In the *contact lens pricing* case, the defendant had been selling a lens for repeated use over the course of a year at a certain price. In an effort to recapture market share from other companies that were selling cheaper lenses for more frequent replacement, the company offered the lens that was origi-

nally designed for annual replacement, now in different packaging, for a lower price. In the company's view, it was *discounting* the price of its lens to some users. In the FDA's view, the company was complying with safety and effectiveness labeling laws, which is its only regulatory concern. In Dr. Pazen's view, the company was not disclosing to its annual-replacement lens customers that they could now buy the same lens for a lower price. To 17 state attorneys general, who settled separate lawsuits against Bausch & Lomb for $100,000 apiece, the company was engaging in misleading—and therefore illegal—sales practices.

In the *brokerage products* case, where plaintiffs alleged that class members had been misled into converting their bank deposits to more risky mutual funds, the defendant argued that written materials given to investors indicated the risks associated with the funds. The company presented evidence that a number of the class members whom its lawyers had interviewed did not believe that they had been misled. Moreover, as the bond market recovered during the litigation, the number of investors who had arguably suffered financial harm from purchasing the mutual funds fell (a consequence of market forces, not defendants' sales practices). But some class members who were interviewed during the litigation said that they had been deceived by Great Western, and more than 6000 Great Western customers ultimately submitted evidence that they had lost money from purchasing its mutual funds.

In the *collateral protection insurance* case, defendant representatives told us that they had already changed their practices regarding the amount of coverage purchased on behalf of borrowers, premium charged, and commission taken *before* the litigation, as a result of an internal evaluation. That alleged evaluation would have followed a wave of class action litigation against this and other banks alleging the same improper practices; however, the defendant's claim calls into question the deterrence function of the specific class action that we studied.

In 1996, California enacted legislation permitting late-fee charges up to $4.75 per late payment; the bill was wending its way through the legislative process as the class action lawsuit against *Sacramento Cable* for its $5 late fee moved toward settlement. Observers might, again, disagree on the import of the legislative action for assessing the cable company's behavior.

Heilig-Meyers' mode of calculating *credit life insurance premiums* was arguably sanctioned by the Alabama Banking Department and Department of Insurance, and was incontestably sanctioned by at least 14 other states. Moreover, defendants offered affidavits from staff in both departments who interpreted Alabama's regulations as permitting Heilig-Meyers' practice. When the Alabama Supreme Court held the practice illegal in 1995 (in the case Ivey argued to pro-

vide the legal grounds for the later class action), it said that plaintiffs could assert claims of fraud under a new theory of "innocent/mistaken misrepresentation."

In the *insurance premium double rounding* case, defendants offered correspondence and affidavits from Texas Department of Insurance and State Board of Insurance staff that appeared to *require* double rounding or, at least, to sanction the practice. Moreover, the Commissioner of Insurance said that the Department's regulations regarding rounding were ambiguous, and the Department ultimately held public hearings and adopted new regulations to clarify the rounding rules. But consumer advocates and plaintiffs' attorneys claimed that the former staff members who provided correspondence and affidavits authorizing double rounding had been improperly swayed by the insurance industry.

In three of the four mass tort class actions we studied, defendants did not contest plaintiffs' assertions that the products involved were defective, although defendants did contest their liability for these defects. The battles over scientific evidence that have characterized many high-profile mass tort class actions—and that go to the heart of the question of their merit—were largely absent from these cases.

In the *blood products* case, defendants conceded that their products were contaminated with HIV and that hemophiliacs who contracted AIDS after using the products most likely did so as a result of this contamination. However, defendants claimed that they distributed the products at a time when it was not generally known that HIV infection was carried by blood. Perhaps more important, they claimed the statutory protection accorded their products in most states, which deems that blood products are not to be treated as "products" for purposes of product liability litigation.

In the *polybutylene pipes* case, defendants agreed that the products failed under some circumstances, although in most of the early litigation the defendants pointed the finger at each other, each claiming that a different part of the manufacturing and installation process was implicated in the failures. Ultimately, a group of manufacturers and material suppliers established a consumer complaint organization that offered plumbing repairs outside the litigation context. In the *home siding case,* Louisiana-Pacific claimed that any problems with its product were traceable to poor installation and inadequate maintenance; however, like the PB pipes defendants, the company attempted to handle consumer complaints outside the litigation context through their warranty program and arbitration.

Defendants in the New Orleans *chemical factory* case did not contest that chemicals had been spilled near the factory, but assembled experts to testify that there was no credible evidence of heightened rates of illness in the factory

neighborhood. Had the case gone to trial, there would have been a classic "battle of experts" over the issue of injury causation.

Although many of these class action lawsuits were vigorously contested, at the time of settlement there was still considerable uncertainty about defendants' culpability and plaintiff class members' damages. To us, it seems unclear which, if any, of the ten class actions "just weren't worth it"—and which were. In principle, when disputes are litigated, we rely on judges or juries to decide the merits of the dispute. In the absence of adjudication, the merits of any class action will inevitably be a matter of controversy.

C. WHO BENEFITS?

The notion that class action attorneys are the prime beneficiaries of damage class actions is widespread. Tales abound of lawsuits in which class members receive checks for a few dollars—or even a few cents!—while lawyers reap millions in fees. The "aroma of gross profiteering" that many perceive rising from damage class actions troubles even those who support continuance of Rule 23(b)(3) lawsuits and fuels the controversy over them.

Among the damage class actions we studied, we found enormous variety in the amounts of money that class members received and in the suits' nonmonetary consequences. Class action attorneys received substantial fees in all of the suits, but both the amount of their fees and their share of the monetary funds created as a result of the settlements varied dramatically.

The wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion's share of settlements. But what we learned about the process of reaching these outcomes suggests that class action attorneys were sometimes simply interested in finding a settlement price that defendants would agree to—rather than in finding out what class members had lost, what defendants had gained, how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement against that background. Such instances call into question the validity of claims about the social utility of class actions, which depends on how effectively the lawsuits compensate injured consumers and—many would argue—deter wrongful practices. Moreover, among the class actions we studied, some settlements appeared at first hearing to provide more for class members and consumers than they actually did, and plaintiffs attorneys' financial rewards sometimes were based on the settlements' apparent value rather than on the real outcomes of the cases. Such outcomes contribute to public cynicism about the actual goals of damage class actions when compared with the aspirations articulated for them by class action advocates.

1. What Defendants Agreed to Pay Class Members

Figure 15.1 shows the amount defendants agreed to pay to class members to compensate them for their losses (excluding attorney fees and other expenses), for nine of the ten class actions we studied.[14] The figure omits the amount of compensation that the defendant agreed to pay class members in the *credit life insurance* class action because that amount was not included in the settlement agreement approved by the judge or in any other pleadings filed with the court. Later in this chapter we will present some information about the *credit life insurance* settlement that we were able to obtain from other sources.

In the nine class action settlements, the total compensation pledged to class members ranged from just under $1 million in the *cable TV late fee* lawsuit to more than $800 million in the *polybutylene pipes* lawsuit. In the *contact lens pricing* settlement, half of the amount the defendant agreed to pay was in the form of discount certificates—i.e., coupons. Depending on how one values those coupons, the total promised compensation to class members in that settlement ranged between $33.5 million and $67 million.

In approving class action settlements, judges must consider their "adequacy" and "fairness." Comparing a proposed settlement amount with the estimated class losses provides a partial basis for such an assessment; the judge must also take into account how likely it is that the plaintiff class would prevail at trial since that goes to the issues of adequacy and fairness. However, for most of the

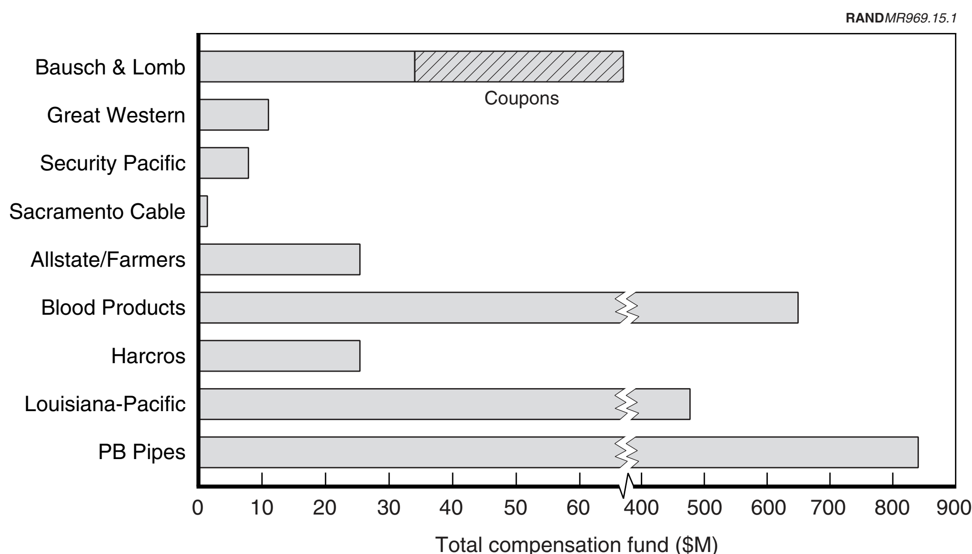


Figure 15.1—What Defendants Agreed to Pay to Compensate Class Members (Evidence from Nine Class Actions)

class actions we studied, we could not compare the proffered compensation with aggregate loss because the attorneys never offered a public estimate of these losses.

In the *contact lens pricing* negotiations, the plaintiff attorneys and defendants threw up their hands at trying to estimate individual class members' losses from the allegedly inflated retail prices, and settled on a compromise estimate of the gains to the defendants from its pricing strategy, measured by differences in wholesale prices between the different types of lenses. In the *collateral protection insurance* and *credit life insurance* class actions, we could not find any estimates of class members' average losses in the court record (although in the latter case we estimated losses from financial reports).

In the two mass tort personal injury class actions, the *blood products* and *chemical factory* lawsuits, the settlement amounts were reached according to formulae whose relationship to loss was ambiguous. In the *blood products* settlement, each claimant received an *equal* amount without regard to his or her state of health. Half of the claimants who ultimately came forward were family members of HIV-infected hemophiliacs who had already died. The $100,000 each received was a small fraction of the value that government regulators typically assign to loss of life.[15] In the *chemical factory* class action, the special master devised an elaborate formula for compensating different types of claims. Claims for "fear" and "toxic exposure" were compensated according to where the claimant lived and how long he or she had lived in that area, but these claims did not require any medical evidence of harm. Claims for specified illnesses did require evidence of the relevant medical diagnosis, but the claims were compensated according to a point system that did not require claimants to present evidence of medical costs, work loss, and the like. In addition, plaintiffs never established that the claimed illnesses were associated with toxic exposure to the factory's chemical products.

In the two mass tort property damage class actions, *home siding* and *polybutylene pipes*, the defendants agreed to pay actual damages (as established by independent inspectors in accordance with rules negotiated as part of the settlement) to all class members who come forward over a period of 7 and 14 years, respectively, following the final approval of the settlements. The two settlements were negotiated by the same group of attorneys and share key features. In the *home siding* settlement, Louisiana-Pacific agreed to establish a $275 million fund to cover the first seven years' claims, and to optionally add perhaps another $200 million or more to cover payments to any additional claimants; expenses for administering the funds were to be paid on top of this cap. In the *polybutylene pipes* settlement, Shell and the other defendants committed to pay all valid claims and any administration costs up to a maximum of $950 million. In both cases, any class members who claim after the aggregate amounts de-

fendants agreed to are exceeded will be free to file lawsuits against the defendants. In the *home siding* case, defendants presented expert evidence on loss estimation at the fairness hearing, but because of the structure of the settlement the experts' analysis does not appear to have influenced settlement negotiations; in the *polybutylene pipes* lawsuit, we could not find any estimate of total losses to consumers in the public record.

In three cases, *brokerage products, cable TV late fees,* and *insurance premium double rounding*, plaintiff attorneys developed analytic approaches for estimating plaintiffs' losses that were used as a basis for negotiations. Figure 15.2 displays the proportion of total estimated losses that defendants agreed to pay class members in each of these cases. Across the three cases, the proportion of total losses defendants pledged to pay ranged from a low of 13 percent in the c*able TV late fee* settlement (assuming that *none* of the late fee was legitimate—a worst-case scenario) to a high of 61 percent in the *insurance premium double rounding* settlement.[16]

2. What Class Members Actually Received

Judges evaluate the adequacy and fairness of settlements, in part, on the basis of how much defendants have agreed to pay class members. But what class members *actually* receive may differ substantially from that amount. The total amount of compensation dollars collected or projected to be collected by class

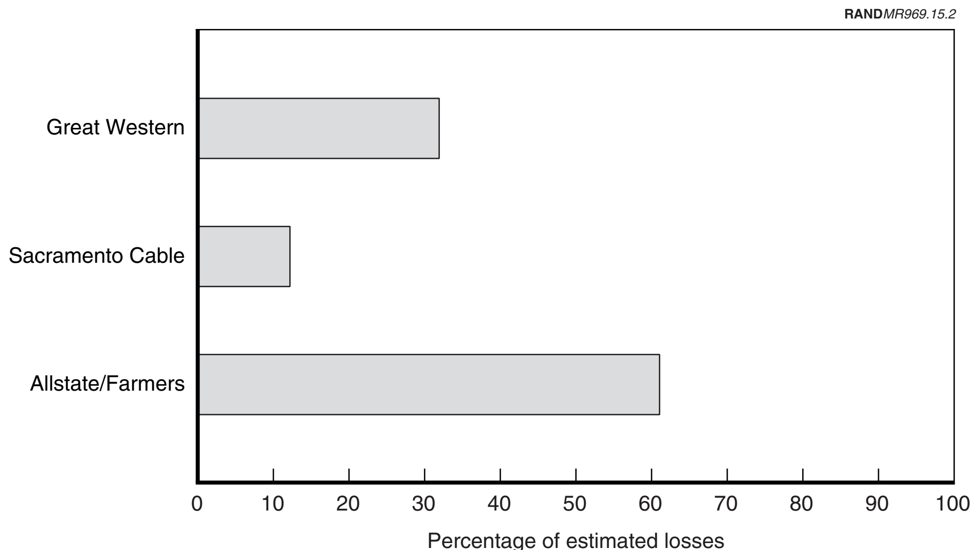


Figure 15.2—How Promised Compensation to Class Members Compared with Estimated Losses (Evidence from Three Class Actions)

members in the cases we studied ranged from about $270,000 to about $840 million. In the six consumer class actions, the average amount collected by class members ranged from a low of $5.75 in the *insurance premium double rounding* case to a high of about $1500 in the *brokerage products* case. In the four mass tort cases, average payments have ranged from about $1400 (to date) in the *polybutylene pipes* lawsuit to $100,000 in the *blood products* case (see Table 15.5).

Actual payments are a function of the number (and, in some cases, the characteristics) of the class members who come forward to claim compensation. Figure 15.3 shows how the total amounts disbursed to class members compare to the total amount of compensation defendants offered in the nine class actions where we could obtain this information either from court records or from other sources. Despite the small number of cases included in our analysis, we found considerable variation in disbursement rates. In two instances—the *brokerage products* and the *chemical factory* class actions—all or almost all of the monies set aside for compensation have been claimed by class members. In four other class actions, it appears that all or almost all of the funds committed by the defendants for class compensation will ultimately be claimed. In the *home siding* class action, over $457 million in claims have already been submitted and inspected, an amount that exceeds the $275 million in the initial seven-year

Table 15.5

Amount of Compensation Collected by Class Members

	Total Amount Collected ($M)	Average Cash Payment ($)
Consumer Class Actions		
Roberts v. Bausch & Lomb	$9.175[a]	Unknown
Pinney v. Great Western Bank	$11.232	$1478.89
Graham v. Security Pacific Housing Services, Inc.	$7.868[c]	$130.71[c]
Selnick v. Sacramento Cable	$0.271	$35.58
Inman v. Heilig-Meyers	$0.272[b]	$45.79[b]
Martinez v. Allstate/Sendejo v. Farmers	$8.914	$5.75
Mass Tort Actions		
In re Factor VIII or IX Blood Products	$620.000[c]	$100,000.00
Atkins v. Harcros	$25.175	$6404.22
In re Louisiana-Pacific Siding Litigation	$470.054[c]	$4367.27[d]
Cox et al. v. Shell et al.	$838.000[c]	$1433.29[d]

[a]Uses midpoint of estimated range ($3.75M to $14.6M) of cash compensation based on financial reports and other public documents.

[b]Information not from public records.

[c]Projected.

[d]To June 1998.

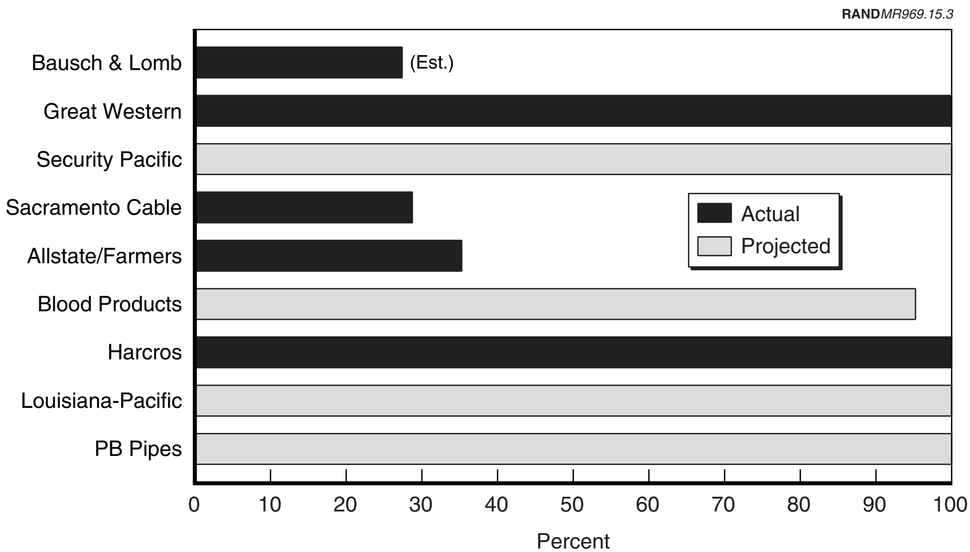


Figure 15.3—What Proportion of the Compensation Fund Class Members Received (Evidence from Nine Class Actions)

fund only two and a half years after the settlement was finally approved (and is rapidly approaching the $475 million figure used as a benchmark for the maximum potential pay-out).[17] In the three other class action settlements in which defendants committed to paying specified amounts to or satisfying claims of all eligible class members who came forward (*collateral protection insurance, blood products,* and *polybutylene pipes*), it also appears that all or almost all of the funds either committed or anticipated will ultimately be paid out.

In at least three instances, class members claimed less than half of the funds set aside for compensation. In the *contact lens pricing* case, based on the company's SEC filings and other information, we estimate that less than 30 percent of the dollars offered for compensation were ultimately collected; we presume that an equivalent amount of the coupons were collected by those who claimed cash payments, but these coupons may or may not have been redeemed.[18] According to public records in the *cable TV late fee* class action, about 30 percent of that compensation fund was disbursed to class members. In the *insurance premium double rounding* class action, 35 percent of the compensation fund was disbursed, although 100 percent of the funds allocated for current and recent policy holders was collected by them. The modest fraction of the total fund disbursed is attributable to the fact that *less than 1 percent* of the fund allocated to compensate previous policy holders was ever claimed. In addition, although there is no official record of disbursements in the *credit life insurance* class action, based on information made available to us, we suspect that the

amount of money ultimately disbursed to class members in that lawsuit also was less than half the amount the defendant was prepared to pay when the case was settled.

3. Other Monetary Benefits

Sometimes class action settlements produce monetary benefits that are not strictly construed as compensation to class members. In four of the cases we studied, plaintiff class action attorneys negotiated settlement provisions that provided additional amounts to class members or others, beyond those intended strictly for compensation. In a fifth case, a provision for such payment was required by state law.

In the *credit life insurance* class action, defendants agreed to set aside a $250,000 "supplementary fund" (which plaintiffs' attorneys viewed as punitive damages) that claimants would share equally, in addition to whatever they would collect in compensation for losses. Because only about 6000 claimants came forward, and the individual losses that could be attributable to this defendant were, on average, less than $4, the supplementary fund accounted for most of the money Heilig-Meyers ultimately paid out. Had the settlement been limited to compensatory funds, the corporation would have paid about $22,000 in addition to legal and administrative fees and expenses. In the *insurance premium double rounding* and *chemical factory* class actions, there were contributions of $2 million and $1 million, respectively, to community funds. In the *insurance premium double rounding* class action, the state attorney general required the additional payment because he thought the total amount the companies would pay under the settlement otherwise would be too low. In the *chemical factory* class action, the plaintiffs' attorneys viewed the additional payment as a form of punitive damages.[19] In the *blood products* case, class counsel negotiated a provision of the settlement under which defendants agreed to pay the federal government $12.8 million for the release of third-party claims for reimbursement of health care costs (e.g., Medicare, Medicaid) and agreed to pay an additional $30–$40 million to private insurers for release of third-party claims. Without these provisions, class members would have been liable to reimburse these expenses from their $100,000 shares of the settlement. In the *cable TV late fee* case, the portion of the compensation fund that was not claimed by class members—which turned out to be the majority of the dollars allocated for compensation—was donated to a judge-selected nonprofit organization, under a state law that requires such distribution, rather than returned to the defendant.

4. Nonmonetary Consequences

Whether regulatory enforcement is a proper objective for damage class actions is a subject of sharp dispute. But parties sometimes claim that regulatory enforcement benefits will flow from proposed settlements when they seek judicial approval and attorney fee awards. Measuring such benefits can be difficult: Although some defendants may publicize changes in practice in response to litigation,[20] others may not want to reveal such changes. Also, defendants may change their practices *before* litigation is filed, to avoid paying higher damages or to try to avoid litigation altogether; this shadow effect of litigation cannot be captured merely by asking what happened as a result of a particular lawsuit.

The class actions we studied present a mixed picture with regard to changes in practice (see Table 15.6). In all six consumer cases, the litigation was associated with changes in practice. In four of the six cases—*contact lens pricing, brokerage products, credit life insurance,* and *insurance premium double rounding*—the evidence strongly suggests that the litigation, directly or indirectly, produced the change in practice. In the two other lawsuits, the evidence on the role of the litigation in changing the practice is more ambiguous: In the *collateral protection insurance* class action, the defendant said that it had changed its practice before the class action that we studied had been filed; in the *cable TV late fee case,* a regulatory investigation was already under way when the class action was filed.

Table 15.6

How the Ten Class Actions Affected Defendants' Practices

	Was there a change in practice?	What was timing of change in relation to litigation?	Was there other regulatory enforcement activity?
	Consumer Class Actions		
Roberts v. Bausch & Lomb	(1) Packaging changed to indicate that different lenses were identical; (2) notices to practitioners advised of repackaging; (3) different lens names dropped	Packaging changed and notices sent after suit was filed, but before settlement. Different lens names dropped after class action settlement	State attorneys general investigations started after initial publicity. Attorneys general lawsuits settled for $1.7 million after class action was settled, and after different lens names had already been dropped
Pinney v. Great Western Bank	Sales practices within bank branches changed to better distinguish bank and brokerage employees; disclosure materials became more detailed	Defendant press release announcing settlement details changes in practice, but does not say when these occurred	Reported SEC investigation, but no reported outcome

Table 15.6 (continued)

	Was there a change in practice?	What was timing of change in relation to litigation?	Was there other regulatory enforcement activity?
Graham v. Security Pacific Housing Services, Inc.	Defendant eliminated unnecessary coverage and commissions	Practices were changed prior to this class action commencing, but probably as a result of prior class action litigation	No
Selnick v. Sacramento Cable	Defendant extended "grace period"; legislative provision now permits late fees up to $4.75 without need to show justification	Change in grace period occurred after lawsuit was filed, but before it settled. Late fee charges continued up until settlement date	Cable commission investigation may have led to change in grace period that occurred after investigation commenced. Legislation validated late fees of close to amount defendant was charging
Inman v. Heilig-Meyers	Defendant stopped gross premium sales. State law now prohibits including unearned finance charges in credit life premiums; legislation limits penalties for overcharging	Heilig-Meyers halted practice immediately after Alabama Supreme Court ruling in a different case, before settlement was reached	After lawsuit was filed, supreme court held that practice was illegal and that defendant could be held retroactively liable
Martinez v. Allstate/Sendejo v. Farmers	Defendants changed their premium calculation to eliminate double rounding	Practice changed after lawsuit was filed, one month before agreeing to settle	Mandatory change in premium calculation method ordered by Texas Department of Insurance to take effect prior to final settlement approval
		Mass Tort Class Actions	
In re Factor VIII or IX Blood Products	Manufacturers now screen for HIV and heat-treat blood products	Screening practices changed and heat treatment adopted about a decade before class action was filed	New standards for blood collection issued by FDA in 1983
Atkins v. Harcros	Chemical factory closed in 1986; remediation commenced in 1989	Remediation preceded filing of class action	Remediation ordered by Louisiana Department of Environmental Quality

Table 15.6 (continued)

	Was there a change in practice?	What was timing of change in relation to litigation?	Was there other regulatory enforcement activity?
In re Louisiana-Pacific Siding Litigation	Product is still on market, but design and manufacturing processes have changed	Changes in product manufacturing followed initiation of state attorney general suits and class actions	Washington state attorney general suit resulted in $350,000 in civil penalties and lawyer fees and costs, contribution of $1 million to Washington State University for wood materials research. Oregon attorney general suit resulted in $505,000 contribution to state consumer education fund. Informal agreement with Florida attorney general led to $850,000 in donations to Florida A&M University
Cox et al. v. Shell et al.	Raw material no longer manufactured for use in plumbing in the United States	Most manufacturers stopped making product for U.S. plumbing market before class actions. However, Shell stopped after national class actions were filed	Press report of FTC inquiry in 1991. No outcomes reported

In two of the consumer cases—*credit life insurance* and *insurance premium double rounding*—the class action or associated litigation also led to changes in state law that protect consumers. In addition, cases similar to the *cable TV late fee* class action, alleging excessive late fee charges by other cable companies, may have led California to adopt legislation setting a limit on late fees; whether this legislation should be termed "pro-consumer" or "pro-business" is unclear.

In three of the mass tort cases we studied, the class litigation followed removal of the product from the market or change in the product: The Harcros chemical factory was closed three years before litigation commenced, the blood product manufacturers began testing for HIV and heat-treating their products in the 1980s, and the manufacturers of raw material for polybutylene pipe fittings stopped distributing their product in the United States by the mid-1990s. However, individual litigation that preceded the class actions contributed to the cessation of polybutylene pipe manufacturing. In the *home siding* case, the manufacturers changed the product (which is still marketed) to reduce its susceptibility to water damage after the state attorneys general investigations and litigation commenced. In Washington and Oregon, the state attorneys

general enjoined the company from promoting its product for exterior use without substantiation.

5. What Class Action Attorneys Received

Attorney fees are the lightning rod in the controversy over damage class actions. In the ten cases that we studied, awards to class action attorneys for their fees and expenses ranged from about half a million dollars to $75 million (see Table 15.7). (Note that we could not obtain data on how much defense attorneys earned from these lawsuits, because these fees were not a matter of public record and most defendants were unwilling to share the information with us.)

How should we assess these fees? Critics often compare the amount of fees awarded to attorneys to the amounts received, on average, by class members. As shown in Table 15.7, in the class actions we studied—as in most damage class actions—this ratio was huge. But, under law, attorneys are paid for what they accomplish *for the class as a whole*, not just for an individual class member. Hence, the issue is not how class counsel fees compare to payments to individual class members, but rather how the fees compare to the "common benefit" produced by the class action attorneys' efforts.

Table 15.7

Amounts Awarded to Class Counsel for Fees and Expenses, Compared with Average Cash Payment to Class Members

	Class Counsel Award for Fees & Expenses ($M)	Average Cash Payment ($)
Consumer Class Actions		
Roberts v. Bausch & Lomb	$8.500	Unknown
Pinney v. Great Western Bank	$5.223	$1478.89
Graham v. Security Pacific Housing Services, Inc.	$1.920	$130.71[a]
Selnick v. Sacramento Cable	$0.511	$35.58
Inman v. Heilig-Meyers	$0.580	$45.79[b]
Martinez v. Allstate/Sendejo v. Farmers	$11.288	$5.75
Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	$36.500[a]	$100,000.00
Atkins v. Harcros	$24.900	$6404.22
In re Louisiana-Pacific Siding Litigation	$25.200	$4367.27[c]
Cox et al. v. Shell et al.	$75.000	$1433.29[c]

[a]Projected.

[b]Information not from public records.

[c]To June 1998.

What the ratio of fees to common benefit is depends on how one defines that benefit. Under law, the common benefit is measured by the total monetary value of the settlement—that is, the total amount defendants agreed to pay to settle the lawsuit.[21] In the nine cases for which we know both the total amount of the negotiated settlement and the total amount awarded or set aside for class counsel, class counsel fees and expenses ranged from 5 percent of the total dollars defendants agreed to pay to settle the lawsuit to about 50 percent of the total settlement value (see Figure 15.4). Judges sometimes use one-third of the settlement value as a benchmark for awarding class counsel fees; consistent with this practice, in eight of the nine cases, class counsel received one-third or less of the total settlement value. In the tenth case *(credit life insurance)* it does not appear that the judge was provided with any means for comparing the fee request with this benchmark, because there was no public estimate of the aggregate common benefit.

But, as we have seen, defendants do not always pay out the full amount of the negotiated settlement because some class members do not come forward to claim their share and the residual funds revert to the defendant. When we consider actual dollars paid out, we find that class counsel received one-third or less of the *actual* settlement value in six of the ten cases; in the remaining four

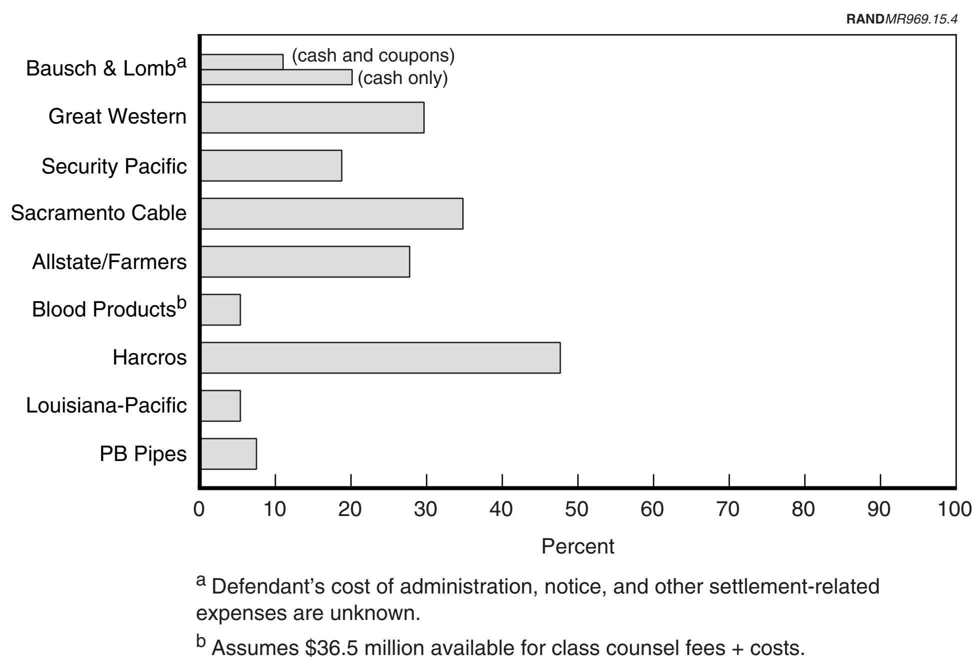


Figure 15.4—Class Counsel Fees and Expenses as a Percentage of Negotiated Settlement Value (Evidence from Nine Class Actions)

cases, class counsel's share of the settlement was about one-half (see Figure 15.5). (Because we were able to learn the amount that the defendants actually paid out in the *credit life insurance* settlement, we have included that lawsuit in this figure, although we did not include it in Figure 15.4.)

The notion that it is appropriate for class counsel to receive one-third of a class action settlement probably derives from individual plaintiff attorneys' practice of charging their clients a one-third contingency fee in ordinary personal injury litigation. Because class action settlements may involve substantial allocations for administrative costs, class counsel who receive one-third of the total settlement value may actually receive a larger share of the combined total amount of fees and compensation to class members—arguably, the more appropriate basis for comparing their financial rewards to those of plaintiff attorneys in ordinary civil litigation.

Figure 15.6 compares class counsel's share of benefits, defined in this fashion, to the shares received by plaintiff attorneys in ordinary and complex nonclass civil litigation calculated in an identical fashion. In previous research, analysts have found that plaintiffs' attorneys' fees generally average 30 to 35 percent of what plaintiffs receive in settlement, except in instances like aviation accident cases where there is fierce competition among plaintiff attorneys for clients and

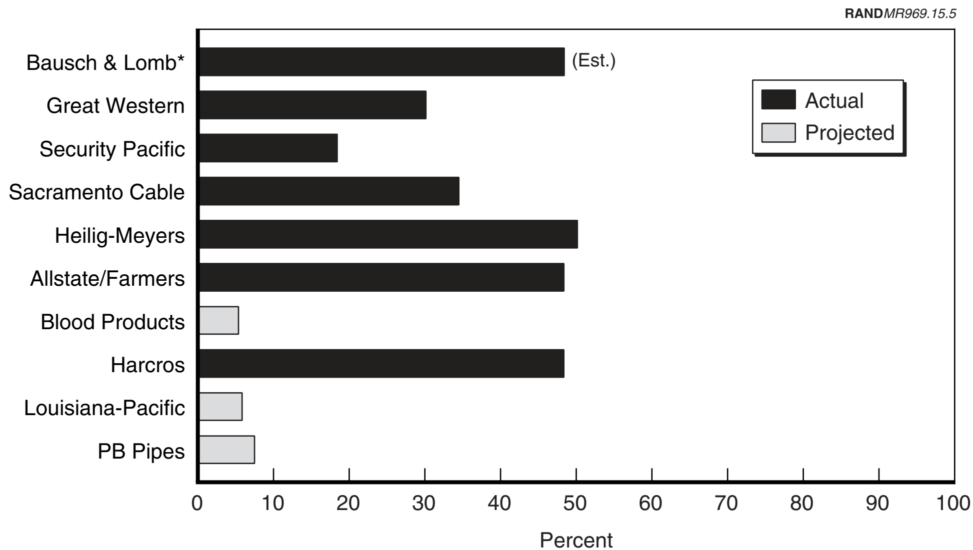


Figure 15.5—Class Counsel Fees and Expenses as a Percentage of Actual Settlement Value

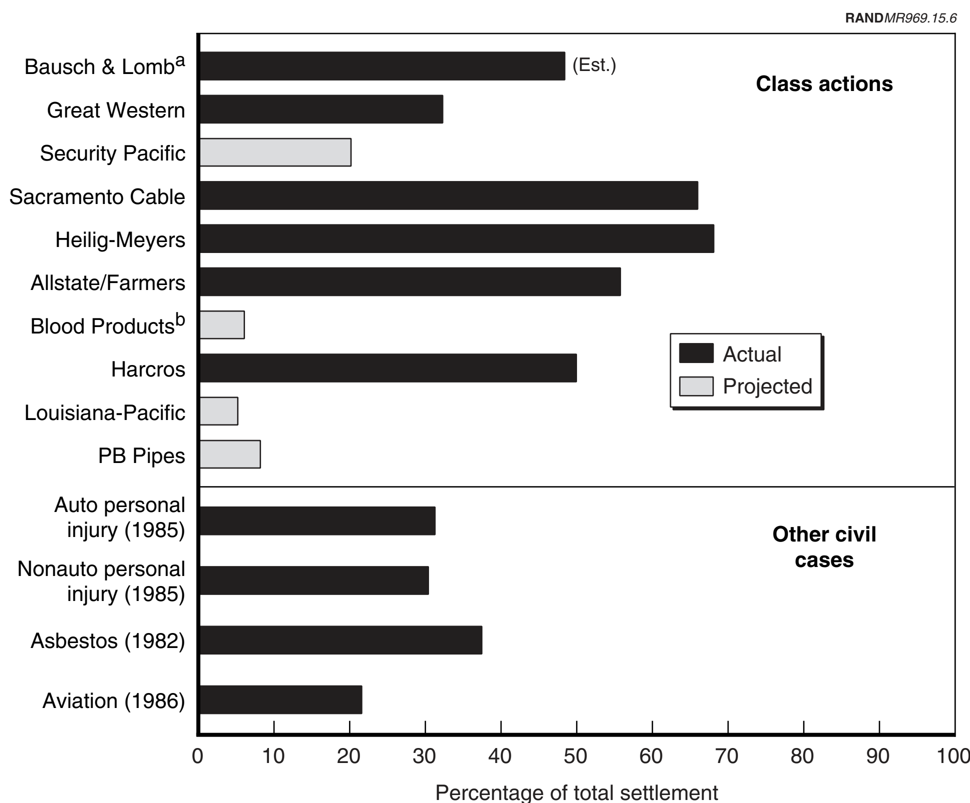


Figure 15.6—Class Counsel's Share of the Sum of Class Benefits and Attorney Fees Compared to Plaintiff Attorney Shares in Other Civil Cases

cases are typically settled for large amounts. In four of the ten class actions we studied, class counsel received (or will receive) much less, proportionally, than attorneys who represent plaintiffs in ordinary litigation. Three of these four cases were mass tort class actions that resulted in large aggregate settlements; in the fourth (*collateral protection insurance)*, class counsel's share of the settlement would have been far larger—at least four times the total payout to class members—had Trial Lawyers for Public Justice not intervened in the settlement process. In a fifth case (*brokerage products*), class counsel received about the same share as attorneys who represent plaintiffs in ordinary litigation. In the other five cases, four of which were consumer class actions, class counsel received much *more*, proportionally, than attorneys who represent plaintiffs in ordinary litigation. In three of these consumer cases, class counsel received more than what class members collected *altogether*.

D. TRANSACTION COSTS

Claims about high transaction costs are not unique to class action litigation—civil litigation in the United States is generally characterized by high costs for lawyer fees and other legal expenses. In addition to legal fees and expenses, the transaction costs of a lawsuit include the costs that parties incur for their own (and, in the case of corporations, their employees') participation in the litigation, and the time of judges and other court personnel to manage and resolve the litigation. In damage class actions, transaction costs include not only all of these expenses, but also the cost of designing, mailing, and publishing notices; costs to administer and disburse settlement funds and any other funds paid out as a condition of settlement; and any fees paid to others, such as court-appointed masters and expert witnesses. In mass tort class actions, there may be both class counsel fees and expenses and fees and expenses for individually retained plaintiff attorneys. In some cases, judges may award fees to objectors as well.

For most of the ten class actions we studied, we were able to assemble information from public records and interviews about class counsel's fees and expenses, the cost of pre- and post-settlement notices, and costs to administer and disburse settlement funds. However, these costs were not reported consistently, which complicated comparisons across lawsuits. Unless the court played some role in setting the fees of individually retained attorneys in mass tort class actions, we do not have information about this component of transaction costs, which would normally be paid by those class members who retained counsel out of their share of the settlement. For most of the cases, we were not able to collect information about *defendants'* legal fees, or costs of in-house counsel, which are not a matter of public record and which defendants in those cases declined to share with us.[22] We also do not have any information about defendants' indirect costs of litigation, such as management time devoted to the litigation. Courts generally do not keep detailed records of time spent on specific lawsuits, so we do not have information about judges' and other court staff's time spent on the cases we studied. But generally, court costs for civil litigation account for a very small fraction of total transaction costs.[23] We did collect information on special masters' fees, which unlike judge time are often charged to the parties. In sum, *our estimates represent a lower bound on both the total price tag to settle these cases and the transaction costs*.

1. What Was the Price Tag to Resolve the Suits?

Table 15.8 shows our best estimates of what defendants actually paid, or will ultimately pay, in the class actions we studied, including payments to class members and nonclass beneficiaries (e.g., cy pres awards), class counsel and other plaintiffs' attorneys, objectors and special masters (if any), and payments

Table 15.8

The Price Tag to Resolve the Ten Class Actions, Not Including Defendants' Own Legal Fees and Expenses

	Total[a] ($M)	Transaction Costs[b] ($M)
Consumer Class Actions		
Roberts v. Bausch & Lomb	$17.675[c,d]	$8.500[d]
Pinney v. Great Western Bank	$17.200	5.968
Graham v. Security Pacific Housing Services, Inc.	$10.500	$2.632
Selnick v. Sacramento Cable	$1.500	$0.571
Inman v. Heilig-Meyers	$1.152[e]	$0.880
Martinez v. Allstate/Sendejo v. Farmers	$23.695	$12.463
Mass Tort Actions		
In re Factor VIII or IX Blood Products	$695.000[f]	$40.000[f]
Atkins v. Harcros	$51.575	$25.400
In re Louisiana-Pacific Siding Litigation	$516.300[f]	$46.246[f]
Cox et al. v. Shell et al.	$1042.448[f]	$204.448[f]

[a]Includes all payments to class members and other beneficiaries, class counsel and other plaintiff attorney fees, notice costs, settlement administration, special master fees, and related costs.

[b]Includes all payments to class counsel and other plaintiff attorneys, notice costs, settlement administration, special master fees, and related costs.

[c]Class compensation component uses midpoint of range estimated from financial records and other public documents. Does not include coupon benefits.

[d]Defendants' costs of settlement administration and notice are unknown.

[e]Amount of actual class compensation not from public records.

[f]Projected.

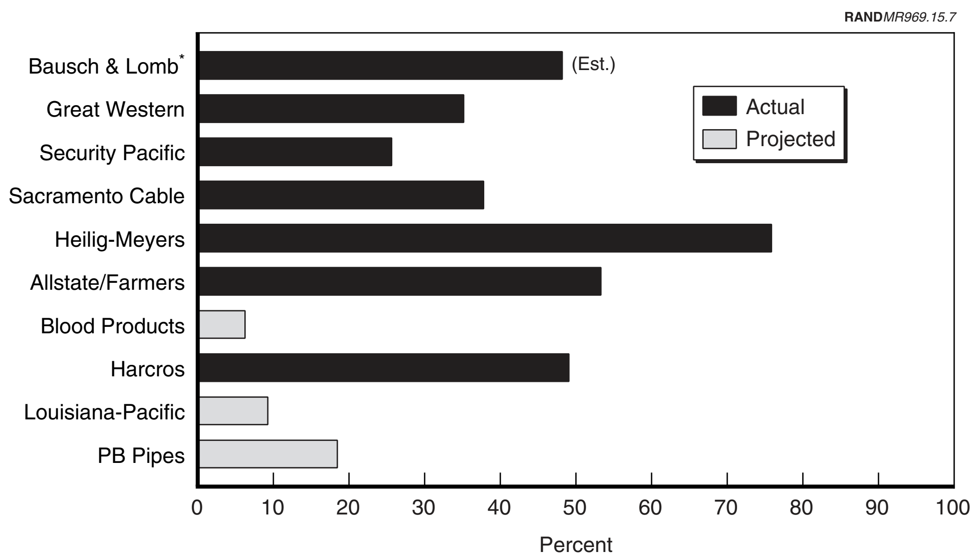
for notices and settlement fund administration, but not including defendants' own legal fees and expenses. The first column of the table shows the total price tag, exclusive of defendants' own legal fees and expenses, and the second column separates transaction costs from the total. Total costs, not including defendants' own legal fees and expenses, ranged from just a bit over $1 million, in the *credit life insurance* class action, to over $1 billion in the *polybutylene pipes* class action. The highest price tags were in the four mass tort class actions, the lowest in the consumer class actions. Transaction costs ranged from a bit more than half a million dollars in the *cable TV late fee* class action to more than $200 million in the *polybutylene pipes* litigation. Again, the highest transaction costs were in the mass product class actions and the lowest in the consumer class actions.

2. What Share of the Bill Was for Transaction Costs?

When we consider what share of the total bill, not including defendants' own legal fees and expenses, was spent on transaction costs, a striking pattern

emerges. As a share of the total bill, excluding defendants' legal fees and expenses, transaction costs were lowest in three of the four mass tort class actions, and highest in the consumer class actions (see Figure 15.7). Transaction costs accounted for about half or more of defendants' expenditures (excluding their own fees) in four of the ten class actions, and about one-quarter or less in another four lawsuits; in the remaining two suits, transaction costs accounted for about one-third of the bill. As a share of the total bill, excluding defendants' legal fees and expenses, transaction costs were lowest when the total price tag was highest.

The absence of defense costs from the expense accounts makes interpreting the patterns shown in Figure 15.7 difficult. For example, if defendants' own legal fees and expenses were higher in the mass tort class actions than in the consumer class actions—as they may well have been, given the complexity of this litigation—then the real shares for transaction costs in these class actions may have been as large or larger than the transaction cost shares in the consumer class actions. Of course, Figure 15.7 also does not show the defendants' share of transaction costs in the consumer class actions.



NOTE: Transaction costs include payments to plaintiffs' attorneys and costs of administration, notice, and other expenditures.

*Defendant's costs of administration, notice, and other settlement-related expenses are unknown. Excludes coupon benefits.

Figure 15.7—Proportion of the Settlement, Excluding Defendants' Own Legal Fees and Expenses, Attributable to Transaction Costs

For two of the consumer class actions, *credit life insurance* and *insurance premium double rounding*, defendants did report their outside legal counsel fees and expenses to us. In the former lawsuit, these fees and expenses increased transaction costs by just over 10 percent. In the latter, however, defendants' own legal fees and expenses increased transaction costs by more than a third. In the *brokerage products* class action, we obtained an estimate of defense fees from a local news report;[24] using this estimate, outside defense fees increased transaction costs by about 85 percent. This suggests that *total* transaction costs (*including* defendants' legal fees and expenses) in the remaining lawsuits for which we could not collect defense legal expenses could be either just a bit more than the numbers shown in Figure 15.7 or substantially higher.

3. Transaction Cost Components

Critics of damage class actions often focus on class counsel fees, but they are only one component of transaction costs. What components of transaction costs loomed largest in the lawsuits for which we were able to obtain a more complete estimate of dollars paid out by defendants? In these three class actions, plaintiff attorney fees and expenses accounted for 50–60 percent of the transaction costs that defendants paid (see Figure 15.8). In the *credit life insurance* class action, most of the remaining transaction costs were attributable to the costs of notice and settlement fund administration. But in the *insurance premium double rounding* and *brokerage products* lawsuits, the remaining costs were mostly attributable to defense legal fees and expenses.

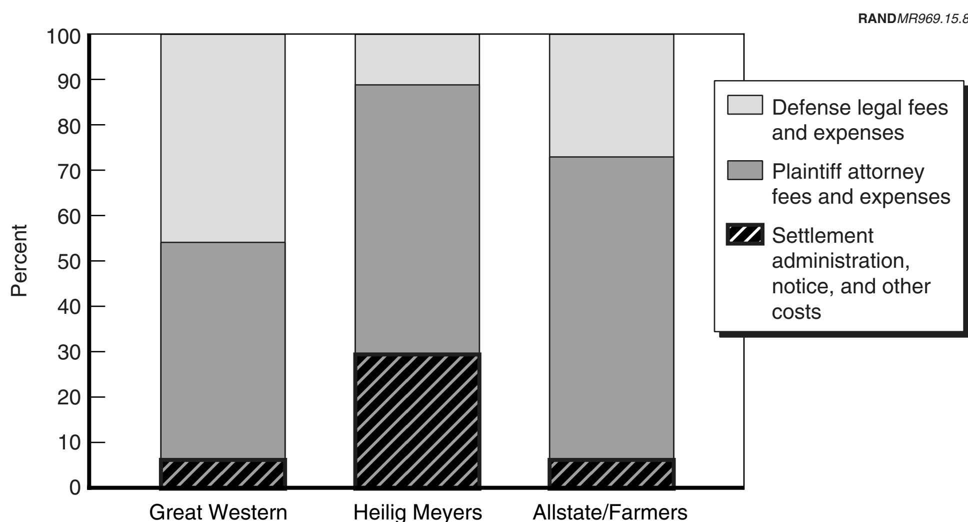


Figure 15.8—Components of Transaction Costs Paid by Defendants (Evidence from Three Class Actions)

Viewed from another perspective, in the *credit life insurance* class action, the defendant's outside legal fees and expenses were about one-fifth the amount awarded for class action attorney fees and expenses; in the *double rounding* class action, the defendants' outside legal fees and expenses were about two-fifths the amount awarded to the class action attorneys, and in the *brokerage products* class action, defense fees and expenses were just about equal to class action attorney fees and expenses. (Recall that we are referring here to court-awarded attorney fees and expenses; in many instances, class counsel claim that their actual investment in class action litigation is greater than the amount awarded to them by the court.) The differences in the relative size of transaction cost components suggest that the ratio of defense fees and expenses to class action attorney fees and expenses varies dramatically across class action lawsuits.

4. How Many Cents on the Dollar Did Class Members Receive?

Depending on how they assess the factual and legal claims in the ten class actions we studied, readers may think that class members in these cases ought to have received more, less, or no money at all from the defendants. But most readers would probably agree that whatever defendants agreed to pay, the largest share of the dollars should go to class members, rather than to lawyers, experts, and other legal service providers. Among the ten class actions we studied, we found a wide variation in the fraction of every dollar spent by defendants (not including defendants' own legal fees and expenses) that was attributable to payments to class members (see Figure 15.9). Of the monies we accounted for, we found that class members collected or were projected to collect amounts ranging from less than 20 cents of every dollar spent by defendants, in the *cable TV late fee* class action, to about 90 cents of every dollar spent, in the *blood products* and *home siding* class actions. In three of the ten cases, class members collected substantially less than 50 cents on the dollar; in two cases, they collected just about 50 cents on the dollar; and in five cases, they collected 65 cents on the dollar or more.

In previous research, analysts have found a wide variation in the fraction of dollars spent on civil litigation that end up in plaintiffs' pockets. In ordinary personal injury litigation in the mid-1980s, typified by auto accident cases, plaintiffs collected about 58 cents of every dollar spent by defendants; in other personal injury litigation, including more complicated liability cases, plaintiffs did less well but still collected 52 cents on the dollar.[25] In the early stages of even-more-complicated asbestos personal injury litigation, when plaintiff lawyers sued multiple defendants and legal doctrine pertaining to the cases was still ambiguous, defense legal fees and expenses were substantial, and plaintiffs

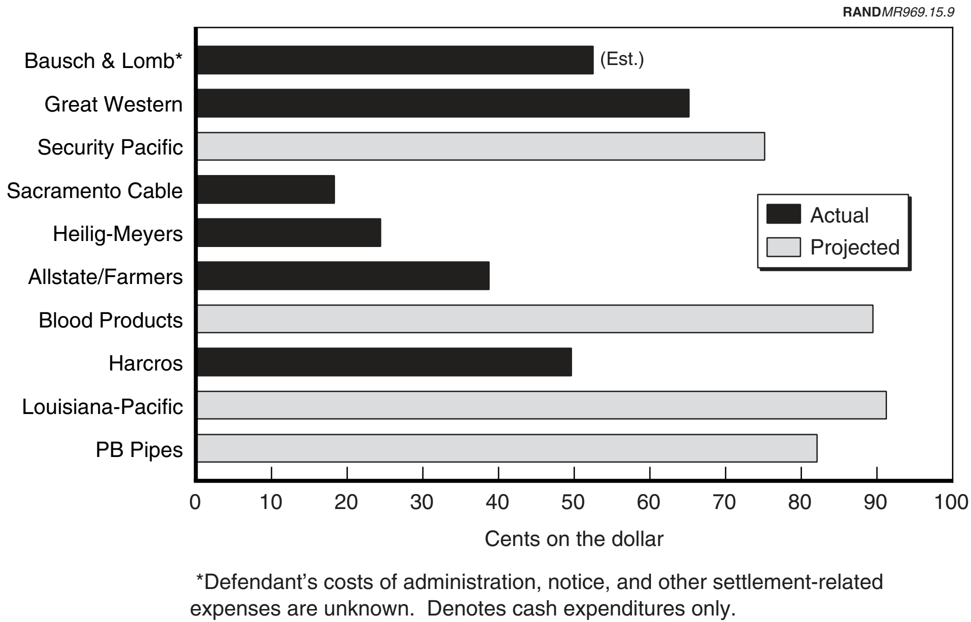
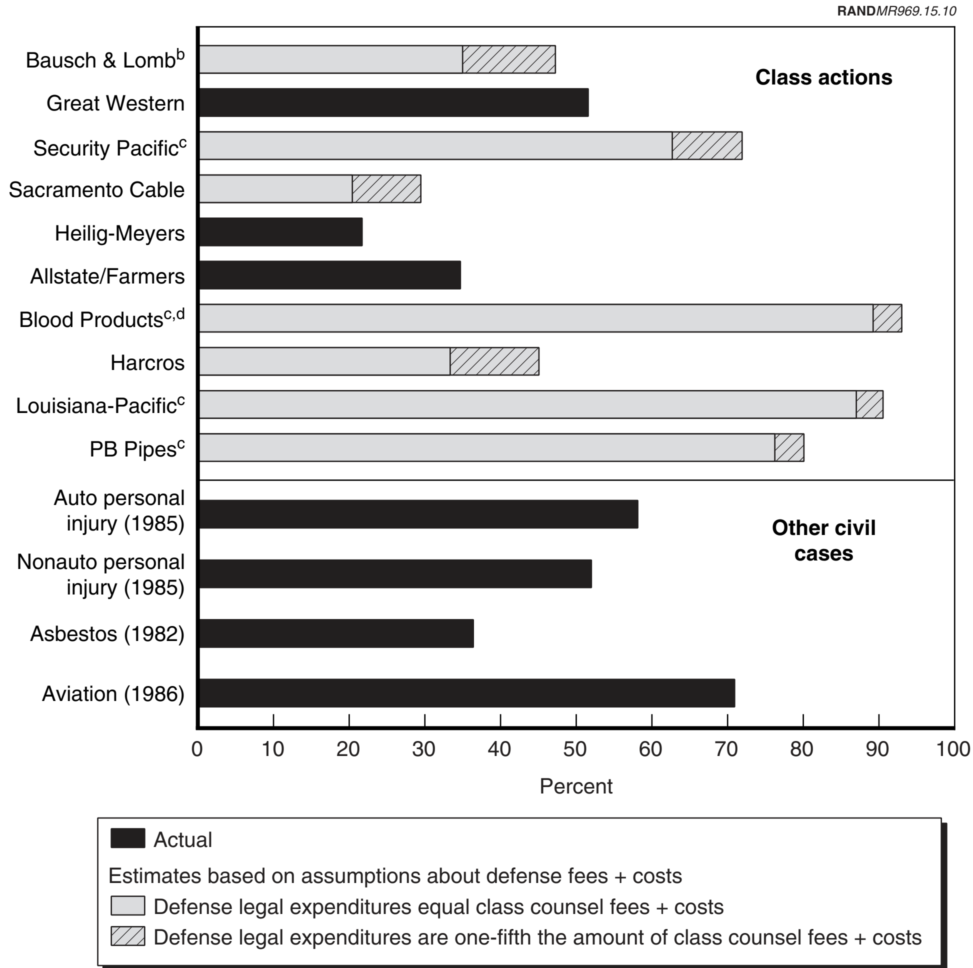


Figure 15.9—How Many Cents on Each Dollar Paid by Defendants (Excluding Their Own Legal Fees and Expenses) Went to Class Members

collected only 37 cents of every dollar spent by defendants.[26] In contrast, in wrongful death cases arising out of commercial airline disasters in the mid-1980s, plaintiffs collected more than 71 cents of every dollar spent by defendants because plaintiff attorneys competed vigorously for these cases, defendants coordinated their defense, and liability was not always at issue. We might expect plaintiffs (i.e., class members) in class action litigation (normally regarded as complex litigation) to pocket a smaller share of the amount defendants pay out than plaintiffs in routine automobile accident litigation, but whether we should expect them to pocket as much as aviation accident plaintiffs in the mid-1980s or as little as asbestos plaintiffs in the early 1980s is not clear.

The previous studies all accounted for defendants' legal fees and expenses, but we were able to account for these amounts in only three of the cases we studied. Consequently, to compare class members' share of defendants' expenditures in the ten case studies with plaintiffs' shares in the previously studied cases, we estimated class members' shares of total transaction costs under the minimum and maximum scenarios that we observed in the cases for which we did collect information about defense fees: defense fees equal to one-fifth of plaintiff attorney fees and defense fees equal to plaintiff attorney fees. (For *credit life in-*

surance, insurance premium double rounding and brokerage products, we show actual amounts, as reported to us or to the press.)



[a]Payment includes fees paid to defense attorneys, transaction costs, and cash payments to class; excludes indirect benefits and cy pres awards.

[b]Based on estimated payout of cash compensation. Defendant's costs of administration, notice, and settlement-related expenses are unknown.

[c]Based on projected payout.

[d]Assumes $36.5 million available for class counsel fees + costs.

Figure 15.10—Class Members' Portion of Estimated Total Payout,[a] Compared to Plaintiffs' Portion of Payout in Other Civil Cases

As shown in Figure 15.10, in the worst-case scenario among our estimates, class members receive only about 20 cents on the dollar paid out by defendants; in the best-case scenario, they receive more than 90 cents on the dollar. Hence, our estimates span an even broader range of transaction costs than researchers have observed in other forms of civil litigation. As in those other forms of litigation, however, class members receive the largest *proportion* of dollars paid out when the *total sums* paid out are extremely large.

E. JUDICIAL OVERSIGHT

Judges play a unique role in damage class actions: Without the judge's decision to grant certification, a class action lawsuit does not exist. Without the judge's approval, a lawsuit cannot be settled. Without a judge's decision to award fees, the class action attorneys cannot be paid. Moreover, judges have special responsibilities while the litigation is ongoing: They approve the form and content of notices to class members that a class action has been certified or settled; they determine when and where fairness hearings will be held, how long they will be, and who can participate; they decide whether non–class members can intervene in the litigation, and whether lawyers representing objectors will receive any compensation. Even after a case is resolved, judges may continue to play a role by overseeing the disbursement of settlement funds.

How judges exercise these responsibilities determines the outcomes of the class actions that come before them. But even more important, how judges exercise these responsibilities determines the shape of class actions to come. Lawyers and parties learn from judges' actions what types of claims may be certified as class actions, what types of settlements will pass muster, and what the rewards of bringing class actions will be. In the class actions we studied, judges seem to have interpreted their responsibilities differently. The evidence suggests that what mattered most in determining lawsuit outcomes is what the judge required of settlements and how the judge approached the issue of attorney fees.

1. Certification

Under Rule 23(c)(1), a judge should decide whether to certify a class action "as soon as practicable after the commencement of an action." The class should then be notified of the pendency of the class action and given an opportunity to opt out. Under the rule, a judge may conditionally certify a class, and judges sometimes withdraw previously granted conditional certification.

When judges certify a damage class action, the basis for their decision must be whether the case meets the criteria for certification spelled out under the rule, which have to do with the *shape* of the litigation, such as how many claimants

there are and whether legal and factual questions that are common to the claims predominate over individual questions. The *validity* of the factual and legal claims are not before the judges when they are deciding certification.

Defendants may ask judges to dismiss the claims underlying the proposed class action on substantive legal grounds, or to grant summary judgment. In its study of class actions in four federal district courts, the Federal Judicial Center found that judges generally ruled on dismissal motions before deciding whether to certify a class, and sometimes ruled on motions for summary judgment before deciding certification as well.[27]

Because we deliberately selected lawsuits for study that we knew had been certified and resolved as class actions, we cannot say anything about proposed class actions that judges decide *not* to certify, or which they dismiss, or grant summary judgment for the defendant. But the class actions we studied do illustrate the variety of circumstances in which judges decide certification.

In four of the ten class actions we studied, classes were certified *for settlement purposes only;* in six, the judge certified classes for trial. Five of the class actions that were certified for trial were consumer actions, and one was a mass personal injury lawsuit (see Table 15.9).

Settlement classes have been the subject of sharp controversy. When class action attorneys and defendants join together to request certification, the judge has no opportunity to hear arguments for and against certification. We might expect that this would lead judges to certify some suits that should have been turned away—even though class counsel and defendants had agreed to a classwide resolution—because the suits did not satisfy the certification criteria. But critics of settlement classes have focused on the quality of the settlements themselves. They argue that class action attorneys have greater leverage to negotiate settlements—and hence can persuade defendants to agree to more attractive settlements for class members—once a class action has been certified. If defendants agree to give up the opportunity to argue against certification because they have been able to negotiate a more attractive settlement than they might have felt pressed to accept if a class had already been certified, and if class action attorneys argue for certification because the settlement includes lucrative fees for themselves even when the settlement is not in class members' best interests, then the public goals of class actions are at risk of being subverted.

Among the class actions we studied, the timing of class certification varied. In some the judge certified the class soon after filing; in others certification took place a year or more later. In these instances, judges had considerable opportunity to learn about the cases prior to making the certification decisions

Table 15.9

Circumstances of Certification

	Was case ever certified for trial, or for settlement only?	Did defendants oppose certification prior to agreeing to settle?	Was there substantial discovery and other preparation for trial?
		Consumer Class Actions	
Roberts v. Bausch & Lomb	Trial	Yes	Yes
Pinney v. Great Western Bank	Trial	Yes	Significant litigation activity right up to scheduled trial date
Graham v. Security Pacific Housing Services, Inc.	Settlement	No	No formal discovery. Settlement reached 9 months after filing
Selnick v. Sacramento Cable	Trial	Yes	Significant litigation activity right up to scheduled trial date
Inman v. Heilig-Meyers	Trial	Yes	Some
Martinez v. Allstate/ Sendejo v. Farmers	Trial	Yes	Yes
		Mass Tort Class Actions	
In re Factor VIII or IX Blood Products	Settlement	Yes, but only in earlier case	Yes, but only in earlier case
Atkins v. Harcros	Trial	Yes	Significant litigation activity right up to scheduled trial date
In re Louisiana-Pacific Siding Litigation	Settlement	No	Case was settled 4 weeks after filing
Cox et al. v. Shell et al.	Settlement	No	Extensive discovery during individual litigation, although none in final class action

and plaintiff attorneys and defendants had considerable opportunity to test the relative strengths of their positions in negotiation and discovery.

We could not find any obvious pattern of relationship between whether a class was certified for trial or for settlement only and the outcomes of cases. For example, in the *collateral protection insurance* case, the class was never certified for trial—the defendant actually joined with the class action attorney to request certification *before* settlement had been reached to facilitate settlement negotiations. There was no formal discovery, and the suit was settled nine months after filing. The settlement the attorneys and defendant submitted to the judge for approval included substantially more money for attorney fees than for the class. In two other cases that were not certified for trial, the *home siding* and *polybutylene pipes* litigation, there had been little activity in the courts that certified the settlement classes prior to certification (although there was considerable previous litigation in other courts, both on an individual and class basis). But these settlements created huge funds for class members; the large amounts allocated for attorney fees represented small fractions of the dollars

paid by defendants. The *credit life insurance* class action *was* certified for trial over the defendant's objections. There was also some discovery. But in this class action, the judge ultimately approved a settlement without knowing how much defendants were agreeing to pay the class.

2. Notice of Certification

Rule 23 requires that class members be notified of the pendency of a (b)(3) class action so that they can opt out and preserve their right to litigate individually. But notice could also serve the function of alerting class members who wish to *remain* a part of the litigation that the litigation is ongoing, so that they might monitor the behavior of class counsel and the class representatives. If that were a purpose of notice, it would clearly not have been met in seven of the ten lawsuits we studied (see Table 15.10). In all of these lawsuits, notice was not given until the judges had preliminarily approved the settlement, and class members received notice of certification *after* the plaintiff attorneys and defendants had already reached agreement on how to resolve the case. (In three of these cases, notice was ordered but then delayed until the settlement was reached.)

In contrast, in the *contact lens pricing, cable TV late fee,* and *chemical factory* class actions, potential class members could learn about the litigation soon after it was certified when notices appeared in local and national mass media. In the *cable TV late fee* case, class members had about two weeks to decide whether they wanted to remain in the case; in the *contact lens pricing case* they had three months. In the *chemical factory* case, residents of Gert Town had 60 days in which to opt out, and then 60 more days to decide whether to *opt in* by filing a claim, a decision they had to make without knowing what they might receive as a result of the litigation. Fewer than one hundred persons chose to opt out of the *contact lens pricing* case after receiving notice of certification. Only 25 opted out of the *chemical factory* class action, while 3877 opted in. According to plaintiff attorneys, there were fewer than five opt-outs in the *cable TV late fee* case.

Of course, formal notice may not be the only way potential class members hear about the litigation. The *contact lens pricing, insurance premium double rounding, blood products,* and *polybutylene pipes* lawsuits all received extensive press coverage, and the plaintiff lawyers in the *insurance premium double rounding* case bought advertising time on local TV to inform Texas consumers about the ongoing litigation. But we do not know what class members learned from this mass media coverage about whether and how they could influence the course of the litigation. Gert Town residents heard about the *chemical factory* litigation by word of mouth, but we do not know whether they believed

Table 15.10

Notice of Certification in Ten Class Actions

	Type of certification notice	Time from notice to opt-out for cases certified for trial	Who paid, how much?
	Consumer Class Actions		
Roberts v. Bausch & Lomb	Published in 23 papers on a single day, in *USA Today* twice, plus once in special media; direct mailing to eye care practitioners. Practitioners asked to forward notice to class members; their mailing costs would be reimbursed	Approximately 3 months	Plaintiff attorneys, $148,000
Pinney v. Great Western Bank	Initial notice of certification ordered but never initiated; single notice of certification and settlement	—	Included in settlement costs
Graham v. Security Pacific Housing Services, Inc.	Single notice of certification and settlement	—	Included in settlement costs
Selnick v. Sacramento Cable	Published in local newspaper on a single day, plus 5 days of notices on preview channel	15 days	Paid for by defendants, amount not disclosed
Inman v. Heilig-Meyers	Initial notice of certification ordered but never initiated; single notice of certification and settlement	—	Included in settlement costs
Martinez v. Allstate/ Sendejo v. Farmers	Initial notice of certification ordered but never initiated; single notice of certification and settlement	—	Included in settlement costs
	Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	Single notice of certification and settlement	—	Included in settlement costs
Atkins v. Harcros	Two waves of direct mail to neighborhood residents, publication in local newspaper, posting in local churches. First wave of notices required potential class members to opt out, second required those who wanted to participate to opt in	60 days to opt out, followed by 60 days to opt in	Plaintiff attorneys; precise amount unknown
In re Louisiana-Pacific Siding Litigation	Single notice of certification and settlement	—	Included in settlement costs
Cox et al. v. Shell et al.	Single notice of certification and settlement	—	Included in settlement costs

they could play any role in the litigation other than as claimants. In the *blood products* case, the victims and their families who were members of the Committee of Ten Thousand tried to influence the course of the litigation, sometimes to the consternation of the lead plaintiff attorneys.

Notice campaigns sometimes cost millions of dollars. When the U.S. Supreme Court held, in a famous 1974 opinion,[28] that trial court judges could not require defendants to incur this expense, even when class members were likely to succeed in their litigation, many observers believed that this would seriously impair plaintiffs' ability to bring damage class actions. But (as shown in Table 15.10) in eight of the ten class actions that we studied, including four that were certified for trial, plaintiff attorneys did not have to pay the costs of notice of certification.

3. Notice of Settlement

In ordinary litigation, attorneys are responsible for informing their clients about how the litigation is progressing, negotiating settlements on their behalf, and advising them about whether or not to accept a settlement offer. In practice, after they have collected essential facts about the dispute, attorneys may not talk much with clients until they need the clients' approval of a settlement, and their advice on whether to accept a settlement offer may be influenced by whether they themselves want to invest more resources in litigating the case.[29] How frequently lawyers communicate with their clients and what they communicate about the progress of the litigation and settlement are not matters of concern to the court.

But in Rule 23(b)(3) class actions, lawyers are required to notify potential class members—the putative plaintiffs in the case—that a settlement has been tentatively reached; judges must approve the notification scheme, and often will review the language of the notices. In addition, judges inform class members who object to a settlement how they may voice their objections, and they hold public "fairness hearings" to help them determine whether to approve a proposed settlement.

Because many concerns about damage class actions stem from the perception that there are no clients on the plaintiff side to actively monitor the behavior of attorneys—other than the representative plaintiffs, who are often mere figureheads—notice requirements and fairness hearings offer important opportunities to encourage class member attention to, and participation in, the litigation process.

In accordance with damage class action rules, class members in all the lawsuits we studied received notice of settlement by direct mail or through print or

broadcast media (or some combination thereof), and were thereby always informed of their right to opt out or (if they remained in the class) to object to the terms of the settlement. Typically, class members had two or three months from the time of preliminary settlement approval to make their decision, but sometimes the notice period was shorter (see Table 15.11). Time limits of 30 to 60 days are routine in civil litigation, where attorneys are expected to respond more or less promptly to opposing counsel's and the court's actions. But two months or less might not be enough time for a layperson to decide whether to pursue an objection and to figure out how to go about doing so, particularly if the notice is the first time he or she hears of the litigation.

Table 15.11

Notice of Settlement and Claiming Procedures in Ten Class Actions

	Form of notice	Timing of key events from notice of settlement	Who paid; how much?
	Consumer Class Actions		
Roberts v. Bausch & Lomb	Notice and claim form published in major newspapers and posted on internet. Toll-free number and web site to get information. Information packets mailed to eye care practitioners	Approximately 3 months to file notice of objection. Fairness hearing held about 1 month after objection filing cutoff date. Approximately 6 months to file claim form	Defendant, as part of settlement. Amount not disclosed
Pinney v. Great Western Bank	Direct mail to 112,000 customers and published in state newspapers	Approximately 6 weeks to opt out or file objections. Fairness hearing held 3 weeks after objection-filing cutoff date. Approximately 4 months to file claims	Defendant, as part of settlement. $138,000
Graham v. Security Pacific Housing Services, Inc.	Direct mail to 60,000 customers and 2 notices in *USA Today*	Approximately 8 weeks to opt out or object and to claim. Fairness hearing held 6 weeks after objection-filing cutoff date	Defendant, as part of settlement. Amount not disclosed
Selnick v. Sacramento Cable	Direct mail to all customers and published in local newspaper once a week for 4 weeks	About 6 months to claim. Fairness hearing held about 3 months after preliminary approval	Defendant, as part of settlement. Amount not disclosed
Inman v. Heilig-Meyers	Two notices, one regarding settlement and the other providing instructions on claiming. Both mailed directly to customers and published in local newspapers for 3 weeks	Approximately 14 weeks to file objections after notice of settlement. Fairness hearing held about 2 weeks after objection-filing cutoff date; about 4 months to file claims from notice regarding claiming procedures	Defendant, as part of settlement. $125,000

Table 15.11 (continued)

	Form of notice	Timing of key events from notice of settlement	Who paid; how much?
Martinez v. Allstate/Sendejo v. Farmers	Direct mail to approximately 1.6 million current and recent policy holders. About 2.9 million previous policy holders would learn about certification and settlement from 2 ads in 20 state newspapers	About 2 months to opt out or file objections. Fairness hearing less than 2 weeks after objection-filing cutoff date. Current and recent customers received payment without claiming. Previous customers had about 9 months to file claims	Defendant, as part of settlement. Approximately $1 million for notice and distribution of checks
	Mass Tort Class Actions		
In re Factor VIII or IX Blood Products	Direct mail to known litigants and hemophiliacs, published in *USA Today* 3 times, and press release to broadcast media	Approximately 2 months to opt out, object, or claim. Fairness hearing held approximately 5 weeks after objection-filing cutoff date	Defendant, as part of settlement. Amount not yet known
Atkins v. Harcros	Direct mail to all those who had registered as claimants	Approximately 2 months to opt out, object, or claim. Fairness hearing concluded approximately 5 weeks after objection-filing cutoff date	Defendant, as part of settlement. Amount not known
In re Louisiana-Pacific Siding Litigation	Small direct mailing to known purchasers; published notice in *Wall Street Journal, USA Today*, 7 other major newspapers, and 300 other newspapers, plus 8 general periodicals and 7 construction periodicals; TV and radio ads over approximately 2 weeks	Approximately 6 months to opt out or object. Fairness hearing about 2 weeks after objection-filing cutoff date. Seven years to file claims	Defendant, as part of settlement. $4.9 million
Cox et al. v. Shell et al.	Published in national, regional, and ethnic newspapers and news magazines, network and cable TV, internet website, electronic bulletin board, and 800 number. Ads in trade and professional magazines; direct mailing to known potential class members such as mobile home owners. Periodic re-publication of information about how to claim over 14-year program	Approximately 3 months to opt out or object. Fairness hearing approximately 3 weeks after objection-filing cutoff date. Periodic opportunities to opt out over 14 years. Fourteen years to claim	Defendant, as part of settlement. Initial notice, $12 million. Additional notices, $18 million in future expenditures

The key elements of the notices in all ten class actions were the same: class members were told at least a bit about the nature of the litigation, who qualified as a class member, what benefits were provided by the settlement, and what class members needed to do to opt out, object, or file a claim for reimbursement (see Table 15.12). But in some cases, class members were not told what individual class members would get as a result of the settlement. In most of the cases, class members were told what plaintiff class action attorneys would receive in fees and expenses.

Table 15.12

What Class Members Were Told About the Ten Class Actions

	Nature of claims	Who is in the class	How much class members can get	How much plaintiff attorneys will get	How to opt out and/or claim	How to participate in fairness hearing
			Consumer Class Actions			
Roberts v. Bausch & Lomb	✓	✓	✓	✓	✓	✓
Pinney v. Great Western Bank	No	✓	✓	No	✓	No
Graham v. Security Pacific Housing Services, Inc.	✓	✓	✓	✓	✓	✓
Selnick v. Sacramento Cable	✓	✓	✓	✓	✓	No
Inman v. Heilig-Meyers	✓	✓	No	No	Non-opt-out class	✓
Martinez v. Allstate/Sendejo v. Farmers	✓	✓	✓	✓	✓	✓
			Mass Tort Class Actions			
In re Factor VIII or IX Blood Products	✓	✓	✓	No (but told that fees are not part of fund)	✓	✓
Atkins v. Harcros	✓	✓	✓	✓	✓	✓
In re Louisiana-Pacific Siding Litigation	✓	✓	No (but told the basis for determining amount to be paid)	✓	✓	✓
Cox et al. v. Shell et al.	✓	✓	No (but told the basis for determining the amount to be paid)	✓	✓	✓

Although the elements of most notices were the same, how much information was provided—and even more important, how intelligible the information was—varied dramatically from case to case. Figures 15.11 through 15.13 contrast descriptions of the litigation, the benefits class members would receive, and instructions on how to file an objection contained in notices for different class actions. From the *Heilig-Meyers* notice it is difficult to discern what exactly the defendant is alleged to have done; the *Louisiana-Pacific* notice clearly explains that the lawsuit alleges that a specific product manufactured by the defendant has certain defects. The second notice seems more likely to attract the attention of class members (see Figure 15.11). A reader who invested sufficient time in the detailed *Bausch & Lomb* notice could determine for herself whether or not she was a class member, but a less dedicated reader might not be able to pick her way through the various conditions (see Figure 15.12). That class members may express views in favor of or against the proposed settlement is nicely articulated in the *blood products* notice; the *insurance premium double rounding* class members are more sternly addressed about their "rights and obligations" (see Figure 15.13).

However detailed and intelligible (or vague and unintelligible) the notices were, they all had something in common: an instruction to class members that they should *not* contact the court if they have any questions. Thus, directly and indirectly, courts convey to class members that they are not very concerned about what individual class members understand about the litigation and what they might want from it.

4. How Notice, Settlement Allocation, and Disbursement Procedures Affect Outcomes

When judges approve a settlement, they are not simply approving a lump sum payment to class members. Implicitly, if not explicitly, they are also approving strategies for allocating and disbursing the fund. In the ten class actions that we studied closely, settlement allocation and disbursement strategies played a large role in determining the fraction of settlement funds that class members obtained (see Table 15.13).

When the settlement called for dividing the total compensation fund on a pro rata basis among all those who came forward (as in the *brokerage products* lawsuit), or among all class members who did not opt out (as in the *collateral protection insurance* lawsuit), all of the funds were disbursed. When the parties knew, at the time of the settlement, the number of eligible class members, and negotiated a formula for paying these class members, as in the *chemical factory* and *blood products* lawsuits, the ultimate disbursements matched (or ultimately will match) the negotiated settlement. When the available compensation was substantial, when damage (however caused) was directly observable

by class members, and when notice was extensive—as in the *home siding* and *polybutylene pipes* lawsuits—it also appears that the disbursements ultimately will match the negotiated settlement amount.

RANDMR969.15.11

Heilig-Meyers Notice

III. DESCRIPTION OF LITIGATION

The following description of the litigation is a summary only, and reference is made to the Complaint, Answer, and other pleadings that are on file with the Court and available for your inspection.

This litigation started on May 12, 1994, with the filing of a complaint by Marilyn Inman and Gary Inman against Heilig-Meyers in the Circuit Court of Fayette County, Alabama. In their complaint, the Plaintiffs alleged that the Defendant violated the Alabama Mini-Code and had made misrepresentations with respect to credit life and disability fees charged customers of Heilig-Meyers in conjunction with the financing of merchandise purchased at Heilig-Meyers's Alabama stores.

Heilig-Meyers denies all allegations of wrongdoing and further denies that the Plaintiffs or members of the proposed class are entitled to any relief against it.

SOURCE: From the notice mailed to class members.

Louisiana-Pacific Notice

2. WHAT IS THE LAWSUIT ABOUT?

Plaintiffs, who own structures that have exterior L-P Inner-Seal Siding, on behalf of themselves and all persons similarly situated, brought class actions against defendant Louisiana-Pacific Corporation and, in one case, its former President and Chairman of the Board of Directors, HarryA. Merlo ("Merlo"), on behalf of all residents or domicillaries of the United States who have owned, own, or subsequently acquire structures on which L-P Inner-Seal exterior siding has been installed.

Plaintiffs alleged that Defendants manufactured, distributed, advertised and marketed Inner-Seal exterior siding in a manner that concealed its true, defective nature, character and quality. Specifically, plaintiffs alleged that Defendants advertised and marketed Inner-Seal exterior siding as "durable," "effective," and "superior" to other types of exterior siding when, in fact, it prematurely rots, buckles, cracks, and otherwise deteriorates when exposed to normal weather conditions.

Plaintiffs sought relief based upon theories of breach of express and implied warranties, negligence, fraud, violation of consumer protection statutes, and violations of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. These claims were allegations and have not been proven as no trial has or will occur.

The Defendants generally denied liability relating to L-P Inner-Seal Siding, and further denied that all Class Members generally are entitled to damages or any other relief from the Defendants. The Court has not made any rulings on the merits of plaintiffs' claims or on the defenses of the Defendants.

SOURCE: From the notice mailed to class members.

Figure 15.11—What Is This Case About?

RANDMR969.15.12

Bausch & Lomb Notice

3. WHO IS IN THE SETTLEMENT CLASS?

The settlement class consists of residents or domiciliaries of the United States who were consumer purchasers of Bausch & Lomb's Medalist lenses from January 1, 1991 through December 31, 1995, Optima FW lenses from November 1, 1990 through December 31, 1995, and Criterion Ultra FW lenses from November 1, 1990 through April 30, 1996.

The Court, on November 1, 1994, certified a class of residents or domiciliaries of the United States who were consumer purchasers of Bausch & Lomb's Medalist and Optima FW lenses from January 1, 1991 through November 1, 1994. Notice of this action was disseminated in early 1995. Class members were given until May 1, 1995 to exclude themselves from the class. If you were such consumer purchaser of either a Medalist or Optima FW lens between the period of January 1, 1991 and November 1, 1994, and did not timely opt-out of the class, you are bound by the settlement as to those purchases if the settlement is finally approved by the Court.

The Court, on July, 1996, certified an expanded class, adding residents or domiciliaries of the United States who were consumer purchasers of Bausch & Lomb's Criterion Ultra FW lens from November 1, 1990 through April 30, 1996, and extending the class period from November 1, 1994 through December 31, 1995 for Medalist consumer purchasers and from November 1, 1990 through December 31, 1990 and from November 1, 1994 through December 31, 1995 for Optima FW consumer purchasers. If you purchased an Optima FW lens between November 1, 1990 and December 31, 1990 or between November 1, 1994 and December 31, 1995, or if you purchased a Criterion Ultra FW lens between November 1, 1990 and April 30, 1996, or if you purchased Medalist lenses between November 1, 1994 and December 31, 1995, as to those purchases you may exercise your right to exclude yourself. The judgment is this case will bind all such class members who do not timely "opt-out" of the proposed settlement class, and you will be bound by the settlement as to those purchases, if it is finally approved by the Court. If you do not opt-out, you will be represented free of charge by the class counsel described in Paragraph 5 below, or you may appear through your own counsel at your expense.

SOURCE: From the notice as it appeared on the Web.

Sacramento Cable Notice

C. The Class

On April 25, 1995, the Sacramento Superior Court certified as a Class for purposes of this lawsuit:

(1) All Sacramento Cable subscribers who, since March 1, 1992, paid late fees to Sacramento Cable (for purposes of damages); and

(2) All current Sacramento Cable subscribers (for purposes of injunctive relief).

If you fit this description, you are a member of the Class for purposes of this lawsuit, and you have the rights that are described below.

SOURCE: From the notice mailed to class members.

Figure 15.12—Who Is in the Class?

RANDMR969.15.13

Allstate/Farmers Notice

RIGHTS AND OBLIGATIONS OF CLASS MEMBERS

If you remain a member of one or more of the classes:

(1) The plaintiffs and class counsel shall act as your representatives and counsel for the presentation of the charges against the defendants; if you desire, you may also appear by your own attorney, and may advise the court if at any time you consider that you are not being fairly and adequately represented by the plaintiffs and class counsel;

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SETTLEMENT HEARING

The court shall hold a hearing at the 365th Judicial District Court, Zavala County Courthouse, 200 East Uvalde, Crystal City, Texas 78839, at 10:00 a.m. on December 13, 1996 to determine whether as recommended by class counsel, it should finally (1) certify the above-defined settlement classes and (2) approve the proposed settlement.

Objections to the proposed settlement by class members (who have not previously elected to exclude themselves from the class) shall be considered by the court, but only if such objections are filed with the Clerk of the Court, at the address indicated below, and served upon the Committee of Counsel, at the addresses indicated below, by no later than December 4, 1996:

SOURCE: From the notice as it appeared on the Web.

Blood Products Notice

C. Your Right to Support or Oppose the Settlement

If you remain a member of the Settlement Class (in other words, you do not request to be excluded) you also have the right to support or oppose the Settlement at the Court Fairness Hearing. This right is described in more detail in the section of this Notice concerning the Court Fairness Hearing.

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FINAL FAIRNESS HEARING

Judge Grady will conduct a Fairness Hearing to determine whether the proposed settlement and plan of distribution is fair and reasonable for members of the Settlement Class. This hearing will be held on November 25, 1996 at the United States District Court, Northern District of Illinois, Eastern Division, Courtroom 2525, 219 South Dearborn Street, 9:30 a.m., Chicago local time. The Hearing may be adjourned without additional notice.

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If you remain a member of the Settlement Class, you do not need to be represented by an attorney to support or oppose the Settlement. If you desire to write in favor of or in opposition to the Settlement, you should state each reason you support or oppose the Settlement. Your statement must be postmarked on or before October 15, 1996. You must send copies of your statement to each of the following: (1) Clerk of Court of the United States District Court for the Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois 60604; (2) David S. Shrager, Two Commerce Square, 2001 Market St., Philadelphia, Pa. 19103; (3) Dianne M. Nast, 36 E. King St., Suite 301, Lancaster, Pa., 17602; and (4) Sara J. Gourley, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. If you desire to appear and speak at the Fairness Hearing, so indicate in your statement. You do not have to appear at the hearing to write in favor of or to oppose the Settlement.

SOURCE: From the notice mailed to class members.

Figure 15.13—How Can Class Members Object?

Table 15.13

Disbursement Rates, Type of Fund, and Notice and Claiming Procedures

	Disbursement Rate	Type of Fund	Claiming Procedures
		Consumer Class Actions	
Roberts v. Bausch & Lomb	0.27[a]	Claims made; compensation claimed by class members; residual returned to defendant	Published notice and claim form in national newspapers and on internet; direct mail to contact lens providers. Mail in form, with documentation of purchases from provider
Pinney v. Great Western Bank	1.00	Pro rata; payout shared among all claimants	Direct mail and published notice in state newspapers, mail in detailed application
Graham v. Security Pacific Housing Services, Inc.	1.00[b]	Pro rata; payout shared among all non-opt-outs	Direct mail and published notice in state newspapers; automatic credit or refund
Selnick v. Sacramento Cable	0.29	Claims made; reimbursement claimed by subscribers; residual contributed to others	Direct mail and published notice (including form), and mail in form
Inman v. Heilig-Meyers	Unknown	Claims made; reimbursement claimed by class members; $250,000 supplemental fund shared by all claimants; residual returned to defendant	Direct mail and published notice, mail in form that requested but did not require supporting documentation
Martinez v. Allstate/ Sendejo v. Farmers (current and recent policy holders)	0.97	$5.75 for each class member paid automatically	Direct mail and automatic refund checks
Martinez v. Allstate/ Sendejo v. Farmers (former policy holders)	0.0001	$5.75 for each class member who makes a claim	Published notice, mail in form
		Mass Tort Class Actions	
In re Factor VIII or IX Blood Products	0.95[b]	Each claimant receives $100,000 and defendants pay all claims. No formal cap in settlement but defendants knew maximum number of claimants at time of settlement	Published notice in *USA Today* and internet and direct mailing. Class members opt out or file claim by mail
Atkins v. Harcros	1.00	Formula for allocating compensation fund among all opt-ins	Neighborhood notices and published notice in local newspaper, mail in detailed form to opt in

Table 15.13 (continued)

	Disbursement Rate	Type of Fund	Claiming Procedures
Atkins v. Harcros	1.00	Formula for allocating compensation fund among all opt-ins	Neighborhood notices and published notice in local newspaper, mail in detailed form to opt in
In re Louisiana-Pacific Siding Litigation	1.00[b]	Claimants apply for reimbursement and independent inspection determines damages paid. If cap is reached, defendants may replenish fund or future claimants may sue	Published notice in national newspapers, TV and radio and direct mail to builders. Claimants apply to facility to receive inspection and compensation
Cox et al. v. Shell et al.	1.00[b]	Claimants apply for compensation and independent inspector determines costs to replumb, according to settlement terms. If cap is reached, defendants may replenish fund or future claimants may sue	Published notice in national newspapers, network and cable TV and internet and electronic bulletin boards. Direct mail to mobile homeowners. Claimants apply to facility to receive inspection and compensation

[a]Estimated from financial records and other sources.

[b]Projected.

Even when compensation was quite modest, when the parties knew the size of the class and automatically refunded the amounts agreed upon in the settlement to eligible class members, as in the case of current and recent *Allstate* and *Farmers'* Texas insurance policy holders, all of the funds were ultimately disbursed. But when the settlement required class members to come forward to claim modest amounts of compensation *and* unclaimed funds reverted to either defendants—so-called “claims made” settlements—(as in the *contact lens pricing* lawsuit, the *credit life insurance* class action, and the past policy holders' component of the *insurance premium double rounding* lawsuit) or to other entities as cy pres remedies (as in the *cable TV late fee* lawsuit), the fraction of compensation funds actually disbursed to class members was modest to negligible. (We believe that the disbursement rate for the *credit life insurance* settlement was similarly modest, when measured by the ratio of the amount claimed as loss reimbursement ($22,000) to the total amount of liability for loss reimbursement[30] under the settlement. The defendant paid a larger share of its total liability, however, because of the provision for a $250,000 supplemental fund that was shared by all claimants.)

5. Settlement Approval

Judges directly shape the outcomes of damage class actions by approving proposed settlements as presented to them by the class action attorneys and defendants or by withholding approval until certain conditions are met. But judges also shape outcomes indirectly by granting or refusing permission for outside parties to intervene for the purpose of objecting, by granting an adequate hearing to objecting class members and intervenors, and by maintaining oversight over the disbursement of settlement funds. In the ten class actions we studied, we found considerable variation in what judges required of settlements, the role of objectors and intervenors, and whether judges required an accounting of settlement fund disbursements (see Table 15.14).

Table 15.14

How Judges, Objectors, and Intervenors Affected Class Action Outcomes

	Role of the judge	Role of objectors and intervenors
	Consumer Class Actions	
Roberts v. Bausch & Lomb	Approved settlement including coupons and based percentage of fund (POF) fee award on total value of cash and coupons Retained jurisdiction. No reporting ordered or performed	No objectors appeared at hearing. Defendant settled with attorneys who filed 2 similar class actions, reportedly for fees only
Pinney v. Great Western Bank	Required original attorney team to bring in more experienced counsel. Approved settlement and POF fee award Retained jurisdiction. Ongoing reports on claim processing filed with the court	One attorney sought unsuccessfully to intervene
Graham v. Security Pacific Housing Services, Inc.	Required parties to modify original agreement to meet intervenors' objections Retained jurisdiction. Report of undistributed funds ordered by court	No objectors. Intervenors significantly involved in final negotiations
Selnick v. Sacramento Cable	Approved settlement and POF fee award. Cy pres award of residual required under California law Retained jurisdiction. Report of undistributed funds ordered by court	No objectors or intervenors
Inman v. Heilig-Meyers	Approved settlement and fee award apparently without information on value of common benefit fund Retained jurisdiction. No public reporting ordered or performed	No objectors or intervenors

Table 15.14 (continued)

	Role of the judge	Role of objectors and intervenors
Martinez v. Allstate/Sendejo v. Farmers	Approved settlement and POF fee award on total value of settlement fund Retained jurisdiction. Ongoing reports on claim processing ordered by court	State attorney general intervened and obtained additional $2 million for consumer protection
	Mass Tort Class Actions	
In re Factor VIII or IX Blood Products	Approved separate capped fund for fee awards. Required each attorney to petition for fee award Retained jurisdiction. Continues to supervise fund distribution	Victims group and some individual class members objected, but judge approved the settlement. Subsequently, two groups of class members who had not opted out appealed, saying they wanted to pursue individual lawsuits. The appeals were dismissed after defendants acceded to their request
Atkins v. Harcros	Approved settlement and POF fee award. Appointed special master to design allocation plan Retained jurisdiction. Ongoing reports on claims processing ordered by court	Thousands of objections from individuals within and outside the class. Most class members' objections resolved
In re Louisiana-Pacific Siding Litigation	Required changes in notice period; established claim eligibility and valuation protocol and arbitration for dissatisfied claimants. Approved separate fee negotiated by parties with help of mediator Retained jurisdiction. Appointed special master to supervise distribution	Objectors and intervenors participated in final settlement negotiations
Cox et al. v. Shell et al.	Multiple judges and attorney teams helped shape settlement Retained jurisdiction. Reports of claim processing issued periodically	Multiple objections by a few parties; may have enhanced legitimacy of final settlement, since each objection was considered in open court proceedings

In some instances, judges' actions had an obvious and direct effect on the quality of the settlement. In the *brokerage products* case, Judge Irving Hill required the plaintiff attorneys who initiated the class action to engage an experienced securities litigation firm as their collaborator. Under that firm's leadership, the parties negotiated a settlement that estimated damages in accordance with prevailing case law and divided the entire compensation fund (net of legal fees) among eligible class members, on a pro rata basis.

In the *collateral protection insurance* case, Judge Charles Pickering granted Trial Lawyers for Public Justice (TLPJ) permission to intervene. In response to TLPJ's urging, the parties modified the original settlement to increase the funds allo-

cated for class members from $1.3 million to $7.7 million, reduce plaintiff attorney fees and expenses from $5.4 million to $1.9 million, substitute direct payment for a claims-made approach, and require that any residual amounts be earmarked for charitable funds rather than returned to the defendants. Had the judge approved the original settlement, plaintiff attorneys would have received more money than class members on the dubious grounds that the class action was responsible for changing defendants' practices, and the defendant might have paid less than the putative settlement amount.

In the *blood products* class action, Judge John Grady insisted that individually retained plaintiff attorneys not claim fees from the monies defendants agreed to pay class members, despite efforts by some attorneys to persuade him to the contrary. As a result of his insistence on this principle, some plaintiff attorneys appealed the settlement to the Seventh Circuit. The appellate court turned away their appeal.[31]

In the *chemical factory* class action, Judge Frank Zaccaria appointed a special master to devise a plan for allocating compensation to the Gert Town class members, and presided over an elaborate multiday fairness hearing that had such a large attendance that it had to be held in the New Orleans Superdome. Judge Zaccaria protected the settlement fund from dilution by late-appearing claimants by refusing to waive the deadline for filing claims.

In the *home siding* class action, Judge Robert Jones insisted on significant changes in the claims processing plan before he would approve the settlement. In an apparent effort to create an incentive for plaintiff class action attorneys to monitor the performance of the claims processing facility in that case, Judge Jones's fee award included a provision that plaintiff attorneys' $26.25 million fee would be paid out over a four-year period, rather than in a single lump sum.

In contrast, in the *contact lens pricing* case, the judge approved a settlement of which half the value was accounted for by discount coupons for the defendants' products. No information was ever presented to the judge about the coupons' likely redemption rate, and the judge did not require the settlement administrator to report how many class members came forward to claim cash benefits and coupons, nor how many coupons were ultimately redeemed. He awarded class action attorney fees on the full settlement, as negotiated, including coupons.

In the *credit life insurance* case, the judge approved a settlement apparently without knowing the total amount the defendant was offering to pay class members; notwithstanding, he awarded more than half a million dollars to class counsel. The judge did not require the settlement administrator to report how many class members ultimately came forward or how much money was ultimately paid out. (The figures we report were shared with us by participants in the litigation.)

In the *insurance premium double rounding* case, the judge approved a settlement whose ultimate value depended on how many class members would come forward to claim modest payments averaging around $5. Because only a small percentage of those who were required to file claims forms did so, a significant fraction of the fund reverted to the defendant. Class action attorney fees were awarded on the full value of the settlement, as negotiated.

6. Fee Awards

In class actions, judges award fees to class counsel for creating a "common benefit"—that is, a fund or other remedy that provides benefits to all class members. But how to arrive at the right amount of fees is a matter of some dispute. In eight of the ten class actions we studied, either the court said it was awarding fees to class counsel as a percentage of the fund ("POF") created or class counsel argued for a POF award and there is no indication in the record that the judge rejected the POF argument (see Table 15.15). In the *credit life insurance* case, class counsel negotiated the fee award with the defendant, the judge awarded the negotiated amount, and nothing on the record indicates the basis for the award. In the *blood products* case, Judge Grady was in the process of deciding attorney fees when we went to press.

Fee awards in the ten class actions usually did not refer explicitly to the relationship between the fee amount and the monetary value of the settlement. Class counsel based their requests on the total value of the settlements they had negotiated, consistent with the U.S. Supreme Court's 1980 holding in *Boeing v. Van Gemert.*[32] As we have seen, the fees awarded in the ten class actions ranged from as little as 5 percent of the total settlement value to close to 50 percent (see Figure 15.4). But in four of the cases, class counsel fees and expenses amounted to 50 percent of the settlement funds actually expended (see Figure 15.5), and in three cases *class counsel received more in fees and expenses than class members received altogether* (see Figure 15.6).

Class counsel's hours were reported to the court in only half of the ten cases, and in none of the cases did the judge say that attorneys' hours were the basis for the fee award. Even the district court judge in the *collateral protection insurance* case, which is located in a circuit that has endorsed the lodestar method, appears to have adopted the POF approach.

Although judges in the class actions do not seem to have awarded fees based on attorneys' reports of hours and expenses, information regarding hours is available for five cases: *brokerage products, cable TV late fees, insurance premium double rounding, chemical factory,* and *polybutylene pipes*. Using these reports,

Table 15.15

Basis for Awarding Class Counsel Fees

	Specific evidence of number of hours worked	Court's approval approach/language or reasoning used by court
	Consumer Class Actions	
Roberts v. Bausch & Lomb	No	Percentage-of-the-fund (POF) (assumed) Explicit basis for award not given in final order; however, court indicated the efforts of class counsel had made available benefits worth $67 million and that amount requested is reasonable in light of relevant criteria for award and evidence offered in support of application. Class counsel had argued that POF was the preferred method in federal courts and that request was 12 percent of $76 million fund, less than general benchmark of 25 percent, and less than usual range of 13–20 percent for similarly sized funds
Pinney v. Great Western Bank	Yes	POF Fee of 30 percent of settlement fund (net of litigation expenses and claims administration costs) is fair and reasonable
Graham v. Security Pacific Housing Services, Inc.	No	POF (assumed) Basis for award of fees not given in final order; however, class counsel argued that despite Fifth Circuit use of lodestar, amounts awarded using lodestar are usually around 30 percent of common fund anyway; movement is toward use of POF; requested amount is 22 percent of settlement value excluding injunctive relief, and would be lower than usual market rate
Selnick v. Sacramento Cable	Yes	POF (assumed) No explicit basis for award in final order. Class counsel requested fee award equaling 30 percent of total settlement fund, argued that POF is appropriate and that percentage requested is slightly higher than median of 25 percent but still justified. Alternative lodestar of 3.0 argued
Inman v. Heilig-Meyers	No	Unknown Final judgment only indicated that grant of class counsel award is reasonable and is being made "pursuant to general guidelines and factors set forth by the Alabama Supreme Court and the facts of this case." No pleadings filed by class counsel indicate the estimated size of fund, hours worked, or other basis for request
Martinez v. Allstate/ Sendejo v. Farmers	Yes	POF (assumed) Actual basis for award of fees not given in final order; however, earlier preliminary order of approval indicated satisfaction with proposed award of 29 percent of aggregate class benefits and would be less than prevailing rates paid to other common fund class action counsel

Table 15.15 (continued)

	Specific evidence of number of hours worked	Court's approval approach/language or reasoning used by court
		Mass Tort Class Actions
In re Factor VIII or IX Blood Products	No	Unknown Final award of attorney fees not yet completed
Atkins v. Harcros	Yes	POF Court indicated that it was routine for local attorneys to receive awards equaling one-third of recovery. Court-appointed expert recommended use of POF; asserted that fee request of one-third of recovery would yield smaller award than if reasonable lodestar multiplier of 2.75 was used
In re Louisiana-Pacific Siding Litigation	No	POF Percentage recovery is appropriate. Fees and expenses requested are less than 8.5 percent of the total class recovery, fee request, and administration expenses (well within typical range for fee awards)
Cox et al. v. Shell et al.	Yes	POF Without class settlement, plaintiffs' recovery would be reduced by one-third to 40 percent; fees requested are approximately 5 percent of settlement fund and are paid outside fund. Request is reasonable under circumstances

we calculate that plaintiff class action attorneys received average hourly fees in these lawsuits ranging from $320 in *brokerage products* to almost $2000 in *polybutylene pipes* (see Table 15.16).

When judges award fees on an hours-and-expense basis, they normally look first to the usual hourly rate charged by attorneys with comparable experience in the jurisdiction where the case was brought. Then they may adjust the fee upwards or downwards by multiplying it by a factor intended to reflect the benefit that the attorneys produced, the riskiness of the action (i.e., how likely it appeared that they would win the case at its inception), the skill they demonstrated, and other relevant variables. The hourly rate we calculated for class counsel in the *Great Western* case is well within the range of hourly rates charged by attorneys in Los Angeles; the higher rates we calculated for the other four cases would probably have been awarded by judges in those cases only if they believed that it was appropriate to enhance the usual hourly rate charged in those jurisdictions by multipliers of two or more.

Would such multipliers have been justified in these cases? Defendants vigorously contested the Texas *insurance premium double rounding* lawsuit and the

Table 15.16

A Comparison of Class Counsel Fees, with Reported Hours, in Five Class Actions

	Court-awarded fees to class counsel (net of expenses) ($M)	Reported hours	Average hourly rate
Consumer Class Actions			
Pinney v. Great Western Bank	$4.814	15,044	$320
Selnick v. Sacramento Cable	$.457	548	$834
Martinez v. Allstate/Sendejo v. Farmers	$10.349	14,082	$735
Mass Tort Class Actions			
Atkins v. Harcros	$17.2	27,368	$628
Polybutylene pipes	$44 (*Cox*)[a]	22,500 (*Cox*)[b]	$1956

[a]Fee award to *Cox* counsel only. The $45 million fee award included expenses. Class counsel said they had incurred more than $594,000 in expenses. For our estimate of the hourly fee awarded, we assumed $1 million in expenses.

[b]The application for attorney fees noted that the time spent included hours for "legal assistants"; we have also included the estimated 2500 hours *Cox* counsel indicated they anticipated spending on settlement administration.

New Orleans *chemical factory* lawsuit, so it seems fair to conclude that victory was far from assured when those lawsuits began. Moreover, the Texas case presented a novel issue, and the New Orleans case potentially required plaintiff attorneys to prove causation, which is often a difficult matter in toxic tort litigation. Class action attorneys in these cases obtained millions of dollars in compensation for class members. The defendant also contested certification in the *cable TV late fee* class action. But the class action counsel in that case had previously litigated other late-fee cases, and, although counsel succeeded in getting the defendant to pay close to $1 million (in addition to fees), most of that money was never collected by class members, but, under California state law, was awarded to other beneficiaries. Class action attorneys in the *polybutylene pipes* litigation negotiated a settlement that promised compensation for damages, assessed by neutral experts, to all eligible class members who came forward. But the defendant in that suit was seeking a settlement, and the *Cox* class action had the benefit of long years of individual litigation, and perhaps the benefit, as well, of previous attempts to negotiate settlements between these defendants and other groups of attorneys.

F. ANSWERING THE "GREAT BIG QUESTION"

Determining whether the benefits of Rule 23 damage class actions outweigh their costs—even in ten lawsuits—turns out to be enormously difficult. Whether the corporate behaviors that consumer class actions sought to change

were worth changing, whether the dollars that plaintiff class action attorneys sought to obtain for consumer class members were worth recouping, and whether the changes in corporate behavior that were achieved and the amounts of compensation consumers collected were significant are, to a considerable extent, matters of judgment. Whether the damages claimed by mass tort class members were legitimate, whether defendants should have been held responsible for these damages, and whether plaintiffs were better served by class litigation than they would have been by individual litigation are also matters of judgment.

Readers might well disagree about the import of the alleged business practices leading up to the six consumer class actions we studied, the losses suffered by consumers as a result of these alleged practices, and the gains to class members and consumers resulting from the settlements that the parties negotiated. Although all six of these class actions were associated with changes in defendants' practices, in some instances those changes appeared to be a result of prior litigation or regulatory activity rather than the instant class action. Readers might disagree about whether the practices that were changed *ought* to have been changed, and if so, whether the pursuit of such change should be left to administrative agencies or is a legitimate goal of private litigation.

Many readers might agree that plaintiffs in the four mass tort class actions we studied were harmed, but these same readers might nonetheless disagree about whether defendants should have been held responsible for those harms under prevailing law. Moreover, in three of the four lawsuits, manufacturers changed their products or practices long before the class actions were filed; in the fourth, changes in the product may have been, in part, a response to state attorneys general investigations.

However one assesses the validity of plaintiffs' claims and the culpability of defendants, the evidence strongly suggests in all ten class actions that class members would not likely have received any monetary compensation absent a class action or some other form of aggregation. In most of the consumer class actions, the amounts at stake were small enough that most lawyers would not have taken nonclass cases. Indeed, absent the incentives provided by class actions, attorneys might not have investigated defendants' practices or challenged prior interpretations of statutes and regulations, and consumers might never even have learned about defendants' alleged wrongdoing. In the mass tort cases, plaintiff success resulted from aggregating individual suits with or without seeking class certification. In the *blood products* litigation, the defendants turned back individual lawsuits by claiming the protection of the blood shield laws; it was only when the individual suits were aggregated that these same defendants agreed to pay substantial amounts to settle the litigation. In the *polybutylene pipes* litigation, before the class action, plaintiff attorneys suc-

cessfully litigated large aggregations of individual cases without claiming class action status. In the *home siding* class action, neither consumers nor the defendant were satisfied with the lengthy process of resolving claims individually through an arbitration program. In all four lawsuits, class action certification provided a means of resolving claims in the aggregate, but in the absence of class certification, plaintiff attorneys and defendants might well have pursued other forms of aggregate settlement. Whether plaintiffs in any of these ten class actions *should* have received compensation from *these* defendants is a normative question that was never decided by the courts, because the cases were settled without judgment.

As in all other forms of civil litigation, the costs of obtaining these benefits were large. Defendants in some of the class actions spent tens of millions of dollars—in one instance, hundreds of millions of dollars—in plaintiff attorney fees and expenses and administrative costs, including the costs of notice and disbursement of settlement funds. Defense attorneys' charges added unknown amounts to these transaction costs; in some cases, these charges may have exceeded plaintiff attorney fees and expenses. In three of the ten class actions, transaction costs (excluding defense fees) exceeded the total amounts paid to class members; in another two cases, transaction costs and payments to class members were roughly equal.

In six of the ten class actions, plaintiff attorney fees accounted for one-third or less—in several cases, substantially less—of the total paid in compensation and plaintiff fees, well in line with the norms in other civil litigation. But in several cases these shares amounted to tens of millions of dollars. Did class action attorneys receive *too much* for their efforts? In the five cases for which enough information was presented to the court for us to perform the calculation, class action attorneys earned amounts ranging from $320 to almost $2000 per hour. Whether the high-end rates appropriately reflected the risks associated with bringing the litigation, the efforts required to settle these cases, and the outcomes class action attorneys achieved is another matter requiring judgment.

The costs of class action litigation—and the total dollars earned by plaintiff class action attorneys—fuel the controversy over damage class actions. It is clear that the costs are high. But how one assesses the cost-benefit ratio of these class actions depends on how one assesses the merits of these actions, the value of the settlement to class members in the aggregate and individually, the deterrence value of the litigation, and the value to our democracy of providing access to the justice system for individuals with small, as well as large, grievances. How one evaluates the need for and outcomes of these class actions also depends in part on one's confidence in other institutions' capacity to identify wrongdoing and to seek remedies for those who are harmed and penalties for those who erred. Because members of our society do not all agree

on how to evaluate the merits of specific litigation or on the appropriateness of using litigation to achieve social goals, it is unlikely that we will soon reach consensus on the proper answer to the "great big question" about class actions.

NOTES

[1]John P. Frank, Whither Rule 23: Memorandum to the Honorable Patrick E. Higginbotham (Apr. 28, 1995) (on file with the Advisory Committee).

[2]See, e.g., Andrew Leigh, "Being a Plaintiff Sometimes Amounts to a Profession," *Investor's Business Daily*, Nov. 1, 1991, at 8; and Karen Donovan, "Bloodsucking Scumbag," *Wired 4.11: Electrosphere* (Nov. 1996), available on the internet at http://www.wired.com/wired/4.11.

[3]Lawrence Schonbrun, "The Class Action Con Game," *Regulation,* Fall 1997, at 50–51.

[4]Although the Federal Trade Commission (FTC) appears to have opened a preliminary investigation into the *polybutylene pipes* consumer complaints, we did not find any evidence that the FTC's activities played a role in that litigation. Similarly, consumer groups and regulators were reportedly investigating consumer complaints about aggressive and misleading bank sales practices, but we did not find any evidence that such activity stimulated the *Great Western brokerage products* class action.

[5]Parties argued for non-opt-out classes in these cases on the grounds that plaintiffs were suing for injunctive relief as well as damages, and that Rule 23(b)(2) provisions therefore applied.

[6]In a line of cases beginning with *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938), the U.S. Supreme Court has held that in diversity cases (and with regard to state claims in cases also involving federal claims) the substantive law of the relevant state prevails, arguably removing incentives to file in federal rather than state court. Within the federal court system one set of procedural rules, the Federal Rules of Civil Procedure, supposedly governs all civil cases without regard to the jurisdiction in which they are filed. In practice, federal district courts operate under somewhat different interpretations of the federal rules. Each state court has its own procedural rules, but many are identical or similar to the federal rules.

[7]See *supra* Chapter Three.

[8]As a formal matter, parties and their lawyers cannot select the judge who will hear their cases. But lawyers can in some instances enhance the likelihood of finding themselves before a particular judge by strategically selecting a jurisdiction and venue.

[9]Sometimes, parties ask judges to enjoin potential class members from filing new suits against the defendants during the pendency of a class action. See, e.g., *supra* Chapter Seven, at 196–97.

[10]A proposed revision to Rule 23(b)(3) that would have asked that judges, when deciding whether to certify a class, weigh the "probable relief" against the likely costs, was quickly dubbed the "it just ain't worth it" rule. See *supra* Chapter Two.

[11]See, e.g., Administrative Office of the U.S. Courts, 1 *Working Papers of the Advisory Committee on the Civil Rules on Proposed Amendments to Rule 23* 254–61, 272–75 (1996) (hereinafter Working Papers of the Advisory Committee) (Minutes of Nov. 9–10, 1995, and Apr. 18–19, 1996, discussing proposed factor (F)).

[12]As discussed in Chapter Nine, the public record for the *credit life insurance* class action contains no estimates of the alleged aggregate loss to the class or the individual loss to class members. We estimated the alleged average overcharge per class member using public announcements of the class size and the total value of premiums purchased.

[13]Individuals actually secured representation in two of these suits, the *Great Western brokerage products* class action and the *Heilig-Meyers credit life insurance* class action. But, in the first instance, the attorney entered the litigation on behalf of a relative; in the second, the attorney entered the litigation to develop the legal grounds for future class action litigation. (See Chapters Six and Nine, *supra.*) Individuals willing to pay $100 or more per hour in attorney fees could secure legal representation. But most people seeking financial reimbursement in cases such as these would retain lawyers on a contingency-fee basis. Because of the small sums involved, attorneys probably would not agree to represent individuals in these circumstances on a contingency-fee basis. In instances involving small sums, individuals can seek recompense through small claims

courts. But these courts typically deal with routine civil disputes where the law is certain but the facts are contested. Controversies over the law were at the heart of these class actions.

[14]See Table E.1. in Appendix E for a detailed explanation of the calculations used in the figures in this chapter.

[15]W. Kip Viscusi, *Reforming Products Liability* 108 (Cambridge, Mass.: Harvard University Press, 1991). Viscusi reports value of life estimates ranging, in 1989 dollars, from $2.4 million to $13.4 million. According to Viscusi, the most widely used estimate is $3.6 million (1989 dollars); this is equivalent to $4.5 million in 1997 dollars.

[16]In the *home siding* class action, the experts estimated that the settlement would fully compensate the losses of all eligible claimants who came forward (under a formula that set certain damage thresholds). See *supra* Chapter Thirteen.

[17]Louisiana-Pacific Corp., Form 10-Q for the Quarterly Period Ended September 30, 1997, at 19.

[18]Recall that the actual disbursements in the *contact lens pricing* class action were not publicly recorded and the participants declined to share the information with us. See *supra* Chapter Five.

[19]The $2 million paid to satisfy the state attorney general in the Texas insurance case was jointly agreed to by plaintiff attorneys (who contributed some of their fee award) and the defendants. But, in practice, defendants paid the entire amount, since they were the source of the attorney fee award.

[20]Denny's, Texaco, and Publix publicized their changes in practice after suffering from negative publicity as defendants in class litigation. *Ridgeway v. Flagstar Corp.*, Nos. C 93-20202 JW, C 93-20208 JW (N.D. Cal. 1994) (civil rights suit alleging discrimination against African-American patrons); *Roberts v. Texaco, Inc.*, No. 94 Civ. 2015 (S.D.N.Y. 1997) (employment discrimination); *Shores v. Publix Super Markets*, *Inc.*, No. 95-1162-CIV-T-25E (M.D. Fla. 1997) (employment discrimination).

[21]*Boeing v. Van Gemert*, 444 U.S. 472 (1980).

[22]Defendants know what they paid their outside defense counsel, although they generally declined to share this information with us. However, based on our interviews, we suspect that many defendants cannot accurately allocate in-house counsel costs to specific class action lawsuits, because they do not monitor in-house costs on a case-specific basis.

[23]See James Kakalik and Nicholas Pace, *Costs and Compensation Paid in Tort Litigation* (Santa Monica, Calif.: RAND, 1986).

[24]E. Scott Reckard, "S&L Settles Fraud Suits," *Orange County Register*, Feb. 4, 1997, at C1.

[25]Calculations based on data presented in Kakalik and Pace, *supra* note 23, at 74 Figure 7.2. These figures exclude the value of plaintiffs' and defendants' own time spent on the litigation.

[26]James Kakalik et al., *Costs of Asbestos Litigation* vii Table S.2. (Santa Monica, Calif.: RAND, 1983).

[27]Thomas Willging, Laural Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 171 (Washington, D.C.: Federal Judicial Center, 1996). The FJC found that in three-quarters of the cases in which motions for dismissal were decided, judges made their rulings before certification. About one-third of the motions were denied, about one-third were granted, and the remainder had mixed outcomes. In 60 percent of the cases in which motions for summary judgment were decided, judges ruled *after* certification. About 40 percent of motions for summary judgment were granted, about one-third were denied, and the remainder had mixed outcomes.

[28]*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Not all states follow *Eisen* in writing or interpreting their own class action rules. For example, California consumer legislation provides for judges to impose the costs of notice on defendants. Cal. Civ. Code § 1781(d) (1985).

[29]See Deborah Hensler, "The Real World of Tort Litigation," in Austin Sarat et al., eds., *Everyday Practices and Trouble Cases* 155–76 (Evanston, Ill.: Northwestern University Press, 1998).

[30]We estimate that the defendant's minimum total liability under the settlement was $537,000, based on public reports of class size and total value of all premiums.

[31]*In re Factor VIII or IX Concentrate Blood Products Litigation*, 159 F.3d 1016 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1499 (1999).

[32]444 U.S. 472 (1980).

Chapter Sixteen

ACHIEVING THE OBJECTIVES OF RULE 23(b)(3) CLASS ACTIONS

> Admittedly, the dimensions of certain class actions are beyond anything previously seen in Anglo-American courts in terms of size, complexity, and longevity. Some of these cases obligate federal judges to undertake supervisory tasks requiring enormous expenditures of time and effort, converting their role from one of passive adjudicator of a dispute staged by opposing counsel to that of active systems manager. Yet, imaginative judicial management by district judges willing to control, shape and expedite these can go far toward achieving the objectives of the class action.
>
> *Professor Arthur Miller, writing of class actions in 1979* [1]

At the heart of the long controversy over damage class actions is this dilemma: The litigation derives its capacity to do good from the same feature that yields its capacity to do mischief. That feature, of course, is the opportunity damage class actions offer lawyers to secure large fees by identifying, litigating, and resolving claims on behalf of large numbers of individuals, many of whom were not previously aware that they might have a legal claim and most of whom play little or no role in the litigation process. The central question for public policymaking is how to respond to this dilemma.

To those who believe that the social costs of damage class actions outweigh their social benefits, it seems as if the best possible response is to abandon entirely the notion of using private collective litigation to obtain monetary damages. We should rely, say these critics, on administrative agencies and public attorneys general, not private litigation, to enforce regulations. We should rely on individual litigation to secure financial compensation for individuals' financial losses, accepting that some losses that were wrongfully imposed by others will go uncompensated because they are simply too small to be worth the cost of individual litigation.

But those who believe that the social benefits of damage class actions outweigh their costs say that this response is unacceptable. They have less faith in the

capacity of regulatory agencies and public attorneys to enforce regulations. And they argue that some federal and many state consumer protection statutes were enacted with the understanding that claims brought under the statutes would be so small that the only practical way for individuals to assert the rights granted by the statutes would be through collective litigation.

How to respond to the dilemma at the heart of damage class actions is a deeply political question, implicating fundamental beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society. As we discussed in the previous chapter, this political question is unlikely to be resolved by more empirical research. Without a fundamental realignment of political interests, it is also unlikely to be resolved soon.

But there is a third possible response to the dilemma posed by damage class actions. This response recognizes the powerful capacity of class actions to do good *and* ill. And it recognizes that, at present, there is not a consensus that the mix of good and ill consequences of damage class actions requires public policymakers to do away with this form of litigation entirely. Hence, we need to invest more of the legal system's energy and resources in regulating damage class action practices, seeking to improve the balance between public good and private gain whenever their use is sanctioned. Our examination of recent and past controversies over damage class actions, review of the scholarly literature on representative litigation, interviews with attorneys and parties who bring class actions and defend against them, and case studies of consumer and mass tort class actions lead us to this third response.

Achieving agreement on how to better regulate damage class actions without resolving the fundamental disagreement about whether they should be permitted at all, and, if so, in what circumstances, is difficult. Many possible rule changes would shift the balance in favor of or against using damage class actions in certain substantive domains. Hence, debates about proposed changes segue seamlessly into debates about the social value of damage class actions, and opportunities to improve practice may be lost. Moreover, the consequences of changing rules and practices may differ for consumer class actions involving small individual losses and mass tort class actions. This interplay of debates and consequences sometimes confuses the discourse about proposed changes and may impair the ability of those interested in reforming practice to form coalitions in support of change. All these difficulties are amply reflected in the record of the Civil Rules Advisory Committee's hearings and in congressional debate.

Notwithstanding the difficulties, we think much can be gained by seeking a consensus on improving class action practices, even while the larger political debate continues. In this final chapter we review the leading proposals for

damage class action reform that have been put forward in recent years. Although some of these proposals have been put aside for the moment, they illustrate approaches to reforms that have been proposed over the past several decades and hence are likely to remain on the reform agenda as long as the debate over damage class actions continues. Our goal is to identify those changes that are most likely to improve the balance between public good and private gain without either restricting or expanding the use of damage class actions in particular substantive domains. In so doing, we hope to help those who are on opposite sides of the broad policy debate about the social value of damage class actions but who share concerns about current damage class action practices to find common ground.

We begin by reviewing five class action reform proposals that have been subjects of sharp political controversy.

A. ADDING A COST-BENEFIT TEST TO THE RULE 23(b)(3) CERTIFICATION CRITERIA

The focus of the Civil Rules Advisory Committee's effort to reform Rule 23 in the 1990s was providing clearer guidance to judges on when, and when not, to certify damage class actions. In the committee's final deliberations, no issue occupied more time than the so-called "just ain't worth it" rule (proposed Factor (F)), and no proposed change better reflected the belief of some class action critics that a prime way to curb perceived abuses in class action practice is to change the criteria for certification.[2]

The proposed new provision of Rule 23(b)(3) would have encouraged judges to deny certification when they believe the possible benefits of class action litigation are not worth the likely costs. The proposal clearly implicated the broad policy question at the heart of the damage class action controversy because it called for judges to define the relevant benefits and costs. The "just ain't worth it" rule was a primary focus of debate during the period of public comment on the proposed revisions, arousing strong support from the business community and strong opposition from consumer public interest advocates and consumer class action attorneys. It was only after multiple committee discussions, hours of oral testimony, and hundreds of pages of written commentary that the committee put aside the proposal to include such a "cost-benefit" test among the criteria for certification.

The effort to amend Rule 23 to include a cost-benefit test for certification foundered on disagreement about the social value of class actions, particularly lawsuits involving small losses to class members. But the committee also stumbled over the difficulty of crafting language that would provide clear guid-

ance to trial court judges on how to implement such a test. Our case studies illuminate the problems associated with adding a cost-benefit test to the 23(b)(3) certification criteria. For it seems to us that, depending on what one believes are the appropriate benefits to consider—a substantive decision—and depending on what features of the class action claims one focuses on, any one of the class action lawsuits we studied might or might not pass a "just ain't worth it" test.

For example, some readers may think that marketing identical lenses under different labels at significantly different prices is an example of wrongdoing that should not go uncorrected. These same readers may believe that consumer class members who incurred additional charges for lenses as a result of Bausch & Lomb's policy deserved reimbursement for those charges, which we estimate may have totaled $200–$300 per lens user. Other readers may believe that Bausch & Lomb's policy, which did not violate any FDA regulation, was well within the law, and that consumer class members were simply paying different prices for different products, among which they were free to choose. Still others may believe that the proper recourse for consumer protection advocates was the enforcement actions by the state attorneys general that yielded fines against Bausch & Lomb but did not provide reimbursement to lens users.

Similarly, some readers may believe that the additional premium charges of about $3 per motorist per year, resulting from Allstate and Farmers' insurance companies' premium-rounding formula, were so small as not to be worth *any* amount of litigation costs, much less the millions that were spent on the lawsuit. These readers may also believe that because the companies' behavior was consistent with advice from regulators regarding rounding, the social value of class litigation was negligible. Other readers, however, may point to the possibility of additional charges per consumer amounting to as much as $140 over a ten-year period and to the insurance commissioner's post hoc holding that the companies' rounding formula violated Texas regulations, and conclude—as did a host of law professors—that clear benefits accrued from certifying a class and allowing the litigation to go forward. A third group might believe that consumer advocates should have relied on administrative processes for regulatory enforcement, rather than on class action litigation.

In sum, once one moves beyond the rhetoric surrounding these class action lawsuits to a close analysis of their facts, which cases "just ain't worth it" and which are becomes a lot less distinguishable. Without adjudication of the *legal merits—not* part of the certification decision under current law[3]—we do not think it is at all certain that we could depend on judges who have different social attitudes and beliefs to arrive at the same assessment of the likely costs and benefits of lawsuits such as these.

Arguing against a cost-benefit test for certification is not the same as arguing that all class actions have substantive merit and ought to be decided in favor of class members. Courts already have procedures for deciding the legal merits of putative class actions early in a litigation, apart from the certification decision. Defendants in any civil case may request that the case be dismissed by the judge when, even if the facts are construed in the most favorable way possible for the plaintiffs, the defendants should win as a matter of law. Defendants can also move for summary judgment on the argument that the factual evidence, as demonstrated by documents, depositions, and so forth is not sufficient to sustain the complaint.

In its study of class actions in four federal district courts, the Federal Judicial Center (FJC) found that judges ruled on dismissal in more than half of the cases,[4] suggesting that this procedure is widely used in class action lawsuits. (Defendants also filed motions to dismiss or for summary judgment in five of the ten class actions that we studied.) Among cases in which judges considered dismissal, the FJC found rates of dismissal ranging from 15 to 34 percent across the four courts,[5] suggesting that motions to dismiss have real bite in class action litigation, as in other forms of civil litigation. (Because we deliberately selected cases for study that survived legal challenges, the fact that none of those cases was dismissed is not an indicator of the true rate of dismissal in the population of all class action lawsuits that are filed.)

Asking judges to review the merits of a lawsuit preliminarily when deciding whether to certify it as a class tempts class action reformers primarily because of the impact the certification decision itself has on the litigation: Depending on whether a judge decides yea or nay on certification, the litigation may live or die. What is sometimes termed the *in terrorem* effect of the certification decision (literally, its terrorizing effect) seems to many to justify strong efforts at the inception of the litigation to assure that the decision is a correct one. But the FJC found that, in three of the four courts it studied, judges generally ruled on defendants' motions to dismiss *before* deciding whether or not to certify.

Asking judges to review the merits of a lawsuit preliminarily when deciding whether to certify it is also attractive because of the substantial transaction costs associated with this litigation. Although dismissals may occur early in the litigation process, normally we would expect a motion for summary judgment to occur after substantial discovery (with attendant costs) has taken place. Across the four courts it studied, the FJC found that judges ruled on motions for summary judgment in 5 to 10 percent of cases with class action allegations. In three of the four courts, these rulings usually were made *after* the certification decision. [6]

Rule 23 currently instructs judges to decide whether to certify a class action based on the *form* of the litigation, rather than its substantive merits: its scale, the extent of common features among claims, the representativeness of the individuals who have come forward to litigate on behalf of the class, and the superiority of class treatment over other forms of litigation. Preserving the line between certification based on the form of the litigation and dismissal and summary judgment based on the substantive law and facts seems more likely to send consistent signals to parties as to what types of cases will be certified than conflating the two decisions. Moreover, attempting to craft a standard that incorporates substantive judgments about the merits of claims into the certification criteria strikes at the heart of the damage class action controversy.

B. REQUIRING RULE 23(b)(3) CLASS MEMBERS TO OPT IN

Some contemporary damage class action critics have proposed amending Rule 23 to require that those who wish to join a damage class action proactively assert that by opting in. This requirement would be a return to prior practice, because plaintiffs in damage class actions were required to opt in before the 1966 revision to the rule.[7] Among the proposed revisions to Rule 23 discussed by the Advisory Committee in 1996 (but not formally proposed for review and comment) was a provision for opt-in classes, and even after the revision process foundered, some spokesmen for the business community continued to advocate such a change.

Proponents of opt-in classes reason that many individuals become involved in damage class actions simply because they do not pay attention to class action notices or do not take the time to register their desire to opt out. Damage class action critics suggest that this undercuts the validity of many class actions.

Requiring those who want to be bound by class action outcomes to opt in at the inception of the lawsuit would inevitably reduce the scale of class actions in which the underlying individual claims involve modest amounts of money. Common sense tells us that when little is known about the consequences of joining a lawsuit, smaller numbers of individuals will come forward than would appear later in a litigation when more is known about the defendant's behavior and when the consequences for individuals are clearer. Social science research tells us that in many circumstances, when individuals are required to assent actively (rather than passively) to some procedure, fewer will do so although many of those who do not take action do not disagree with what is proposed. The social science research on active versus passive assent also suggests that minority and low-income individuals might be disproportionately affected by an opt-in requirement, a worrisome possibility.[8]

Requiring class members to opt in is another reform proposal that implicates the broad policy question at the heart of the damage class action controversy. In consumer class actions involving small individual losses, requiring class members to opt in would lead to smaller classes, which would probably obtain smaller aggregate settlements, which would probably result in smaller fee awards for class counsel.[9]

Reduced financial incentives flowing from smaller class actions would discourage attorneys from bringing suit.[10] How one feels about this result depends on one's judgment about the social value of small-dollar consumer class actions. Hence, proposals to substitute an opt-in provision for the current opt-out provision of Rule 23 lead to sharp political debate, arraying consumer advocates and class action attorneys on one side of the question and business groups on the other.[11]

C. PROHIBITING SETTLEMENT CLASSES

One of the most hotly debated issues pertaining to class action procedure during the 1990s was whether judges should be permitted to certify classes *for settlement purposes only.* Rule 23 makes no provision for such classes, although it provides for certification to be conditionally granted and to be withdrawn if a judge subsequently decides it is inappropriate.[12] In practice, however, it appears that certification for settlement purposes only was common in federal and state courts in the 1990s. In its 1996 study of class actions in four federal district courts, the FJC found that about 40 percent of all certified lawsuits were certified conditionally for settlement.[13] Among the ten class actions that we studied, four were certified conditionally for settlement only. Settlement classes have attracted two types of criticism, the first implicating the broad social policy question about when damage class actions should be permitted, and the second focusing on class action practices.

Certifying settlement classes may have the effect of expanding the use of damage class actions if judges certify classes for settlement that they would not certify for trial purposes—for example, on the notion that settlement itself creates sufficient common interests to outweigh differences in fact or law among claims. The issue of whether judges can certify cases for settlement when the criteria for trial class certification are lacking was decided by the U.S. Supreme Court in *Amchem Products, Inc. v. Windsor,* a case involving a class action on behalf of future asbestos plaintiffs. The Court held that neither the fact that the parties have agreed to a settlement, nor that the judge has approved of such a settlement, is sufficient to satisfy Rule 23 criteria for certification. But the Court did not reject the concept of settlement classes when the criteria are satisfied.[14]

Prior to the *Amchem* case, the question of whether damage class actions could be certified for settlement purposes had been raised in consumer class actions.[15] But when the U.S. Supreme Court decided to consider this issue in the context of an asbestos "futures" class action, the issue of settlement classes became entwined with the issue of certifying a class action limited to or including claims of individuals who have not yet identified themselves as injured. The Court's holding in *Amchem* and in a subsequent asbestos futures class action, *Ortiz v. Fibreboard Inc.,*[16] imposed limitations that some practitioners believe will either severely restrict or eliminate the situations in which a damage class action can be certified for mass tort claims. But the Court's restrictive holdings spoke to the shape of a class—and in particular to the question of conflicts of interest among class members and between some class members and class counsel—and not to the question of the legitimacy of settlement classes.

Settlement class actions might increase the use of damage class actions for another reason as well. When the U.S. Supreme Court ruled in 1974 that plaintiff attorneys must bear the costs of notifying class members of the pendency of a damage class action (so that they can decide whether to opt out),[17] some class action supporters worried that this ruling would deter the filing of suits by plaintiff attorneys who could not be certain, so early in the litigation, that they would recover these costs. Initial notice costs can be substantial: In the *contact lens pricing* class action, the estimated costs of initial notice were about \$150,000.[18] We expected that plaintiff attorneys would have to bear such costs whenever class actions were certified for trial. But defendants bore these up-front costs in eight of the ten class actions we studied, including class actions certified for trial and those certified for settlement only.[19]

The primary criticism of settlement classes is that they facilitate collusion between plaintiff class action attorneys and defendants. This perception fed the firestorm of controversy that erupted when the Civil Rules Advisory Committee proposed to add a provision to Rule 23(b) that would explicitly provide for settlement classes.

When the parties are not certain that a judge would certify a class for trial (i.e., unconditionally), settlement class critics say, class counsel negotiate from a weaker position than when they and the defendant know that the alternative to settlement is trial. Moreover, the critics say, if the parties negotiate a settlement before a court has made *any* ruling in the case—as happens in some settlement class actions—then class counsel are in an even weaker position. (In its study of class actions, the FJC found that in about half of the cases that were certified for settlement purposes only, a tentative settlement was presented to the court along with the initial motion for certification.[20])

In our interviews, some plaintiff class action attorneys disputed the notion that uncertainty about certification has unilateral effects on class counsel. In some cases, they claimed, uncertainty about whether a case will be certified works to the advantage of class members, rather than to that of defendants. Moreover, some plaintiff class action attorneys and some defense counsel argued that even when settlement negotiations precede formal certification, the parties have often had an opportunity to assess the likelihood of prevailing in a certification battle. In the four settlement class actions that we studied, there was no significant discovery before the settlement. But two of the four cases followed years of individual litigation, and a third was one of many similar class action lawsuits. In these cases, class counsel and defendants probably had considerable information for evaluating the likelihood that either side would prevail in a certification battle.

Another concern about settlement class practice that we examined in our study is that when judges are simultaneously presented with a motion for certification and an already-negotiated settlement, the appropriateness of the settlement may not receive proper scrutiny. In our early interviews with class action practitioners, both plaintiff and defense attorneys told us about settlements reached early in the litigation process before the parties had conducted much legal research or discovery. They asserted that attorneys in these cases could not have arrived at a proper evaluation of the factual and legal merits of the lawsuit before settlement, and that judges who approved these settlements had insufficient grounds for their approval. Among our ten cases, we found no evidence that settlement quality—evaluated in terms of the ratio of class-member benefits to lawyer fees—correlated with whether the class had been certified for settlement only or unconditionally.

A third practice-oriented criticism of settlement class certification is that it diminishes the opportunity for class-member participation and monitoring of the process. If class members first hear about a case when a settlement has already been reached, critics say, they have little likelihood of influencing the outcome.[21] Currently, this concern is more theoretical than real, since there is little evidence that class members participate in class litigation regardless of its formal certification status. But tying initial notice of a class action's pendency to a settlement's having been reached precludes the development of strategies to expand the role of class members in monitoring and shaping settlement negotiations.[22]

As written, Rule 23(b)(3) requires class members to decide whether to opt out of a damage class action or bind themselves to its outcome before they have any knowledge of that outcome. For example, in the New Orleans toxic chemical factory litigation, which was certified for trial, class members were required to opt out sixty days after the class was certified—a year and a half before either a

settlement amount, or a formula for allocating any fund that might be established, was negotiated.[23] In ordinary civil litigation, where we presume that individual plaintiffs (unlike class members) have some control over the litigation process, we do not require plaintiffs to agree at the onset to accept any settlement that the attorneys negotiate. On its face, requiring class members to decide whether to bind themselves to a class action's outcome before they know what it is seems unfair to them. But a rule that allows individuals to opt in *after* a settlement has been negotiated might be regarded as unfair to defendants. In settlement class actions, class counsel and the defendant may negotiate a combination of opt-in and opt-out provisions that they perceive to be in their joint interests.

Our analysis of the controversy over settlement class actions and the evidence pertaining to their use leaves us uncertain about the wisdom of prohibiting certification for settlement only in every circumstance. The available qualitative and quantitative evidence suggests that in some instances when judges certify class actions for settlement purposes, class counsel and defendants have not fully investigated the legal and factual merits of the case and have negotiated settlements that better serve class counsel and defense interests than those of class members. When coupled with indifferent judicial management and the absence of publicity about the circumstances surrounding the litigation, settlement classes offer significant opportunities for collusion and self-dealing. But we are not persuaded that these opportunities flow from the formal character of certification rather than from the circumstances of a case.

When the individual claims underlying a damage class action are small, when defendants would rather settle quickly than contest the certification or the merits, and when class counsel do not have sufficient resources or desire to accept the risks of litigating aggressively, judges need to exercise special care in scrutinizing settlements and assessing the basis for attorney fee requests. In such circumstances, settlement class certification may enhance the risk that class counsel and defendants will negotiate settlements that are not in class members' best interests, but certifying a class unconditionally (i.e., for trial) will not automatically eliminate this risk. In these circumstances, whatever the form of certification, there is a particularly strong need for judges to open up the process to objectors and intervenors, to utilize neutral experts, and to require that all transactions be disclosed, as we discuss later in this chapter.

On the other hand, when a lawsuit has been fiercely contested by the defendant, when a significant amount of factual investigation has taken place in this or prior litigation, and when class counsel have and are willing to spend resources to obtain a fair settlement, settlement class certification may facilitate settlements that are in the best interests of class members as well as those of defendants. A judge who is paying careful attention to the class action litigation

process then might properly decide to certify a class for settlement purposes only. Of course, such certification does not absolve the judge of responsibility for assuring that the settlement is reasonable, adequate, and fair, and for properly assessing the value of class counsel's work to the class, using the full range of tools that are available.

D. BROADENING FEDERAL COURT JURISDICTION

A fourth proposal for class action reform that has attracted considerable attention from Congress in recent years would broaden federal court jurisdiction over class actions so that many class actions that are now subject to state class action rules would be governed by federal rules, practices, and judges. Proposals to expand federal court jurisdiction over class actions reflect views about the social value of class actions and about strategies for improving practice.

Some critics of class actions believe that federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly.[24] Currently, defendants cannot remove a lawsuit from state to federal court unless *all* of the class representatives are citizens of states different from *all* of the defendants—a condition that is quite easy for class counsel to avoid.[25] Moreover, defendants cannot remove a class action to federal court unless the monetary value of each class member's claim satisfies the diversity jurisdiction threshold, currently $75,000.[26] In consumer class actions involving claims for modest losses, this standard cannot be satisfied unless claims for punitive damages, if any, are considered.

A bill introduced in the 106th Congress would change this situation dramatically. It would permit plaintiffs to file a class action in federal court and defendants to remove a class action from state to federal court whenever a class includes *any* member who is a citizen of a state different from *any* defendant, the total amount in controversy exceeds the diversity threshold, and the circumstances that gave rise to the action occurred in more than one state.[27] Predictably, the bill evoked opposition from consumer class action advocates who viewed it as an attempt to limit the use of class actions. Those who opposed the bill questioned the perception that the social costs of state class actions outweigh their benefits, which they attributed to the bills' sponsors. The opponents also raised concerns about the consequences of the proposed change for our federal system of courts and law.[28]

Although proposals to expand federal jurisdiction have been embraced by some who favor doing away with damage class actions entirely,[29] the jurisdiction issue has important implications for class action practice in whatever circumstances they are used. For example, some argue that state court judges, who

historically have had far fewer resources at their command, are ill-equipped to provide the kind of close attention that class actions require (and which we recommend later in this chapter). These critics say that providing for easier removal of lawsuits to federal court would have salutary effects on class action practices.

Because there is so little systematic data on state court class actions, we have no empirical basis for assessing the argument that federal judges generally manage damage class actions better than state court judges. But the current situation, in which plaintiff class action attorneys can file multiple competing class actions in a number of different state and federal courts, has other negative consequences. First and most obviously, duplicative litigation drives up the public and private costs of damage class actions. Second, and perhaps more important, class action attorneys and defendants who negotiate agreements that do not pass muster with one judge may simply take their lawsuit to another jurisdiction and another judge. Under most circumstances, none of the judges in the different courts in which the case is filed has the authority to preclude action by another judge as long as all cases are still in progress.[30] A class action settlement approved by a judge in one court usually cannot be overturned by another court (which might disapprove of the terms of the settlement), even if the claims settled in the first court are subject to the jurisdiction of the second court.[31]

How to stop "end-runs" around judges in our system of state and federal courts is one of the most difficult dilemmas facing those interested in reforming class action practice. In the federal courts, duplicative class actions can be assigned to a single judge by the judicial panel on multidistrict litigation.[32] However, under the MDL statute, transferee judges do not currently have the power to *try* all the cases assigned to them, but may only manage them for pretrial purposes.[33] Although MDL transferee judges can and do preside over settlements of aggregate litigation, the fact that MDL judges cannot try cases that were not originally filed in their court may undercut their ability to regulate their outcomes.

Congress could amend the statute that authorizes multidistricting to give the panel authority to assign multiple, competing federal class actions to a single federal judge for all purposes, including trial.[34] Some states have developed procedures for collecting like cases within their states for pretrial purposes, analogous to the federal multidistricting procedure.[35] States could adapt these mechanisms, or develop new ones, to assign multiple competing class actions within their state to a single judge for all purposes.

But consolidating cases *within* federal or individual state courts would not solve the problem of competing federal *and* state class actions, which may be filed

within a single state or in different states by the same or competing groups of class action practitioners. Since the early 1980s, largely in response to increasing mass tort litigation, numerous bills have been introduced in Congress to create a basis for federal court jurisdiction over multiple lawsuits arising from a "mass accident."[36] Various task forces and individuals have also proposed devices for collecting cases across federal and state courts.[37] Some have even proposed a national mass disaster court.[38] Most of these proposals envisaged consolidating individual lawsuits, but they could extend to damage class actions.

A key problem for federal and state class actions that involve allegations that multiple state laws were violated by defendants' practices is how to apply these laws to the case. In some class actions, defendants have argued and judges have agreed that because multiple states' laws are implicated, the lawsuit cannot meet the Rule 23(b)(3) criterion that common issues predominate.[39] Some past proposals for consolidating multistate claims include provisions for dealing with choice-of-law problems.[40] But recent proposals to expand federal jurisdiction over damage class actions do not address this issue. Perhaps the ingredients for a consensus approach to the problems of multistate class actions could be found by incorporating a solution to the choice-of-law problem in a proposal that expands federal jurisdiction over such litigation and provides additional resources for federal judges who preside over such lawsuits.

E. PROHIBITING MASS TORT CLASS ACTIONS

The 1990s debate over revising Rule 23 began with a concern about how best to manage mass tort litigation.[41] By the end of the decade, the popular debate had broadened to include securities class actions and consumer class actions, but the procedural questions raised by mass tort litigation continued to engage the legal academic community and to shape the policy discourse over class actions. Yet, when the Civil Rules Advisory Committee's lengthy review process ended, little was left of earlier proposals to revise Rule 23 to incorporate mass torts into its framework. Moreover, recent U.S. Supreme Court opinions dealing with asbestos futures class actions are likely to restrict the use of class actions in mass torts.[42]

Arguments over the costs and benefits of mass tort class actions have been hampered by the apparent belief of many legal scholars that, absent class certification, mass product defect and mass environmental exposure claims would proceed as individual lawsuits. Empirical research indicates, to the contrary, that whenever claims of mass injury exist, litigation either proceeds in aggregate form or dies on the vine.[43] The important public policy question relating to mass torts is not *whether* to aggregate litigation, but *how* and *when*.

Rule 23 provides a framework for courts to control the disposition of aggregate litigation that is currently missing from multidistrict litigation and that does not exist when cases are informally aggregated. Judges hold fairness hearings and approve settlements under the provision of Rule 23, but are not required to do this in the MDL context or in informally aggregated cases. Judges award attorney fees when a settlement creates a common fund, as in a class action or a settlement of multidistrict litigation. But when cases are informally aggregated, plaintiff attorney fees are governed by private contracts between the attorneys and their clients, and whatever economies of scale the attorneys may realize in aggregating cases need not be passed on to their clients.

As we have seen, judges do not always exercise their full authority to scrutinize proposed class action settlements, and they do not always closely examine the rationale for class counsel fee requests. However, the formal requirements of Rule 23 provide a shield against self-dealing on the part of attorneys that is missing in informally aggregated cases and not as clearly defined in multidistrict litigation.

Class action certification often puts class action attorneys in control of mass tort litigation, and these attorneys often adopt a strategy of settling the largest possible number of claims early in the litigation process according to a formula that only roughly distinguishes among claimants with injuries of differing severity.[44] But, in mass tort litigation, significant numbers of claimants often would be better served by lengthier litigation (to develop a stronger factual basis for negotiation) and more individualized damage assessment. Plaintiff attorneys who aggregate mass tort cases informally argue that they are better able than the class action attorneys to achieve these ends. Although conducted in the lofty terminology of due process, the public debate over mass tort class actions actually reflects a power struggle between these two groups of attorneys. To date, there is insufficient empirical evidence to indicate whether mass tort claimants are better served by formal aggregation through class certification, by informal aggregation, or by the somewhat ambiguous middle-ground that MDL provides.

Mass tort class actions present yet another dilemma for private and public decisionmakers: Classwide resolution of large-scale litigation offers an opportunity for courts and parties to stem the flow of resources required to litigate cases individually or in small groups. But the potential for large-scale resolution stimulates claiming by large numbers of individuals who might not otherwise have come forward. The expansion of the claimant population not only drives the cost of global resolution skyward, it also dilutes the value of claims that are arguably more deserving of compensation.

To defendants in mass product defect and mass exposure cases, class certification is a double-edged sword. When aggregate litigation is inevitable, class certification and settlement may offer a vehicle for controlling costs. But few companies—and few corporate counsel—are comfortable accepting the "bet the company" risk associated with a single classwide trial. Moreover, early certification of a mass tort class may short-circuit the process of testing the strength of the plaintiffs' factual and legal case, and testing the plaintiffs' attorneys' willingness to invest the necessary resources to litigate successfully. Informal aggregative procedures provide more avenues to test plaintiff attorneys' resolve and more ability to craft different settlements for different groups of claimants and their attorneys.

Class certification of mass torts *after* the facts and law underlying the litigation have been fully developed might best balance the competing interests of mass tort claimants and defendants, by providing both court scrutiny of settlement and fees and an efficient means of resolving large-scale litigation once the merits of the plaintiffs' case have been demonstrated. The proposal to add a "maturity" factor to the criteria for class certification[45] was based, in part, on this intuition. But once informal aggregation of cases proves successful for them, individual plaintiff attorneys are unlikely to find any classwide resolution attractive because it would stem the flow of fees from individually negotiated contingency-fee agreements. Finding that elusive moment when global settlement is in both sides' interest may be nigh impossible. But before we can find that moment—or any other solution to the problems of mass tort litigation—we need to abandon the myth that mass tort cases, absent class certification, proceed as individual lawsuits, with a full panoply of due process.

* * *

Our review of the leading class action reform proposals is sobering. History suggests that some of these proposals are unlikely to garner sufficient support for adoption because they involve the political disagreement at the heart of the class action controversy. And the likelihood that other proposals will improve class action practice is uncertain at best. What avenues for reform remain?

We think it is judges who hold the key to improving the balance of good and ill consequences of damage class actions. It is what the judge requires of the attorneys, parties, and process that determines the outcome of a damage class action. And it is the outcome of one class action that determines whether another similar class action will be brought. If judges approve settlements that are not in class members' interest and then reward class counsel for obtaining such settlements, they sow the seeds for frivolous litigation—settlements that waste

society's resources—and ultimately disrespect for the legal system. If more judges in more circumstances dismiss cases that have no legal merits, refuse to approve settlements whose benefits are illusory, and award fees to class counsel proportionate to what they *actually* accomplish, over the long run the balance between public good and private gain will improve. In the final section of this chapter we discuss how this might be accomplished.

F. INCREASING JUDICIAL REGULATION OF DAMAGE CLASS ACTIONS

Judicial regulation of damage class actions has two key components: settlement approval and fee awards. Judges need to take more responsibility for the quality of settlements. And they need to reward class counsel only for achieving outcomes that are worthwhile to class members and society. For assistance in these tasks they can sometimes turn to objectors and intervenors. But because intervenors and objectors often are also a part of the triangle of interests[46] that impedes regulation of damage class actions, judges should also turn for help to neutral experts and to class members themselves.

1. Settlement Approval

Rule 23(e) requires judges to approve settlements of class actions, but does not specify the criteria that judges should use in deciding whether to grant such approval. Case law requires that class action settlements be fair, adequate, and reasonable[47]—elastic concepts that do not, on their face, offer much guidance as to which settlement elements judges should approve, and which they should reject.[48] The federal judges' reference manual on complex litigation offers more guidance, suggesting that judges should question settlements that appear to offer unduly preferential treatment of class representatives or particular subgroups of class members, or excessive compensation for attorneys, or that involve monetary amounts that are much less than the amounts sought initially by plaintiffs' attorneys or are indicated by preliminary discovery.[49] The manual also suggests that judges question settlements to which there are many objectors or to which apparently cogent objections have been raised.[50]

Neither case law nor the judicial reference manual offers much help to judges in determining what the settlement is actually worth, and hence how adequate, reasonable, or fair it really is. Outcomes of damage class actions are often intended both to compensate class members' losses and to deter the defendant and others from engaging in illegal practices. In the ten class actions we studied, the information presented to judges for the purpose of determining

whether settlements fairly, adequately, and reasonably met these objectives was very uneven.

According to case law, judges may only approve or reject proposed class action settlements; they may not themselves devise a settlement that is to their liking.[51] In practice, however, judges may signal what features of settlements will and will not meet their approval, as Judge Robert Jones did in a series of meetings with counsel in the *home siding* class action.[52]

To give meaning to the objectives of damage class actions, before approving a settlement, a judge ought to inquire what the estimated losses were and how these losses were calculated. In some instances, such information might be more readily provided in the form of aggregates, as in the *brokerage products case,* where class counsel retained experts who calculated aggregate losses to class members under two different theories of loss estimation, and compared the total negotiated settlement amount to these aggregate loss estimates.[53] In other instances, it may be more practical to estimate losses to individual class members, as in the *cable TV late fee* case, in which the alleged loss was the monthly late fee, and the settlement offered reimbursement of up to ten late-fee charges.[54] In some instances, providing loss estimates in support of settlement requires fairly significant factual investigation (i.e., discovery), and may lead to disputes over the proper method of loss estimation, as occurred in the *brokerage products* litigation.[55] But approving a settlement without *any* information on aggregate *or* individual losses, which seems to have happened in the *collateral protection insurance* case,[56] raises serious questions about how the judge determined the settlement's adequacy, reasonableness, and fairness.

The issue is *not* that class members should always be fully compensated for their losses. Because the legal merits of the lawsuits have not been adjudicated, judges quite properly expect settlements to reflect compromises between the parties that take into account the strengths and weaknesses of the class members' case. However, judges should be suspicious of settlements that fall far short of reasonably estimated losses, and of plaintiff class action attorneys whose advocacy is directed toward persuading the judge of the weaknesses of the very case that they were eager to have that same judge certify not many months before.[57]

The judge's assessment of the adequacy and reasonableness of a class action settlement should not rest merely on the amount of money it is putatively worth. If few class members come forward to claim compensation, then the settlement is, in reality, worth much less than it appears. Case law on attorney fees (which we discuss further below) does not require judges to distinguish between the total *potential* liability of defendants and their actual payments to

settle a class action.[58] We think that ignoring this important distinction encourages collusion between plaintiff attorneys and defendants.

Judges ought to require settling parties to lay out their plans for disbursement, including proposed notices to class members, information dissemination plans, whether payments will be automatic (e.g., credited against consumers' accounts) or class members will be required to apply for payment, and, in the latter instance, what class members will be required to do and to show in their applications. Generally, in consumer class actions involving small individual losses, automatic payments to class members should be favored when lists of eligible claimants (e.g., subscribers) are available from defendants and when a formula can be devised for calculating payments. Among the consumer class actions we studied, settlement funds were more likely to be fully disbursed to class members when payments were automatic—for example, when defendants credited the accounts of *current* policy holders in the *insurance premium double rounding* litigation[59] —rather than requiring class members to file a claim against the fund.

Settlement plans presented to the judge should always indicate what will be done with any funds that are not claimed by class members. If the settlement includes a provision to return any residual funds to the defendant, the parties should disclose their estimates of the projected total disbursement by defendants. In cases in which unclaimed funds revert to defendants, the actual size of the settlement may be very different from the amount negotiated. For example, because less than 1 percent of *past* policy holders filed claims against the settlement fund in the *insurance premium double rounding* class action, the true value of the settlement turned out to be about $24 million, rather than the $39.6 million negotiated by the parties and approved by the judge.[60]

Coupon settlements, in which class members receive coupons for free or discounted products and services—often the same products or services whose alleged flaws led to the litigation—have been the subject of sharp controversy.[61] Coupons can be an efficient way of delivering compensation to class members when defendants do not have available lists of eligible claimants—as when the class comprises all purchasers of a common product, such as orange juice—or a ready means of making direct cash payments to class members. But coupons that are not redeemed impose no real cost on the defendant, and a settlement composed wholly or largely of such coupons is not worth its face value. For example, half of the negotiated settlement amount in the *contact lens pricing* case was to be paid in the form of coupons. Was the true value of that settlement the $67 million amount negotiated, or the $34 million promised in cash payments? Or was it the smaller but unknown amount of cash paid and coupons redeemed by lens users who came forward to claim compensation?[62]

Judges who are reviewing coupon settlements ought to ask defendants for estimates of the rate of coupon redemption and projected payouts. Since many defendants use coupons as marketing devices, such information ought to be available to them and would, at least, provide some guidance to judges as to the probable monetary value of a coupon settlement. When direct cash payments to class members are feasible, a judge ought to assume that coupons are proposed in lieu of cash payments because they will cost the defendant less than to pay cash, and therefore the judge ought to closely scrutinize the parties' claims about the monetary value of the settlement and the appropriateness of using coupons at all.

Currently, many damage class actions are justified by their presumed regulatory enforcement effects. Particularly when individual payments to class members are small, so that the claim of a compensation objective being met is weak, judges should take regulatory enforcement effects into account in assessing the quality of the settlement. Judges should ask whether the class litigation contributed to changes in defendants' practices or in government regulations. But judges need to be wary of unsubstantiated claims that such changes occurred, and should be skeptical when large dollar values are assigned to alleged injunctive effects. For example, the parties initially assigned a value of $11.7 million to the "injunction" component of the settlement in the *collateral protection insurance* lawsuit[63] even though the evidence suggests that the defendants' practices contested in that lawsuit had ceased some time before, either in response to previous class actions or simply as a result of a change in corporate policy. In inquiring about changes in practice, judges should also ask whether the instant class action is the first such suit against the defendant, or is one in a long chain of such suits, because later suits are less valuable as regulatory enforcement tools.

Judges' responsibility for the fairness, adequacy, and reasonableness of class action settlements should not end with their formal approval of those settlements. In two of the ten class actions we studied, no public record exists of the amounts of money ultimately paid out by defendants.[64] Judges should require that settlement administrators (including defendants, organizations retained by defendants to administer the settlement, and individuals or organizations acting on behalf of the court) report, in a timely fashion, both the total amounts of disbursements to class members and the total costs of administration. Judges should review these reports to determine whether rates of claiming and coupon redemption are in line with parties' projections at the time the settlement was proposed; they also, as we discuss below, should adjust class counsel fees when the true value of the settlement falls substantially below the value asserted during the settlement approval process.[65]

When settlements are structured to provide payments over lengthy periods, judges should require, at least, annual reports of disbursements and costs as well as reports on the process of claims administration—including the numbers of claims accepted and denied, reasons for denial, use and outcome of appellate procedures (where provided) and time to disposition. When settlements provide for cy pres remedies, the beneficiaries of those remedies and the amount of disbursement to them should also be reported. When alternative dispute resolution procedures, such as arbitration or mediation, are utilized in the claims administration process, judges should require reporting on the selection and training of the arbitrators or mediators, payment provisions, and quality control procedures. These regular reports on claims administration should be available to the public for review.

2. Attorney Fees

The private gains that accrue to plaintiff class counsel in damage class action litigation are the engine that drives the litigation. *The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.*

Currently, judges award fees to plaintiff class action attorneys using either the percentage of fund (POF) approach (a judge-determined percentage of the common fund) or the lodestar approach (reported hours multiplied by a judge-determined hourly rate multiplied by a judge-determined factor reflecting lawyers' skill, success, or the risk they incurred in litigating). The POF approach has been criticized as rewarding class action attorneys without regard for how much effort they actually invested in obtaining a particular monetary award or settlement—for example, when defendants agree to pay a large amount to settle the lawsuit early in the litigation to contain their own costs and avoid publicity. The lodestar approach has been criticized for its potential to overpay attorneys who invest unnecessary time in the litigation (or pad their bills), and for requiring excessive attention from judges to attorneys' billing practices to avoid such overpayment.[66] In practice, neither approach may achieve the proper social objective, which is to reward class action attorneys for bringing litigation that delivers value for class members and society.

In theory, the POF approach ought to result in the right level of reward for class action attorneys, because we should be able to rely on defendants to ensure that class action attorneys work hard to achieve substantial monetary rewards for class members. But in class action litigation, defendants may have an interest in plaintiff attorneys' receiving significant rewards for substandard settle-

ments: Such settlements leave defendants, on net, better off than they might have been had the class action attorney worked harder (or more skillfully), thereby forcing the defendant either to try the case to verdict or settle for a larger amount. If judges do not strictly scrutinize the quality of settlements, plaintiff attorneys may get paid too much for what they accomplish and defendants may pay too little for closing off future litigation.

We do not think the solution to this problem is to rely on the lodestar approach. Rather, we think judges ought to calibrate POF awards more carefully to reflect the benefits actually produced by the class litigation. To avoid rewarding class action attorneys for dubious accomplishments, judges should award fees in the form of a percentage of the fund *actually disbursed* to class members or other beneficiaries of the litigation.[67] When settlements include coupons, judges should award fees based on the monetary value of coupons *redeemed,* not coupons offered.

In an important case decided in 1980, the U.S. Supreme Court held that class action attorney fees could be awarded on the basis of the negotiated size of a settlement fund, without regard to how many class members came forward to claim shares of the fund.[68] We think this rule has perverse effects in damage class actions and ought to be overturned. When defendants keep any dollars not collected by class members, the rule gives class action attorneys and defendants an incentive to collude in negotiating settlements whose actual monetary value is less than their face value.

Awarding fees on the basis of dollars paid out, rather than dollars that *might* be paid out, poses a practical problem: Plaintiff class action attorneys have a legitimate concern about collecting their fees as soon after the close of litigation as possible, since they have to pay salaries and expenses as they accrue and have often accumulated a large financial burden by the time the lawsuit is settled. Judges may, however, award a portion of the projected fee immediately and award the remainder, as a percentage of disbursements, over time. For settlements with long disbursement tails, such as the *polybutylene pipes* litigation, judges can use annual reports of disbursements as a basis for making sound projections of ultimate disbursements and pay the remainder of attorney fees over time based on those data. An added benefit of linking class action attorney fees to disbursements is that it would give the attorneys an interest in ensuring expeditious and effective delivery of compensation to class members. In the *home siding* litigation, Judge Jones decided that the class counsel fees would be paid out over the first four years of the claims administration process.[69] Judges have held back portions of attorney fees in other cases, where disbursements were to be made over a long period of time or where there was uncertainty about what the total payout would be.[70]

Class counsel *expenses* could be paid out as soon as the judge has assessed these expenses, before disbursements have been completed. As is common today in other areas of legal practice, class action attorneys ought to be required to provide detailed expense reports.

In awarding fees, judges ought to award attorneys a lower percentage of any dollars that are not collected by class members, but instead are awarded to other beneficiaries—so called cy pres remedies—except in instances where direct compensation to class members is clearly impracticable. Some damage class action proponents argue that when class counsel succeed in negotiating a settlement that requires defendants to pay a substantial amount to resolve the lawsuit, they have served a regulatory enforcement purpose that merits a fee award. From the perspective of economic theory, it does not matter who collects the defendant's money. As a social matter, however, having the defendant pay shareholder funds to attorney- or judge-selected charitable organizations whose mission may have little to do with the defendants' alleged wrongdoing is hard to justify.[71] For example, class counsel in the *cable TV late fee* litigation proposed awarding $250,000 to the California State University in Sacramento (where the representative plaintiff was a member of the faculty), $25,000 to a local TV station, and $12,000 to the "Legal Community Against Violence," among others.[72] Moreover, when plaintiff class action attorneys know that they will receive fees as a result of a settlement, without regard to whether class members come forward to claim disbursement or payments are made to other organizations, they have less interest in designing and administering effective disbursement processes.

To assure that they themselves do not have an improper interest in the settlement of a class action, judges should refrain from making cy pres awards to organizations with which they have some personal connection—for example, the law school from which they graduated or an organization on whose board they serve.

As long as the use of damage class actions for regulatory enforcement is sanctioned, judges should be prepared to award fees, as well, for changes in defendants' practices and other regulatory consequences. But judges should not readily make awards for practices that were changed in the past in response to enforcement actions by public attorneys general or other public officials, individual litigation, or previous class actions. Conversely, judges *should* consider the public regulatory consequences of the class action litigation that is before them: statutory or rule changes and public enforcement actions undertaken as a result of the class action.

All of the issues considered so far pertain to the calculation of the *amount* that class counsel should receive in fees. Another question is when that amount

should be decided, and by whom. In practice, when class counsel submit attorney fee requests to a judge, the amount of fees often has been negotiated with the defendant simultaneously with negotiating other aspects of the settlement agreement. Class counsel and the defendant may agree to a specific amount—as in the *credit life insurance* class action, where the settlement agreement submitted for judicial approval specified the fee but not the size of the compensation fund[73]—or a defendant may agree not to object to a fee request, up to some specified amount.[74] In 1985, the U.S. Supreme Court upheld the right of parties to include a fee stipulation in settlement agreements, seemingly paving the way for plaintiffs' attorneys and defendants to include understandings about fees in settlement agreements. A judge who does not approve of such a fee understanding, the Court held, can refuse to approve the entire settlement agreement under Rule 23(e).[75]

The impetus for defendants to know the maximum amount of fees that they might have to pay class counsel before agreeing to other terms of a settlement is clear: They need to know what the bottom line of any proposed agreement will be. But because of the conflict of interests posed for class counsel, such fee agreements deserve close scrutiny.[76] In cases where the potential for self-dealing and collusion is high—consumer class actions involving small losses to individuals; actions where defendants have chosen not to contest certification or the legal merits; where class counsel do not appear to have either the resources or the will required to appropriately investigate the facts; and where the case has received little or no attention from intervenors or objectors, government regulators, or the press—we think judges ought to consider alternative approaches. For example, in a report issued more than a decade ago, the Third Circuit Task Force on Attorney Fees recommended that judges negotiate a percentage fee arrangement with class counsel at the *outset* of the case or "as early as practicable." In complex cases, the Task Force recommended that the judge appoint an attorney to negotiate the fee arrangement on behalf of the class; that attorney would then submit a fee recommendation to the judge.[77] More recently, the National Association of Consumer Advocates recommended that class counsel and defendant negotiate the total amount to be paid by the defendant, without discussing fees; the judge would then award fees as a share of this amount.[78]

3. Sources of Assistance

One reason some judges may not currently engage in close examination of settlement quality and fee requests is that they do not have information or expertise available to assist them. Judges could enhance their capacity to evaluate settlements and fee requests by inviting others to assist them. A key question

for judges is how to identify and obtain advice from knowledgeable but disinterested parties.

Intervenors and objectors are sources of assistance to judges. But intervenors and objectors require timely information about a proposed settlement and access to case information. When there is little time provided between notice of settlement and the date for filing a motion for leave to intervene, or between notice and a fairness hearing, intervenors and objectors are hard-pressed to effectively assist a judge in investigating the background of the settlement and its provisions.

Judges need to ensure that the opportunity for interested parties to come forward to identify and argue what they perceive as demerits of a proposed settlement is a real one. This opportunity is particularly important when the individual claims underlying a damage class action are small, when defendants have settled quickly without contesting the certification or the merits, and when class counsel do not appear to have sufficient resources or desire to accept the risks of litigating aggressively.[79]

The value of intervenors was sharply demonstrated in the *collateral protection insurance* class action. In that case, class counsel and the defendants initially proposed a settlement in which class counsel would receive 80 percent of the common fund, class members would submit forms to collect modest shares of the remaining 20 percent, and defendants would receive any portion that was not claimed by class members; also, one of the three subclasses that were defined under the agreement was to be certified as a non-opt-out class. After Trial Lawyers for Public Justice entered as intervenors, the settlement was revised so that the entire class was certified on an opt-out basis, payments were made automatically to class members with any residual left in the fund to be paid to charitable organizations, and attorney fees were reduced to not more than 20 percent of the common fund—about $3.5 million less than their original share.[80]

Intervenors and objectors, however, are not disinterested parties. Judges need to be wary of lawyers who claim to represent a particular set of parties, but whose real motivation is to negotiate a fee with defendants and plaintiff class action attorneys at the price of disappearing from the scene. To help guard against collusion among class counsel, defendants, intervenors, and objectors, payments made by one set of lawyers to another or by defendants to intervening or objecting lawyers ought to be disclosed to the judge,[81] and arguably to class members as well.

Public interest lawyers may be a source of more impartial advice to judges. As advocates for groups that have their own policy agendas, these lawyers are not

wholly disinterested, either. But public interest organizations like Public Citizen have played an important role in recent years in calling attention to questionable class action practices, even while they advocate the continued use of damage class actions in a wide range of circumstances. Public interest lawyers are perennially strapped for resources, and unless they have a chance to recover their expenses for intervening, they can come forward in only a relatively small number of cases. Hence, we think judges ought to award fees to intervenors representing nonprofit organizations who significantly improve the quality of a settlement. These payments should also be a matter of public record.[82]

The need for vigilance when dealing with intervenors should not be an excuse for judges to exclude outsiders from the process. Nor should judges automatically reject the notion of paying public interest intervenors out of a concern about increasing transaction costs: With so much money at stake, in payments to beneficiaries and class counsel fees and expenses, properly assessed intervenors' fees are a small price to pay for assisting the judge in assessing the value of a settlement. When a judge determines that intervenors merit fees because their efforts have contributed to a significant improvement in the quality of a settlement, their fees should be split evenly between the defendant and class counsel (from the latter's *already-decided* share of the settlement).

Judges should also seek assistance in evaluating the quality of settlements from neutral experts. Experts can provide independent analyses of loss estimation, assess the reasonableness of disbursement plans, and project the probable value of the settlement to class members and other beneficiaries. However, judges need to be wary of experts obtained by plaintiff class action attorneys or defendants who may have a financial interest in securing the judge's approval of a settlement. Under Rule 706 of the Federal Rules of Evidence, federal judges have the authority to appoint their own neutral experts. Judges should appoint neutral experts to assist them in assessing claims of regulatory enforcement to assure that such claims are real. When nonmonetary benefits are included in a settlement, judges should appoint neutral experts to assess the value of these benefits before making their fee award. Judges also should appoint neutral accountants to audit attorney expense reports before making a final award of expenses. These additional costs should be divided between the defendant and class counsel, as described above.

Currently, federal judges are advised to limit post-settlement discovery, particularly when a settlement occurs early in the litigation, to avoid increasing attorney fees and expenses.[83] But these settlements are often the most questionable in terms of benefits achieved for class members. Avoiding expert fees seems a foolish economy when millions of dollars will be spent by defendants to settle the litigation. Because settling parties share an interest in convincing the judge of the reasonableness of the settlement, judges have

particular reason to use their authority to appoint their own experts in class action litigation.

Many judges presently ignore a potentially large group of helpers: the class members themselves. Typically, class members are brought into the litigation late in the process, when the deal has already been done. They may not be told the details of the proposed settlement, or may be told the details in some fashion that is intelligible only to lawyers. However much they are told, class members are always told that they should not approach the court directly for information. They are told that they may object to a settlement, but sometimes they are not told much about how to go about doing that, and often what they are expected to do—e.g., appear in some place miles away or secure a lawyer to appear on their behalf—is infeasible. Whatever the notices say, the real message to class members is "stay away."

It is time for courts to rethink the role of class members in damage class actions, and to bring methods of communication with class members into the twentieth, if not the twenty-first, century.[84] Defendants who routinely hire marketing experts to develop media campaigns and write advertising copy, and plaintiff class action attorneys who have begun to do the same, know how to secure assistance to write notices to class members that can be understood by most citizens. Judges ought to require that the parties secure the assistance of communication experts in planning and implementing notice campaigns, and that all notices are written in plain English rather than lawyerese.

In notices of the pendency of class actions, potential class members should be told what the class action is all about: what defendants are alleged to have done, to whom, and with what effects. In notices of settlement, class members should be told, in some detail, the provisions of proposed settlements: what eligible claimants will receive on average; what they will have to do to receive payments; what defendants are projected to pay, in the aggregate; what other activities defendants have agreed to undertake, if any; what plaintiff attorneys will receive, if fees have been negotiated during the settlement process; and whether any plans are made for residual or supplementary payments to other organizations.[85]

Rather than distancing themselves from class members, judges ought to invite questions from potential class members via "800" telephone numbers, electronic mail, and more traditional correspondence. Judges presiding over large complex class actions should have sufficient staff to monitor such communications. Information about the pendency of a class action and about its proposed settlement ought to be available on a court Web site, and comments by potential class members ought to be solicited on that Web site. Judges also should facilitate class members' participation in fairness hearings.[86] In mass tort class

actions, where class members frequently include represented and unrepresented parties, judges ought to consider appointing a committee of unrepresented class members to serve as spokespeople for the latter. Claimant support groups, which often are established during the course of mass tort litigation, can help in this regard. All of these techniques have been used successfully by some judges in some class actions.[87]

Historically, judges have refrained from direct communication with represented parties in civil litigation. And some judges may fear that opening the doors to direct communication with class members will offer new opportunities for other actors to manipulate the litigation. But a core concern in class actions is that class members' interests may not be adequately represented either by the representative parties or by class counsel. Comment from class members would provide an additional source of information for judges who share that concern.

G. THE ROAD TO REFORM

If judges already have the power to regulate damage class actions but not all judges use this power in all circumstances, what stands in the way of stricter regulation? We see three obstacles: a discourse about judging that emphasizes calendar-clearing above all other values, a belief that court efficiency is measured in terms of dollars spent rather than dollars spent *well*, and a failure to expose what occurs in ordinary damage class actions to public light.

1. Judicial Education

For more than two decades, federal and state judges have been lectured that efficient use of public and private resources compels them to settle cases quickly and cheaply in whatever fashion "works." Judges (and parties) have been told that civil litigation is rightfully understood as "problem solving," rather than adjudication of rights and remedies.[88] Public policy favors settlement over adjudication, and views lawyers, acting on parties' behalf, as the appropriate people to decide when to settle, and for what. Notwithstanding concerns about the incentives for self-dealing provided by representative litigation, much of the guidance judges are given about presiding over class actions echoes this understanding about the role of judges and lawyers and the purposes of civil litigation.[89]

To promote stricter regulation of damage class actions, we need to change the discourse about the role of judges in collective litigation. Judges need to be told that damage class actions are *not* just about problem solving, that the rights of plaintiffs *and* defendants are at stake, that responsibility for their outcomes lies

not just with the class counsel and defendant but with the judge as well, and that what is deemed acceptable in one case sends important signals about what will be accepted in another.

Judges presiding over their first damage class action need somewhere to turn for guidance, not just about the steps of the process, but also about the incentives for self-dealing inherent in representative litigation and the strategies available to them for countering these incentives. Judges should be reminded of their authority to dismiss cases and grant summary judgment, whenever appropriate. At conferences of state and federal judges, participants should be asked to share with their colleagues not just techniques for "getting rid of cases," but techniques for ensuring that the settlements that they approve are appropriate, given the law and facts, and that fee awards are proportionate to real outcomes. Questions about how Rule 23(b)(3)'s certification criteria apply to various types of lawsuits, at what stage of the process certification is appropriate, and whether to certify cases conditionally for settlement should be debated at these conferences. Most important, judges should be celebrated for *how* they carry out their responsibilities in damage class actions, not just for how fast or how cheaply, from the court's perspective, they resolve these lawsuits.

2. Resources

Our recommendations for judicial management of damage class actions might require an increase in public expenditures for the courts. Inviting greater participation in the litigation process by class members and intervenors, requiring and assessing additional information about disbursement plans, inviting and hearing neutral testimony on the value of purported changes in defendants' practices and the appropriateness of class counsel's fees and expenses, would probably extend the litigation process and increase judicial time spent on class action lawsuits. However, unlike traditional commentators, we are not persuaded that judicial time-savings should be a primary objective in resolving class actions. The question ought not to be what amount of court resources was spent managing a class action lawsuit, but rather whether court resources were used wisely. Saving money on damage class actions by limiting judicial scrutiny is a foolish economy that has the long-term consequence of wasting society's resources.

In the short run, our recommendations might also increase the *private* costs of individual damage class actions. The price to settle the class actions that survive a more rigorous judicial approval process might well be higher than the current average cost to settle damage class actions. But if plaintiff class action attorneys had to weigh more carefully the risks of not earning anything for

nonmeritorious lawsuits, and if they and defendants had to work harder to achieve settlements acceptable to judges, class action attorneys' threshold for deciding whether or not to pursue a case would rise, the ratio of appropriate to inappropriate class action certifications would increase, and the proportion of appropriate to inappropriate settlements would increase. To the extent that the current costs of damage class actions reflect significant amounts of frivolous litigation and worthless settlements—as critics allege—these costs would diminish, benefiting both defendants and consumers.

3. Opening Class Action Practice and Outcomes to Public View

Except in a few notorious cases, what happens as a result of class actions—who gets what, with what consequences, and at what costs—is rarely a subject of public commentary. Notwithstanding the requirement that judges approve settlements, the key ingredients of settlements are not always recorded publicly. What class members obtained, at what cost to defendants and what benefit to class counsel, are also not always available for public reporting. Shining more light on damage class actions would enhance judges' incentives for regulating class actions.

To increase public information about class action outcomes, judges should require a public record of the final disposition of damage class action lawsuits, including the total value of any monetary settlement, number of class members who claimed and received compensation, total funds disbursed to class members, amounts of disbursements to other beneficiaries and who these beneficiaries are, and amounts paid to class counsel in fees and expenses. Courts and legislatures should consider ways of facilitating broad public access to such data, for example, by making electronically readable case files available through the internet.[90] Requiring comprehensive reporting of class action litigation would provide a rich resource for policymakers concerned about class action reform; it would also provide an unbiased information source for print and broadcast reporters.

The lack of such information currently leaves the public with, at best, an incomplete picture of class action litigation. But the failure to monitor and systematically report the outcomes of class actions also means that judges and lawyers cannot learn from their experiences how better to serve the public goals of class actions. Widely published reports on the results of different sorts of notice campaigns and different approaches to disbursement would help practitioners devise better strategies and provide more information for judges in assessing the strategies that are proposed to them. Widely published reports on the distribution of settlement funds—to class members, other beneficiaries, or the defendants themselves—and on fees paid to class action attorneys would

provide data for assessing how well different class actions serve their stated purposes.

* * *

Notwithstanding the controversy they arouse, history suggests that damage class actions will remain a feature of the American civil litigation landscape. Whether and when to permit specific types of damage class actions will be decided by Congress and the fifty state legislatures. But it is judges—by their willingness or unwillingness to certify cases, to approve settlements, and to award fees—who will decide the kinds of cases that will be brought within whatever substantive legal framework emerges. Educating judges to take responsibility for class action outcomes and providing them with more detailed guidance as to how to evaluate settlements and assess attorney fee requests, ensuring that courts have the resources to manage the process and scrutinize outcomes, and opening up the class action process to public scrutiny will not resolve the political disagreement that lies at the heart of the class action controversy. But these actions could go a long way toward ensuring that the public goals of damage class actions are not overwhelmed by the private interests of lawyers.

NOTES

[1]Arthur Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality and the Class Action Problem," 92 *Harvard Law Review* 664 (1979) at 667–68.

[2]See *supra* Chapter Two at 31–33. The Advisory Committee also considered, but did not propose for formal review, a new provision of Rule 23 (b)(3) that would have required a preliminary hearing on the merits prior to certification. *Id.,* at 29 and fns. 102 and 103. That provision encountered opposition from both plaintiff and defense bars. The thrust of our analysis of the "just ain't worth it" provision applies to this and other proposals for incorporating substantive review into the class certification criteria.

[3]*Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

[4]Thomas Willging, Laural Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 171 table 24 (Washington, D.C.: Federal Judicial Center, 1996).

[5]*Id.* at 171 table 22.

[6]*Id.* at 171 tables 23–24.

[7]See *supra* Chapter Two, at 14 and fn. 18.

[8]See, e.g., Phyllis Ellickson, "Getting and Keeping Schools and Kids for Evaluation Studies," Special Issue, *Journal of Community Psychology* 102 (1994).

[9]Some critics of the proposal to return to an opt-in regime also argue that in Rule 23(b)(3) employment class actions, an opt-in requirement might scare off class members who fear reprisals from a defendant.

[10]In a speech to the National Press Club in Washington, D.C. on May 20, 1998, the then-chair of the Civil Rules Advisory Committee, Judge Paul V. Niemeyer, observed: "The inertia of not responding [to notice] has been identified as the cohesive force behind the viability of plaintiff class actions. [Requiring individuals to opt in] is. . . the change to the rule that could be made to eliminate most of the class actions or radically reduce their size."

[11]Opt-in provisions play a different role in mass tort class actions, where individual losses are generally larger and class counsel and defendants share an interest in determining how large the class will be and what the likely aggregate settlement value will be under a tentative settlement agreement. Judges have approved combinations of opt-out and opt-in provisions that are tailored to the special characteristics of mass torts.

[12]Rule 23(c)(1).

[13]Willging et al., *supra* note 4, at 35.

[14]*Amchem Products, Inc., v. Windsor,* 521 U.S. 591 (1997).

[15]*In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation,* 55 F.3d 768 (3d Cir. 1995).

[16]119 S. Ct. 2295 (1999).

[17]*Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

[18]See *supra,* Chapter Five.

[19]See *supra* Chapter Fifteen, at 449 (Table 15.10). Costs of noticing class members of settlement ranged into the millions of dollars.

[20]Willging et al., *supra* note 4, at 35. Not all of these cases were damage class actions, however. From additional information appearing in Tables 30 and 31, about half were apparently 23(b)(3) certifications, a majority of which were securities class actions. *Id.* at 174.

[21]Judith Resnik, Margaret Berger, Dennis Curtis, and Nancy Morawetz, Comments on Proposed Changes to Federal Rules of Civil Procedure 23 (Oct. 30, 1996), in Administrative Office of the U.S. Courts, 4 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Rule 23* 124-31 (1997) (hereinafter *Working Papers of the Advisory Committee*).

[22]Public Citizen lawyers have suggested that one way to broaden participation of interested parties in settlement classes would be to require public notice of the preliminary hearing at which the judge considers certifying the class, preliminarily evaluates the settlement, and approves the notice plan. See Brian Wolfman and Alan Morrison, "Representing the Unrepresented in Class Actions Seeking Monetary Relief," 71 *New York University Law Review* 439, 480–85 (1996). Another approach was adopted by Congress in the Private Securities Litigation Reform Act of 1995 that requires class counsel to publish notice of the pendency of the action within 20 days after a complaint is filed. 15 U.S.C. § 78u-4.

[23]In the *chemical factory* lawsuit, those who wanted to be bound were also required to *opt in.* See *supra* Chapter Eleven.

[24]See, e.g., E. Donald Elliott, Summary of Key Points: Testimony Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary Concerning S. 353, the Class Action Fairness Act of 1999 (May 4, 1999) (on file with the authors); Stephen Morrison, Statement Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, S. 353: the Class Action Fairness Act of 1999 (May 4, 1999) (on file with the authors).

[25]*Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921). For a discussion of diversity jurisdiction in the context of class actions and other dispersed litigation, see Thomas Rowe and Kenneth Sibley, "Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction," 135 *University of Pennsylvania Law Review* 7 (1986).

[26]This interpretation of the application of the jurisdictional threshold to class actions dates back to the period before the adoption of the 1966 amendments to Rule 23. After 1966, some proponents of damage class actions argued that the jurisdictional requirement could be met by aggregating individual class members' claims. The Supreme Court rejected this interpretation first in *Snyder v. Harris,* 394 U.S. 332 (1969), and then again in *Zahn v. International Paper Co.,* 414 U.S. 291 (1973). At the time when *Zahn* was decided, the jurisdictional threshold was $10,000.

Since 1990, the applicability of *Snyder* and *Zahn* has been questioned in the light of the supplemental jurisdiction provision of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367(a). Some circuits have held that the amendment to § 1367 effectively overruled *Zahn*; others disagree. See, e.g., *Daniels v. Philip Morris Companies,* 18 F. Supp. 2d 1110 (S.D. Cal. 1998).

[27]Class Action Fairness Act of 1999, S. 353, 106th Cong., 1st Sess. (1999). H.R. 1875, 106th Cong., 1st Sess. (1999) passed the House in 1999. Similar bills introduced in the 105th Congress did not con-

tain the multistate restriction. See, e.g., Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong., 2d Sess. (1998).

[28]See, e.g., Eleanor Acheson, Assistant Attorney General, U.S. Department of Justice, Statement to the Courts Subcommittee on S.B. 353 (May 4, 1999) (on file with the authors).

[29]See, e.g., John Frank, Statement to Courts Subcommittee on S.B. 353 (May 4, 1999) (on file with the authors).

[30]The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal courts from enjoining state court action, with certain exceptions specified by statute and case law. See Diane Wood, "Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act," 1990 *Brigham Young University Law Review* 289. Legal doctrine pertaining to the preclusive effects of substantive legal decisions varies across jurisdictions. See Stephen Burbank, "Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach," 71 *Cornell Law Review* 733 (1986).

[31]*Matsushita Electrical Industrial Co. v. Epstein,* 516 U.S. 367 (1996) (holding that a settlement of a securities class action in the state court of Delaware must be given full faith and credit, even though some of the claims settled were subject to exclusive federal court jurisdiction). But see *Epstein v. MCA,* 156 F.3d 1235 (9th Cir. 1997), *withdrawn on rehearing,* 179 F.3d 641 (9th Cir. 1999).

[32]28 U.S.C. § 1407.

[33]The transferee judge can try cases that were filed in her district court. Hence, once the MDL has issued a transfer order, attorneys seeking an aggregative disposition may file claims in that court, knowing that, under the MDL panel's order, they will automatically be assigned to the transferee judge. In the past, some district court judges have claimed authority to try other cases as well. For example, Judge Carl Rubin, sitting in the Southern District of Ohio, consolidated for trial all Bendectin cases filed in the Northern and Southern Districts, on the rationale that (since these were diversity cases) Ohio state law would apply to all. Judge Rubin also allowed attorneys who had filed cases outside these districts to voluntarily join the consolidated trial. See Michael Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation* 195 (New York: University of Pennsylvania Press, 1996). In *Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes and Lerach*, 523 U.S. 26 (1998), the U.S. Supreme Court held that transferee judges must return all unsettled cases filed outside the transferee judge's district to their original jurisdictions for trial.

[34]A provision amending 28 U.S.C. §1407 to allow MDL transferee judges to decide liability and punitive damages, and remand cases in which defendants were held liable to the district court in which they were filed for determination of damages, has been included in some versions of the "multiparty multiforum" bills that have been introduced in Congress over the past ten years. See, e.g., Multiparty Multiforum Jurisdiction Act of 1993, H.R. 1100, 103d Cong., 1st Sess. (1993). Under this bill, choice of law was to be determined by the transferee judge. Versions of this bill passed the House in 1989, 1991, and 1998. In 1999, the House of Representatives passed a bill that broadens the transferee judges' authority to include trial. H.R. 2112, 106th Cong., 1st Sess. (1999).

[35]See Mark Weber, "The Federal Civil Rules Amendments of 1992 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases," 14 *Review of Litigation* 113 (1994).

[36]See *supra* note 34.

[37]See, e.g., American Bar Association, *Commission on Mass Torts* (1990); American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (Philadelphia, Pa.: American Law Institute, 1994); Rowe and Sibley, *supra* note 25; William Schwarzer, Alan Hirsch, and Edward Sussman, "A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts," 73 *Texas Law Review* 1529 (1995); Wood, "Fine-Tuning Judicial Federalism," *supra* note 30. The ALI's 1990s project was preceded by a much earlier proposal to create a new federal jurisdiction for litigation involving dispersed parties. See American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969). Rowe and Sibley provide a historical overview of proposals relating to multiforum litigation. Rowe and Sibley, *supra* note 25, at 11–14. Judge Schwarzer et al.'s proposal would authorize consolidation of state and federal cases for pretrial purposes only. Judge Wood's proposal would broaden federal court authority to enjoin state court proceedings. Many of these efforts were driven by concern about increasing numbers of mass tort cases, although not all of the proposals were limited to mass torts.

[38]Ralph Lancaster and Catherine Connors, "Creation of a National Disaster Court: A Response to Judicial Federalism in Action," 78 *Virginia Law Review* 1753 (1992).

[39]See, e.g., *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996) (reversing certification of nationwide state law–based class action on mandamus, holding that "variations in state law may swamp any common issues and defeat predominance"); *Osborne v. Suburu of America, Inc.*, 198 Cal. App. 3d 646 (1988) (affirming denial of class certification, on the grounds that "the sheer magnitude of the task of construing the various laws will compel a court not to certify [a] multistate class").

[40]This was a central concern of the American Law Institute project, *supra* note 37. For a discussion of the difficulty of the task and the complexity of the ALI's approach, see Linda Mullenix, "Unfinished Symphony: The Complex Litigation Project Rests," 54 *Louisiana Law Review* 977 (1994).

[41]See *supra* Chapter Two.

[42]*Amchem Products, Inc. v Windsor,* 521 U.S. 591 (1997); *Ortiz v. Fibreboard, Inc.,* 119 S. Ct. 2295 (1999).

[43]See, e.g., Deborah Hensler and Mark Peterson, "Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis," 59 *Brooklyn Law Review* 961 (1993).

[44]See *supra* Chapter Three, at 104–05.

[45]See *supra* Chapter Two, at fn. 111.

[46]See *supra* Chapter Three, at 97.

[47]*Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

[48]To provide clearer and more consistent guidance to judges, Judge William Schwarzer proposed an amendment to Rule 23(e) calling for the judge to consider and make findings with respect to 11 factors, including class definition, treatment of class members with possibly diverse interests, opt-out rights, attorney fees, benefits to class members, and costs to defendants. William Schwarzer, "Settlement of Mass Tort Class Actions: Order Out of Chaos," 80 *Cornell Law Review* 87 (1995). Judge Schwarzer's proposal was put forward in the context of the debate over certifying mass tort class actions.

[49]*Manual for Complex Litigation* 237, 239 (3d ed. 1995).

[50]*Id.*

[51]*Evans v. Jeff D.*, 475 U.S. 717 (1986).

[52]See *supra* Chapter Thirteen, at 357–60.

[53]See *supra* Chapter Six, at 181–82.

[54]See *supra* Chapter Eight, at 218.

[55]See *supra* Chapter Six, at 181–82.

[56]See *supra* Chapter Seven, at 241–42.

[57]The *Manual for Complex Litigation* advises judges to consider comparisons of the proposed settlement amount with the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, and suggests that expert testimony may be helpful in this analysis. *Id.* at 238.

[58]B*oeing Co. v. Van Gemert,* 444 U.S. 472 (1980).

[59]See *supra* Chapter Fifteen, at Table 15.13.

[60]See *supra,* Chapter Ten, at 282–83.

[61] See *supra* Chapter Three, at 82–84.

[62]See *supra* Chapter Five, at 163–67.

[63]See *supra* Chapter Seven, at 199.

[64]In the *contact lens pricing* litigation, class counsel and defendants agreed not to release information on the amount of cash and coupons collected by class members. See *supra* Chapter Five. In the *credit life insurance* litigation, the judge did not even require the parties to tell *him* how

much money was to be disbursed and no reporting of disbursements was required; we obtained the information with the defendant's cooperation. See *supra* Chapter Nine.

[65]The National Association of Consumer Advocates (NACA), which comprises both attorneys who bring individual lawsuits and consumer class action attorneys, has proposed that class counsel should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon, so as to create an informational base for assessing the circumstances in which coupons "work." See National Association of Consumer Advocates, "Standards and Guidelines for Litigating and Settling Consumer Class Actions," 176 F.R.D. 375 (1997) (hereinafter NACA, "Standards").

[66]See *supra* Chapter Three, at 76–78.

[67]Attorney fees based on a percentage of the amount of damages and prejudgment interest actually paid to the class are required under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (Supp. II 1996)).

[68]*Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980).

[69]See *supra* Chapter Thirteen, at 359.

[70]See, e.g. *Duhaime v. John Hancock Mutual Life Insurance Co.,* 989 F. Supp. 375 (D. Mass. 1997) (court awarded fee requested provisionally, ordered partial payment immediately and reserved balance for payment in full or to be adjusted in light of the actual funds disbursed); *Bowling v. Pfizer,* 102 F.3d 777 (6th Cir. 1996) (rehearing denied) (upholding district court fee award of 10 percent of the amount paid into the common fund to date, plus up to 10 percent of annual payments to be paid into one of the funds established by the settlement over a period of ten years).

[71]NACA has proposed limiting cy pres payments to organizations that have some connection to "the interests the underlying litigation sought to protect." NACA, "Standards," *supra* note 65, at 393.

[72]See *supra* Chapter Eight, at Table 8.2.

[73]See *supra* Chapter Nine, at 238–39.

[74]Sometimes termed a "clear sailing" agreement. See, e.g., *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518 (1st Cir. 1991).

[75]*Evans v. Jeff D.,* 475 U.S. 717 (1985).

[76]See, e.g., *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518 (holding that "clear sailing agreements" must receive close judicial scrutiny).

[77]"Court Awarded Attorney Fees Report of the Third Circuit Task Force," 108 F.R.D. 237, 255 (1985).

[78]NACA, "Standards," *supra* note 65, at 397.

[79]NACA has proposed that class counsel "consider notifying persons and groups who have an interest in the proceedings that a tentative settlement has been reached and that a preliminary hearing will be scheduled to consider the fairness and adequacy of the settlement." *Id.* at 386.

[80]See *supra* Chapter Seven, at 197–205.

[81]See, e.g., *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 216 (2d Cir. 1987), *cert. denied*, 484 U.S. 926 (1997) (holding that fee-sharing agreements need to be disclosed to the judge since "only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising"). *Id.* at 226.

[82]An interesting question with regard to public interest lawyer-intervenors is whether and how to reward them when their intervention results in the collapse of a class action settlement and lawsuit. If their activities helped a judge decide that certification and settlement were *in*appropriate, do they deserve fees? If so, who should pay them? The fact that fees are currently available to intervenors only if a settlement is ultimately approved by a judge has the unfortunate consequence of drawing intervenors into the "triangle of interests" that promotes settlement when it is not in class members' or society's best interests.

[83]*Manual for Complex Litigation* at 238–39.

[84]Judge Jack B. Weinstein, who presided over the Agent Orange mass tort class action, the second asbestos Manville Trust reorganization, DES product liability litigation, and other large-scale litigation, has written about how judges might relate to individual plaintiffs in aggregative litigation. See Jack B. Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (Evanston, Ill.: Northwestern University Press, 1995).

See also Judith Resnik et al., "Individuals Within the Aggregate: Relationships, Representation, and Fees," 71 *New York University Law Review* 296, 381–401 (1996).

[85]Under the provisions of the Private Securities Litigation Reform Act of 1995, notice of a proposed settlement must include information on the aggregate and average amount proposed to be distributed to class members; the amount of fees and expenses class counsel will seek, in total and on average per claimant; and a brief statement explaining the reasons why the parties are proposing the settlement. The NACA Guidelines propose that notices include information about how to determine whether one is a member of the class, the size of the class, the total amount "to be granted" to the class, individual shares or estimates thereof, the total amount of attorney fees, the basis for their calculation and their source, and what will happen to any unclaimed funds. NACA, "Standards," *supra* note 65, at 400.

[86]Recall that in the *chemical factory* class action, fairness hearings were held in the New Orleans Superdome! See *supra* Chapter Twelve. In the Agent Orange class action, Judge Jack B. Weinstein held fairness hearings in Brooklyn, Chicago, Houston, Atlanta, and San Francisco. See Peter Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 173 (Cambridge, Mass.: Harvard University Press, 1987).

[87]For example, in the silicone breast implant class action, claimants and lawyers had access to Websites and "800" telephone numbers to obtain information about the progress of the litigation and claim submission. Judge Samuel C. Pointer appointed a silicone breast implant claimant advocate to the plaintiffs' steering committee.

[88]On federal judges' incentives to expedite resolution of civil cases, see James Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (Santa Monica, Calif.: RAND, 1996).

[89]See *supra* Chapter Three, at 91.

[90]Some legislatures and courts have required collection and publication of litigation data, including settlement. The Health Care Quality Improvement Act of 1986 established a national data bank of information on judgments and settlements paid by businesses and professional corporations in medical malpractice litigation. 42 U.S.C. § 1320a-7e. Under California law, the state Judicial Council is charged with providing for the uniform entry, storage, and retrieval of court data relating to civil cases, including nature and amount of settlement. Cal. Govt. Code § 68513. In the Northern District of California, under Local Rule 23-2, securities class action attorneys are required to post documents filed in connection with private securities litigation claims at a designated internet site.

RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

 (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

 (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In 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. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals.

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

RULE 23.1. DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise

have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

RULE 23.2. ACTIONS RELATING TO UNINCORPORATED ASSOCIATIONS

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

DATABASE CONSTRUCTION

INTRODUCTION

No nationwide system exists for recording and counting class action lawsuits. Class actions can be brought in most state courts,[1] as well as in the federal courts. No state court reports the number of class action lawsuits filed annually. The Administrative Office of the U.S. Courts has reported the number of class actions filed yearly in federal courts, but a 1996 study conducted by the Federal Judicial Center (the research arm of the federal judiciary) found that those reports missed many class action lawsuits.[2] Since then, the Administrative Office has attempted to improve its record-keeping by alerting the district courts to the importance of recording class action activity. The effectiveness of this effort is uncertain.

For many years, courts did not separately report any civil lawsuits and, even today, court reports of civil litigation often lack detail. But courts face problems with class actions that would frustrate even the most dedicated record-keeper. Litigation obtains "class action" status when it is certified as such by a trial judge. Certification may occur soon after filing or sometime later in the litigation process, such as when a settlement is reached. As a result, plaintiff attorneys may enter into negotiations with defendants in which both sides understand that the suit at issue is a class action, but—as a formal matter—a class action does not yet exist. Parties and their attorneys describe these suits as "putative class actions," and develop, defend, manage, and negotiate them within the class action framework of the jurisdiction in which the suit has been filed. But these lawsuits might be missed in a formal count of "class actions." During the litigation process certification may be granted conditionally and later revoked, which would also complicate formal counting of class action lawsuits. Hence, even if one had sufficient resources to review case files from courts all over the country, accurately identifying and quantifying class action litigation activity would still be nearly impossible.

In its study, the Federal Judicial Center reviewed records in four district courts in considerable detail to draw conclusions about class action activity in those

districts.[3] Other empirical analyses have adopted similar, district-specific approaches to measuring class action activity.[4] We took a different approach, one that relied on specialized electronic data files to identify and describe class action activity nationwide.

DATA SOURCES

We used three sources of data: LEXIS, which reports federal and state appellate court opinions and selected federal district court decisions; NEXIS, which is an electronic library of newspapers, news magazines, and newsletters; and a business press database that comprises a subset of newspapers and periodicals of particular interest to the business community (also contained in NEXIS), plus the *Wall Street Journal*, which is available in a separate electronic data file.

Reported judicial decisions appear in the national reporter system and in official state reporters for the states that have them. These collections are electronically accessible through LEXIS-NEXIS and Westlaw. The cases that appear in the official reporters do not constitute all cases decided by the courts. All decisions at the highest appellate level (e.g., the Supreme Court) in state and federal courts are reported. But not all decisions by the U.S. Courts of Appeals appear in the federal reporter, and only some opinions of state intermediate appellate courts appear in the state reporters. Typically, opinions of state trial court judges are not reported and only some federal trial court opinions are reported. As a consequence, the class action database we constructed using LEXIS represents primarily cases that generated controversy, leading to appeals to higher court levels; this database also disproportionately reflects activity in federal courts.

The NEXIS electronic library contains 457 periodicals, including all major newspapers in the U.S. as well as regional and local papers from 43 of the 50 states. Class action litigation reported by the general press includes cases of local interest as well as lawsuits that are perceived to have broad economic or social consequences. Cases may be reported when they are filed, when newsworthy developments occur in the litigation, when they are tried to verdict or settled, or when an appellate court hands down an important decision. Sometimes the news reports do not indicate whether a case was filed in federal or state court, or describe its previous litigation history.

The business database includes *Business Week*, *Forbes*, *Fortune*, *Inc.*, the *Reuters Business Report,* and the *Wall Street Journal*, as well as other newspapers and periodicals targeted to the business community. Like other periodicals contained in NEXIS, these media report class action litigation at various stages of development and sometimes do not distinguish between federal and state law-

suits. This database comprises lawsuits of special interest to business—e.g., securities class actions, mass product defect cases—as well as cases of general interest. Stories involving purely local cases are unlikely to appear.

In sum, each database we constructed reflects a particular set of interests, and each sheds light only on a particular portion of the class action terrain. Because of differences in how the databases were constructed and in their underlying data sources, our combining them would be inappropriate. In Chapter Three, we therefore report the results of our analyses of the three databases separately.

DATA SEARCH AND RETRIEVAL

We searched each of the databases described above for two time periods: July 1, 1995–June 30, 1996, and July 1, 1996–June 30, 1997. Because of differences in our coding approach during the two periods, we report results separately for each year.

Our first goal was to identify articles within each database that discussed specific class action lawsuits. This identification process required developing a computer search routine that would accurately locate all such articles while excluding articles *not* reporting class action activity. We could search all of the databases for content using alphanumeric search strings (i.e., alphabetic and numerical characters, words, and phrases) and Boolean logic connectors (i.e., "and" and "or"). We experimented with various search strings, but eventually adopted the term "class action" itself. Although searching with this term yielded a high percentage of irrelevant articles including many references to class action litigation generally, it ensured that we captured the largest proportion of articles and opinions that contained references to particular class action lawsuits. For the years of our search we found approximately 17,000 and 20,000 general press articles, respectively, on class action litigation, and much smaller numbers of articles and reported judicial opinions pertaining to class actions in the other two databases (see Table B.1).

Table B.1

Number of Articles

	Number of Articles	
Source	July 1, 1995–June 30, 1996	July 1, 1996–June 30, 1997
Reported judicial decisions	1,581	1,720
General press	16,874	20,484
Business press	906	766

SAMPLING

Because we identified such a large number of articles pertaining to class actions in the general press database, we selected a random sample of these articles for our research. We sampled 2000 articles for 1995–1996 and 1000 for 1996–1997. We coded all of the articles we identified from the two other databases without sampling.

CODING

After identifying relevant articles, we used a three-step coding process to extract information. First, we screened articles for content and separated those that reported on specific cases. This group of articles was the basis for our research. Second, we separated out those articles that reported high-profile class actions that were much in the news during this period: tobacco litigation, breast implant litigation, and asbestos litigation. Our analysis did not require us to code each of the many articles about these cases that appeared in the press during the study years. We developed a special coding approach for these high-profile cases. Third, for all other articles, we used a standardized coding form to extract information about the lawsuit mentioned, including case type, class size, party names, party type, state or federal court, geographic location, procedural status, and disposition. A copy of the coding form is included as Figure B.1.[5]

Each article was coded by a staff member and checked by the coding supervisor, so that all articles were read twice. Any differences in opinion regarding the appropriate code were discussed and resolved, and additional training was provided as necessary. In addition, a small sample of articles was coded twice by coding staff members to ensure inter-coder consistency.

DATA TRANSFORMATION

The initial coded data pertained to articles rather than cases, creating the possibility that some cases would appear multiple times within the database. To describe the landscape of class action litigation, we needed to transform the database so that the unit of analysis would be a single lawsuit.

To create case-specific records, we developed a computer program that compared plaintiff names, defendant names, case type, and forum state. When the computer identified matches of cases across articles, it created a single case record and extracted the relevant information about the case from the available articles. When the information in the coding forms was not sufficient to determine whether a case match existed, we reviewed the forms manually. Table B.2 presents the number of distinct cases that we identified from each database using this approach.

CLASS ACTION CODING PROJECT BATCH NUMBER: ☐☐☐☐

1. Source code: ☐☐☐☐☐☐-☐

2. Coder ID: ☐☐

3. Date case coded: ☐☐/☐☐/☐☐ (Month Day Year)

4. Subject of article: **(Circle One)**

   Class actions in general (DO NOT CODE)....... 1

   A particular tobacco case (DO NOT CODE)..... 2

   A particular breast implant case (DO NOT CODE) 3

   A particular asbestos case (DO NOT CODE).. 4

   Any other particular class action case (CONTINUE) 5

5. Case Type: **(Circle One)**

   Securities 100
   Shareholder derivative actions 200
   Consumer:
   - Fraud 301
   - Anti-trust 302
   - Fees 303
   - Utilities 304
   - Business 305
   - Other 306
     (specify: ____________)

   Environmental:
   - Land 401
   - Water 402
   - Air 403
   - Noise 404
   - Other 405
     (specify: ____________)

   Torts:
   - Product liability:
     - Norplant 501
     - Other pharmaceuticals 502
     - Auto 503
     - Food 504
     - Household goods 505
     - Other 506
       (specify: ____________)
   - Non-product liability:
     - Mass torts 510
       (specify: ____________)
     - Other torts 520
       (specify: ____________)

   Employment:
   - Labor/unions 601
   - Discrimination 602
   - Other 603
     (specify: ____________)

   Civil rights:
   - First amendment 701
   - Prisoner's rights 702
   - Discrimination 703
   - Other 704
     (specify: ____________)

   Citizen's rights:
   - Tax 801
   - Social or welfare entitlements 802
   - Zoning 803
   - Other citizen's rights 804
     (specify: ____________)

   Other 900
   (specify: ____________)

   Unknown 0

6. Class size: ☐☐☐☐☐☐☐☐

   OR **(Circle One)**

   1-100 1
   101-1000 2
   1001-10,000 3
   10,001-100,000 4
   More than 100,000 5
   Unknown 8

7. Plaintiff's last name(s):

   Plaintiff #1 ☐☐☐☐☐☐☐☐☐☐

   Plaintiff #2 ☐☐☐☐☐☐☐☐☐☐

   Plaintiff #3 ☐☐☐☐☐☐☐☐☐☐

   or

   Not Reported 9

Figure B.1—Class Action Coding Form

8. Plaintiff type: .... **(Code All That Apply)**

Individual 10

Public agency:
- Local 21
- State 22
- Federal 23

Utility 30

Business:
- Bank 41
- Insurance 42
- Pharmaceuticals 43
- Auto 44
- Aerospace 45
- Other manufacturing 46
  (specify: ____________)
- Other service 47
  (specify: ____________)
- Not Reported 9

9. Defendant's name(s):

Defendant #1

Defendant #2

Defendant #3

Not Reported 9

10. Defendant type: **(Code All That Apply)**

Individual 10

Public agency:
- Local 21
- State 22
- Federal 23

Utility 30

Business:
- Bank 41
- Insurance 42
- Pharmaceuticals 43
- Auto 44
- Aerospace 45
- Other manufacturing 46
  (specify: ____________)
- Other service 47
  (specify: ____________)
- Not Reported 9

11. Court: **(Circle One)**

State 1

Federal 2

Not reported 9

12. Location: ☐☐ **OR**

Not reported 99

13. Litigation events:

A. Complaint

1. Date filed: ☐☐/☐☐/☐☐

OR **(Circle One)**

Filed no date 1

Not filed .... 2 → GO TO 14

No mention whether filed...................... 3

2. Harm complained of: **(Code All That Apply)**

Bodily injury 1

Property damage 2

Financial damage 3

Natural resource damage 4

Other 5

(specify: ____________)

Not Reported 9

3. Relief being sought: **(Code All That Apply)**

Injunctive relief 1

Money damages 2

$☐,☐☐☐,☐☐☐,☐☐☐

Not Reported 9

Figure B.1—(continued)

B. Class certification

1. Date motion filed to certify:

☐☐/☐☐/☐☐ OR

(Circle One)

No motion filed .... 1 → GO TO 13C1

D/K if motion filed .... 2 → GO TO 13C1

Motion filed, no date .. 3

2. Date case certified:

☐☐/☐☐/☐☐ OR

(Circle One)

Not certified .... 1 → GO TO 13C1

D/K if certified .... 2 → GO TO 13C1

Certified, D/K date .. 3

3. Certified for settlement purposes only:

(Circle One)

Yes 1

No 2

Not reported 9

C. Disposition

1. Settlement:

(Circle One)

Not settled .... 1 → GO TO 13C2

D/K if settled .... 2 → GO TO 13C2

Date: ☐☐/☐☐/☐☐

Settled, no date 3

a. Date settlement approved:

☐☐/☐☐/☐☐ OR

↓

GO TO 13C4

(Circle One)

Not approved 1

D/K if approved .... 2 → GO TO 13C4

Approved, no date .. 3

b. Amount of Settlement:

$☐,☐☐☐,☐☐☐,☐☐☐

↓

GO TO 13D

2a. Date of verdict:

☐☐/☐☐/☐☐ OR

(Circle One)

No verdict reached .... 1 → GO TO 13C3

D/K if verdict reached 2 → GO TO 13C3

Reached verdict, D/K Date 3

b. Outcome:

(Circle One)

i. Not disposed .... 1 → GO TO 13D1

ii. For defendant .... 2 → GO TO 13D1

iii. For plaintiff.............. 3

Injunctive relief 1

Money damages 2

↓

$☐,☐☐☐,☐☐☐,☐☐☐

↓

GO TO 13D1

OR

iv. Money damages, amount not reported 3

v. Other disposition 4

(specify: ____________________)

Figure B.1—(continued)

D. Appellate review

1. Date of post-disposition review:

☐☐/☐☐/☐☐ OR

(Circle One)

No post-disposition review 1
D/K if post-disposition review 2
Post-disposition review, D/Kdate 3

2. Date of pre-disposition review :

☐☐/☐☐/☐☐ OR

(Circle One)

No post-disposition review 1
D/K if post-disposition review 2
Pre-disposition review, D/Kdate 3

14. Plaintiff's Attorneys:

Last name | Firm

Not Reported 9

Defendant's Attorneys

Last name | Firm

Not Reported 9

15. Spokesperson:

Plaintiff — Last name — Affiliation

Defendant — Last name — Affiliation

Not Reported 9

16. Other:

(Code All That Apply)

Related to Multi-District Litigation (MDL) 1
Consolidation 2
Associated Class Action 3
Case Site 4

(specify ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐)

None 5

Figure B.1—(continued)

Table B.2

Number of Cases

Source	Number of Cases (unweighted)	
	July 1, 1995–June 30, 1996	July 1, 1996–June 30, 1997
Reported judicial decisions	1,020	1,158
General press	736	517
Business press	300	568

WEIGHTING THE GENERAL PRESS DATA

Because we had sampled the general press in each of the two study years, we needed to weight the cases we extracted from this database to appropriately reflect the sampling rate. Because some cases generated more press coverage than others, we had to develop a weighting algorithm that took into account differential reporting of cases. In the equation below, W equals the sampling weight that we calculated for use in our analyses of the cases extracted from the general press database.

$$W = \frac{S \times \left(\frac{N}{n}\right)}{P}$$

$N =$ the number of articles in the population
$n =$ the number of articles in the sample
$S =$ the number of articles in the sample about a given case
$P =$ the number of articles in the population about a given case.

The values of all variables in this equation, except for P, were determined by our coding procedure. We estimated P by performing additional analyses of the data set.

Table B.3 shows the number of (weighted) cases for each of the databases we used for the analysis in Chapter Three.

Table B.3

Number of Cases (Weighted)

Source	Number of Cases (weighted)	
	July 1, 1995–June 30, 1996	July 1, 1996–June 30, 1997
Reported judicial decisions	1,581	1,720
General press	3,000	6,000
Business press	906	766

COMPARISON WITH THE FEDERAL JUDICIAL CENTER STUDY DATA

In its 1996 study, the Federal Judicial Center described class action lawsuits terminated in four federal district courts from July 1, 1992–June 30, 1994. The authors of the study graciously provided us with the data, which enabled us to

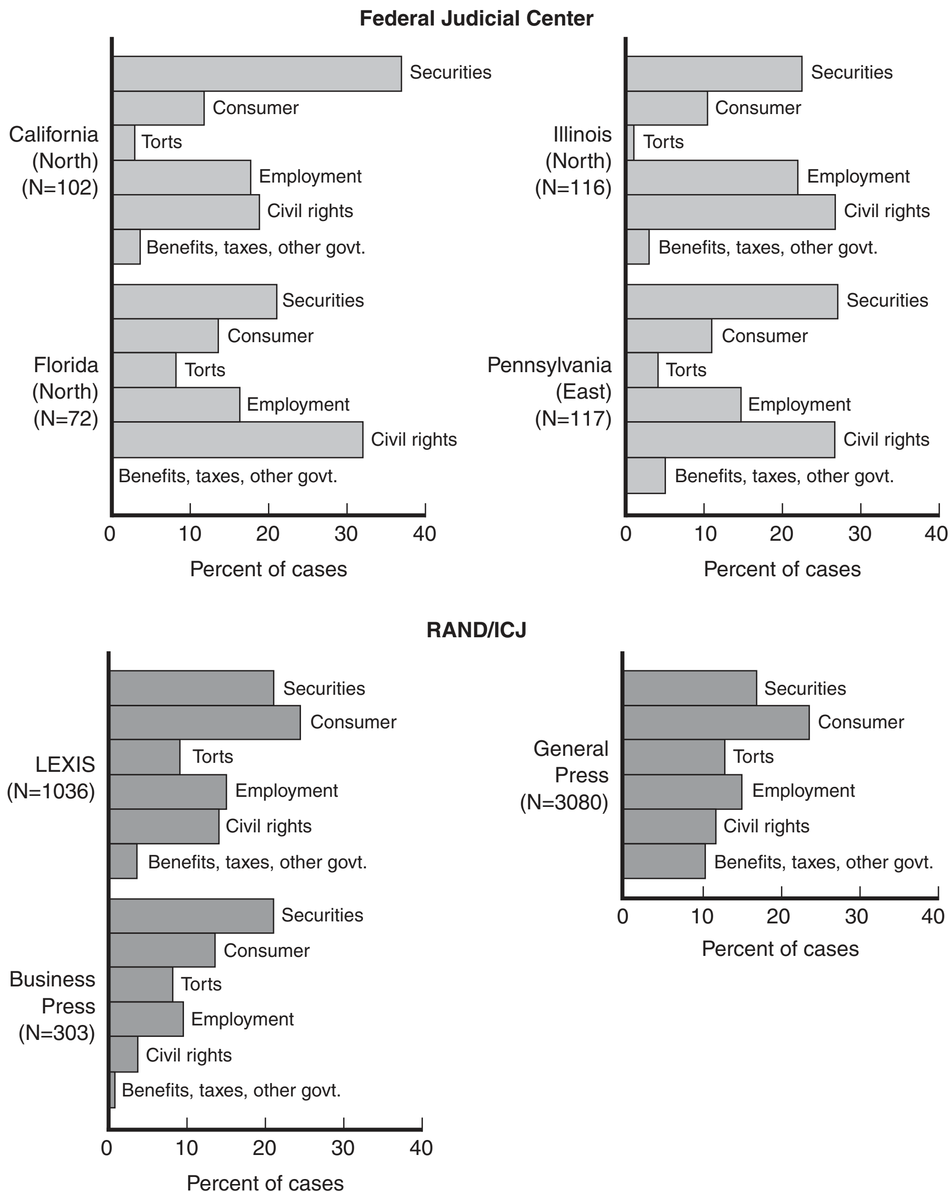

Figure B.2—Comparison of Federal Judicial Center Data and RAND/ICJ Data

categorize the lawsuits according to the scheme we used for coding cases in our database. Figure B.2 compares the FJC data and the data we collected for this study.

There are a number of explanations for the differences between the FJC study data and our own. First, differences exist in the scope of the two studies: The FJC study was limited to four federal district courts, whereas our study reflects the nationwide population of class actions, including class actions brought in state courts. Second, the FJC study identified and described class action lawsuits from court records. Our study relies on less inclusive appellate decisions and more inclusive but less precise newspaper reports. Third, the FJC study identified cases terminated in 1992–1994, some of which were filed years earlier. Our study captures class actions in process during 1995–1996, which include newly filed and terminated lawsuits as well as cases still pending.

NOTES

[1]See Thomas Dickerson, *Class Actions: The Law of 50 States* (New York: Law Journal Seminars-Press, 1997).

[2]Thomas Willging, Laural Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Washington, D.C.: Federal Judicial Center, 1996).

[3]*Id.*

[4] See discussion in Chapter Two, *supra* at 18.

[5]We used an abbreviated form to code judicial opinions, and a still more abbreviated version to code articles selected for the second study year. By the second coding, we had determined that much of the information we sought in the original protocol could not be obtained from a sufficient number of articles to make collecting it worthwhile.

Appendix C

QUALITATIVE INTERVIEW METHODOLOGY

To better understand the controversy over damage class actions, and especially to learn about trends and issues in class action practice, we interviewed leading class action practitioners. We used a non-random purposive sampling technique aimed at identifying individuals in plaintiff and defense practices and private- and public-sector positions to select respondents.

On the plaintiff side, we interviewed leading class action practitioners who have served as class counsel in myriad lawsuits. We also interviewed plaintiff tort attorneys who oppose class action certification of mass torts; some of the latter nonetheless had represented parties in class actions. We interviewed some plaintiff attorneys whose practices primarily focus on financial injury suits, others whose practices primarily focus on personal injury suits, and some whose practices include a mix of both types. On the defense side, we interviewed corporate (in-house) counsel in a number of different industrial sectors as well as outside defense counsel. In the public interest sector, we interviewed representatives of organizations that have intervened in class action lawsuits as well as those who have represented class members. While all of the private practitioners we interviewed primarily represent parties in damage class actions, several of the public interest lawyers we interviewed generally or sometimes represent parties in other types of class actions. We interviewed a private attorney who has a specialty practice as an intervenor, a staff attorney in a state attorney general's office, and a nonlawyer communications expert who specializes in designing and placing class action notices. Table C.1 shows the distribution of interviews by type of firm or organization.[1]

Many of those whom we asked to participate invited colleagues to join them in the interview, or asked us to interview several people in their firm or organization sequentially. As a result, we talked with 70 individuals at 41 firms and organizations. The typical interview lasted for 90 minutes, but some were lengthier and on a few occasions we spent half a day or more at a particular firm or organization. In a few instances, we conducted multiple interviews with a single individual. (We later re-interviewed some of those who participated in this phase of the study for our case study analysis.)

Table C.1

Number of Interviews, by Type of Firm or Organization

Type of Practice	Number
Plaintiff	13
Corporate counsel	15
Financial services (banking and insurance)	6
Manufacturing (automotive, chemical, pharmaceutical, petroleum)	9
Outside defense counsel	6
Public interest	4
Other	3
Total	41

We conducted all of the interviews during this phase of the study under the promise of confidentiality. In discussing class action practices, some individuals cited specific cases. Some were uncomfortable talking about actual cases, even under a promise of confidentiality, and invoked instead unnamed or hypothetical cases to illustrate their points. Some interviews focused exclusively on a single class action, and others ranged over the respondent's recent class action experiences.

All of the interviews were conducted over a 15-month period from October 1996 through December 1997. During this time, there were ongoing activities in the Civil Rules Advisory Committee and Congress directed at changing Rule 23. We anticipated that some respondents would view the interview as an opportunity to lobby us on the correctness of their views regarding class actions and argue for particular changes. Although we did discuss various proposals to change Rule 23 in our interviews, we focused our questions on respondents' actual experiences with class action lawsuits and their beliefs about the uses and abuses of class actions based on these experiences. We asked all of the interviewees to tell us about their and their firm's (or organization's) experience with class action litigation in recent years and recent changes in filings. We asked them to compare and contrast appropriate and inappropriate uses of class actions, with reference to actual cases, and to discuss settlement practices and outcomes in cases they had litigated. When respondents identified areas that they thought merited reform, we asked them to identify types of changes they thought worthy of consideration. Most respondents spent most of the interview time discussing their own experiences litigating class action lawsuits, and their assessments of these experiences, rather than promoting or opposing proposed reforms.

The individuals we interviewed have a wide range of perspectives and experiences covering virtually all areas of class action practice, but they do not consti-

tute a random sample of class action participants. Our discussion of trends in class action filings derives from our interviews with these individuals, but we cannot draw statistical inferences to the population of class action litigators from these interviews. Our analysis of the virtues and vices of damage class actions (presented in Chapter Three) was shaped not only by what we learned in the interviews, but also by our own and others' previous empirical studies of mass torts and class actions, and by the rich legal scholarship on the dynamics of class action litigation.

NOTE

[1]During this phase of the research we did not interview legal scholars who have studied class actions. But in the course of our study we had the opportunity to discuss class action policy issues and our research findings with colleagues and others at academic workshops and conferences.

We also did not interview judges during this phase of the research, as we anticipated that practitioners would be a better source of broad nationwide trends in class action filing and settlement practices.

Appendix D

CASE STUDY METHODOLOGY

Ideally, to evaluate the empirical support for assertions about the benefits and costs of Rule 23(b)(3) class actions, we would select a statistically representative sample of class action lawsuits and measure key characteristics and outcomes of those lawsuits. To select such a sample we first would have to construct a complete list of class action lawsuits, either for the nation or for selected jurisdictions. At the present time, developing such a list would be very difficult. Prior to 1995, reports of class action filings in the federal courts contained many inaccuracies; since then, the Administrative Office of the U.S. Courts believes that its effort to improve district reporting of class action status has improved the reliability of its database. However, the change has been so recent that many of those cases would still be pending and we would not be able to measure outcomes. Moreover, many class action lawsuits are filed in state courts that do not identify class action lawsuits in their reports of civil case filings. The only way to identify class actions in state courts would be to systematically review individual case files, a gargantuan task to undertake in multiple jurisdictions. If we could construct a sampling list, we then would need to collect information about each case we chose during our sampling. Because much information about class action litigation processes and outcomes is not contained in court records, we would need both to collect court record data and to survey key participants in each lawsuit to obtain data for analysis. To draw statistical inferences using this approach, we would need to sample a large number of cases and survey the participants in them.

We did not have the resources available to adopt such a large-scale approach, nor were we confident that we could surmount the considerable sampling and data collection problems it would entail. Moreover, many of the data we were interested in pertained to litigation processes; survey research techniques are not as well suited to studying processes as they are to measuring characteristics of individuals and organizations. Instead, we adopted a case study approach.

Case study research calls for selecting a few examples of the phenomenon to be studied and then intensively investigating the characteristics of those examples

("cases"). By closely examining a relatively small number of cases, and comparing and contrasting them, the researcher learns about significant features of the phenomenon and how it varies under different circumstances. Case study research is particularly well suited to investigating processes.[1]

After deciding to adopt a case study approach and considering the data collection that would be required, we determined that we had sufficient resources to study ten class action lawsuits.

WHAT TYPES OF CASES DID WE CHOOSE FOR OUR CASE STUDIES?

Because we could not hope to reflect the full diversity of class actions with ten cases, we decided that we would focus on two case types that have been the target of most of the criticism leveled at class actions in recent years: consumer class actions involving small individual losses and mass tort class actions involving personal injury and property damage.[2] Within the two categories we selected, we wanted to study a mix of complaints. In the consumer category, we sought examples of complaints about fees, deceptive advertising, and other unfair trade practices. In the mass tort category we initially wanted to select personal injury cases only, but when we found few personal injury mass torts that met all our selection criteria, we broadened our search to include property damage mass torts as well. We eliminated mass disaster cases, such as building and bridge collapses and hotel fires, from consideration because both defendant representatives and plaintiff attorneys whom we interviewed in the earlier phase of our research reported little controversy over the appropriateness of using a class approach in such situations.

HOW DID WE CHOOSE OUR CASE STUDIES?

The overarching point to note about our case selection process is that the process was not random but it was as impartial as we could make it. Because we wanted to focus our attention on ordinary or typical damage class action lawsuits, we excluded cases that had attracted widespread controversy (such as the asbestos futures class actions) from consideration. As a result, we did not know what had occurred in most of our cases—the meat of the stories and their outcomes, whether they could be held up as good or bad examples of class action practices—at the time we selected them. (The Texas insurance premium double rounding consumer class action and the blood products mass tort case had each attracted attention from legal academics and the legal press. However, we were not familiar with the facts of these cases when we selected them for study.)

We established four prerequisites for inclusion as a case study:

- The case was certified by the court as a class action; this would include cases certified for settlement only.
- The case had been filed within the several years prior to our study.
- The case had been substantially closed, which we defined as one that the major parties would agree is complete, even if some minor issue is still open.
- The case was central to a litigation, rather than ancillary.

We required that the cases selected be certified because we wanted to focus on the outcomes of class actions. An important question for further study is what happens to potential class members and defendants when plaintiff class action attorneys are unable to secure class certification.

We required that the cases selected had been filed within a few years prior to our study because many of the practitioners we interviewed in the earlier phase of the study believed that class action practice has changed significantly in recent years. We wanted our study to reflect current, rather than earlier, practice.

We required that the cases selected be resolved, because we wanted to know the outcomes of class actions; also, we knew the key participants would be reluctant to share information about ongoing litigation.

Because much about the dynamics of the litigation can only be conveyed by insiders, and because much of the information we sought is not part of the public record, we needed the cooperation of the key participants. Unlike our general interviews with class action practitioners, we were not able to guarantee confidentiality to the parties because these cases would be identifiable. Lack of confidentiality ended up being more of a stumbling block in defendants' willingness to share cost data with us than to their (or other parties') willingness to talk with us at all, although we encountered some parties who did not want to participate in the study. Although we began the study by requiring cooperation from at least some participants on all sides of the litigation, we later relaxed this criterion when some individuals who had earlier agreed to cooperate with the interviewing process withdrew.

For those types of cases in which distribution is accomplished relatively quickly (e.g., a typical consumer dispute), we preferred cases in which all settlement monies had been distributed so that we could construct complete accounts of case outcomes and costs. But for those types of cases in which distribution typically occurs over many years (e.g., when class members can come forward over

a lengthy period to claim compensation), we preferred cases that had been filed and resolved relatively recently—but where the settlement funds had not yet been fully distributed—to older litigation in which all funds had been distributed. Finally, we wanted a mix of cases that included both federal and state court cases, nationwide and more limited classes, and a variety of plaintiffs' law firms and defendants.

SOURCES OF INFORMATION

Our sources for case selection included the database that we had constructed of class actions identified by LEXIS and national or business press reports in 1995 and 1996 (see Appendix B). We also consulted the docket of the judicial panel on multidistrict litigation, which indicates litigation in which there has been some class action–related activity. We constructed a master list of all the cases mentioned in the several dozen interviews we had conducted in the earlier phase. (Because we promised confidentiality to respondents in that phase, our list did not contain any attribution to the respondents or their firms or corporations; nor did we include any case information that they asked us to keep confidential.) And we asked two insurance companies that had been involved in a number of small damage consumer cases to assist us by assembling a list of *all* the recent completed class actions in which they had been involved as defendants so that we could choose one at random.

Our criteria ended up being surprisingly restrictive. Many putative class actions in our databases were either never certified as such or were not resolved as class actions; many cases mentioned in our interviews were either not recent, not completed, or were "notorious" cases. Trying to get the cooperation of parties we did not know was time-consuming and led us to reject otherwise promising candidates for study. Ultimately, we identified many of the lawsuits we studied by iteratively choosing cases from the sources mentioned above, searching the LEXIS–NEXIS database and perhaps calling identified individuals to determine whether that case met our criteria (finding out that it often did not) and then searching among similar case types, such as toxic exposure or collateral protection insurance, for a case that did meet our criteria.

DATA COLLECTION: WHAT SOURCES DID WE USE AND WHAT TYPE OF INFORMATION DID WE SEEK?

For each case, we did a background search on LEXIS–NEXIS for any mention about it in the legal press (including published court opinions), the business press, and the general press. We attempted to interview all key participants in the litigation, including class counsel, in-house and outside counsel for lead

defendants, objectors, judges and special masters, and when relevant, regulators. We did not attempt to contact representative plaintiffs. Where the parties representing a particular side were numerous, such as in the *polybutylene pipes* case, we selected respondents to maximize the probability that we would obtain diverse views on the litigation. In all, we interviewed about 80 individuals.[3] Finally, we gathered public court documents relating to the litigation dynamics of each case. In the text, at the beginning of each case study's endnotes, we list the sources we drew upon.

To guide our data collection, we developed a protocol that we used for both record searches and interviews with participants. Although we needed to understand the main legal issues involved in each suit, our primary focus was on issues pertaining to the class framework. The main categories for which we collected data included:

- initiation of the litigation
- roles of regulators and other interested parties such as consumer organizations
- class definition (including class size)
- class representatives
- class certification
- competing or ancillary actions
- notice
- settlement negotiations
- settlement agreement
- opt-outs
- fairness hearings
- objectors and intervenors
- fees and expenses
- other costs
- final judgments
- execution of settlement provisions
- final outcomes, including intangible benefits and costs such as changes in practice
- practitioners' perceptions of the process.

ANALYSIS

We assigned two researchers to each case, one of whom drafted an initial case study report. The project leader reviewed all of the drafts and prepared lists of queries seeking clarification and additional information for each case study. Answering these queries usually required further discussion and correspondence with participants in the litigation. After several iterations, the preliminary drafts were then circulated to the key participants for review and comment. The review and comment stage generated further telephone interviews and record data collection.

In presenting the case studies, the research teams attempted to tell the story of the litigation rather than to assess the practices of the participants or the litigation outcomes. Our goal was to allow readers to draw their own conclusions.

Preparation of Chapter Fifteen, which compares and contrasts the ten cases and discusses their implications, led to further queries, discussions with participants in the litigation, and some final refinements of the case study chapters. Unlike the case studies themselves, Chapter Fifteen is interpretive. The tables accompanying Chapter Fifteen connect the analysis with the facts presented in the case studies, rather than offering new facts. This process of sifting, sorting, and interpreting qualitative information, involving multiple iterations and interactions with case participants, is characteristic of case study research.

NOTES

[1]See Robert Yin, *Case Study Research: Design and Methods*, 2nd ed. (Thousand Oaks, Calif.: Sage Publications, 1994).

[2]We excluded securities fraud cases, which have also been a subject of controversy, from consideration because we could not identify any class action lawsuits that had been completed since the passage of the Private Securities Reform Act of 1995, and we felt that cases completed prior to this legislation would no longer be useful examples to study.

[3]These included a few people whom we had already interviewed in the previous phase of data collection, but who were selected in this phase because they played a key role in one or more of the cases we selected for analysis.

Appendix E

CALCULATIONS FOR CASE STUDY SETTLEMENTS, STRUCTURES, COSTS, AND DISTRIBUTIONS

INTRODUCTION

In spite of the high level of precision found in the carefully chosen words used by attorneys drafting settlement agreements, and the centuries of Anglo-American jurisprudence that interpret and enforce such contracts, no standard taxonomy exists for those who attempt to understand how the terms and conditions contained in a settlement's complicated provisions affect the costs paid and compensation received by parties to litigation.

Class actions are certainly no exception to this observation. While the subtle nuances of what exactly is being promised when class counsel and the defendants' attorneys reach an agreement to end the litigation might be known to the parties (and hopefully to the judicial officer approving the settlement), it is often difficult for outsiders to understand *who is supposed to pay what to whom and when, and from what source, and for what in return*. Indeed, some attorneys make settlement provisions deliberately vague to provide greater latitude in interpreting claiming requirements, to avoid attracting the attention of those who might object to its terms, or to defer, until the distant future, confronting potentially thorny issues that could scuttle a hard-won resolution during the sensitive period prior to court approval.

Even when the terms are crafted in such a way as to make them as unambiguous as possible, the attorneys involved employ very different language from that used in provisions in other cases with similar intentions. For example, an "incentive payment" to representative plaintiffs in one case is a "direct award" in another; "settlement funds" sometimes include class counsel fees and costs and sometimes do not; "benefits available to the class" can include payments made to charities in some situations and in others refer only to the cash claimants might pocket; an order that the "defendant shall pay for the costs of administration" in one case means that the payments will be made by the defendant out of the common fund and, in another, that the defendant will handle

these expenditures separately and in addition to the fund set aside for compensation. In a sense, each class action settlement agreement is a unique work of art that defies easy categorization.

When we first attempted to organize the information from our ten cases in a manner that would allow us to compare the particular settlement provisions in a meaningful way, we were struck by the difficulty of merely assessing the total value of what was being offered to end the litigation. What is the real value to a class member of a discount coupon? How likely is it that "optional" funding contributions will be made years in the future? What has the class "lost" when personal injuries or deaths are involved? Is the value of the benefit conferred the total funds made available by defendants, or the total likely to be collected by class members? How much did class counsel really receive for their services when they were in turn required to make payments to others as part of the final order of approval?

Another difficult issue we confronted was how to define the case. Most of the class action lawsuits we studied did not take place in a litigation vacuum. Often, other class actions had been filed pertaining to the same circumstances that gave rise to the lawsuit that we selected for study; in some instances, individuals had filed lawsuits as well. Defendants' costs to resolve all of the litigation associated with particular circumstances included the costs of these other suits as well as the costs of the lawsuit that was the subject of our analysis. Our solution to this problem was to limit our analysis to data pertaining to cases that were proximately related to the ultimate settlement in the lawsuit we selected. So, for example, our analysis of the *home siding* litigation incorporates information from the three lawsuits that were settled in *Sandpiper Village v. Louisiana-Pacific Corporation* (*Sandpiper, Hudlicky v. Louisiana-Pacific,* and *Matherly v. Louisiana-Pacific*), but not the information pertaining to *Anderson v. Louisiana-Pacific*, a Florida statewide class action that was settled about three months prior to the settlement in *Sandpiper.*

The most frustrating aspect of our efforts was the lack of systematic information about the cases. While we expected some difficulty in learning about the outside legal fees and costs incurred by defendants, we were surprised to find other aspects of the class action settlement agreement equally shrouded in mystery, given the responsibility of judges to approve any settlement and award fees based on the outcome. Ongoing reporting of settlement distribution details to the court was not always required or made publicly available. Information regarding the ancillary costs of providing compensation to the class, such as expenditures for settlement administration and notice, were sometimes documented publicly and sometimes not. In some of the latter instances, parties shared this information with us; in other instances, the details remain closely

held by the parties. In some cases, the pleadings offered support for the request for final approval of the settlement, and the settlement agreement itself clearly set forth the expectations of class counsel and the defendants regarding what most likely *could* be paid to the class as well as what would be the *most likely* aggregate level of claims. In other cases, the issue of what level of demand would be made upon the settlement fund was not broached by parties in court papers, apparently in an effort to present the agreement to the judge in the most favorable light. In one case, no one apparently ever stated how much the class might receive in the aggregate, even under the most optimistic assumptions. All of these problems make assessment of the value of settlements difficult or impossible, even in instances where the parties agree about what the settlement is trying to accomplish.

Some of the attorneys we contacted tried to dissuade us from comparing the terms of settlement in different cases. They variously argued that each case is unique, that the factors driving the parties to reach agreement do not translate well to a spreadsheet or summary table, and that the dispensation of civil justice should not be viewed in the same light as the manufacture and sale of products. Despite their concerns, the fact is that courts generally make comparisons similar to ours in their deliberations as to the fairness of a proposed settlement. The most obvious example of this is in the decision to award class counsel fees. With the percentage-of-fund method generally enjoying the greatest favor among judges, a real need exists for judicial officers to define exactly what makes up the fund on which fees will be calculated. Does the fund include all of defendants' expenditures required under the settlement or just those intended to compensate the class directly? Should it include coupons providing some level of discount for retail purchases, and if so, how should they be valued? Once the fund is defined, judges must decide whether the fees sought are reasonable, given the awards in similar class actions. Moreover, it is unreasonable to claim that competing settlement proposals in the same case, or an objector's criticism of terms in an agreement, cannot be evaluated in a systematic way simply because the matter involves a lawsuit. Such a position ignores the fact that class action settlement agreements are contracts and that even extremely complicated contracts are analyzed, dissected, and compared every business day.

What does *not* appear in the tables that follow is any valuation of the effect of the lawsuit on defendant practices, or of how it may have provided the initiative for new regulations or legislation, or whether it satisfied a class member's sense of justice and fair play. Although the main text discusses these possible outcomes, assigning a monetary value to them is highly imprecise and subject to competing claims even by class counsel and defendants who are jointly offering a settlement for a judge's approval.

APPROACH

Our calculations are based upon the assumption that the defendants bear the entire cost of the class action settlement. This assumption follows from the fact that the defendants are generally responsible for paying plaintiff attorney fees and costs (usually including the costs of notifying the class of initial certification), the settlement benefits to the class, and the expenses for settlement administration, notice of settlement and fairness hearings, and other items. In some instances, this assumption is not wholly accurate. For example, the class counsel may have agreed to pay one-third of a settlement to a third-party intervenor to eliminate a potential roadblock to final approval, with defendants agreeing to pay the other two-thirds. Some might view this contribution as the plaintiff attorney's uncompensated business expense, rather than as a part of the settlement agreement. On the other hand, the payment to the intervenor constituted a significant portion of the amount of fees and costs the class counsel collected from defendant and furthermore, without such payment, the case might not have been settled. We felt that it would be unfair to compare "percentage of fund" fees in this matter with those in other cases without using the fee award *excluding* this necessary expense of litigation. To account for these costs, we added the class counsel's contribution to our category for "other litigation costs and expense paid by defendants." The *total* paid by the defendant for class counsel fees and the intervenor settlement is the same regardless of how we view (or in what category we place) the class counsel's share of the payment. We used a similar approach when class counsel was responsible for paying the representative plaintiffs an incentive fee. These direct payments to the plaintiffs were shifted to the "other litigation costs" category and deducted from the class counsel award.

Another potential area of confusion concerns our characterization of all transactional costs or settlement benefits as being paid by defendants. Some settlements require the defendants to pay a flat amount into a fund, which in turn is used to pay the costs of settlement administration, notification to the class regarding the proposed settlement or claiming procedures, other expenses, the class counsel fees and expenses, and class member claims. Subsequent demands on this fund may be paid by an independent third-party settlement administrator and not technically by the defendants (who may no longer have any duties or responsibility to the class). However, the money originated with the defendants regardless of who actually wrote the check and we treat these costs as such. We have also been required occasionally to use estimates of future payments by defendants for the costs of administration and notice. In some instances, defendants made these estimates at the time of settlement approval but the actual amount expended over the life of the settlement is not publicly known (and the parties were not willing to share the true figure with

us). Rather than characterizing these costs as unknown, we have used the best publicly available figures as part of the defendants' overall payments to settle the class's claims.

The costs and compensation figures presented herein are not restricted only to those that are a direct result of the judicially approved settlement. We have attempted to include all costs paid or incurred that had an effect upon the ability of the parties to reach an agreement, that were spent to avoid or resolve challenges to a proposed settlement, or played a role in the size of the funds available to compensate the class. Thus, descriptions of some of these costs will not be found in the settlement agreement or in the order of approval. Such costs might include, for example, confidential payments to attorneys representing potential objectors or the satisfaction of the subrogation claims of third-parties.

To some extent, we are tied to the parties' own definitions of what the intended purposes were for their expenditures. For example, some of a defendant's estimated costs of notice of settlement might be characterized as administrative expenses if they involved providing claim forms to be used in the event of final approval of proposed agreement.

COSTS, BENEFITS, AND OTHER ADDITIONS AND SUBTRACTIONS GENERALLY NOT INCLUDED

Defendants' Own Legal Expenses

Keep in mind that we are not including, *except where clearly indicated*, the expenditures incurred by defendants for outside legal fees and costs. These expenditures are an important part of the costs of litigating and settling class actions but since we could only obtain this information for three of the case studies, we chose not to add them routinely to our transactions cost and settlement valuations. In the text, we present estimates of such costs for the other seven case studies, based on three different assumptions (see Chapter Fifteen). However, in our database, outside defense expenditures are not generally taken into account because they were not consistently available.

Arguably, just as important to a complete picture of class action costs are those costs incurred by defendants' own in-house counsel. While it appears that most defendants contracted with independent law firms to handle litigation duties associated with the class action, corporate counsel appeared to play an important role throughout the pendency of the lawsuit (as well as before and after). However, the costs for such internal legal services could not be determined, even in the cases where the defendants were willing and able to share information about other legal expenses they paid.

Other Transactional Costs and Settlement Benefits Not Included

The picture painted by the tables contained in this appendix do not include a number of other cost components of civil litigation. Other RAND ICJ research analyses of litigation costs have included the time and money expended by plaintiffs and defendants (individuals and employees of organizations and government agencies) as a result of talking with lawyers, experts, witnesses, court personnel and others; collecting information to assist in the lawsuit; traveling to and from law offices and courthouses; processing claims not related to specific litigation; and government expenditures related to the judicial system for judges' salaries, etc.[1] We could not estimate these costs from the data collected in our case studies.[2]

In most of our cases, obligations under the settlement terms were met within about the first year after final approval. In two cases, however, payments to claimants may take seven or more years to complete. This extended payment period, coupled with the size of the amounts in question, would suggest that a more precise way of viewing what was at stake at the time of settlement would be to discount the fund to a comparable net present value. This solution is somewhat problematic because in these two cases (*polybutylene plumbing pipes* litigation and *home siding* litigation), the actual rate at which the defendant would have to make payments into the compensation fund would vary depending on claimant demand and the defendants' desire to meet that demand.

In the *polybutylene pipes* case, defendants were to pay into the Consumer Plumbing Recovery Center (the administrative mechanism for compensation) on an ongoing, as-needed basis. The great uncertainty about the number of class members and the value of their claims would have made any calculations of net present value at the time of settlement highly speculative. In the *home siding* case, there was a structure anticipated at the time of settlement for defendant contributions. We have calculated a comparable net present value of the settlement, as it was originally structured, of between $242 million and $381 million, compared to minimum and maximum anticipated contributions of between $275 million and $475 million.[3] The actual rate of defendant contributions into the siding compensation fund, however, is significantly greater than what was anticipated at the time of settlement (and so the net present value would be higher). Also, the settlement structure has undergone a number of changes recently that may affect the final numbers.[4] For these reasons, and because the defendants' obligations in both cases have soft caps that may be breached when the dust finally settles, we do not use net present value figures in our costs and compensation analysis. Remember, however, that in both of the cases (and to a lesser extent in others), the fact that a significant portion of

the defendant's obligation might not come due for some time may have played a role in the decision to agree to a particular settlement structure.

In some of our cases, funds are paid into interest-bearing accounts prior to distribution to attorneys and claimants. Because we were usually unable to get detailed information about the interest paid into the accounts as well as the tax liabilities incurred, we ignore them in our analysis.

GENERAL ASSUMPTIONS

Our key assumption about the cost structure of these cases is that the *negotiated* value of a class action settlement at the time of final approval is the sum of the maximum potential settlement benefits available to the class members and the transaction costs[5] incurred to obtain judicial approval of the settlement as well as to deliver the benefits. The *actual* value of such a settlement is the actual *or most likely projection* of the distribution of benefits plus the transaction costs.

Settlement Transaction Costs

We define "transaction costs" as the sum of payments defendants made to plaintiffs' attorneys (whether ordered by the court or paid voluntarily) and any settlement-related expenses also paid by defendants.[6] In nearly all of our cases, we had no problem distinguishing between expenditures made to plaintiffs' attorneys and other costs. However, in the *blood products* litigation, a single $40 million fund was created to pay all transaction costs, with the costs of administration and notice being drawn off first and the residual used to pay class counsel fees. As we went to press, the final accounting of this fund had not yet taken place and so we cannot say with certainty what the judge will eventually award to class counsel and other attorneys seeking compensation from this fund. We do know, informally, that as of September 1998 about $3.5 million had been drawn from the fund for the costs of administration and notice. Thus, a maximum of about $36.5 million is available for attorney compensation, and our calculations use $36.5 million as the estimated plaintiffs attorney fees and costs. However, the final figure could be less.

Plaintiff Attorney Fees and Costs

These are costs to the defendants other than for settlement benefits or related administrative expenditures. Throughout this appendix we attempt to distinguish class counsel (whether actually appointed, putative, or de facto) in the matters that are the primary focus of our case studies from other plaintiff attor-

neys who also are an integral part of the story. The latter include attorneys representing intervenors and objectors as well as those who have brought competing or related class litigation (who may be named as class counsel but not in our primary case). The term "plaintiff attorneys" generally encompasses both our study case class counsel and all other attorneys receiving some sort of payment from the defendants (or, less commonly, from the class counsel in our primary case). Information about payments made to attorneys other than class counsel is not always available: Unlike court-ordered fees and costs to class counsel, settlements with attorneys representing individual plaintiffs are often confidential.

Costs for notice are amounts known to have been paid by plaintiff attorneys for notice given to the class of the initial certification order and informing them of any opt-out requirements. In some cases class counsel was responsible for underwriting the expenses of notice, but for various reasons the process of publicizing the order for certifying a trial class was delayed or deferred and a subsequent settlement made such notice unnecessary. "Costs for other than notice" are the more typical expenses of litigation (e.g., court fees, witness and expert fees, travel) reimbursed directly or indirectly by the defendant. In many instances, we were unable to distinguish what portion of plaintiff attorneys' reimbursed costs was for notice.

Note that we consider class counsel's "costs" as costs so defined and awarded by the court, or paid by the defendants (or the settlement fund). These costs may be less than the actual litigation expenditures incurred by class counsel.

We also were not always able to determine how much of the money received by the plaintiff attorneys was for their fees and how much was for expenses. Some final orders awarded class counsel a single undifferentiated amount to cover both fees and costs. A similar lump sum payment might also be made to plaintiff attorneys other than class counsel.

Settlement-Related Expenses

These expenses are direct costs to the defendants (or costs paid indirectly through a settlement fund) other than for settlement benefits or for plaintiff attorney fees and costs. Typically, these expenses are for administering the terms of the settlement, including establishing compensation facilities, reviewing submitted claims, and issuing checks or credits to accounts. They may also cover providing notice to the class that a settlement has been reached, informing members of the time period available to opt out of the class if members have not received a previous notice, giving details of an impending fairness hearing and the procedures for making objections, and explaining how claims are to be made. The distinctions between the costs of administration and no-

tice are often blurred, especially where notice of the right to opt out and instructions for claiming compensation from a fund are published simultaneously.

Information about such expenditures comes from a variety of sources. Ideally, these data are included as part of the ongoing process of reporting on the progress of distributing the settlement proceeds. In a number of cases, however, the defendants paid these costs separately from funding the common benefits and were not required to report them; we relied on their cooperation to obtain these figures. In some instances, the actual expenditures were not available but projections of what the defendants might pay for administration and notice were made or reported at the time the settlement was submitted for judicial approval. Such estimates may not prove accurate because they are usually based on the costs of handling the claims of the *entire* potential class, rather than on the smaller number of class members who may come forward.

In some cases, a portion of the settlement fund was set aside and made available to pay the costs of administration. Expenses would be extracted from the amount set aside and any funds remaining after final distribution might be paid to the class as benefits, shared with class counsel, contributed to charities, or returned to the defendants. In those cases where a final accounting has not been made (or was not made available to the public), we assumed that the entire amount of this fund would be used for administration.

Other costs and charges to defendants include all other expenses that are neither benefits to the class (or their substitutes) nor payments to plaintiff attorneys nor the defendants' administration or notice costs. Most often these are incentive payments to representative plaintiffs or intervenors, but we also include any fees or expenses paid to special masters who are tasked with reviewing the adequacy of the proposed settlement on behalf of the supervising judge.

NEGOTIATED SETTLEMENT BENEFITS

Generally

"Negotiated settlement benefits" refer to the value of any benefits made available, at the time of settlement approval, to the class (or others) as compensation for class member losses or claimed damages. This amount does not include any expenditures to attorneys or other transactional costs of the settlement and reflects what one might have expected to be the *maximum possible size of the aggregate distribution*.

What this figure encompasses differs somewhat from case to case. In some cases (*brokerage products, collateral protection insurance, chemical factory*), the

aggregate amount of benefits to be paid to successful claimants (or as automatic payments to class members) or other recipients was fixed at the time of settlement. The fund would be divided up into pro rata shares among all successful claimants. Thus, the negotiated settlement benefit was the size of the fund set aside for claims. In two cases (*insurance premium double rounding, cable TV late fee*), a predetermined, capped fund was also made available to the class but no pro rata distribution was anticipated. Here again, the negotiated settlement benefit was the size of the fund but not all of this fund necessarily would be used. In another case (*polybutylene pipes*), the defendants had agreed to pay claims as they were submitted but the total payments were capped, even if total demand on the fund exceeded its size. Defendants could refuse to pay more than their agreed-to maximum but had to pay all claims up to that amount. Accordingly, we used the maximum aggregate ceiling as the allocated settlement benefit. The situation was a little more complicated in the *home siding* litigation, since the defendant has the choice whether to make a number of additional payments into the compensation fund. Because all involved have a general expectation that all of these payments eventually will be made, we have used the sum of both mandatory and optional funding as our maximum benefit allocation.

In other cases, however, no maximum preset cap to defendants' expenditures exists, and they have essentially agreed to pay all claims received. Nevertheless, we sometimes were still able to calculate a maximum exposure. In the *blood products* case, the number of class members who appeared to have valid claims at the time of the settlement is used to calculate the compensation benefit since the number of eventually successful claimants by definition had to be a subset of this group. In another case (*contact lens pricing*), we used the parties' own estimates of the total allocated settlement benefits, though conceivably the final amount of paid claims could exceed this estimate. In the *credit life insurance* case, no information was provided to the court (as far as we could determine) as to the amount the defendant was agreeing to pay in the aggregate.

Because compensation funds can involve a significant amount of money that is not used for quite some time, they are sometimes deposited in bank accounts and drawn upon as needed. We do not include in the negotiated settlement benefit any interest accrued from these accounts, any taxes paid on such interest, or any costs of administration (if we can identify such costs) expended towards handling either interest or related taxes.

Cash and Noncash Benefits

In all of our cases save two, all of the compensation that was to be paid to class members was in the form of "cash" (typically in negotiable checks or account

credit). In the *contact lens pricing* litigation, in addition to cash compensation, each claimant would receive a coupon giving a discount on future purchases of selected products. Since the amount of the discount was equal to the cash compensation received, the coupons were potentially a significant amount of the total benefit package. However, the true value of such retail coupons as settlement compensation has been called into question in a number of cases, so we separate cash and noncash benefits. Coupons were also issued, to a far lesser extent, in the *credit life insurance* settlement. Claimants for whom it was impossible to confirm the purchase of the policies in question were issued a 10 percent discount coupon for future purchases in the defendants' stores. However, these discounts were issued more as gestures of goodwill to unsuccessful claimants (who would have received nothing had they failed the claiming process in our other case studies) and do not appear to have been perceived by parties as class compensation. Apparently the parties never expected to issue a significant number of these coupons and so we do not include an estimate of their value.

Direct and Indirect Benefits

The bulk of the compensation offered in our case studies was to be given directly to class members. In a number of instances, however, defendants made payments to nonparties as disgorgement of allegedly illegal gains, to forestall objections to settlement approval advanced by intervenors or others, or to enhance the value of the proposed compensation offered to class members by settling third-party claims. In *the insurance premium double rounding* case, defendants and class counsel ended an intervention initiated by the State of Texas by making a $2 million contribution to a consumer education fund. In the *blood products* case, defendants paid off about $35 million in possible subrogation claims that might have canceled out the benefits for some class members. In the *chemical factory* case, the defendants made a $1 million donation to a local charity in lieu of allowing class members the right to opt out and sue for punitive damages.

We have termed these payments "indirect" settlement benefits because they are not paid to class members per se but serve some settlement-related interest. Such expenses should be distinguished from cy pres uses of unused portions of the compensation fund; these contributions may also be paid to charities or other third parties in lieu of compensation to class members, but are typically an accounting tool to compensate for claimants not cashing issued checks, accounts' closing prior to being credited with the settlement benefits, or the failure of class members to initiate or complete the claiming process.[7]

DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS

Generally

In some of our cases, we know at the outset how much cash will be distributed to the class. In *brokerage products, collateral protection insurance,* and the *chemical factory* litigation, every dollar of the negotiated settlement direct cash benefits will be divided up, using various formulas, among successful claimants.[8] In the remainder of our cases, we are dependent either on published reports of settlement distribution or on the cooperation of the parties because the actual aggregate claiming demand may well be less than the negotiated settlement benefits.

In these seven cases, less-than-100 percent claiming has different effects, depending on how the settlement distribution was structured. In the *cable TV late fee* litigation, the defendant paid the settlement amount into a separate fund administered by a third party. Any amount in this fund left over after the claiming period ended and all other costs were deducted was to be donated to nonprofit organizations approved by the court, a "cy pres" distribution of the remainder. In the *home siding* litigation, all undistributed amounts in the compensation fund revert to the defendants when the settlement administrator decides no more claims are likely to be made. Unlike these two cases, other settlements have the defendants controlling the distribution of money at all times so there really never is any unused balance to be redirected to the defendant (as a reversion) or anyone else (as a cy pres distribution). In *polybutylene pipes*, the defendants simply pay claims as they come in. The $950 million soft cap is not a fund per se, but only a limit to what they have agreed ultimately to spend. If only $750 million in claims is received and paid, for example, there is no multimillion dollar refund due anybody. On the other hand, the settlement was approved with the understanding that its benefits to the class were "worth" $950 million. In the hypothetical presented, the ultimate settlement payout would be "worth" $200 million less than that anticipated in the proposed agreement. The defendants would not get anything back because they never spent the whole amount, but they would wind up buying global peace at a reduced price. In one sense, this price reduction is the same as the undistributed amounts in the fund described in *home siding*, and we treat these "reversions" identically.

We used a similar reasoning in our figures for *blood products.* At the time of settlement, the defendants thought that under the worst-case scenario they would have to pay 6500 claims worth $100,000 each. They agreed to the settlement because 6500 claims appeared valid (without further inspection), they knew that no new claims would be allowed, and the maximum potential demand on their assets was acceptable. At the present time, though, 300 of those claims appear to be duplicates and will not be paid. Thus, the defendants will

"receive" a reversion (or refund) of $30 million from the maximum potential settlement value since the ultimate number of claims did not meet expectations.

The *insurance premium double rounding* settlement has a mix of these approaches, depending on what particular subgroup a class member was in. There was one allocation of settlement benefits for a combined Groups 1 and 2 and another for Group 3. If not all of the claim allocation in Group 3 was used, the defendant would keep any amount remaining (as in *polybutylene pipes*, the defendants made payments only as needed) and we are able to calculate a remainder to the defendants for that group (because we know the approximate amount of money actually distributed). The tiny remainder from the automatic payment scheme in Groups 1 and 2, if any, would be used for special master costs (a type of settlement-related expense) and any left after that would go to charity as a cy pres distribution (similar to *cable TV late fees*).

These sorts of calculations were not possible for our remaining two cases. The defendant in *credit life insurance* made payments as needed and we would normally calculate a reversion using the difference between the actual distribution and the maximum potential aggregate compensation claimed at the time the settlement was presented for final approval. Unfortunately, while we know (from the defendants) how much was distributed, we do not know how much in total was on the table at the time of settlement. In *contact lens pricing*, the opposite is true. The parties to the agreement were quick to point out what the potential payout might be when they submitted the settlement for approval, but they kept the details regarding eventual distribution to themselves. We did, however, attempt to estimate how much the company thought it might have to pay out based on its SEC filings.[9]

Because of the problem with placing a value on coupons, we report settlement benefit distribution, cy pres redirection, and reversion to the defendants only for actual cash benefits. This coupon valuation reporting would be a significant issue in only one case, *contact lens pricing*, but since the parties would not share their ultimate distribution figures with us, as a practical matter it did not affect any calculations. There is a "coupon" component in the *credit life premium* case but since these 10-percent-off certificates were only given as a goodwill gesture to possible class members whose claims were inadequately documented (and who in other cases would receive nothing), we do not include them in our settlement valuation.

As we did in calculating maximum potential allocated settlement benefits, we did not include in the distribution figures the amount of interest accrued in settlement fund accounts, any taxes paid on such interest, or any costs of administration expended towards handling either interest or related taxes.

Reported Versus Projected

Unlike settlement benefits directly intended for the class, indirect benefit payments are usually made relatively soon after the settlement is finalized. Because of this, we assume that the contributions intended for charitable organizations or other third parties as indirect benefits were indeed made as agreed or anticipated, even in cases where the distribution of benefits to class members is still ongoing.

In these cases where the final distribution will take place after we have gone to press, we attempted to estimate how much will eventually be distributed to the class. In some instances, we assumed that a relatively tiny amount of leftover checks that had not yet been cashed or delivered would eventually find their way to the rightful owners. In *blood products,* we assumed, as do the parties in the case, that all remaining class members with currently valid claims will be paid.

Estimating projected amounts in *home siding* and *polybutylene pipes* was more problematic. Many claims will not be made against the settlement fund in these cases for years and the ultimate magnitude of the payout is currently unknown. However, we assumed that since $457 million worth of claims already had been submitted and inspected by September 1998 for *home siding* compensation (even though additional claims could conceivably come in through at least the year 2002), the total of mandatory and optional funding of $475 million would eventually be exhausted. In *polybutylene pipes*, it is generally expected that the ultimate amount of claims will be at or near the allocated settlement benefit cap.

Table E.1 summarizes all these data for all ten class actions. These data provide the basis for figures and tables in Chapter Fifteen. Tables E.2–E.11 repeat these figures and provide additional details for each of our cases.

Table E.1

Comparative Class Action Case Study Settlement Structure, Costs, and Distribution Summary

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
SECTION A: SETTLEMENT TRANSACTION COSTS											
A	Total known transaction costs paid by defendants ($M) (total, lines A1, A2, A3)	8.500	5.968	2.632	0.571	0.880	12.463	40.000	25.400	46.246	204.448
A1	Undifferentiated fund for defendant's costs and charges and plaintiff attorneys' fees and costs ($M)	—	—	—	—	—	—	—	—	—	—
A2	Total known fees and costs awarded or paid to all plaintiff attorneys ($M) (total, lines A2.1, A2.2)	8.500	5.223	2.270	0.520	0.580	11.288	36.500	24.900	26.300	83.400
A2.1	Total class counsel's fees and costs ($M) (total, lines A2.11, A2.12, A2.13)	8.500	5.223	1.920	0.511	0.580	11.288	36.500	24.900	25.200	75.000
A2.11	Class counsel's undifferentiated fees and costs awarded/paid ($M)	—	—	1.920	—	0.580	—	36.500	—	25.200	75.000
A2.12	Class counsel's fees awarded/paid ($M)	8.000	4.769	—	0.448	—	9.683	—	17.200	—	—
A2.13	Class counsel's costs awarded/paid ($M) (total, lines A2.131, A2.132, A2.133)	0.500	0.454	—	0.063	—	1.605	—	7.700	—	—
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)	—	—	—	—	—	—	—	—	—	—

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
A2.132	Class counsel's costs for notice awarded/paid ($M)	0.148	—	—	—	—	—	—	3.100	—	—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)	0.352	0.454	—	0.063	—	1.605	—	4.600	—	—
A2.2	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)	Unknown	Unknown	0.350	0.009	Unknown	—	Unknown	—	1.100	8.400
A3	Total known costs to defendants for settlement-related expenses ($M) (total, lines A3.1, A3.2)	Unknown	0.745	0.362	0.051	0.300	1.175	3.500	0.500	19.946	121.048
A3.1	Costs to defendants for administration and notice ($M) (total, lines A3.11, A3.12, A3.13)	Unknown	0.700	0.350	0.049	0.300	1.010	3.500	0.500	18.900	114.000
A3.11	Costs to defendants for administration and notice, undifferentiated ($M)	Unknown	—	0.350	—	—	1.010	3.500	Unknown	—	—
A3.12	Costs to defendants for administration ($M)	Unknown	0.562	Unknown	0.049	0.175	Unknown	Unknown	0.500	14.000	84.000
A3.13	Costs to defendants for notice ($M)	Unknown	0.138	Unknown	Unknown	0.125	Unknown	Unknown	Unknown	4.900	30.000
A3.2	Other costs and charges to defendants ($M) (not including settlement benefits)	Unknown	0.045	0.012	0.003	—	0.165	Unknown	—	1.046	7.048

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
SECTION B: NEGOTIATED SETTLEMENT BENEFITS											
B	Negotiated direct and indirect settlement benefits ($M) (total, lines B1, B2)	67.000	11.232	7.868	0.929	Unknown	27.235	685.000	26.175	470.054	838.000
B1	Settlement benefits not directly allocated to class ($M)	—	—	—	—	—	2.000	35.000	1.000	—	—
B2	Total settlement benefits allocated to class members ($M) (total, lines B2.1, B2.2)	67.000	11.232	7.868	0.929	Unknown	25.235	650.000	25.175	470.054	838.000
B2.1	Noncash benefits allocated to class members ($M)	33.500	—	—	—	—	—	—	—	—	—
B2.2	Cash benefits allocated to class ($M)	33.500	11.232	7.868	0.929	Unknown	25.235	650.000	25.175	470.054	838.000
SECTION C: DEFENDANT'S LEGAL FEES AND COSTS											
C	Outside defense fees and costs ($M)	Unknown	5.000	Unknown	Unknown	0.115	4.487	Unknown	Unknown	Unknown	Unknown
SECTION D: AGGREGATE CLASS LOSS AND SIZE											
D1	Total loss ($M)	Unknown	34.900	Unknown	7.260	Unknown	41.127	Unknown	Unknown	Unknown	Unknown
D2	Class size	1,250,000	60,000	60,379	Unknown	Unknown	4,401,817	6,500	3,931	808,000	Unknown
SECTION E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS											
E1	Reported number of claims paid	Unknown	7,595	56,506	7,629	5,940	1,550,221	4,364	3,931	37,781	395,969
E2	Reported cash disbursed to class ($M)	9.175	11.232	7.583	0.271	0.272	8.914	436.400	25.175	165.000	567.538
E3	Cy pres, based on reported cash disbursement ($M)	—	—	0.285	0.657	—	0.319	—	—	—	—

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
E4	Cash reversion to defendant(s), based on reported cash disbursement ($M)	24.325	—	—	—	Unknown	16.003	213.600	—	305.054	270.462
SECTION F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS											
F1	Projected final number of claims paid	Unknown	7,595	60,195	7,629	5,940	1,550,221	6,200	3,931	Unknown	Unknown
F2	Projected final cash disbursed to class ($M)	9.175	11.232	7.868	0.271	0.272	8.914	620.000	25.175	470.054	838.000
F3	Cy pres, based on projected cash disbursement ($M)	—	—	—	0.657	—	0.319	—	—	—	—
F4	Cash reversion to defendant(s), based on projected cash disbursement ($M)	24.325	—	—	—	Unknown	16.003	30.000	—	—	—
SECTION G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT											
G1	Average loss per class member	Unknown	$581.67	Unknown	Unknown	$1.92	$9.34	Unknown	Unknown	Unknown	Unknown
G2	Average allocated direct cash benefit per class member	$26.80	$187.20	$130.31	Unknown	Unknown	$5.73	$100,000.00	$6,404.22	$581.75	Unknown
G3	Average allocated direct/indirect cash/credit benefit per class member	$53.60	$187.20	$130.31	Unknown	Unknown	$6.19	$105,384.62	$6,658.61	$581.75	Unknown
G4	Average known cash payout per claiming class member	Unknown	$1,478.89	$134.20	$35.58	$45.79	$5.75	$100,000.00	$6,404.22	$4,367.27	$1,433.29
G5	Average projected cash payout per claiming class member	Unknown	$1,478.89	$130.71	$35.58	$45.79	$5.75	$100,000.00	$6,404.22	Unknown	Unknown

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
SECTION H: NEGOTIATED TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT											
H1	Maximum potential value of settlement ($M) (total, lines A, B)	75.500	17.200	10.500	1.500	Unknown	39.698	725.000	51.575	516.300	1,042.448
H2	Maximum potential cash value of settlement (excluding noncash benefits) ($M) (total, lines A, B1, B2.2)	42.000	17.200	10.500	1.500	Unknown	39.698	725.000	51.575	516.300	1,042.448
H3	Maximum potential direct cash value of settlement(excluding noncash and indirect) ($M) (total, lines A, B2.2)	42.000	17.200	10.500	1.500	Unknown	37.698	690.000	50.575	516.300	1,042.448
SECTION I: ACTUAL AND PROJECTED SETTLEMENT EXPENDITURES											
I1	Reported cash disbursed, cy pres, and indirect benefits ($M) (total lines E2, E3, B1)	9.175	11.232	7.868	0.929	0.272	11.232	471.400	26.175	165.000	567.538
I2	Projected cash disbursed, cy pres and indirect benefits ($M) (total lines F2, F3, B1)	9.175	11.232	7.868	0.929	0.272	11.232	655.000	26.175	470.054	838.000
I3	Reported total cash settlement expenditures (reported cash disbursed, cy pres, indirect benefits, and transaction costs (excluding own legal)) ($M) (total, lines I1, A)	17.675	17.200	10.500	1.500	1.152	23.695	511.400	51.575	211.246	771.986

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
I4	Projected total cash settlement expenditures (projected cash disbursed, cy pres, indirect benefit, and transaction costs (excluding own legal)) ($M) (total, lines I2, A)	17.675	17.200	10.500	1.500	1.152	23.695	695.000	51.575	516.300	1,042.448
I5	Reported class-related direct cash settlement pay-out (reported cash disbursed (excluding cy pres or indirect benefits) and transaction costs excluding own legal)) ($M) (total, lines E2, A)	17.675	17.200	10.215	0.843	1.152	21.377	476.400	50.575	211.246	771.986
I6	Projected class-related direct cash settlement pay-out (projected cash disbursed (excluding cy pres or indirect benefits) and transaction costs excluding own legal)) ($M) (total, lines F2, A)	17.675	17.200	10.500	0.843	1.152	21.377	660.000	50.575	516.300	1,042.448
SECTION J: DEFENDANT'S OUTSIDE LEGAL FEES AND COSTS											
J1	'Real' defendant transaction costs, known (transaction costs plus known outside defense) (line A + line C)	Unknown	10.968	Unknown	Unknown	0.995	16.950	Unknown	Unknown	Unknown	Unknown

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
J2	Estimated outside defense fees and costs #1; uses 20% of class counsel's fees and costs (line A2.1) if unknown or actual (line C) if known ($M)	1.700	5.000	0.384	0.102	0.115	4.487	7.300	4.980	5.040	15.000
J3	Estimated outside defense fees and costs #2; uses 40% of class counsel's fees and costs (line A2.1) if unknown or actual (line C) if known ($M)	3.400	5.000	0.768	0.204	0.115	4.487	14.600	9.960	10.080	30.000
J4	Estimated outside defense fees and costs #3; uses 100% of class counsel's fees and costs (line A2.1) if unknown or actual (line C) if known ($M)	8.500	5.000	1.920	0.511	0.115	4.487	36.500	24.900	25.200	75.000
J5	Projected 'real' total cash settlement expenditures #1 (projected cash settlement expenses plus outside defense; uses 20% of class counsel fees and costs if unknown) (line I4 + line J2)	19.375	22.200	10.884	1.602	1.267	28.182	702.300	56.555	521.340	1,057.448
J6	Projected 'real' total cash settlement expenditures #2 (projected cash settlement expenses plus outside defense; uses 40% of class counsel fees and costs if unknown)(line I4 + line J3)	21.075	22.200	11.268	1.704	1.267	28.182	709.600	61.535	526.380	1,072.448

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
J7	Projected 'real' total cash settlement expenditures #3 (projected cash settlement expenses plus outside defense; uses 100% of class counsel fees and costs if unknown)(line I4 + line J4)	26.175	22.200	12.420	2.011	1.267	28.182	731.500	76.475	541.500	1,117.448
J8	Projected 'real' class-related direct cash settlement payout #1 (projected class-related direct cash payout plus outside defense; uses 20% of class counsel if unknown)(line I6 + line J2)	19.375	22.200	10.884	0.945	1.267	25.864	667.300	55.555	521.340	1,057.448
J9	Projected 'real' class-related direct cash settlement payout #2 (projected class-related direct cash payout plus outside defense; uses 40% of class counsel if unknown)(line I6 + line J3)	21.075	22.200	11.268	1.047	1.267	25.864	674.600	60.535	526.380	1,072.448
J10	Projected 'real' class-related direct cash settlement payout #3 (projected class-related direct cash payout plus outside defense; uses 100% of class counsel if unknown) (line I6 + line J4)	26.175	22.200	12.420	1.354	1.267	25.864	696.500	75.475	541.500	1,117.448

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
SECTION K: DATA USED IN FIGURES AND TABLES											
Table 15.5—Amount of Compensation Collected by Class											
K1.1	Reported cash disbursed to class ($M) (line E2)	9.175	11.232	7.583	0.271	0.272	8.914	436.400	25.175	165.000	567.538
K1.2	Projected final cash disbursed to class ($M) (line F2)	9.175	11.232	7.868	0.271	0.272	8.914	620.000	25.175	470.054	838.000
K1.3	Average known cash payout per claiming class member (line G4)	Unknown	$1,478.89	$134.20	$35.58	$45.79	$5.75	$100,000	$6,404.22	$4,367.27	$1,433.29
K1.4	Average projected cash payout per claiming class member (line G5)	Unknown	$1,478.89	$130.71	$35.58	$45.79	$5.75	$100,000	$6,404.22	Unknown	Unknown
Table 15.7—Amounts Awarded to Class Counsel for Fees and Expenses Compared to Average Cash Payment to Class Members											
K2.1	Total class counsel's fees and costs ($M)(line A2.1)	8.500	5.223	1.920	0.511	0.580	11.288	36.500	24.900	25.200	75.000
K2.2	Average known cash payout per claiming class member (line G4)	Unknown	$1,478.89	$134.20	$35.58	$45.79	$5.75	$100,000.00	$6,404.22	$4,367.27	$1,433.29
K2.3	Average projected cash payout per claiming class member (line G5)	Unknown	$1,478.89	$130.71	$35.58	$45.79	$5.75	$100,000.00	$6,404.22	Unknown	Unknown
Table 15.8—Price Tag to Resolve the Ten Class Actions, Not Including Defendants' Own Legal Fees											
K3.1	Reported total cash settlement expenditures (reported cash disbursed, cy pres, indirect benefits, and transaction costs excluding own legal) ($M) (line I3)	17.675	17.200	10.500	1.500	1.152	23.695	511.400	51.575	211.246	771.986

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
K3.2	Projected total cash settlement expenditures (projected cash disbursed, cy pres, indirect benefits, and transaction costs excluding own legal) ($M) (line I4)	17.675	17.200	10.500	1.500	1.152	23.695	695.000	51.575	516.300	1,042.448
K3.3	Total known transaction costs paid by defendants ($M) (line A)	8.500	5.968	2.632	0.571	0.880	12.463	40.000	25.400	46.246	204.448
Figure 15.1—What Defendants Agreed to Pay to Compensate Class Members											
K4.1	Total settlement benefits allocated to class members ($M) (line B2)	67.000	11.232	7.868	0.929	Unknown	25.235	650.000	25.175	470.054	838.000
K4.2	Cash benefits allocated to class ($M) (line B2.2)	33.500	11.232	7.868	0.929	Unknown	25.235	650.000	25.175	470.054	838.000
Figure 15.2—How Promised Compensation to Class Members Compared to Estimated Losses											
K5.1	Percent cash benefits allocated to class of total loss (line B2.2 / line D1)	Unknown	32.2%	Unknown	12.8%	Unknown	61.4%	Unknown	Unknown	Unknown	Unknown
Figure 15.3—What Proportion of the Compensation Fund Class Members Received											
K6.1	Percent reported cash disbursed of cash allocation to class (line E2 / line B2.2)	27.4%	100.0%	96.4%	29.2%	Unknown	35.3%	67.1%	100.0%	35.1%	67.7%
K6.2	Percent projected cash disbursed of cash allocation to class (line F2 / line B2.2)	27.4%	100.0%	100.0%	29.2%	Unknown	35.3%	95.4%	100.0%	100.0%	100.0%

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
Figure 15.4—Class Counsel Fees and Expenses as a Percentage of Negotiated Settlement Value											
K7.1	Percent class counsel fees and costs of maximum potential settlement value (line A2.1 / line H1)	11.3%	30.4%	18.3%	34.1%	Unknown	28.4%	5.0%	48.3%	4.9%	7.2%
K7.2	Percent class counsel fees and costs of maximum potential settlement cash value (line A2.1 / line H2)	20.2%	30.4%	18.3%	34.1%	Unknown	28.4%	5.0%	48.3%	4.9%	7.2%
Figure 15.5—Class Counsel Fees and Expenses as a Percentage of Actual Settlement Value											
K8.1	Percent class counsel fees and costs of projected total cash settlement expenditures (line A2.1 / line I4)	48.1%	30.4%	18.3%	34.1%	50.3%	47.6%	5.3%	48.3%	4.9%	7.2%
Figure 15.6—Class Counsel's Share of Sum of Class Benefits and Attorney Fees Compared to Plaintiff Attorney Shares in Other Civil Cases											
K9.1	Percent class counsel fees and costs of (sum of class counsel fees and cost plus reported cash disbursed to class) (line A2.1 / (lines A2.1 + E2))	48.1%	31.7%	20.2%	65.3%	68.1%	55.9%	7.7%	49.7%	13.2%	11.7%
K9.2	Percent class counsel fees and costs of (sum of class counsel fees and cost plus projected cash disbursed to class) (line A2.1 / (lines A2.1 + F2))	48.1%	31.7%	19.6%	65.3%	68.1%	55.9%	5.6%	49.7%	5.1%	8.2%

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
Figure 15.7—Proportion of the Settlement, Excluding Defendants' Own Legal Fees and Expenses, Attributable to Transaction Costs											
K10.1	Percent settlement transaction costs of reported total cash settlement expenditures (line A / line I3)	48.1%	34.7%	25.1%	38.1%	76.4%	52.6%	7.8%	49.2%	21.9%	26.5%
K10.2	Percent settlement transaction costs of projected total cash settlement expenditures (line A / line I4)	48.1%	34.7%	25.1%	38.1%	76.4%	52.6%	5.8%	49.2%	9.0%	19.6%
Figure 15.8—Components of Transaction Costs Paid by Defendants											
K11.1	Percent outside defense of 'real' defendant transaction costs (known) (line C / line J1)	Unknown	45.6%	Unknown	Unknown	11.6%	26.5%	Unknown	Unknown	Unknown	Unknown
K11.2	Percent plaintiff attorneys' fees and expenses of 'real' defendant transaction costs (known) (line A2 / line J1)	Unknown	47.6%	Unknown	Unknown	58.3%	66.6%	Unknown	Unknown	Unknown	Unknown
K11.3	Percent defendant's known costs of administrative, notice, and other expenses of 'real' defendant transaction costs (known) (line A3 / line J1)	Unknown	6.8%	Unknown	Unknown	30.2%	6.9%	Unknown	Unknown	Unknown	Unknown
Figure 15.9—How Many Cents on Each Dollar Paid by Defendants (Excluding Their Own Legal Fees and Expenses) Went to Class Members											
K12.1	Percent reported cash disbursed of reported total cash settlement expenditures (line E2 / line I3)	51.9%	65.3%	72.2%	18.1%	23.6%	37.6%	85.3%	48.8%	78.1%	73.5%

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
K12.2	Percent projected cash disbursed of projected total cash settlement expenditures (line F2 / line I4)	51.9%	65.3%	74.9%	18.1%	23.6%	37.6%	89.2%	48.8%	91.0%	80.4%
Figure 15.10—Class Members' Proportion of Estimated Total Payout, Compared to Plaintiffs' Portion of Payout in Other Civil Cases											
K13.1	Percent projected cash disbursed to class of projected class-related direct cash settlement payout #1 (substitutes 20 percent of class counsel's fees and expenses for defendants' legal costs if unknown)(line F2 / line J8)	47.4%	50.6%	72.3%	28.7%	21.5%	34.5%	92.9%	45.3%	90.2%	79.2%
K13.2	Percent projected cash disbursed to class of projected class-related direct cash settlement payout #2 (substitutes 100 percent of class counsel's fees and expenses for defendants' legal costs if unknown)(line F2 / line J10)	35.1%	50.6%	63.3%	20.1%	21.5%	34.5%	89.0%	33.4%	86.8%	75.0%
K13.3	Percent projected cash disbursed to class of projected total cash settlement expenditures #1 (substitutes 20 percent of class counsel's fees and expenses for defendants' legal costs if unknown)(line F2 / line J5)	47.4%	50.6%	72.3%	16.9%	21.5%	31.6%	88.3%	44.5%	90.2%	79.2%

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
K13.4	Percent projected cash disbursed to class of projected total cash settlement expenditures #2 (substitutes 100 percent of class counsel's fees and expenses for defendants' legal costs if unknown)(line F2 / line J7)	35.1%	50.6%	63.3%	13.5%	21.5%	31.6%	84.8%	32.9%	86.8%	75.0%
Table S.3—Total Compensation Offered and Collected by Class Members, and Average Cash Payments											
K14.1	Cash benefits allocated to class ($M) (line B2.2)	33.500	11.232	7.868	0.929	Unknown	25.235	650.000	25.175	470.054	838.000
K14.2	Noncash benefits allocated to class members ($M) (line B2.1)	33.500	—	—	—	—	—	—	—	—	—
K14.3	Reported cash disbursed to class ($M) (line E2)	9.175	11.232	7.583	0.271	0.272	8.914	436.400	25.175	165.000	567.538
K14.4	Projected final cash disbursed to class ($M) (line F2)	9.175	11.232	7.868	0.271	0.272	8.914	620.000	25.175	470.054	838.000
K14.5	Average known cash payout per claiming class member (line G4)	Unknown	$1,478.89	$134.20	$35.58	$45.79	$5.75	$100,000	$6,404.22	$4,367.27	$1,433.29
K14.6	Average projected cash payout per claiming class member (line G5)	Unknown	$1,478.89	$130.71	$35.58	$45.79	$5.75	$100,000	$6,404.22	Unknown	Unknown
Table S.4—Total Awarded to Class Counsel, Compared with Total Paid to Class											
K15.1	Total class counsel's fees and costs ($M)(line A2.1)	8.500	5.223	1.920	0.511	0.580	11.288	36.500	24.900	25.200	75.000
K15.2	Reported cash disbursed to class ($M) (line E2)	9.175	11.232	7.583	0.271	0.272	8.914	436.400	25.175	165.000	567.538

Table E.1 (continued)

Line #	Description	Contact Lens Pricing	Bank Brokerage Product	Collateral Protection Insurance	Cable TV Late Fee	Credit Life Insurance Premium Over-charging	Insurance Premium Double Rounding	Blood Clotting Products for Hemo-philiacs	Toxic Chemical Factory	Oriented Strand Board Home Siding	Poly-butylene Plumbing Pipes
K15.3	Projected final cash disbursed to class ($M) (line F2)	9.175	11.232	7.868	0.271	0.272	8.914	620.000	25.175	470.054	838.000
Figure S.3—Class Counsel Fees and Expenses as a Percentage of Negotiated and Actual Settlement Value											
K16.1	Percent class counsel fees and costs of maximum potential settlement value (line A2.1 / line H1)	11.3%	30.4%	18.3%	34.1%	Unknown	28.4%	5.0%	48.3%	4.9%	7.2%
K16.2	Percent class counsel fees and costs of maximum potential settlement cash value (line A2.1 / line H2)	20.2%	30.4%	18.3%	34.1%	Unknown	28.4%	5.0%	48.3%	4.9%	7.2%
K16.3	Percent class counsel fees and costs of reported cash settlement expenditures (line A2.1 / line I3)	48.1%	30.4%	18.3%	34.1%	50.3%	47.6%	7.1%	48.3%	11.9%	9.7%
K16.4	Percent class counsel fees and costs of projected total cash settlement expenditures (line A2.1 / line I4)	48.1%	30.4%	18.3%	34.1%	50.3%	47.6%	5.3%	48.3%	4.9%	7.2%
Figure S.4—Proportion of the Settlement, Excluding Defendants' Own Legal Fees and Expenses, Attributable to Transaction Costs											
K17.1	Percent settlement transaction costs of reported total cash settlement expenditures (line A / line I3)	48.1%	34.7%	25.1%	38.1%	76.4%	52.6%	7.8%	49.2%	21.9%	26.5%
K17.2	Percent settlement transaction costs of projected total cash settlement expenditures (line A / line I4)	48.1%	34.7%	25.1%	38.1%	76.4%	52.6%	5.8%	49.2%	9.0%	19.6%

Table E.2

Contact Lens Pricing Litigation: *Roberts v. Bausch & Lomb, Inc.* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			75.500
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			42.000
Maximum potential direct cash value of settlement (excluding noncash & indirect) ($M) (Total, lines A, B2.2)			42.000
A: SETTLEMENT TRANSACTION COSTS [b]			
A	Total known transaction costs paid by defendant ($M) (Total, lines A1, A2, A3)		8.500
A1	Undifferentiated fund for defendant's costs and charges and plaintiffs attorney fees and costs ($M)		—
A2	Total known fees and costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		8.500
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		8.500
A2.11	Class counsel's undifferentiated fees and costs awarded/paid ($M)		—
A2.12	Class counsel's fees awarded/paid ($M)		8.000
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		0.500
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132[c]	Class counsel's costs for notice awarded/paid ($M)		0.148
	Estimated costs of mailing & reimbursement for forwarding expenses	$30,329.35	
	Estimated costs of publication	$117,866.27	
	Total	*$148,195.62*	
A2.133[d]	Class counsel's costs for other than notice awarded/paid ($M)		0.352
	Award for class counsel expenses	$500,000.00	
	Less estimated amounts for notice	($148,195.62)	
	Total	*$351,804.38*	
A2.2[e]	Total known fees & costs awarded or paid to other plaintiffs attorneys ($M)		Unknown
A3	Total known costs to defendant for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		Unknown
A3.1	Costs to defendant for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		Unknown
A3.11[f]	Costs to defendant for administration and notice, undifferentiated ($M)		Unknown
A3.12	Costs to defendant for administration ($M)		Unknown
A3.13	Costs to defendant for notice ($M)		Unknown
A3.2[g]	Other costs & charges to defendant ($M) (Not including settlement benefits)		Unknown

Table E.2 (continued)

Line #	Description	Component	Total
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		67.000
B1	Settlement benefits not directly allocated to class ($M)		—
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		67.000
B2.1	Noncash benefits allocated to class members ($M)		33.500
B2.2	Cash benefits allocated to class ($M)		33.500
C: DEFENDANT'S LEGAL FEES AND COSTS			
C	Outside defense fees & costs ($M)		Unknown
D: CLASS LOSS AND SIZE			
D1[h]	Total loss ($M)		Unknown
D2[i]	Class size		1,250,000
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1[j]	Reported number of claims paid		Unknown
E2[k]	Reported cash disbursed to class ($M)		9.175
E3	Cy pres, based on reported cash disbursement ($M)		—
E4[l]	Cash reversion to defendant, based on reported cash disbursement ($M)		24.325
	Announced cash value of settlement	$33,500,000	
	Less RAND estimated cash exposure	($9,175,000)	
	Total	*$24,325,000*	
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1	Projected final number of claims paid		Unknown
F2[m]	Projected final cash disbursed to class ($M)		9.175
F3	Cy pres, based on projected cash disbursement ($M)		—
F4[n]	Cash reversion to defendant, based on projected cash disbursement ($M)		24.325
	Announced cash value of settlement	$33,500,000	
	Less RAND estimated cash exposure	($9,175,000)	
	Total	*$24,325,000*	
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		Unknown
G2	Average allocated direct cash benefit per class member		$26.80
G3	Average allocated direct/indirect cash/credit benefit per class member		$53.60
G4	Average known cash payout per claiming class member		Unknown
G5	Average projected cash payout per claiming class member		Unknown

[a]Maximum value of settlement does not include expenditures made by defendant for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendant for in-house or outside legal counsel.

[c]Class counsel's costs are reduced by estimated expenses of publication and reimbursed postage.

[d]Awarded class counsel's costs exclude estimated expenses of publication and reimbursed postage.

[e]Unknown amounts of attorney fees were paid by defendant to counsel in two tag-along cases.

[f]Defendant's expenditures for notice and settlement administration are unknown.

[g]Defendant's expenditures for costs other than notice and administration are unknown.

[h]Plaintiffs' counsel asserts that total loss at wholesale prices was used to estimate the $33.5 million in class cash benefit; however, no estimate of class loss using retail price differences was made available.

[i]Class size is midpoint of August 1996 report of class counsel Fredric Ellis's estimate of 1 to 1.5 million settlement class size.

[j]Number of class members receiving compensation not shared by defendant.

[k]Actual cash distribution figures not shared by defendant; uses midpoint of RAND estimates of defendant's cash exposure, ignoring administration, notice, or other costs ($3.75 to $14.6 million; see Chapter Five).

[l]Reversion (of case benefit allocation) to date based upon $33.5 million potential cash payout less estimated cash distribution to date (see Chapter Five).

[m]Projected cash distribution figures not shared by defendant; uses midpoint of RAND estimates of defendant's cash exposure, ignoring administration, notice, or other costs ($3.75 to $14.6 million; see Chapter Five).

[n]Projected reversion based upon $33.5 million potential cash payout less estimated cash distribution to date (see Chapter Five).

Table E.3

Bank Brokerage Product Litigation: *Pinney v. Great Western* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			17.200
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			17.200
Maximum potential direct cash value of settlement (excluding noncash and indirect) ($M) (Total, lines A, B2.2)			17.200
A: SETTLEMENT TRANSACTION COSTS [b]			
A	Total known transaction costs paid by defendant ($M) (Total, lines A1, A2, A3)		5.968
A1	Undifferentiated fund for defendant's costs and charges and plaintiffs attorney fees and costs ($M)		—
A2	Total known fees & costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		5.223
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		5.223
A2.11	Class counsel's undifferentiated fees & costs awarded/paid ($M)		—
A2.12[c]	Class counsel's fees awarded/paid ($M)		4.769
	Fee award of 30% of common fund less class counsel costs and administration/notice set-aside	$4,813,800	
	Less direct payments to nine plaintiffs at $5000 each	($45,000)	
	Total	*$4,768,800*	
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		0.454
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)		0.454
A2.2[d]	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)		Unknown
A3	Total known costs to defendant for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		0.745
A3.1	Costs to defendant for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		0.700
A3.11	Costs to defendant for administration and notice, undifferentiated ($M)		—
A3.12[e]	Costs to defendant for administration ($M)		0.562
	Administration and notice costs set-aside	$700,000	
	Less $138,000 in known notice expenses incurred	($138,000)	
	Total	*$562,000*	
A3.13	Costs to defendant for notice ($M)		0.138
A3.2[f]	Other costs & charges to defendant ($M) (Not including settlement benefits)		0.045

Table E.3 (continued)

Line #	Description	Component	Total
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		11.232
B1	Settlement benefits not directly allocated to class ($M)		—
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		11.232
B2.1	Noncash benefits allocated to class members ($M)		—
B2.2[g]	Cash benefits allocated to class ($M)		11.232
	Total settlement fund	$17,200,000	
	Less class counsel costs	($454,000)	
	Less set-aside fund for administration and notice expenses	($700,000)	
	Less class counsel fee award (without reduction for direct plaintiff payments)	($4,813,800)	
	Total	*$11,232,200*	
C: DEFENDANT'S LEGAL FEES AND COSTS			
C[h]	Outside defense fees and costs ($M)		5.000
D: CLASS LOSS AND SIZE			
D1[i]	Total loss ($M)		34.900
D2[j]	Class size		60,000
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1	Reported number of claims paid		7,595
	Number of eligible claims with an allowed loss as of June 1998	7,595	
E2[k]	Reported cash disbursed to class ($M)		11.232
E3	Cy pres, based on reported cash disbursement ($M)		—
E4	Cash reversion to defendant, based on reported cash disbursement ($M)		—
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1	Projected final number of claims paid		7,595
	Number of eligible claims with an allowed loss as of June 1998	7,595	
F2[l]	Projected final cash disbursed to class ($M)		11.232
F3	Cy pres, based on projected cash disbursement ($M)		—
F4	Cash reversion to defendant, based on projected cash disbursement ($M)		—
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		$581.67
G2	Average allocated direct cash benefit per class member		$187.20
G3	Average allocated direct/indirect cash/credit benefit per class member		$187.20
G4	Average known cash payout per claiming class member		$1,478.89
G5	Average projected cash payout per claiming class member		$1,478.89

[a]Maximum value of settlement does not include expenditures made by defendant for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendant for in-house or outside legal counsel.

[c]Class counsel fees are reduced by $45,000 in representative plaintiff payments; do not include 30 percent share of any unused amounts in administration/notice set-aside or of common fund interest earnings.

[d]Fees and costs paid to non-class counsel plaintiffs attorneys exclude settlements with attorneys representing individual plaintiffs or with counsel in competing or parallel class litigation.

[e]Costs of administration are based on full amount set aside from common fund for administration and notice expense; actual cost may be less although indications are that most of set-aside has already been spent.

[f]Defendant's other costs and charges include $45,000 in direct payments to representative plaintiffs paid as part of class counsel's fees.

[g]Cash allocation to class does not include any interest earned by common fund or any unused amounts from administration/notice costs set-aside. Actual amount available to class is approximately $11.8 million.

[h]Estimate of defendant's outside legal fees and expenses based on report published at time of settlement; does not include costs occurring beyond February 1997.

[i]Class loss estimate uses "benefit of the bargain" model.

[j]Class size estimate is midpoint of estimates of 50,000 and 70,000.

[k]Distribution to date assumes entire net settlement will be distributed.

[l]Projected distribution assumes entire net common fund will be distributed; does not include interest earned on the fund or unused portion of administration/notice costs set aside.

Table E.4

Collateral Protection Insurance Litigation: *Graham v. Security Pacific Housing Services, Inc.* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			10.500
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			10.500
Maximum potential direct cash value of settlement (excluding noncash and indirect) ($M) (Total, lines A, B2.2)			10.500
A: SETTLEMENT TRANSACTION COSTS [b]			
A	Total known transaction costs paid by defendant ($M) (Total, lines A1, A2, A3)		2.632
A1	Undifferentiated fund for defendant's costs & charges and plaintiffs attorney fees and costs ($M)		—
A2	Total known fees & costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		2.270
A2.1	Total class counsel's fees and costs ($M) (Total, lines A2.11, A2.12, A2.13)		1.920
A2.11[c]	Class counsel's undifferentiated fees & costs awarded/paid ($M)		1.920
A2.12	Class counsel's fees awarded/paid ($M)		—
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		—
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)		—
A2.2	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)		0.350
	Award to Trial Lawyers for Public Justice	$350,000	
A3	Total known costs to defendant for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		0.362
A3.1	Costs to defendant for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		0.350
A3.11[d]	Costs to defendant for administration and notice, undifferentiated ($M)		0.350
A3.12	Costs to defendant for administration ($M)		Unknown
A3.13	Costs to defendant for notice ($M)		Unknown
A3.2[e]	Other costs & charges to defendants ($M) (Not including settlement benefits)		0.012
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		7.868
B1	Settlement benefits not directly allocated to class ($M)		—
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		7.868
B2.1	Noncash benefits allocated to class members ($M)		—

Table E.4 (continued)

Line #	Description	Component	Total
B2.2[f]	Cash benefits allocated to class ($M)		7.868
	Total funds	$10,500,000	
	Less class counsel fees and costs	($1,920,000)	
	Less other attorney fees and costs	($350,000)	
	Less fund set aside for costs of administration and notice	($350,000)	
	Less other defendant's costs	($12,000)	
	Total	*$7,868,000*	
C: DEFENDANT'S LEGAL FEES AND COSTS			
C	Outside defense fees & costs ($M)		Unknown
D: CLASS LOSS AND SIZE			
D1	Total loss ($M)		Unknown
D2	Class size		60,379
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1[g]	Reported number of claims paid		56,506
	Total number of credits issued as of May 1, 1998	41,960	
	Total number of checks sent out as of May 1, 1998	18,235	
	Less checks not yet cashed as of May 1, 1998	(3,689)	
	Total	*56,506*	
E2[h]	Reported cash disbursed to class ($M)		7.583
	Credits issued to class as of May 1, 1998	$5,976,607.31	
	Checks issued to class as of May 1, 1998	$1,891,443.93	
	Less checks not cashed by May 1, 1998	($284,952.27)	
	Total	*$7,583,098.97*	
E3[i]	Cy pres, based on reported cash disbursement ($M)		0.285
E4[j]	Cash reversion to defendant, based on reported cash disbursement ($M)		—
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1[k]	Projected final number of claims paid		60,195
	Total number of credits issued as of May 1, 1998	41,960	
	Total number of checks sent out as of May 1, 1998	18,235	
	Total	*60,195*	
F2[l]	Projected final cash disbursed to class ($M)		7.868
	Credits issued to class as of May 1, 1998	$5,976,607.31	
	Checks issued to class as of May 1, 1998	$1,891,443.93	
	Total	*$7,868,051.24*	
F3[m]	Cy pres, based on projected cash disbursement ($M)		—
F4[n]	Cash reversion to defendant, based on projected cash disbursement ($M)		—
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		Unknown
G2	Average allocated direct cash benefit per class member		$130.31
G3	Average allocated direct/indirect cash/credit benefit per class member		$130.31
G4	Average known cash pay-out per claiming class member		$134.20
G5	Average projected cash pay-out per claiming class member		$130.71

[a]Maximum value of settlement does not include expenditures made by defendant for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendant for in-house or outside legal counsel.

[c]Class counsel combined fees and costs do not include any supplemental reserve for defendant's reimbursement of plaintiffs attorneys' costs of notice and administration.

[d]Defendant's costs of administration and notice assume that entire set-aside will be used; do not include any reversion to be used to offset additional costs or reimbursement to class counsel.

[e]Defendant's other costs and charges include direct payments to representative plaintiffs and intervenors.

[f]Class benefit figure assumes that 100 percent of amount available for defendant's costs of notice and administration will be exhausted and unavailable for class.

[g]Claims to date is to May 1, 1998 and does not include checks not cashed.

[h]Disbursement to date is to May 1, 1998 and does not include checks not cashed.

[i]Cy pres to date (as of May 1, 1998) assumes that no remaining amounts in the settlement fund would be used to offset defendant's costs of notice and administration.

[j]Reversion to date (as of May 1, 1998) assumes no part of the funds remaining would be used to offset defendant's outstanding costs of administration and notice.

[k]Projected claims assume all checks issued will be cashed.

[l]Projected disbursement assumes all checks issued will be cashed.

[m]Cy pres projections assume that all outstanding checks (as of May 1, 1998) will eventually be cashed.

[n]Reversion projection assumes no part of the funds remaining would be used to offset defendant's outstanding costs of administration and notice.

Table E.5

Cable TV Late Fee Litigation: *Selnick v. Sacramento Cable*
Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			1.500
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			1.500
Maximum potential direct cash value of settlement (excluding noncash & indirect) ($M) (Total, lines A, B2.2)			1.500
A: SETTLEMENT TRANSACTION COSTS[b]			
A	Total known transaction costs paid by defendant ($M) (Total, lines A1, A2, A3)		0.571
A1	Undifferentiated fund for defendant's costs and charges and plaintiffs attorney fees and costs ($M)		—
A2	Total known fees and costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		0.520
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		0.511
A2.11	Class counsel's undifferentiated fees and costs awarded/paid ($M)		—
A2.12[c]	Class counsel's fees awarded/paid ($M)		0.448
	Fee award requested	$457,000	
	Less payment made by class counsel to attorneys in competing class action	($9,126)	
	Total	*$447,874*	
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		0.063
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133[d]	Class counsel's costs for other than notice awarded/paid ($M)		0.063
	Combined awarded attorney fees & costs and plaintiff incentive award	$522,601	
	Less requested class counsel fee award	($457,000)	
	Less representative plaintiff fee	($2,500)	
	Total	*$63,101*	
A2.2	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)		0.009
	Payment made by class counsel to attorneys in competing class action	$9,126	
A3	Total known costs to defendant for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		0.051
A3.1	Costs to defendant for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		0.049
A3.11	Costs to defendant for administration and notice, undifferentiated ($M)		—
A3.12[e]	Costs to defendant for administration ($M)		0.049
	Payment to class administrator as of January 1997	$27,603	

Table E.5 (continued)

Line #	Description	Component	Total
	Class counsel's estimate of future payments to class administrator	$21,000	
	Total	*$48,603*	
A3.13[f]	Costs to defendant for notice ($M)		Unknown
A3.2[g]	Other costs and charges to defendant ($M) (Not including settlement benefits)		0.003
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		0.929
B1	Settlement benefits not directly allocated to class ($M)		—
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		0.929
B2.1	Noncash benefits allocated to class members ($M)		—
B2.2[h]	Cash benefits allocated to class ($M)		0.929
	Total settlement fund	$1,500,000	
	Less class counsel fees requested	($457,000)	
	Less class counsel costs awarded	($63,101)	
	Less actual and estimated future costs of administration	($48,603)	
	Less other settlement related expenses	($2,500)	
	Total	*$928,796*	
C: DEFENDANT'S LEGAL FEES AND COSTS			
C	Outside defense fees & costs ($M)		Unknown
D: CLASS LOSS AND SIZE			
D1[i]	Total loss ($M)		7.260
D2	Class size		Unknown
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1	Reported number of claims paid		7,629
	Checks issued in January 1997	7,629	
E2	Reported cash disbursed to class ($M)		0.271
	Checks issued in January 1997	$271,450	
E3[j]	Cy pres, based on reported cash disbursement ($M)		0.657
	Net cash benefits allocated to class	$928,796	
	Less value of checks issued in January 1997	($271,450)	
	Total	*$657,346*	
E4	Cash reversion to defendant, based on reported cash disbursement ($M)		—
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1	Projected final number of claims paid		7,629
F2	Projected final cash disbursed to class ($M)		0.271
F3[k]	Cy pres, based on projected cash disbursement ($M)		0.657
	Net cash benefits allocated to class	$928,796	
	Less value of checks issued in January 1997	($271,450)	
	Total	*$657,346*	
F4	Cash reversion to defendant, based on projected cash disbursement ($M)		—
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		Unknown
G2	Average allocated direct cash benefit per class member		Unknown

Table E.5 (continued)

Line #	Description	Component	Total
G3	Average allocated direct/indirect cash/credit benefit per class member		Unknown
G4	Average known cash payout per claiming class member		$35.58
G5	Average projected cash payout per claiming class member		$35.58

[a]Maximum value of settlement does not include expenditures made by defendant for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendant for in-house or outside legal counsel.

[c]Assumes fee award to class counsel equaled amount requested in petition and is reduced by payments made by class counsel to other attorneys.

[d]Costs awarded class counsel are the balance of the combined attorney award less payments made to representative plaintiff and less the requested amount of attorney fees.

[e]Defendant's costs of administration include both actual and projected future payments to settlement administrator; do not include estimated $17,000 in interest taxes and $750 in related CPA fees.

[f]Defendant's expenditures for the costs of notice are unknown.

[g]Miscellaneous defendant's costs include direct award paid to representative plaintiff through class counsel.

[h]Cash fund available to class does not include $29,870 accrued interest nor does it reflect reductions for $17,000 in estimated interest taxes or $750 in related CPA fees.

[i]Estimated total loss based on 33,000 late fees per month at $5 each for 32 months (Mar. 92–Oct. 94) and 22,000 per month at $5 each for 18 months (Nov. 94–Apr. 96). Total loss would be reduced to the extent late fees were found justified.

[j]Cy pres amount to date does not include $29,870 accrued interest, $17,000 taxes on interest, and $750 in CPA fees for interest taxes.

[k]Projected cy pres amount does not include $29,870 accrued interest, $17,000 taxes on interest, and $750 in CPA fees for interest taxes.

Table E.6

Credit Life Insurance Premium Overcharging Litigation: *Inman v. Heilig-Meyers* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			Unknown
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			Unknown
Maximum potential direct cash value of settlement (excluding noncash & indirect) ($M) (Total, lines A, B2.2)			Unknown
A: SETTLEMENT TRANSACTION COSTS[b]			
A	Total known transaction costs paid by defendant ($M) (Total, lines A1, A2, A3)		0.880
A1	Undifferentiated fund for defendant's costs & charges and plaintiffs attorney fees & costs ($M)		—
A2	Total known fees & costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		0.580
A2.1	Total class counsel's fees and costs ($M) (Total, lines A2.11, A2.12, A2.13)		0.580
A2.11	Class counsel's undifferentiated fees & costs awarded/paid ($M)		0.580
A2.12	Class counsel's fees awarded/paid ($M)		—
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		—
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)		—
A2.2[c]	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)		Unknown
A3	Total known costs to defendant for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		0.300
A3.1	Costs to defendant for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		0.300
A3.11	Costs to defendant for administration and notice, undifferentiated ($M)		—
A3.12	Costs to defendant for administration ($M)		0.175
A3.13	Costs to defendant for notice ($M)		0.125
A3.2	Other costs and charges to defendant ($M) (Not including settlement benefits)		—
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct and indirect settlement benefits ($M) (Total, lines B1, B2)		Unknown
B1	Settlement benefits not directly allocated to class ($M)		—
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		Unknown
B2.1[d]	Noncash benefits allocated to class members ($M)		—
B2.2[e]	Cash benefits allocated to class ($M)		Unknown

Table E.6 (continued)

Line #	Description	Component	Total
C: DEFENDANT'S LEGAL FEES AND COSTS			
C	Outside defense fees & costs ($M)		0.115
D: CLASS LOSS AND SIZE			
D1[f]	Total loss ($M)		Unknown
D2[g]	Class size		Unknown
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1	Reported number of claims paid		5,940
E2	Reported cash disbursed to class ($M)		0.272
E3	Cy pres, based on reported cash disbursement ($M)		—
E4[h]	Cash reversion to defendant, based on reported cash disbursement ($M)		Unknown
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1	Projected final number of claims paid		5,940
F2	Projected final cash disbursed to class ($M)		0.272
F3	Cy pres, based on projected cash disbursement ($M)		—
F4[i]	Cash reversion to defendant, based on projected cash disbursement ($M)		Unknown
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1[j]	Average loss per class member		$1.92
G2	Average allocated direct cash benefit per class member		Unknown
G3	Average allocated direct/indirect cash/credit benefit per class member		Unknown
G4	Average known cash payout per claiming class member		$45.79
G5	Average projected cash payout per claiming class member		$45.79

[a]Maximum value of settlement does not include expenditures made by defendant for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendant for in-house or outside legal counsel.

[c]Payments made to attorneys representing five class members with potential objections are unknown.

[d]Value of 10-percent-off coupons not included.

[e]Documentation in case file does not permit estimate of total class cash allocation.

[f]Documentation in case file does not permit estimate of total class loss.

[g]Documentation in case file does not permit estimate of total class size.

[h]Documentation in case file does not permit estimate of actual reversion to defendant.

[i]Documentation in case file does not permit estimate of projected reversion to defendant.

[j]Average loss per class member based upon Heilig-Meyers' 50 percent share of estimated amount (see Chapter Nine); actual loss would have approximately doubled.

Table E.7

Insurance Premium Double Rounding Litigation: *Martinez v. Allstate* and *Sendejo v. Farmers* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			39.698
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			39.698
Maximum potential direct cash value of settlement (excluding noncash and indirect) ($M) (Total, lines A, B2.2)			37.698
A: SETTLEMENT TRANSACTION COSTS[b]			
A	Total known transaction costs paid by defendants ($M) (Total, lines A1, A2, A3)		12.463
A1	Undifferentiated fund for defendants' costs and charges and plaintiffs attorney fees & costs ($M)		—
A2	Total known fees and costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		11.288
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		11.288
A2.11	Class counsel's undifferentiated fees & costs awarded/paid ($M)		—
A2.12[c]	Class counsel's fees awarded/paid ($M)		9.683
	Fee award	$10,349,430	
	Less class counsel's one-third share of $2 million contribution to Texas attorney general fund	($666,666.67)	
	Total	*$9,682,673.33*	
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		1.605
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)		1.605
	Allstate contribution	$1,520,000	
	Farmers contribution	$85,000	
	Total	*$1,605,000*	
A2.2	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)		—
A3	Total known costs to defendants for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		1.175
A3.1	Costs to defendants for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		1.010
A3.11[d]	Costs to defendants for administration and notice, undifferentiated ($M)		1.010
	Costs of notice and check distribution to Groups 1 & 2 (from Preliminary Order of Approval)	$900,000	
	Costs of publication to Group 3 (from Preliminary Order of Approval)	$110,000	
	Total	*$1,010,000*	
A3.12	Costs to defendants for administration ($M)		Unknown

Table E.7 (continued)

Line #	Description	Component	Total
A3.13	Costs to defendants for notice ($M)		Unknown
A3.2[e]	Other costs & charges to defendants ($M) (Not including settlement benefits)		0.165
	Direct payments to named plaintiffs (six at $15,000 each)	$90,000	
	Special master's fees and costs	$75,000	
	Total	*$165,000*	
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		27.235
B1[f]	Settlement benefits not directly allocated to class ($M)		2.000
	Defendants' 2/3 share of $2,000,000 contribution to Texas attorney general fund	$1,333,333.33	
	Class counsel's 1/3 share of $2,000,000 contribution to Texas attorney general fund	$666,666.67	
	Total	*$2,000,000*	
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		25.235
B2.1	Noncash benefits allocated to class members ($M)		—
B2.2[g]	Cash benefits allocated to class ($M)		25.235
	Group 1 fund allocation less class counsel fees and costs	$8,064,967	
	Group 2 fund allocation less class counsel fees and costs	$1,240,523	
	Group 3 fund allocation less class counsel fees and costs	$16,004,958	
	Less special master's fees and costs	($75,000)	
	Total	*$25,235,448*	
C: DEFENDANTS' LEGAL FEES AND COSTS			
C	Outside defense fees & costs ($M)		4.487
	Allstate reported fees	$950,000	
	Allstate reported costs	$448,000	
	Farmers reported fees	$2,300,000	
	Farmers reported costs	$789,000	
	Total	*$4,487,000*	
D: CLASS LOSS AND SIZE			
D1[h]	Total loss ($M)		41.127
D2[i]	Class size		4,401,817
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1	Reported number of claims paid		1,550,221
	Amount of funds paid to Groups 1 & 2 divided by $5.75	1,549,873	
	Estimate of Group 3 payment divided by $5.75	348	
	Total	*1,550,221*	
E2[j]	Reported cash disbursed to class ($M)		8.914
	Latest reported data for Groups 1 & 2	$8,911,769.75	
	Most likely total payout for Group 3	$2,000	
	Total	*$8,913,769.75*	
E3	Cy pres, based on reported cash disbursement ($M)		0.319
	Group 1 net fund allocation	$8,064,967	
	Group 2 net fund allocation	$1,240,523	

Table E.7 (continued)

Line #	Description	Component	Total
	Less special master fees and costs	($75,000)	
	Less actual Groups 1 and 2 payout	($8,911,769.75)	
	Total	*$318,720.25*	
E4	Cash reversion to defendants, based on reported cash disbursement ($M)		16.003
	Group 3 allocation	$16,004,958	
	Less estimated Group 3 distribution	($2,000)	
	Total	*$16,002,958*	
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1	Projected final number of claims paid		1,550,221
	Amount of funds paid to Groups 1 & 2 divided by $5.75	1,549,873	
	Estimate of Group 3 payment divided by $5.75	348	
	Total	*1,550,221*	
F2	Projected final cash disbursed to class ($M)		8.914
	Latest reported data for Groups 1 & 2	$8,911,769.75	
	Most likely total payout for Group 3	$2,000	
	Total	*$8,913,769.75*	
F3	Cy pres, based on projected cash disbursement ($M)		0.319
	Group 1 net fund allocation	$8,064,967	
	Group 2 net fund allocation	$1,240,523	
	Less special master fees and costs	($75,000)	
	Less projected Groups 1 and 2 payout	($8,911,769.75)	
	Total	*$318,720.25*	
F4	Cash reversion to defendant based on projected cash disbursement ($M)		16.003
	Group 3 allocation	$16,004,958	
	Less estimated Group 3 distribution	($2,000)	
	Total	*$16,002,958*	
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		$9.34
G2[k]	Average allocated direct cash benefit per class member		$5.73
G3[l]	Average allocated direct/indirect cash/credit benefit per class member		$6.19
G4	Average known cash payout per claiming class member		$5.75
G5	Average projected cash payout per claiming class member		$5.75

[a]Maximum value of settlement does not include expenditures made by defendants for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendants for in-house or outside legal counsel.

[c]Class counsel fee award is reduced by 1/3 share of $2,000,000 combined contribution to attorney general Consumer Education Fund.

[d]Defendants' costs of administration and notice do not include negligible costs of distributing checks to Group 3. Figures are from the Preliminary Order of Approval and differ from class counsel estimates.

[e]Defendants' other costs and charges include $90,000 in direct payments paid to representative plaintiffs and $75,000 in special master fees and costs.

[f]Indirect settlement benefits includes both defendants' and class counsel's share of contribution to attorney general fund.

[g]Cash benefits exclude fees and expenses to be paid to special master.

[h]Total loss estimate is midpoint of defendants' ($36M) and latest plaintiffs' ($46.3M; from Application for Fees) estimates for ten-year class.

[i]Class size estimate is from Final Order.

[j]Disbursement to date figure includes estimate of $2000 Group 3 payout.

[k]Cash allocation per class member differs slightly from refund amount due to special master fee adjustment.

[l]Cash and indirect benefit allocation per class member is adjusted for special master fee.

Table E.8

Blood Clotting Products for Hemophiliacs: *In re Factor VIII or IX Concentrate Blood Products* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
	Maximum potential value of settlement ($M) (Total, lines A, B)		725.000
	Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)		725.000
	Maximum potential direct cash value of settlement (excluding noncash & indirect) ($M) (Total, lines A, B2.2)		690.000
A: SETTLEMENT TRANSACTION COSTS[b]			
A	Total known transaction costs paid by defendants ($M) (Total, lines A1, A2, A3)		40.000
A1[c]	Undifferentiated fund for defendants' costs & charges and plaintiffs attorney fees and costs ($M)		—
A2	Total known fees and costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		36.500
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		36.500
A2.11[d]	Class counsel's undifferentiated fees & costs awarded/paid ($M)		36.500
	'Cost and Fee Fund'; covers all transaction costs including costs of administration and notice and attorney fees and expenses	$40,000,000	
	Less amounts used from fund for administration and costs as of September 1998	($3,500,000)	
	Total	*$36,500,000*	
A2.12	Class counsel's fees awarded/paid ($M)		—
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		—
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)		—
A2.2[e]	Total known fees & costs awarded or paid to other plaintiffs attorneys ($M)		Unknown
A3	Total known costs to defendants for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		3.500
A3.1	Costs to defendants for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		3.500
A3.11	Costs to defendants for administration and notice, undifferentiated ($M)		3.500
	Midpoint of estimated $3–$4 million paid out of Cost and Fee Fund as of September 1998	$3,500,000	
A3.12	Costs to defendants for administration ($M)		Unknown
A3.13	Costs to defendants for notice ($M)		Unknown
A3.2	Other costs and charges to defendants ($M) (Not including settlement benefits)		Unknown

Table E.8 (continued)

Line #	Description	Component	Total
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		685.000
B1[e]	Settlement benefits not directly allocated to class ($M)		35.000
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		650.000
B2.1	Noncash benefits allocated to class members ($M)		—
B2.2[f]	Cash benefits allocated to class ($M)		650.000
C: DEFENDANTS' LEGAL FEES AND COSTS			
C	Outside defense fees and costs ($M)		Unknown
D: CLASS LOSS AND SIZE			
D1	Total loss ($M)		Unknown
D2[g]	Class size		6,500
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1[h]	Reported number of claims paid		4,364
E2[i]	Reported cash disbursed to class ($M)		436.400
E3	Cy pres, based on reported cash disbursement ($M)		—
E4[j]	Cash reversion to defendants, based on reported cash disbursement ($M)		213.600
	Estimated size of class cash benefit allocation	$650,000,000	
	Less disbursement to May 26, 1998	($436,400,000)	
	Total	*$213,600,000*	
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1[k]	Projected final number of claims paid		6,200
	Number of claims appearing to be valid at time of submission for final approval (and not opting out)	6,500	
	Less number of claims presumed to duplicate existing submission as of May 26, 1998	(300)	
	Total	*6,200*	
F2[l]	Projected final cash disbursed to class ($M)		620.000
F3	Cy pres, based on projected cash disbursement ($M)		—
F4[m]	Cash reversion to defendants, based on projected cash disbursement ($M)		30.000
	Estimated size of class cash benefit allocation	$650,000,000	
	Less projected disbursement	($620,000,000)	
	Total	*$30,000,000*	
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		Unknown
G2	Average allocated direct cash benefit per class member		$100,000
G3	Average allocated direct/indirect cash/credit benefit per class member		$105,384.62
G4	Average known cash payout per claiming class member		$100,000
	Average payout (line F2/F1)	$100,000	

[a]Maximum value of settlement does not include expenditures made by defendants for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendants for in-house or outside legal counsel.

[c]Undifferentiated Cost and Fee Fund of $40 million will be used to pay all plaintiffs' attorney fees and costs as well as notice and administrative expenses. Since some administrative and notice costs are known, remainder is treated as fund for attorney fees and costs.

[d]Class counsel fees and costs assume use of entire unspent amount in Cost and Fee Fund available as of Sept. 1998 after known deduction for notice and administration (uses midpoint of $3–$4 million estimate). Final amount may be less.

[e]Indirect settlement benefits includes estimated $30–$40 million in settled subrogation claims; midpoint figure used here.

[f]Class benefit based on 6500 claims that appeared valid at final approval (does not include 550 valid opt-outs), at $100,000 each.

[g]Class size uses 6500 claims that appeared to be valid at time of final approval. Does not include 550 opt-outs with valid claims. Actual size is higher because definition included family members and partners.

[h]Number of claims is actual paid as of May 26, 1998.

[i]Disbursement is actual as of May 26, 1998.

[j]Reversion to date is based upon actual disbursement as of May 26, 1998. Assumes that the parties' estimated number of valid claims at the time of submission of the settlement for final approval was 6500.

[k]Projected number of claims assumes all 6200 class members with nonduplicative claims as of May 26, 1998 will be paid.

[l]Projected disbursement assumes all 6200 class members with nonduplicative claims as of May 26, 1998 will be paid.

[m]Projected reversion assumes 6200 claims will eventually be paid and that the parties' estimated number of valid claims at the time of submission of the settlement for final approval was 6500.

Table E.9

Harcros Toxic Chemical Factory Litigation: *Atkins v. Harcros* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			51.575
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			51.575
Maximum potential direct cash value of settlement (excluding noncash and indirect) ($M) (Total, lines A, B2.2)			50.575
A: SETTLEMENT TRANSACTION COSTS[b]			
A	Total known transaction costs paid by defendants ($M) (Total, lines A1, A2, A3)		25.400
A1	Undifferentiated fund for defendants' costs & charges and plaintiffs attorney fees and costs ($M)		—
A2	Total known fees & costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		24.900
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		24.900
A2.11	Class counsel's undifferentiated fees & costs awarded/paid ($M)		—
A2.12	Class counsel's fees awarded/paid ($M)		17.200
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		7.700
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132[c]	Class counsel's costs for notice awarded/paid ($M)		3.100
A2.133[d]	Class counsel's costs for other than notice awarded/paid ($M)		4.600
A2.2	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)		—
A3	Total known costs to defendants for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		0.500
A3.1	Costs to defendants for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		0.500
A3.11	Costs to defendants for administration and notice, undifferentiated ($M)		Unknown
A3.12	Costs to defendants for administration ($M)		0.500
	Amount earmarked for settlement administration	$500,000	
A3.13	Costs to defendants for notice ($M)		Unknown
A3.2	Other costs and charges to defendants ($M) (Not including settlement benefits)		—
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct and indirect settlement benefits ($M) (Total, lines B1, B2)		26.175
B1[e]	Settlement benefits not directly allocated to class ($M)		1.000
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		25.175
B2.1	Noncash benefits allocated to class members ($M)		—

Table E.9 (continued)

Line #	Description	Component	Total
B2.2	Cash benefits allocated to class ($M)		25.175
C: DEFENDANTS' LEGAL FEES AND COSTS			
C	Outside defense fees and costs ($M)		Unknown
D: CLASS LOSS AND SIZE			
D1	Total loss ($M)		Unknown
D2[f]	Class size		3,931
	Claim forms opting in	3,877	
	Additional opt-ins allowed at fairness hearing	54	
	Total	*3,931*	
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1[g]	Reported number of claims paid		3,931
E2[h]	Reported cash disbursed to class ($M)		25.175
E3	Cy pres, based on reported cash disbursement ($M)		—
E4	Cash reversion to defendants, based on reported cash disbursement ($M)		—
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1[i]	Projected final number of claims paid		3,931
F2[j]	Projected final cash disbursed to class ($M)		25.175
F3	Cy pres, based on projected cash disbursement ($M)		—
F4	Cash reversion to defendants, based on projected cash disbursement ($M)		—
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		Unknown
G2	Average allocated direct cash benefit per class member		$6,404.22
G3	Average allocated direct/indirect cash/credit benefit per class member		$6,658.61
G4	Average known cash payout per claiming class member		$6,404.22
G5	Average projected cash payout per claiming class member		$6,404.22

[a]Maximum value of settlement does not include expenditures made by defendants for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendants for in-house or outside legal counsel.

[c]Class counsel's awarded costs for nonnotice expenses include reimbursement for 'litigation costs' such as witness preparation, court filing costs, etc.

[d]Class counsel's costs for 'notice' includes costs of notice, establishment of Gert Town office, holding of Superdome hearing, and other expenses; some expenditures might be characterized as administrative.

[e]Indirect settlement benefits includes $1 million charitable contribution to Gert Town projects.

[f]Number of claims allowed to "opt in"; actual number of potential class members unknown.

[g]Number of claims to date includes about 20 to 22 disbursements that have not yet been made.

[h]Disbursement to date includes total to be eventually distributed among class members; about 20 to 22 disbursements have not yet been made.

[i]Projected number of claims assumes that all eligible payments will eventually be made.

[j]Projected disbursement assumes all eligible payments will eventually be made.

Table E.10

Oriented Strand Board Home Siding Litigation: *In re Louisiana-Pacific Inner-Seal Siding* Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			516.300
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			516.300
Maximum potential direct cash value of settlement (excluding noncash and indirect) ($M) (Total, lines A, B2.2)			516.300
A: SETTLEMENT TRANSACTION COSTS[b]			
A	Total known transaction costs paid by defendant ($M) (Total, lines A1, A2, A3)		46.246
A1	Undifferentiated fund for defendant's costs & charges and plaintiffs attorney fees & costs ($M)		—
A2	Total known fees & costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		26.300
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		25.200
A2.11[c]	Class counsel's undifferentiated fees & costs awarded/paid ($M)		25.200
	Total fees and costs awarded to class counsel	$26,250,000	
	Less one-half of special master expenses	($500,000)	
	Less one-half of payments made to attorneys representing Gronvold intervenors	($500,000)	
	Less one-half of payments made to Lawrence Schonbrun	($50,000)	
	Total	*$25,200,000*	
A2.12	Class counsel's fees awarded/paid ($M)		—
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		—
A2.131	Class counsel's costs awarded/paid, undifferentiated, may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)		—
A2.2[d]	Total known fees and costs awarded or paid to other plaintiffs attorneys ($M)		1.100
	Defendant's share of payments to attorneys for Gronvold intervenors	$500,000	
	Class counsel's share of payments to attorneys for Gronvold intervenors	$500,000	
	Defendant's estimated share of reported payments to Lawrence Schonbrun	$50,000	
	Class counsel's estimated share of reported payments to Lawrence Schonbrun	$50,000	
	Total	*$1,100,000*	
A3	Total known costs to defendant for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		19.946
A3.1	Costs to defendant for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		18.900

Table E.10 (continued)

Line #	Description	Component	Total
A3.11	Costs to defendant for administration and notice, undifferentiated ($M)		—
A3.12[e]	Costs to defendant for administration ($M)		14.000
A3.13[f]	Costs to defendant for notice ($M)		4.900
A3.2[g]	Other costs and charges to defendant ($M) (Not including settlement benefits)		1.046
	Class counsel's one-half share of special master expenses	$500,000	
	Defendant's one-half share of special master expenses	$500,000	
	Direct payments to representative plaintiffs and intervenors (12 at $3,000 each plus 1 at $10,000 each)	$46,000	
	Total	*$1,046,000*	
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		470.054
B1	Settlement benefits not directly allocated to class ($M)		—
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		470.054
B2.1	Noncash benefits allocated to class members ($M)		—
B2.2[h]	Cash benefits allocated to class ($M)		470.054
	Initial funding obligations through Year 7	$275,000,000	
	Second funding obligation (estimated maximum)	$50,000,000	
	Third funding obligation (estimated maximum)	$50,000,000	
	Final funding obligation, Year 8 (estimated benchmark value)	$50,000,000	
	Final funding obligation, Year 9 (estimated benchmark value)	$50,000,000	
	Less direct payments to representative plaintiffs and intervenors	($46,000)	
	Less minimum amount of pre-Fairness Hearing notice costs	($4,900,000)	
	Total	*$470,054,000*	
C: DEFENDANT'S LEGAL FEES AND COSTS			
C	Outside defense fees and costs ($M)		Unknown
D: CLASS LOSS AND SIZE			
D1	Total loss ($M)		Unknown
D2[i]	Class size		808,000
	Midpoint of class counsel's estimated range of 700,000 to 900,000 single-family dwellings	800,000	
	Midpoint of class counsel's estimated range of 7500 to 8500 multifamily structures	8,000	
	Total	*808,000*	
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1[j]	Reported number of claims paid		37,871
E2[k]	Reported cash disbursed to class ($M)		165.000
E3	Cy pres, based on reported cash disbursement ($M)		—
E4[l]	Cash reversion to defendant, based on reported cash disbursement ($M)		305.054
	Total available in fund, including optional supplemental payments	$470,054,000	

Table E.10 (continued)

Line #	Description	Component	Total
	Less known distribution through June 1998	($165,000,000)	
	Total	*$305,054,000*	
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1[m]	Projected final number of claims paid		Unknown
F2	Projected final cash disbursed to class ($M)		470.054
	Assumes complete exhaustion of initial and optional funding	$470,054,000	
F3	Cy pres, based on projected cash disbursement ($M)		—
F4[n]	Cash reversion to defendant, based on projected cash disbursement ($M)		—
	Total available in fund, including optional supplemental payments	$470,054,000	
	Less projected final disbursement	($470,054,000)	
	Total	*0*	
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		Unknown
G2	Average allocated direct cash benefit per class member		$581.75
G3	Average allocated direct/indirect cash/credit benefit per class member		$581.75
G4	Average known cash payout per claiming class member		$4,367.27
G5	Average projected cash payout per claiming class member		Unknown

[a]Maximum value of settlement does not include expenditures made by defendant for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendant for in-house or outside legal counsel.

[c]Class counsel fees and cost are reduced by their share for special master expenses and payments to Gronvold attorneys and Lawrence Schonbrun.

[d]Amounts paid to nonclass counsel plaintiffs' attorneys do not include payments made to attorneys appealing the settlement on behalf of builders.

[e]Costs of administration based upon midpoint of estimates published in the *San Francisco Recorder* at time of approval of settlement; may include some postapproval notice costs.

[f]Costs of notice is minimum amount reported for pre-Fairness Hearing purposes. Notice costs subsequent to settlement approval come from common fund.

[g]Defendant's other costs and charges includes class counsel's and defendant's shares of five years of special master expenses as well as incentive payments to plaintiffs and intervenors.

[h]Cash benefit includes $275 million initial contribution and $200 million in optional funding, less direct fees paid and initial notice costs; does not include interest added or deduction for postapproval notice costs; no adjustment for Nov. 1998 amendments.

[i]Class size based upon midpoints of class counsel's estimates for single-family dwelling and multifamily structures. Does not include commercial structures.

[j]Number of claims to date are to June 1998.

[k]Disbursements to date are to June 1998.

[l]Reversion to date is to June 1998; assumes $200 million in optional funding will eventually be added; however, no additional funds beyond initial $275 million would be needed if no further claims paid.

[m]Projected disbursement assumes exhaustion of $275 million initial funding and $200 million in optional funding. As of June 1998, claims worth $410 million had been submitted and inspected. No adjustment for Nov. 1998 settlement amendments.

[n]Projected reversion assumes exhaustion of $275 million initial funding as well as $200 million in optional funding opportunities. No adjustment for Nov. 1998 settlement amendments.

Table E.11

Polybutylene Plumbing Pipes Litigation: *Cox v. Shell Oil*
Settlement Structure, Costs, and Distribution Summary

Line #	Description	Component	Total
TOTAL SETTLEMENT VALUE AT TIME OF AGREEMENT[a]			
Maximum potential value of settlement ($M) (Total, lines A, B)			1,042.448
Maximum potential cash value of settlement (excluding noncash benefits) ($M) (Total, lines A, B1, B2.2)			1,042.448
Maximum potential direct cash value of settlement (excluding noncash and indirect) ($M) (Total, lines A, B2.2)			1,042.448
A: SETTLEMENT TRANSACTION COSTS [b]			
A	Total known transaction costs paid by defendants ($M) (Total, lines A1, A2, A3)		204.448
A1	Undifferentiated fund for defendants' costs and charges and plaintiffs attorney fees and costs ($M)		—
A2	Total known fees & costs awarded or paid to all plaintiffs attorneys ($M) (Total, lines A2.1, A2.2)		83.400
A2.1	Total class counsel's fees & costs ($M) (Total, lines A2.11, A2.12, A2.13)		75.000
A2.11[c]	Class counsel's undifferentiated fees & costs awarded/paid ($M)		75.000
	Cox counsel's fees awarded/paid ($M)	$45,000,000	
	Spencer counsel fees & costs from coordinated settlement with *Cox* case	$30,000,000	
	Total	*$75,000,000*	
A2.12	Class counsel's fees awarded/paid ($M)		—
A2.13	Class counsel's costs awarded/paid ($M) (Total, lines A2.131, A2.132, A2.133)		—
A2.131	Class counsel's costs awarded/paid, undifferentiated; may include notice ($M)		—
A2.132	Class counsel's costs for notice awarded/paid ($M)		—
A2.133	Class counsel's costs for other than notice awarded/paid ($M)		—
A2.2[d]	Total known fees and costs awarded or paid to other plaintiffs' attorneys ($M)		8.400
	Spencer counsel fees and costs from earlier settlement with DuPont	$8,400,000	
	Total	*$8,400,000*	
A3	Total known costs to defendants for settlement-related expenses ($M) (Total, lines A3.1, A3.2)		121.048
A3.1	Costs to defendants for administration and notice ($M) (Total, lines A3.11, A3.12, A3.13)		114.000
A3.11	Costs to defendants for administration and notice, undifferentiated ($M)		—
A3.12[e]	Costs to defendants for administration ($M)		84.000
A3.13[f]	Costs to defendants for notice ($M)		30.000
	CPRC capped costs of notice to be deducted from fund (actual is $10.902 million to June 1998)	$28,000,000	
	Defendants' own costs of notice for 1-800 telephone line	$2,000,000	
	Total	*$30,000,000*	

Table E.11 (continued)

Line #	Description	Component	Total
A3.2[g]	Other costs & charges to defendants ($M) (Not including settlement benefits)		7.048
	Payment to *Cox* representative plaintiffs; three individuals and one married couple at $3,000 each	$12,000	
	Payment to *Spencer* representative plaintiffs; twelve individuals at $3,000 each	$36,000	
	Costs expended by DuPont for early notice campaign later subsumed by coordinated settlement	$7,000,000	
	Total	*$7,048,000*	
B: ALLOCATED SETTLEMENT BENEFITS			
B	Known direct & indirect settlement benefits ($M) (Total, lines B1, B2)		838.000
B1	Settlement benefits not directly allocated to class ($M)		—
B2	Total settlement benefits allocated to class members ($M) (Total, lines B2.1, B2.2)		838.000
B2.1	Noncash benefits allocated to class members ($M)		—
B2.2[h]	Cash benefits allocated to class ($M)		838.000
	Soft cap (does not include U.S. Brass contribution of $53.4 million in cash and $20 million in notes)	$950,000,000	
	Less costs of administration to be deducted from the soft cap	($84,000,000)	
	Less costs of notice to be deducted from the soft cap (excludes notice costs borne solely by defendants)	($28,000,000)	
	Total	*$838,000,000*	
C: DEFENDANTS' LEGAL FEES AND COSTS			
C	Outside defense fees & costs ($M)		Unknown
D: CLASS LOSS AND SIZE			
D1[i]	Total loss ($M)		Unknown
D2[j]	Class size		Unknown
E: REPORTED DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
E1[k]	Reported number of claims paid		395,969
E2[l]	Reported cash disbursed to class ($M)		567.538
E3	Cy pres, based on reported cash disbursement ($M)		—
E4[m]	Cash reversion to defendants, based on reported cash disbursement ($M)		270.462
	Total amount of funds available for claims after deductions for administration and notice	$838,000,000	
	Less distribution to June 1998	($567,538,000)	
	Total	*$270,462,000*	
F: PROJECTED FINAL DISTRIBUTION OF SETTLEMENT BENEFITS ALLOCATED TO CLASS			
F1	Projected final number of claims paid		Unknown
F2[m]	Projected final cash disbursed to class ($M)		838.000
F3	Cy pres, based on projected cash disbursement ($M)		—
F4[n]	Cash reversion to defendants, based on projected cash disbursement ($M)		—
	Total amount of funds available for claims after deductions for administration and notice	$838,000,000	
	Less projected distribution	($838,000,000)	
	Total	*0*	

Table E.11 (continued)

Line #	Description	Component	Total
G: TYPICAL CLASS MEMBER LOSS, ALLOCATED BENEFIT, AND PAYOUT			
G1	Average loss per class member		Unknown
G2	Average allocated direct cash benefit per class member		Unknown
G3	Average allocated direct/indirect cash/credit benefit per class member		Unknown
G4	Average known cash payout per claiming class member		$1,433.29
G5	Average projected cash payout per claiming class member		Unknown

[a]Maximum value of settlement does not include expenditures made by defendants for in-house or outside legal counsel.

[b]Settlement transaction costs do not include expenditures made by defendants for in-house or outside legal counsel.

[c]Class counsel fees and costs only include amounts paid to *Cox* and *Spencer* attorneys in coordinated settlement. Fees and costs paid to *Spencer* attorneys for separate settlement with DuPont shown elsewhere.

[d]Fees and costs paid to attorneys in other related individual and class litigation (other than settlement with DuPont in *Spencer*) are unknown.

[e]RAND-estimated costs of administration based on average of 10 percent in claims cost through July 2009. Fund administration costs to June 1998 have been $34.857 million.

[f]Defendants' costs of notice include CPRC capped amount deductible from settlement fund and costs for 1-800 telephone line (borne by defendants). Fund notice costs to June 1998 have been $10.902 million. DuPont's notice expenses shown elsewhere.

[g]Defendants' other expenses include direct payments to named plaintiffs in *Cox* and *Spencer* cases as well as DuPont's notice expenses from early agreement later subsumed by coordinated settlement.

[h]Cash benefit does not include projected U.S. Brass contribution of $53.4 million in cash and $20 million in notes; amount is net of estimated costs of administration and notice chargeable to settlement fund.

[i]Estimated total loss for class is unknown.

[j]Actual number meeting class definition (property owners with leaking polybutylene plumbing) unknown. Estimates of all properties using these pipes ranged from 4.7 million to 6 million.

[k]Number of claims made to date is to June 1998 (includes some open claims).

[l]Dollars disbursed to date are to June 1998.

[m]Projected dollars disbursed assumes entire amount of fund available to class will be exhausted; does not include any additional funding available from U.S. Brass contribution.

[n]Projected reversion estimate assumes eventual magnitude of claims will exhaust fund.

NOTES

[1]See, e.g., James S. Kakalik and Nicholas M. Pace, *Cost and Compensation Paid in Tort Litigation* (Santa Monica, Calif.: RAND, R-3391-ICJ, November 1986). See also David M. Trubek et al., "The Costs of Ordinary Litigation," *31UCLA Law Review*, October 1983.

[2]However, a 1986 RAND Institute for Civil Justice study found that, of all costs and compensation paid in "typical" tort litigation (gross compensation paid to plaintiffs of about $24,000 to $29,000) in federal and state courts of general jurisdiction, 46 percent of the total was for compensation to the plaintiffs, 21 percent was for plaintiffs' legal fees and expenses, 16 percent was for defendants' legal fees and expenses (in-house and outside), the value of plaintiff's time was 3 percent of the total, 9 percent of the total was for defendant's time, and 2 percent was for the costs of processing all tort claims, and 2 percent was for government tort expenditures. James S. Kakalik and Nicholas M. Pace, *supra* note 1 at 71. Of course, class actions with far larger stakes and multitudes of class plaintiffs might yield different proportions.

[3]See Chapter Thirteen, page 352.

[4]See Chapter Thirteen, page 364.

[5]Generally excluding defendant legal fees and expenses.

[6]Note that the term "transaction costs" as applied to class actions is sometimes used in court documents to refer only to expenditures other than for settlement benefits or to plaintiffs' attorneys for their fees and costs.

[7]Note that our concept of a cy pres award may differ from the potentially more common use that includes any "next best use" of settlements or judgments other than payments directly to plaintiffs. Under this definition, the payments to Gert Town charities or to the Texas attorney general consumer funds might be considered cy pres distributions.

[8]In a couple of instances, most notably in the *collateral protection insurance* litigation, the benefit fund would be divided completely and checks or credits issued, but for one reason or another the class member could no longer be located, the check would not be cashed, or crediting the account was no longer possible. The small amount of money remaining from the fund usually was donated to charities as a cy pres distribution.

[9]See Chapter Five.

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