



## **Class Action Dilemmas**

*Pursuing Public Goals for Private Gain*

*Executive Summary*

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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 early 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  
March 24, 1999

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## PREFACE TO THE EXECUTIVE SUMMARY

This document summarizes the major findings and recommendations of our book-length study of class actions, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, a work that represents the product of more than three years' research into the current policy controversy over class action lawsuits for money damages.

In the interests of producing a summary that can be quickly read by policymakers and others, we focus here on findings and recommendations that we believe will contribute most to ongoing discussions about how and whether Rule 23 and other rules relevant to class actions should be amended. Consequently, we have made only passing mention of some features of the complete manuscript. For example, in the course of the research, we conducted ten intensive case studies of recently settled class action lawsuits. Although the summary contains information derived from this portion of our research, it includes few details about the cases themselves. The full book contains a narrative of each of the case studies as well as a comparative analysis of them. Similarly, this summary makes only a few references to the cases, court documents, and other published materials that we consulted during our research, which are extensively documented in the book.

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## CONTENTS

Foreword . . . . .	v
Preface to the Executive Summary . . . . .	vii
Figures and Tables . . . . .	xi
Acknowledgments . . . . .	xiii
THE ONCE AND FUTURE CONTROVERSY . . . . .	1
FAIRNESS ISSUES CATALYZE AN IDEOLOGICAL DEBATE . . . . .	2
BRINGING POLICY ANALYSIS TO BEAR . . . . .	3
Methods . . . . .	4
THE CURRENT CLASS ACTION LANDSCAPE . . . . .	5
CLASS ACTION DILEMMAS ARISE FROM THE INCENTIVES OF LAWYERS, PARTIES, AND JUDGES . . . . .	8
MASS TORT CLASS ACTIONS INJECT ADDITIONAL INCENTIVES . . . . .	11
HOW INCENTIVES SHAPE OUTCOMES . . . . .	12
Class Actions Are Complex Social Dramas . . . . .	13
The Merits Are in the Eyes of the Beholders . . . . .	15
The Benefits and Costs Are Difficult to Assess . . . . .	18
1. Negotiated Compensation Amounts Varied Dramatically . . . . .	19
2. In Some Cases, Actual Compensation Was a Lot Less Than the Amount Negotiated. . . . .	20
3. Consumer Litigation Was Associated with Changes in Practice—but Some Changes May Have Had Other Explanations . . . . .	20
4. Class Counsel’s Fees Were a Modest Share of the Negotiated Settlements . . . . .	20
5. In Some Cases, Class Counsel Got a Larger Share of the Actual Dollars Paid Out Than Indicated by the Negotiated Settlement . . . . .	21
6. In a Few Cases, Class Counsel Got More Than the Total Collected . . . . .	21
7. Total Transaction Costs Are Unknown . . . . .	22
JUDGES’ ACTIONS DETERMINE THE COST-BENEFIT RATIO . . . . .	23
FINDING COMMON GROUND BY FOCUSING ON PRACTICE . . . . .	25
Adding a Cost-Benefit Test for Certification Would Yield Unpredictable Outcomes . . . . .	26
Requiring Class Members to Opt In Would Array Business Representatives Against Consumer Advocates . . . . .	26
Prohibiting Settlement Classes Might Not Cure Any Problems . . . . .	27
Broadening Federal Court Jurisdiction Would Give Federal Judges More Control, but Would Not Address Other Important Issues . . . . .	28
Prohibiting Mass Tort Class Actions Would Not Solve the Mass Tort Problem . . . . .	30
Increasing Judicial Regulation of Damage Class Actions Is the Key to a Better Balance Between Public Goals and Private Gain . . . . .	31
1. Judges Need to Scrutinize Proposed Settlements More Closely . . . . .	32

2. Judges Should Reward Attorneys Only for Actual Accomplishments . . . . .	33
3. Judges Should Seek Assistance from Others . . . . .	34
THE ROAD TO REFORM . . . . .	35
Change Judicial Discourse . . . . .	35
Increase Judicial Resources . . . . .	36
Open Class Action Practice and Outcomes to Public View . . . . .	36

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## FIGURES

S.1.	Surveying the Class Action Landscape (1995–1996) . . . . .	7
S.2.	Distribution of Cases Among Federal and State Courts (reported judicial decisions) . . . . .	8
S.3.	Class Counsel Fees and Expenses as a Percentage of Negotiated and Actual Settlement Value . . . . .	22
S.4.	Proportion of the Settlement, Excluding Defendants’ Own Legal Fees and Expenses, Attributable to Transaction Costs . . . . .	24

## TABLES

S.1.	Profile of Class Action Case Studies . . . . .	14
S.2.	Claims Underlying the Ten Class Actions . . . . .	17
S.3.	Total Compensation Offered and Collected by Class Members, and Average Cash Payments . . . . .	19
S.4.	Total Awarded to Class Counsel, Compared with Total Paid to Class . . . . .	23



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Additional support for the study was provided by more than a dozen law firms, corporations, and individuals, and by core funds from the Institute for Civil Justice. The names of all of the donors are listed at the conclusion of these acknowledgments.

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.

Many people encouraged us to undertake the study and offered advice along the way. We particularly want to thank Judge Patrick Higginbotham, whose interest in the use of empirical research in legal procedural reform stimulated us to consider such a project, and Sheila Birnbaum, Francis Hare, Judyth Pendell, Paul Rheingold, and Judith Resnik, who offered helpful counsel as the study progressed. Portions of the book manuscript were written while Deborah Hensler was on the faculty at the University of Southern California Law School. She gratefully acknowledges the advice of her colleagues and the assistance of USC's wonderful law librarians.

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## THE ONCE AND FUTURE CONTROVERSY

Class action litigation—lawsuits filed by one or a few plaintiffs on behalf of a larger number of people who together seek a legal remedy for some perceived wrong—is as old as the medieval English roots of the United States civil legal system.<sup>1</sup> The controversy over class actions is long-lived as well: Allowing a few individuals to represent the legal interests of many others who do not participate in the lawsuit but who are nonetheless bound by its outcome has always seemed like a dubious proposition to some. But the current controversy over class actions roared to life in 1966 when Rule 23, the procedural rule that provides for class actions in federal courts, was significantly revised. Amidst a host of other rule revisions were a few words that presaged a dramatic change in the class action litigation landscape: Whereas previously, all individuals seeking money damages with a class action lawsuit needed to sign on affirmatively (“opt in”), now those whom the plaintiffs claimed to represent would be deemed part of the lawsuit unless they explicitly withdrew (“opted out”). Overnight the scope of money damage lawsuits—and hence the financial exposure of the corporations against whom they usually were brought—multiplied many times over.

In the decade that followed, a wave of consumer rights statutes, enacted by Congress and state legislatures, expanded the substantive legal grounds for money damage class actions. State courts revised their own class action rules to match the changes in the federal rule. Both federal and state courts interpreted the new rules expansively. By the mid-1970s the business community was up in arms, and there were calls for legislative action and a new round of rule revision. But as the years passed, the legal system gradually acclimated itself to the 1966 rule. Courts pulled back from their initial enthusiastic support, litigation patterns became more predictable and therefore easier for corporations to adjust to, and the clamor for rule revision died down.

Then, in the 1980s, the landscape shifted again with the advent of large-scale product defect litigation, now known as “mass torts.” Asbestos lawsuits, brought by thousands of workers who had been exposed to asbestos in shipyards, petrochemical plants, and other industrial settings, inundated federal and state courts in areas of the country where such work was concentrated. The litigation was characterized by features not seen before then: large numbers of individual lawsuits, litigated in a coordinated fashion by a small number of plaintiff law firms, against a

*The current controversy was ignited in 1966 when the federal rule that governs class action lawsuits for money was changed.*

*Before 1966, only those who said they wanted to be part of a class were included in such lawsuits; after 1966, all those who met the class description were included unless they explicitly declined. The change substantially increased the financial exposure of corporate defendants.*

<sup>1</sup>Class action lawsuits can be filed on behalf of individuals, businesses, or other organizations. They may be filed by public officials, such as state attorneys general, or private citizens. Defendants may also seek class action status, but class certification is most often sought by plaintiffs.

*A new controversy emerged in the 1980s, when some judges began certifying mass tort class actions, breaking with previous practice. In 1991, the Civil Rules Advisory Committee took up the issue of mass tort class actions.*

small number of defendants, before a few judges. As the lawyers, parties, and judges sought to reduce litigation expense by aggregating the cases and resolving them on a group basis—rather than individually—the balance of power between individual tort lawyers and corporate defendants tilted. Whereas once defendants clearly had the superior resources, now they faced organized networks of well-heeled tort lawyers. It was not long until the attorneys applied the lessons they had learned—and the resources they had earned—from asbestos litigation to lawsuits arising out of the use of drugs and medical devices and exposure to toxic substances.

In an advisory note, the committee that revised the class action rule in 1966 had rejected the notion of using class actions for personal injury litigation except in very limited circumstances.<sup>2</sup> But with courts awash in large-scale product defect and environmental exposure litigation, some judges, lawyers, and defendants began to rethink that position. Class actions, they thought, offered vehicles for efficiently resolving the large numbers of new suits. Some judges certified mass tort class actions, but others ruled that certification was barred by the 1966 committee’s advisory note. In 1991, the Civil Rules Advisory Committee took up the issue of class action reform with an eye to resolving this question.

## **FAIRNESS ISSUES CATALYZE AN IDEOLOGICAL DEBATE**

*What began as an effort to find better ways to manage mass torts became an ideological debate about the social purposes of class actions.*

Soon after the committee began its work, its members started to question the wisdom of proposals to facilitate certification of mass tort class actions. Advice poured into the committee from practitioners and scholars alike. Some defendants argued that once a mass tort was certified as a class action, their exposure to damages increased so dramatically that they had no recourse but to settle—even when little or no scientific evidence existed that their products had caused the harms alleged by class members. Some tort attorneys argued that class certification of mass torts denied people an opportunity to pursue claims individually, an approach that might gain these plaintiffs larger awards than they would receive from class action settlements. Law professors and public interest attorneys questioned the fairness of some of the mass tort settlements that had been negotiated by plaintiff class action attorneys and defendants.

As controversy over mass tort class actions continued to grow, corporate representatives pressed for other changes in Rule 23 to respond to a new wave of class actions in which consumers sought compensation for small financial losses. They found allies in unlikely quarters: lawyers outside the corporate defense bar who argued that too many of these consumer

<sup>2</sup>While such notes do not have the force of law, judges look to them for guidance in applying the rules.

suits served only to line the pockets of class action attorneys. As the committee shifted its attention from proposals to expand the scope of Rule 23 to proposals to restrict damage class actions, consumer advocacy groups became alarmed that some of their gains of the past several decades would be lost. Over time, the tenor of discourse about Rule 23 revision became increasingly adversarial. When the committee issued a set of proposed rule revisions for public comment in 1996, a full-scale political battle erupted, echoing the controversy of the 1970s.

When the dust settled a year later, only one technical revision to the rule had survived. The debate had revealed deep political rifts within the legal community about the merits of consumer class actions and continued uncertainty about how to solve the mass tort problem. The committee tabled proposals to raise the bar for damage class actions. Chief Justice Rehnquist appointed another committee to consider mass tort issues, including but not limited to class actions. The battle over damage class action reform shifted to Congress, which is now considering class action legislation.

## BRINGING POLICY ANALYSIS TO BEAR

The debate over damage class actions is characterized by charges and countercharges about the merits of these lawsuits, the fairness of settlements, and the costs and benefits to society. Anecdotes abound, and certain cases are held up repeatedly as exemplars of class actions' great value or worst excesses. In the fervor of debate, it is difficult to separate fact from fiction, aberrational from ordinary. The debate implicates deep beliefs about our social and political systems: the need for regulation, the proper role of the courts, what constitutes fair legal process. These beliefs exert such strong influence over people's reactions to class action lawsuits that different observers sometimes will describe the same lawsuit in starkly different terms. The protagonists disagree not only about the facts, but also about what to make of them. In a democracy such as ours, these kinds of controversies are extraordinarily difficult to resolve.

Policy analysis can sometimes help decisionmakers faced with such a controversy by objectively describing the facts and what information is missing; identifying the issues at the heart of the debate and laying out different perspectives on these issues; and exploring the likely consequences of proposed policy changes. We undertook this study of damage class actions in the hope that we could provide such help. Specifically, we sought to:

- describe the pattern of current damage class actions, including state and federal class actions
- place the current controversy and reform efforts in a historical context

*Sharp disagreement within the legal community over proposed rule changes brought the reform process to a halt in 1996. The debate over class actions shifted to Congress.*

*The class action controversy is characterized by disagreement on what the facts are and what they imply for policy. Policy analysis can aid decisionmakers by sorting out the facts and explaining contending positions—and offering a disinterested perspective.*

- investigate the bases for charges that many class actions are frivolous and many settlements are improper
- obtain information on the benefits and costs of damage class actions
- recommend changes in class action rules or practices, if necessary.

## Methods

*There is a dearth of statistical information about class action activity.*

Enormous methodological obstacles confront anyone conducting research on class action litigation. The first obstacle is a dearth of statistical information. No national register of lawsuits filed with class action claims exists. Until recently, data on the number of federal class actions were substantially incomplete, and data on the number and types of state class actions are still virtually nonexistent. Consequently, no one can reliably estimate how much class action litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis. But even if there were a registry of class actions, it would not provide a detailed picture of class action practices. Such information is critical because charges about class action litigation practices are central to the debate. Such practices are not recorded publicly and must be studied by qualitative methods.

*We used a variety of research methods to describe class action practices, identify problems, and propose solutions.*

To address the special problems of conducting research on class actions, we used a combination of methods.

- We assembled data on the number and types of class action lawsuits from a variety of electronic sources, including LEXIS (for reported judicial opinions) and the general and business news media. None of these sources is comprehensive and the contents of each reflect the interests of its compilers. But by piecing together these fragmentary data, we can discern the shape of the class action litigation terrain in the 1990s.
- We interviewed more than 70 individuals in more than 40 law firms, corporations, and other organizations to learn about class action practices. Many of the nation's leading class action practitioners, on both the plaintiff and defense sides, were among those we interviewed.
- We reviewed commentary following the adoption of amendments to Rule 23 in 1966, congressional testimony from that period on legislation that was proposed in response to the new rule amendments, minutes of the Advisory Committee's meetings on the rule from 1991 to the present, and testimony before the committee. We also attended Advisory Committee meetings and hearings. Our historical analysis allowed us to identify the persistent themes in the controversy.

- We conducted an extensive literature review of the rich scholarly commentary on damage class actions, which provided a theoretical framework for our analysis of qualitative data.
- Drawing on the insights gained from our data collection and interviews, we selected ten recently settled class action lawsuits for intensive “case study” investigation. For each of these cases, we reviewed public court documents and interviewed key players in the litigation (sometimes more than once), including outside and corporate defense counsel, plaintiff class counsel, judges, special masters, and sometimes objectors, regulators, and reporters. In all, we interviewed about 80 litigation participants and others.

By combining these data, we are able to paint a picture of damage class action practice and problems at the close of the century. Our interpretations of all these data—taken together—shape our policy recommendations.

## THE CURRENT CLASS ACTION LANDSCAPE

A common thread in the current controversy is that class action litigation has increased dramatically, imposing new costs for business and new burdens for courts. We found no quantitative data to permit us to calculate growth trends. But we are persuaded by our interviews with plaintiff and defense counsel that there has been a surge in damage class actions in the past several years, particularly in state courts and in the consumer area. Many practitioners trace this growth to the curbs on securities litigation enacted by Congress in 1995.<sup>3</sup> Faced with these curbs, they say, plaintiff attorneys looked for new types of suits to bring and found their opportunities in consumer complaints against business practices and products. The shift toward consumer cases gained impetus from the increasing availability of information on consumer complaints and regulatory investigations from the internet.

It is important to note that when plaintiff and defense lawyers talk about the number of class actions in which they are involved, they are often referring to the number of cases in which a class action claim—or the threat of one—exists, rather than only cases that have been certified as class actions. Our interviews suggest that a significant fraction of cases in which class action status is sought are dropped when the plaintiff attorney concludes that the case cannot be certified or settled for money, when the case is dismissed by the court, or when the claims of representative plaintiffs are settled. Sometimes the latter cases are dropped with an agreement by the plaintiff attorney not to pursue class litigation on this charge again. Lawsuits with class action claims that are not certified

*Though quantitative data are not available to calculate growth trends, our research persuaded us that there has been a surge of damage class actions in the past several years.*

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<sup>3</sup>*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.).

nonetheless result in legal transaction costs. Plaintiff attorneys invest resources in exploring the grounds for these suits and, because of the threat of certification, defendants are likely to spend more preparing to defend these cases than they would individual lawsuits. Consequently, these lawsuits are included in class counsel's and defense attorneys' estimates of the amount of class action litigation, even though they might not be counted in a tally of formal class action lawsuits.

*Damage class actions predominated over civil rights and other social policy reform litigation in the mid-1990s.*

The electronic databases of class action activity that we assembled provide a rough picture of the variety and relative proportions of different types of litigation in the mid-1990s. Figure S.1 describes the variety of class action activity as it was reported in judicial decisions and in the business and general press. The data indicate that damage class actions—suits for money, as opposed to suits seeking only injunctions or changes in business or public agency practices—predominated over civil rights and other social policy reform litigation. For example, civil rights cases accounted for just 14 percent of reported judicial opinions, while securities, consumer, and tort cases accounted for about 50 percent.

*Different pictures of class action activity emerge from published judicial decisions, the business press, and the general press.*

Figure S.1 also suggests that the landscape of class action litigation looks different according to one's vantage point; judges deciding cases are likely to be aware of different trends and features than general newspaper readers and businesspersons. For instance, securities class actions preoccupied the business community in 1995–1996—not surprising, since Congress had just adopted legislation to rein in securities cases. However, securities cases figured much less prominently in the general press and in reported judicial opinions, accounting for about a fifth of the cases in each during the same period. Similarly, tort cases accounted for only 9 percent of reported judicial opinions, but figured more prominently in the general and business press, constituting 14 percent of class actions reported in the general press and almost 20 percent of the cases reported by the business press. Consumer cases, however, received about equal play; they comprised a quarter of each of the three databases.

*More consumer, citizens' rights, and tort cases appear to be filed in state courts. Federal courts hear a larger share of securities, employment, and civil rights cases than state courts.*

From the database on judicial decisions for 1995–1996, we estimate that nearly 60 percent of reported class action decisions arose in state courts, implying that a large share of class action litigation takes place there.<sup>4</sup> Although variety characterized the caseload in both federal and state courts, when state and federal class action activity is examined separately, important differences emerge. More consumer, citizens' rights, and tort cases appear to be filed in state courts, while federal courts hear larger shares of securities, employment, and civil rights cases (see Figure S.2).

Our analyses of the databases also highlight the importance of consumer cases brought against corporations, particularly in state courts. These

<sup>4</sup>Our estimate takes into account differences in federal and state reporting of judicial decisions.

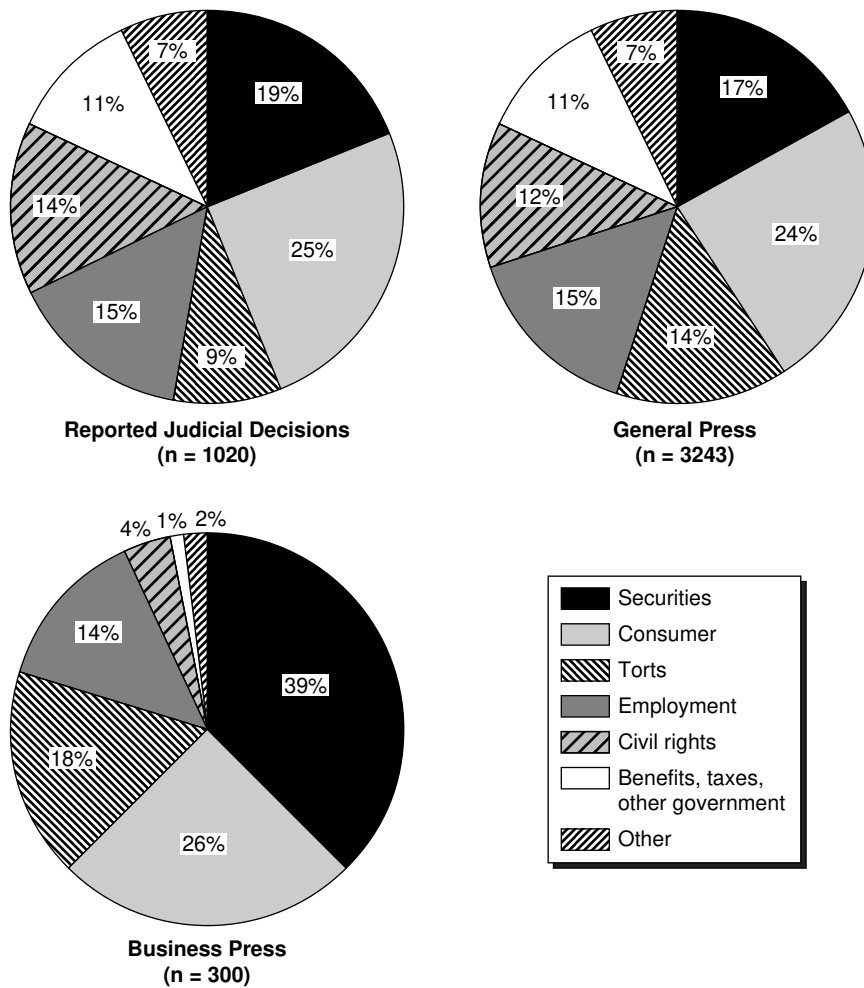


Figure S.1—Surveying the Class Action Landscape (1995–1996)

include cases alleging illegal fee calculations, fraudulent business practices, and false advertising. Our research suggests that the number of consumer cases is much larger than the number of mass tort cases and that the proportion of consumer cases in state courts is considerably larger than the proportion in federal courts.

Critics claim that class action attorneys “shop” for judges who are more favorable to class actions, and find them most often in state courts, particularly in the Gulf region. We found evidence of such patterns in our 1995–1996 data: Consumer class actions were more prevalent in Alabama than one would expect on the basis of population, and Louisiana led in the number and rate of mass tort class actions.<sup>5</sup> In a later section, we discuss the strategic choices that drive filing patterns.

*Particularly in the state courts, consumer cases outnumber mass tort class actions.*

<sup>5</sup>A concentration of mass torts in Louisiana may also reflect the concentration of petrochemical factories that might stimulate toxic exposure litigation in that state.



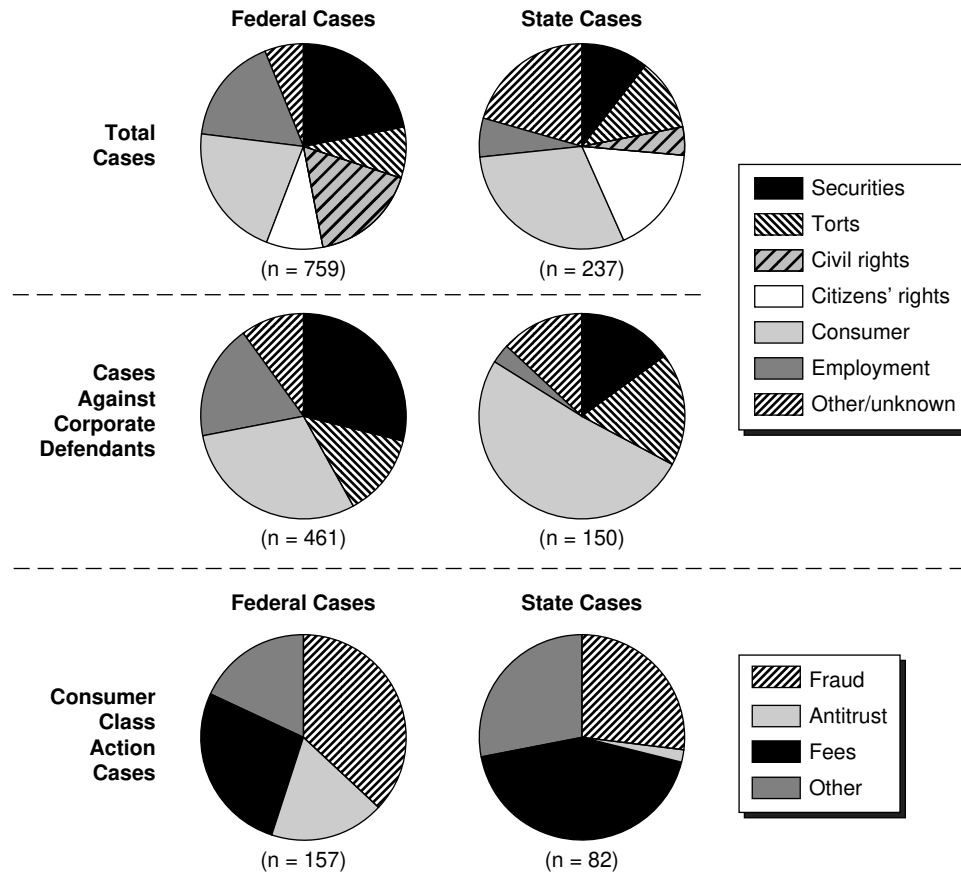


Figure S.2—Distribution of Cases Among Federal and State Courts (reported judicial decisions)

*Class action practices are currently in flux. We cannot say whether the class action landscape will stabilize soon, or whether cases will continue to grow in number and variety.*

At the time of our interviews, class action practices were in flux. Virtually all those with whom we talked felt that they were litigating at the leading edge of the civil justice system. As one practitioner put it: “The ground is shifting under us as we speak.” Whether what we observed was a shift in a landscape that will soon stabilize—consistent with history—or whether damage class action litigation is on a growth trajectory cannot be determined from the information we collected.

### **CLASS ACTION DILEMMAS ARISE FROM THE INCENTIVES OF LAWYERS, PARTIES, AND JUDGES**

Private class actions for money damages, particularly those lawsuits in which each class member claims a small loss but aggregate claimed losses are huge, pose multiple dilemmas for public policy. Many believe that these lawsuits serve important public purposes by supplementing

the work of government regulators whose budgets are usually quite limited and who are subject to political constraints. Hence, these are sometimes called “private attorneys general” lawsuits. Consumer advocates argue that without the threat of such lawsuits, businesses would be free to engage in illegal practices that significantly increase their profits as long as no one individual suffered a substantial loss. This notion of the purpose of damage class actions is sharply contested. In our view, the evidence regarding the historical intent of damage class actions is ambiguous. But whatever the rulemakers may have intended, the corporate representatives whom we interviewed said that the burst of new damage class action lawsuits has played a regulatory role by causing them to review their financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions.

Relying on private attorneys to bring litigation for regulatory enforcement has important consequences. When class action lawsuits are successful, they may yield enormous fees for attorneys because fees are usually calculated as a percentage of the total dollars paid by defendants. So, attorneys have substantial incentives to seek out opportunities for litigation, rather than waiting for clients to come to them. Over the years, class action specialists have developed extensive monitoring strategies to improve their ability to detect situations that seem to offer attractive grounds for litigation. To spread the costs of monitoring, they look for 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 investigating the potential for more and different types of suits—suits that test the boundaries of existing law. Thus, the financial incentives that damage class actions provide to private attorneys tend to drive the frequency and variety of class action litigation upwards. In our interviews, attorneys talked candidly about how these incentives operated in their practices and the practices of those who litigated against them. The key public policy question is whether the entrepreneurial behavior of private attorneys produces litigation that is, on balance, 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 nonmeritorious suits if these suits produce generous financial rewards for them.

Most consumer class members have only a small financial stake in the litigation. And, because of the way the class action rules are commonly applied, the class members may not even learn of the litigation until it is almost over. Even representative plaintiffs (i.e., those in whose name the suit is filed) may play little role in the litigation. As a result, there are few if any consumer class members who actively monitor the class action

*The purposes of damage class actions are sharply contested. Our research suggests that such lawsuits do play a regulatory enforcement role in the consumer arena.*

*The substantial financial incentives that damage class actions provide to private attorneys tend to drive the frequency and variety of class action litigation upwards.*

*The key policy question is whether “private attorneys general” lawsuits are, on balance, socially beneficial.*

*Class members typically play a small role in class action litigation. Their virtual absence may lead lawyers to questionable practices.*

*Plaintiff attorneys can be motivated by the prospect of substantial fees for relatively little effort. For their part, defendants may want to settle early and inexpensively. When these incentives intersect, the settlements reached may send inappropriate deterrence signals, waste resources, and encourage future frivolous litigation.*

*Though judges have special responsibilities for supervising class action litigation, they may not have the resources or inclination to scrutinize settlements for self-dealing and collusion among attorneys.*

attorney's behavior. Such "clientless" 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. These incentives can produce settlements that are arrived at without adequate investigation of facts and law and that create little value for class members or society. For class counsel, the rewards are fees disproportionate to the effort they actually invested in the case. For defendants, the rewards are a less-expensive settlement than they may have anticipated, given the merits of the case, and the ability to get back to business rather than engage in continued litigation. For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers.

Recognizing the potential for conflicts of interest in representative litigation, legal rulemakers have assigned judges special oversight responsibilities for class action litigation, including deciding class counsel's fees, and have devised other procedural safeguards as well. But procedural rules, such as the requirements for notice, judicial approval of settlements, and opportunities for class members and others to object to settlements, provide only a weak bulwark against self-dealing. Notices may obscure more than they reveal to class members. Fees may be set formulaically without regard to the value actually produced by the litigation. Whether class settlements are actually collected by class members or returned to defendants, whether the awards are in the form of cash or coupons, may receive little judicial attention. Those who might object to the settlement may not be granted sufficient time or information to make an effective case. Individuals who do step forward to challenge a less-than-optimal resolution or a larger-than-appropriate fee award may have a price at which they will agree to go away or join forces with the settling attorneys. Judges whose resources are limited, who are constantly urged to clear their dockets, and who increasingly 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.

Our data do not provide a basis for estimating the proportion of litigation in which questionable practices obtain. But because both plaintiff class counsel and defense and corporate counsel related experiences to us pertaining to such practices, often in vivid terms, and because there is documentary evidence of such practices in some cases, we believe that they occur frequently enough to deserve policymakers' attention.

## MASS TORT CLASS ACTIONS INJECT ADDITIONAL INCENTIVES

Rather than solving the incentive problems posed by clientless consumer class actions, mass torts bring an additional set of problems to class action practice. Although mass tort plaintiffs have significant financial as well as nonmonetary stakes in their litigation, their role is typically little larger than that of consumer class members, regardless of whether a class is certified or whether the litigation is pursued in some other aggregative form. The history of mass torts—which we detail in our book—has created a contentious bar comprising class action practitioners, individual practitioners who take on large numbers of cases of varying strength and pursue them aggregatively, and more-selective tort attorneys who represent individual clients with strong claims and large damages. The multiplicity of lawyers with different strategic interests provides additional opportunities for dealmaking, which may or may not benefit the class members themselves. The need to satisfy so many legal representatives tends to drive up the total transaction costs of the litigation. The size of individual class members' claims—tens or hundreds of thousands of dollars, rather than the modest amounts 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 fix their ultimate financial exposure 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' products. Plaintiff class action 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 the class counsel could obtain for injured class members if they were to invest more effort and resources in the litigation. Defendants' incentives to settle mass tort class actions even when scientific evidence of causation is weak, and class action attorneys' incentives to settle for less than the individual claims taken together are worth, diminish the deterrence value of product litigation and lead to both over- and underdeterrence.

The tendency of damage class actions to expand the claimant population also has special consequences for mass torts. In consumer class actions, a successful notice campaign will increase the cost of litigation for defendants if more claimants come forward, but may have little impact on the amount that class members collect, since the individual financial losses that lead to such class actions are usually modest and the remedies 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 probably pay more to settle a class action than they would absent the class certification, because more claimants come forward in response to notices and the media attention

*The multiplicity of parties and high financial stakes of mass tort class actions exacerbate the incentive problems of class action practice.*

*In mass tort class actions, notice campaigns that attract large numbers of class members and settlement formulae may result in outcomes that overcompensate some claimants while undercompensating others.*

that class actions often receive and because some of those who secure payment might not have been able to win individual lawsuits. Individual class members whose claims have merit are likely to get *less* than if they sued individually because mass tort settlements are often “capped” and the money will have to be shared with many other claimants, including those with less serious or questionable injuries. Those class members with the most serious injuries and strongest legal claims are likely to lose the most.

Allocating damages to mass tort class members also 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. But the primary objective of tort damages is to make the victim whole, meaning that compensation should match loss (adjusted for factors such as the strength of the legal claim). When 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 towards formulaic allocation schemes. But resolutions that lack individualization challenge a fundamental reason for dealing with mass injuries through the tort liability system, rather than using a public administrative approach.

*We conducted extensive research on ten recently resolved class action suits to gain a richer understanding of class action practices, costs and benefits, and outcomes. The group included six consumer class actions, two mass product class actions, and two mass personal injury cases. The remarkable variation we found in these cases provided insight into the public policy dilemmas posed by damage class actions.*

## HOW INCENTIVES SHAPE OUTCOMES

To develop a better understanding of how these incentives play out in class action litigation, we selected a small number of class action lawsuits for intensive analysis. 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 notices, fairness hearings, judicial approval of settlements, and fee awards.

Because practitioners had told us that class action practice is in flux, we studied *recently filed* class action lawsuits, which best reflect current practices. Because so much of the controversy over damage class actions focuses on alleged shortcomings in their resolution, we studied cases that were *certified* and *resolved* as class actions. This means that our research did 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 underway, we would not have been able to answer questions about benefits and costs. Finally, we decided to study cases that had *not* been the subject of widespread controversy. 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.

Because of resource constraints, we could conduct only ten case studies. We focused on two types of cases: consumer class actions because they were so numerous and such a source of contention and mass tort class actions because of the central role they have played in the controversy over class actions during the 1990s. Ultimately, we studied six consumer class actions, two mass product damage cases, and two mass personal injury cases. Table S.1 lists the cases and their subjects. Five were settled in federal court, and the other half was settled in state court.<sup>6</sup> Four of the five federal cases were nationwide class actions, as was one state case; one of the federal cases and two of the state cases were statewide class actions; the remaining cases were regional and were brought in state court. In six of the ten cases either the settling lawyers or other lawyers filed similar class action lawsuits in other jurisdictions. At the time we selected these cases, we did not know their outcomes other than that they had reportedly reached resolution. Our book details the facts that gave rise to these cases, their course of litigation, and their outcomes.

Although our case study investigation was limited to ten lawsuits, we found a rich variety of facts and law, practices and outcomes. The case studies provided a concrete basis for considering the claims that are central to the controversy over damage class actions: that these lawsuits are solely the creatures of class action attorneys' entrepreneurial incentives; that nonmeritorious class actions are easily identified—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 class actions that we studied closely alongside the claims of critics, we were better able understand the public policy dilemmas posed by damage class actions.

### **Class Actions Are Complex Social Dramas**

The image of class action lawyers as “bounty hunters” pervades the debate over damage class actions. Without greedy lawyers to search them out, the argument goes, few, if any, such lawsuits would ever be filed.

*Class actions arise in diverse circumstances. But plaintiff attorneys drive the litigation.*

<sup>6</sup>Because of controversy over whether class actions are triable, we would have liked to study some cases that were tried; however, it turned out that all of the cases we identified as candidates for study—like most civil cases and most class actions—never reached trial.

Table S.1  
PROFILE OF CLASS ACTION CASE STUDIES

Short Case Title	Subject	(Court) Jurisdiction, Filing Year	Scope
Consumer Class Actions			
<i>Roberts v. Bausch and Lomb</i>	Contact lens pricing	(Federal) Northern District of Alabama, 1994	Nationwide
<i>Pinney v. Great Western Bank</i>	Brokerage product sales	(Federal) Central District of California, 1995	Statewide
<i>Graham v. Security Pacific Housing Services, Inc.</i>	Collateral protection insurance charges	(Federal) Southern District of Mississippi, 1996	Nationwide
<i>Selnick v. Sacramento Cable</i>	Cable TV late charges	(State) Sacramento County, California, 1994	Metropolitan area subscribers
<i>Inman v. Heilig-Meyers</i>	Credit life insurance premium charges	(State) Fayette County, Alabama, 1994	Statewide
<i>Martinez v. Allstate Insurance; Sendejo v. Farmers Insurance</i>	Automobile insurance premium charges	(State) Zavala County, Texas, 1995	Statewide
Mass Tort Class Actions			
<i>In re Factor VIII or IX Blood Products</i>	Personal injury, product defect, blood products	(Federal) Northern District of Illinois, 1996	Nationwide
<i>Atkins v. Harcros</i>	Personal injury and property damage, toxic exposure, chemical factory	(State) Orleans Parish, Louisiana, 1989	Current and former neighborhood residents
<i>In re Louisiana-Pacific Siding Litigation</i>	Property damage, product defect, manufactured wood siding	(Federal) District of Oregon, 1995	Nationwide
<i>Cox et al. v. Shell et al.</i>	Property damage, product defect, polybutylene pipes	(State) Obion County, Tennessee, 1995	Nationwide

Our case studies tell a more textured tale of how damage class actions arise and obtain certification.

In the ten case study lawsuits, class action attorneys played myriad roles. Some class actions arose after extensive individual litigation or efforts to resolve consumer complaints outside the courts; others were the first and only form of litigation resulting from a perceived problem. Sometimes class action attorneys uncovered an allegedly illegal practice on their own; sometimes angry consumers (or their attorneys) contacted them. Sometimes the lawyers first found out about a potential case from regulators or the media. Sometimes they jumped onto a litigation bandwagon that had been constructed by other class action attorneys. When they came later to the process, class action attorneys sometimes brought resources and expertise that helped conclude the case successfully for the class, but sometimes they seemingly appeared simply to claim a share of the spoils.

Defendants' responses to the class actions varied from case to case. In seven of the cases, 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. Once they lost the initial battle(s) over certification, however, defendants joined with plaintiff attorneys in pursuing certification of a settlement class. In the remaining three cases, from the moment of filing, 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 previously filed class actions, or both. 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. Some defendants also sought to bind class members definitively by seeking certification of non-opt-out classes or subclasses.

Critics charge that class action attorneys file lawsuits in certain courts simply because they believe that judges there are most likely to grant certification. As with many other aspects of damage class actions, the dynamics of case filing are more complicated than this critique suggests.

Forum choice is an important strategic decision in all civil lawsuits. But 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 can file in any county of a state and an attorney filing a nationwide class action can file in virtually any state in the country, and perhaps any county in that state as well. In addition, class action attorneys often can file duplicative suits and pursue them simultaneously. These are powerful tools for shaping litigation, providing opportunities not only to seek out favorable law and positively disposed decisionmakers, but also to maintain (or wrest) control over high-stakes litigation from other class action lawyers.

As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward. 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.

The availability of multiple fora dilutes judicial control over class action certification and settlement, as attorneys and parties 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 best interests of class members or the public.

### **The Merits Are in the Eyes of the Beholders**

A central theme of the testimony before the Civil Rules Advisory Committee in 1996–1997 was the notion that a large fraction of such lawsuits “just ain’t worth it” because the alleged damages to class members are

*Defendants may energetically fight class certification, but sometimes see classwide settlement as advantageous.*

*Forum choice allows plaintiff class action attorneys to wrest control over litigation from competing attorneys and allows defendants to seek out plaintiff attorneys who are attractive settlement partners.*

*Broad forum choice weakens judicial control over class action litigation.*



*Arguments about the merits of damage class actions often confound the merits of the underlying claims with the merits of the settlements that are negotiated.*

*Observers often disagree about the merits of particular class actions.*

*In the lawsuits we examined, class members' estimated losses ranged widely. Though they were generally too modest to have supported individual legal representation on a contingency-fee basis, they often numbered in the hundreds or thousands of dollars.*

“trivial,” “technical,” or just plain make-believe. In the policy debate, questions about lawsuits’ merits—which pertain to the facts and law—are often confused with criticism of their outcomes—which are a product of the incentive structure that we reviewed above, as well as of the merits. In our case studies, we looked at the claims themselves and the allegations that parties made about practices and products to assess the seriousness of the claims underlying the class actions, rather than at the way the claims were settled. We could not fully evaluate the validity of every assertion or counter-assertion by the parties, but we did examine the materials in court records, discuss the claims and evidence with the litigators and, in some cases, talk also with consumer advocates and regulators about plaintiffs’ charges and defendants’ counter-assertions.

Although many of these class action lawsuits were vigorously contested, at the time of settlement considerable uncertainty remained about the 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. Viewed from one perspective, the claims appear meritorious and the behavior of the defendant blameworthy; 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 partial explanations of why reaching a consensus over what sorts of damage class actions should be entertained by the courts is so difficult.

Among the ten class actions, the estimated losses to individuals varied enormously. Among consumer suits, the estimated individual dollar losses ranged from an average of \$3.83 to an average of \$4550; in five of the six cases the average was probably<sup>7</sup> less than \$1000 (see Table S.2). It is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense. By comparison with the consumer cases, the individual losses estimated in the mass tort class actions varied more in character and quantity, ranging from less than \$5000 to death. In the latter case, had plaintiff attorneys been confident that they could prevail on liability, individuals would have been able to secure legal representation on a contingency-fee basis. In cases like the other three mass tort class actions, where damages were relatively modest, 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 non-class litigation.

The defendants’ practices that led to the consumer class actions ranged from modest alleged overcharges on individual transactions to sales practices that were allegedly calculated to deceive. Depending on how one tells the story of what defendants did, they appear more or less cul-

<sup>7</sup>Information on losses was not available in all cases.

Table S.2  
CLAIMS UNDERLYING THE TEN CLASS ACTIONS

	Nature of Alleged Harm <sup>a</sup>	Regulators' Assessment of Whether Practice Violated the Law	Estimated Loss to Individual Class Members <sup>b</sup>	Estimated Alleged Gain to Defendants <sup>b</sup>
Consumer Class Actions				
<i>Roberts v. Bausch &amp; Lomb</i>	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.
<i>Pinney v. Great Western Bank</i>	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.
<i>Graham v. Security Pacific Housing Services, Inc.</i>	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 ten times market rate.
<i>Selnick v. Sacramento Cable</i>	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.
<i>Inman v. Heilig-Meyers</i>	Sold more coverage than needed.	Insurance and banking dept. staff said practice was in compliance; state supreme court held practice contravened "plain meaning" of statute.	\$3.83 on average.	Not estimated in settlement, but probably less than \$1 million.
<i>Martinez v. Allstate/Sendejo v. Farmers</i>	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				
<i>In re Factor VIII or IX Blood Products</i>	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.
<i>Atkins v. Harcros</i>	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.
<i>In re Louisiana-Pacific Siding Litigation</i>	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. <sup>c</sup>	No allegations re defendants' gain.
<i>Cox et al. v. Shell et al.</i>	Product deteriorated, requiring replacement and property repairs.	Federal Trade Commission reportedly conducted investigation. No public record of outcome.	Costs to replumb: \$1200 per mobile home; \$3700 per single home. <sup>d</sup>	No allegation re defendants' gain.

<sup>a</sup>Based on plaintiffs' complaints. Defendants never admitted liability in any of these cases.

<sup>b</sup>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 in the book.

<sup>c</sup>Average value of claims paid in 1997.

<sup>d</sup>Average value of claims paid through June 1998 by administrative claims facility established by settlement.

*Defendants' culpability for alleged harms was sharply contested and remains unresolved since none of the cases we examined—as is typical with class actions—went to trial.*

*The outcomes of the cases we studied varied dramatically, challenging the assertion that all class action lawsuits result in pennies for class members and huge profits for attorneys.*

*The way these outcomes were reached challenges the assertion that class actions are instruments for public good, rather than private gain.*

pable. Whether defendants' practices violated applicable statutes, regulations, and case law was the most contentious issue in the consumer class actions we studied, one that was never fully resolved because none of these cases went to trial.

Three of the mass tort class actions alleged manufacturing defects and the fourth concerned disposal of toxic factory waste products. In three of the four cases, 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.

### **The Benefits and Costs Are Difficult to Assess**

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 damage class actions 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 counsel were sometimes simply interested in finding a settlement price that the defendants would agree to—rather than in finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement based on the answers to these questions. Such instances undermine 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 reading to provide more for class members and consumers than they actually did, and class action 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 as compared to the aspirations articulated for them by class action advocates.

### 1. Negotiated Compensation Amounts Varied Dramatically

In one of the ten class actions, no public record exists of the total amount the defendant had agreed to pay class members, although there was a record of the attorney fee award. In the nine remaining cases, the total compensation defendants offered class members ranged from just under \$1 million to more than \$800 million. One of these cases included a substantial coupon component; depending on how one valued these coupons, the settlement was worth close to \$70 million or just about \$35 million (see Table S.3).

Table S.3  
TOTAL COMPENSATION OFFERED AND COLLECTED BY CLASS MEMBERS, AND AVERAGE CASH PAYMENTS

	Total Amount Defendants Agreed to Pay in Compensation (\$M)	Total Amount Collected by Class Members (\$M)	Average Cash Payment
Consumer Class Actions			
<i>Roberts v. Bausch &amp; Lomb</i>	\$33.500 plus \$33.500 in coupons	\$9.175, plus \$9.175 in coupons <sup>a</sup>	Unknown
<i>Pinney v. Great Western Bank</i>	\$11.232	\$11.232	\$1478.89
<i>Graham v. Security Pacific Housing Services, Inc.</i>	\$7.868	\$7.868 <sup>c</sup>	\$130.71
<i>Selnick v. Sacramento Cable</i>	\$0.929	\$0.271 <sup>e</sup>	\$35.58
<i>Inman v. Heilig-Meyers</i>	Unknown	\$0.272 <sup>b</sup>	\$45.79 <sup>b</sup>
<i>Martinez v. Allstate/Sendejo v. Farmers</i>	\$25.235	\$8.914	\$5.75
Mass Tort Actions			
<i>In re Factor VIII or IX Blood Products</i>	\$650.000	\$620.000 <sup>c</sup>	\$100,000
<i>Atkins v. Harcos</i>	\$25.175	\$25.175	\$6404.22
<i>In re Louisiana-Pacific Siding Litigation</i>	\$470.054	\$470.054 <sup>c</sup>	\$4367.27 <sup>d</sup>
<i>Cox et al. v. Shell et al.</i>	\$838.000	\$838.000 <sup>c</sup>	\$1433.29 <sup>d</sup>

<sup>a</sup>Uses midpoint of range estimated from financial reports and other public documents.

<sup>b</sup>Information not from public records.

<sup>c</sup>Projected.

<sup>d</sup>To June 1998.

<sup>e</sup>All unclaimed compensation was awarded to a nonprofit organization.

When reviewing class action settlements, judges must consider their “adequacy” and “fairness.” Comparing a proposed settlement amount to the estimated total class losses provides one basis for such an assessment. However, in six of the class actions we studied, the attorneys never offered a public estimate of the total amount of these losses.

### ***2. In Some Cases, Actual Compensation Was a Lot Less Than the Amount Negotiated***

In three cases, all or almost all of the money set aside for compensation already has been claimed by class members; in three others, apparently all or almost all of the funds committed by the defendants for class compensation will ultimately be claimed. But in another three cases, class members claimed one-third or less of the funds set aside for compensation. In a fourth case, although the total compensation made available to the class was not reported to the court, we believe that less than half was claimed.<sup>8</sup> In three of these four cases the remaining money was returned to the defendants; in a fourth it was awarded to a nonprofit organization.

The total amount of compensation dollars collected or projected to be collected by class members in the cases we studied ranged from about \$270,000 to about \$840 million. Average payments to individual class members ranged from about \$6 to \$1500 in consumer suits, and from about \$6400 to \$100,000 in mass tort suits (see Table S.3).

### ***3. Consumer Litigation Was Associated with Changes in Practice—but Some Changes May Have Had Other Explanations***

In all six consumer cases, the litigation was associated with changes in the defendants’ business practices. In four of the six cases the evidence strongly suggests that the litigation directly or indirectly produced the changes in practice. In the two other lawsuits, the evidence of whether the instant class action led to the change is more ambiguous. Three of the consumer cases also led to changes in state consumer law, although in one case the revision was arguably pro-business. 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; in the fourth, the manufacturer changed the product (which is still marketed) after state attorneys general investigations and litigation commenced.

### ***4. Class Counsel’s Fees Were a Modest Share of the Negotiated Settlements***

Awards to class action attorneys for fees and expenses ranged from about half a million dollars to \$75 million.<sup>9</sup> Under law judges award

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<sup>8</sup>Our calculation is based on estimates from public financial data.

<sup>9</sup>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

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class counsel fees, calculated either by taking a percentage of the total monetary value of the settlement, or by adding hours, assigning an hourly rate (sometimes adjusted by a factor to reflect the quality of the work), and adding in expenses. Generally, the total monetary value of the settlement is defined as including monies made available for compensation to class members, payments to other beneficiaries, class counsel's fees and expenses, and all of the costs required to administer the settlement, including those for notice. In all of our case studies, judges apparently used the percentage-of-fund (POF) method. 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 fee-and-expense awards ranged from 5 percent to about 50 percent of the total settlement value. In eight of the nine cases, class counsel received one-third or less of the total settlement value<sup>10</sup> (see Figure S.3).

#### ***5. In Some Cases, Class Counsel Got a Larger Share of the Actual Dollars Paid Out Than Indicated by the Negotiated Settlement***

As we have seen, class members do not always come forward to claim the full amount defendants make available for compensation. Class counsel received one-third or less of the actual settlement value in six of the ten cases;<sup>11</sup> in the remaining four cases, class counsel's share of the actual settlement value was about one-half. In three of the mass tort cases, class counsel were awarded less than 10 percent of the actual settlement value, but the absolute dollar amount of fees was very large, because these settlements were huge (see Figure S.3).

#### ***6. In a Few Cases, Class Counsel Got More Than the Total Collected by Class Members***

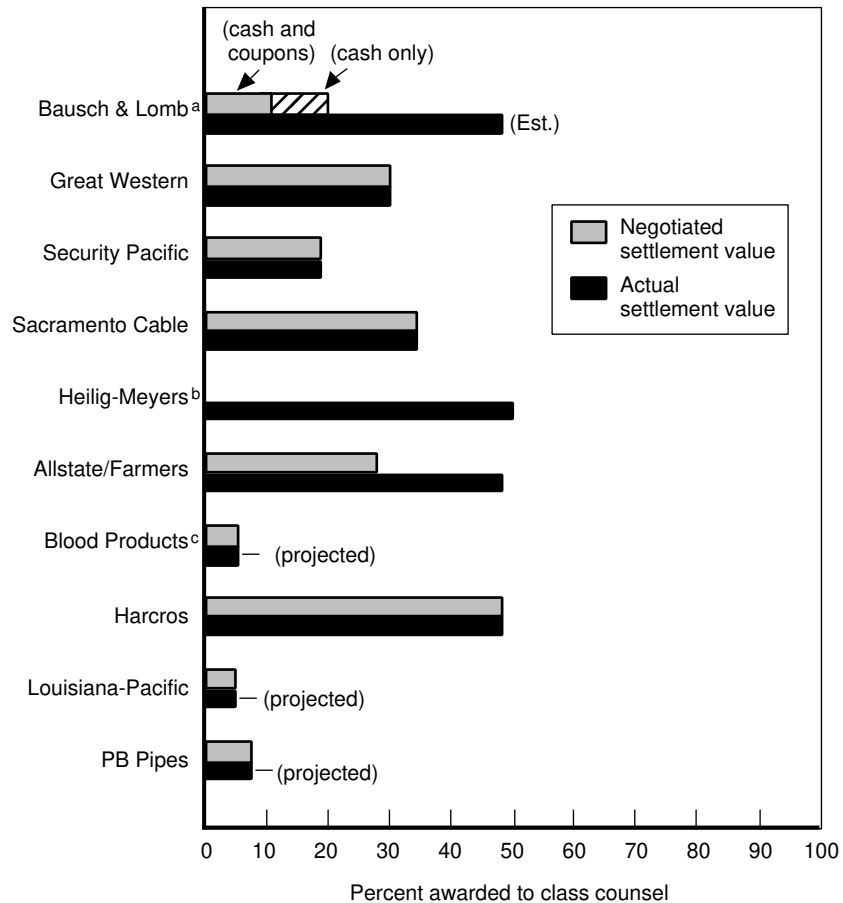
Critics often use yet a third benchmark to assess plaintiff class action attorney fees: the amount the attorneys are awarded compared to the amount class members receive. Because class counsel are paid for what they accomplish for the class as a whole, their fee awards will almost certainly be greater than any individual class member's award, even in a mass tort class action where class members sometimes receive substantial settlements. But in three of the cases we studied, class counsel received more than class members received altogether (see Table S.4).

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to share the information with us. In the three cases in which defendants shared information on their outside-attorney charges, those amounts were one-fifth, two-fifths, and equal to the amount of class counsel's fees and expenses, respectively.

<sup>10</sup>In the tenth case, the judge apparently was not provided with any means for comparing the fee request with this benchmark, because there was no public estimate of the aggregate common benefit.

<sup>11</sup>Although we do not know the total negotiated settlement value in one case, the defendant shared information with us on its actual value. Hence, we can compute these shares for all ten cases.



<sup>a</sup> Defendant's costs of administration, notice, and other settlement-related expenses are unknown.

<sup>b</sup> Negotiated settlement value not available.

<sup>c</sup> Assumes \$36.5 million available for class counsel fees + costs.

**Figure S.3—Class Counsel Fees and Expenses as a Percentage of Negotiated and Actual Settlement Value**

### ***7. Total Transaction Costs Are Unknown***

Class actions are costly. We estimate that total costs in the ten cases, excluding defendants' own legal expenses, ranged from about \$1 million to over \$1 billion. Eight of the cases cost more than \$10 million; four cost more than \$50 million; three cost more than half a billion dollars.

Transaction costs in class action lawsuits include not only fees and expenses for the plaintiff class action attorneys and defense attorneys, but also the costs of notice and settlement administration, which can be substantial. Because most defendants declined to share data on their own legal expenses, we could not calculate a transaction cost ratio that ac-

Table S.4  
TOTAL AWARDED TO CLASS COUNSEL, COMPARED WITH TOTAL  
PAID TO CLASS

	Class Counsel Award for Fees & Expenses (\$M)	Total Cash Pay- ment to Class Members (\$M)
Consumer Class Actions		
<i>Roberts v. Bausch &amp; Lomb</i>	\$8.500	\$9.175 <sup>b</sup>
<i>Pinney v. Great Western Bank</i>	\$5.223	\$11.232
<i>Graham v. Security Pacific Housing Services, Inc.</i>	\$1.920	\$7.583
<i>Selnick v. Sacramento Cable</i>	\$0.511	\$0.271
<i>Inman v. Heilig-Meyers</i>	\$0.580	\$0.272 <sup>c</sup>
<i>Martinez v. Allstate/Sendejo v. Farmers</i>	\$11.288	\$8.914
Mass Tort Class Actions		
<i>In re Factor VIII or IX Blood Products</i>	\$36.500 <sup>a</sup>	\$620.000 <sup>a</sup>
<i>Atkins v. Harcros</i>	\$24.900	\$25.175
<i>In re Louisiana-Pacific Siding Litigation</i>	\$25.200	\$470.054 <sup>a</sup>
<i>Cox et al. v. Shell et al.</i>	\$75.000	\$838.000 <sup>a</sup>

<sup>a</sup>Projected.

<sup>b</sup>Estimated from financial reports and other public documents.

<sup>c</sup>Information not from public records.

counted for all dollars spent on these lawsuits.<sup>12</sup> As a share of the total bill excluding defendants' legal fees and expenses but including plaintiff attorneys' fees and expenses and administrative costs, transaction costs were lowest in three of the four mass tort class actions, and highest in the consumer class actions (see Figure S.4). But because mass tort cases are likely to impose large defense costs, these differences may be illusory. Because they exclude defendants' legal costs for all ten cases, the percentages shown in Figure S.4 represent the lower bound on transaction cost ratios.

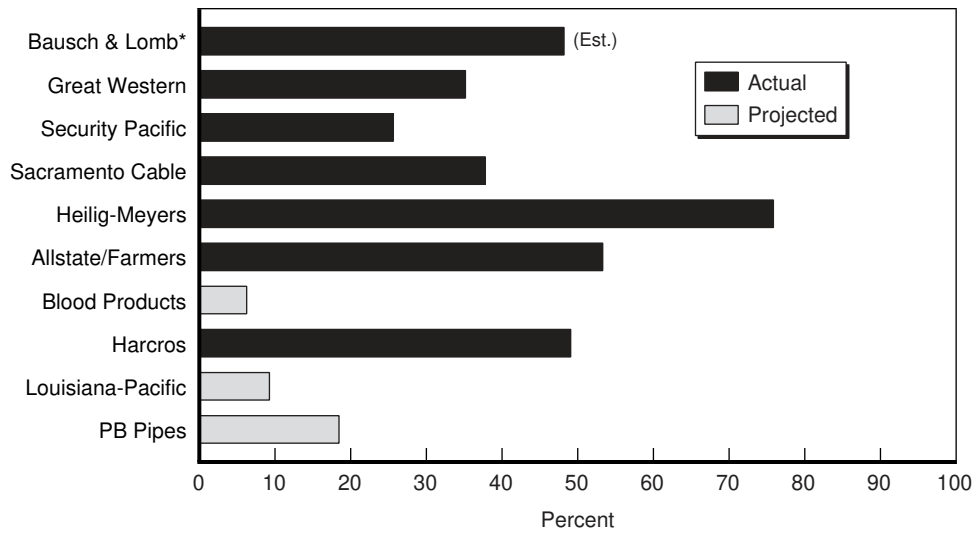
## JUDGES' ACTIONS DETERMINE THE COST-BENEFIT RATIO

Assessing 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

*When judges fully exercise their oversight responsibilities, the quality of class action settlements and the social benefits of the litigation are improved.*

<sup>12</sup>In three cases, we do know outside defense attorneys' charges. Including those expenses increases the transaction cost ratio by just 10 percent in one case, by about one-third in the second, and by 85 percent in the third.





NOTES: Transaction costs include payments to plaintiffs' attorneys and costs of administration, notice, and other expenditures.

\*Defendants' costs of administration, notice, and other settlement-related expenses are unknown.

**Figure S.4—Proportion of the Settlement, Excluding Defendants' Own Legal Fees and Expenses, Attributable to Transaction Costs**

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.

However one assesses the bottom line, the evidence from our case studies suggests strongly that what judges do is the key to determining the benefit-cost ratio. In the class actions we studied, we found considerable variation in what judges required of attorneys and parties. From a societal perspective, the balance of benefits and costs was more salutary when judges:

- required clear and detailed notices
- closely scrutinized the details of settlements including distribution strategies
- invited the participation of legitimate objectors and intervenors
- took responsibility for determining attorney fees, rather than simply rubber-stamping previously negotiated agreements
- determined fees in relation to the actual benefits created by the lawsuit

- required ongoing reporting of the actual distribution of settlement benefits.

How judges exercise their responsibilities not only determines the outcomes of the class actions that come before them, but more important, also 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.

## FINDING COMMON GROUND BY FOCUSING ON PRACTICE

Damage class actions pose a dilemma for public policy because of their capacity to do both good and ill for society. The central issue for policymakers is how to respond to this dilemma.

Those who believe that the social costs of damage class actions outweigh their social benefits think that the best course of action would be to abandon the notion of using private collective litigation to obtain monetary damages in consumer and mass tort cases. We should rely, say these critics, on administrative agencies and public attorneys general to enforce regulations, and on individual litigation to secure financial compensation for individuals' financial losses.

Those who believe that the social benefits of damage class actions outweigh their costs say that prohibiting private collective litigation in these circumstances would be 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.

The current controversy over damage class actions reflects this clash of views. History suggests that it will be difficult to resolve the fundamental conflict between them. But many on both sides of the political divide share concerns about current damage class action practices. We think this argues for refocusing the policy debate on proposals to better regulate such practices, so as to achieve a better balance between the public and private gains of damage class actions. Below, we assess the leading proposals for damage class action reform that have been put forward in recent years, seeking to identify those that might attract support from actors on opposite sides of the policy divide and that might make a difference in outcomes.

*Because the controversy over class action litigation springs from sharp differences in political and social values, it is difficult to resolve. The continuing focus on these questions squanders opportunities for reforming practices.*

### **Adding a Cost-Benefit Test for Certification Would Yield Unpredictable Outcomes**

One of the Civil Rules Advisory Committee's proposed rule changes would have encouraged judges to deny certification when they believe the likely benefits of class action litigation are not worth the likely costs. This proposal evoked sharp controversy, arraying business representatives against consumer advocates, and was ultimately tabled by the committee. We think such a proposal would also yield unpredictable outcomes.

The ambiguity of case facts revealed by our case studies illuminates the problems associated with asking a judge to assess likely benefits and costs when deciding whether to certify a damage class action. Under current law, a judge is not authorized to adjudicate the legal merits of a case when he or she rules on certification. Without such adjudication, 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 costs and benefits of lawsuits such as these. Judges presiding over class actions should use their summary judgment and dismissal powers, when appropriate—as many do now. Preserving the line between certification based on the form of the litigation (e.g., numerosity, commonality, superiority) and dismissal and summary judgment based on the substantive law and facts seems more likely to produce consistent signals to parties as to what types of cases will be certified than conflating the two decisions.

### **Requiring Class Members to Opt In Would Array Business Representatives Against Consumer Advocates**

Some critics have proposed amending Rule 23 to require that those who wish to join a damage class action proactively assert their desire by opting in, thereby returning to pre-1966 practice. In consumer class actions involving small individual losses, requiring class members to opt in would lead to smaller classes that would likely obtain smaller aggregate settlements; in turn, class counsel would probably receive smaller fee awards. The social science research on active versus passive assent suggests that minority and low-income individuals might be disproportionately affected by an opt-in requirement, a worrisome possibility.

Reduced financial incentives flowing from smaller class actions would discourage attorneys from bringing suit. How one feels about this result depends on one's judgment about the social value of small-dollar consumer class actions, meaning that this proposal is unlikely to attract broad political support.

## Prohibiting Settlement Classes Might Not Cure Any Problems

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 does provide for certification to be conditionally granted and to be withdrawn if a judge subsequently decides it is inappropriate. But certification for settlement purposes had apparently become a common practice by the 1990s. Generally, such certification is granted preliminarily<sup>13</sup> after the class counsel and defendants have negotiated a settlement. In a recent decision, the Supreme Court found that Rule 23 permits such certification.<sup>14</sup>

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 more on class action practices. If judges certify classes for settlement that they would not agree to certify for trial, we would expect to see, over time, more damage class actions. Certification of settlement classes also has financial benefits for class counsel—for example, when a class is not certified until a settlement is preliminarily approved, the defendant will generally bear the notice costs. Settlement class certification might therefore encourage damage class action litigation by reducing plaintiff class action attorneys' financial risk.

Critics also argue that certification for settlement only facilitates collusion between plaintiff class action attorneys and defendants. The critics suggest that the former are at a strategic disadvantage when they negotiate a settlement without knowing whether the judge will ultimately grant class certification. Attorneys we interviewed argued to the contrary that uncertainty about the judge's ultimate decision on certification can disadvantage defendants as well. Some attorneys told us that the availability of settlement class certification has different import, depending on the evolution of the litigation. For example, in some lawsuits there has been extensive individual litigation or significant legal skirmishes prior to settlement. In both instances, class counsel and defendants know a good deal about the strength of the case by the time of settlement.

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<sup>13</sup>The judge grants preliminary approval for the purpose of noticing class members and inviting objections. Final approval is granted after a fairness hearing.

<sup>14</sup>*Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). The Court held that settlement classes must satisfy the same criteria as cases certified for all purposes, including trial, although the criteria may apply differently to settlement class certification. Some trial judges had previously held that the fact of settlement itself satisfied key certification criteria; the Court rejected this interpretation.

Our analysis suggests that the key to forestalling improper settlements is the amount and quality of judicial scrutiny, rather than whether a class is certified for trial or settlement only. 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. Conversely, when a lawsuit has been fiercely contested by the defendant, when a significant amount of factual investigation has taken place, and when class counsel have and are willing to spend resources to obtain a fair resolution, settlement class certification may facilitate settlements that are in the interest of class members as well as defendants.

### **Broadening Federal Court Jurisdiction Would Give Federal Judges More Control, but Would Not Address Other Important Issues**

A fourth proposal for class action reform, which passed the House of Representatives in 1999, is to broaden federal court jurisdiction over class actions so that many class actions that are now brought in state court could be removed by defendants to federal court, where they would be governed by federal rules, practices, and judges.<sup>15</sup> 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. Others suggest that state judges may not have adequate resources to oversee and manage class actions with a national scope.<sup>16</sup> Still others suggest that if a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court. The proposed new legislation is animated by these beliefs.

Because there are no systematic data on state court class actions, there is no empirical basis for assessing the arguments that federal judges are more likely than state judges to deny class certification, or that federal judges generally manage damage class actions better than state 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 important consequences. Duplicative litigation drives up the public and private costs of damage class actions. Perhaps more important, class action attorneys and defendants who negotiate agreements that do not pass muster with one judge may take their law-

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<sup>15</sup>H.R. 1875, 106th Cong., 1st Sess. (1999). Similar bills were introduced in the previous Congress.

<sup>16</sup>In its study of class actions in four district courts, the Federal Judicial Center found that federal judges spend about five times as many hours on class actions as on an "average" civil case. See Thomas Willging, Laurel Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts*, Washington, D.C.: Federal Judicial Center, 1996.

suit 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. A class action settlement approved by a judge in one court often cannot be overturned by another court, even if the claims settled in the first court are subject to the jurisdiction of the second court. If we look to judges to rigorously scrutinize class action settlements and attorney fee requests—as we argue below that we should—finding a way to preclude “end-runs” around appropriately demanding judges is critical.

Deciding how to handle duplicative multistate class actions is a difficult problem in our system of federal and state courts. In the federal courts, duplicative class actions can be assigned to a single judge by the Judicial Panel on Multi-District Litigation (MDL).<sup>17</sup> However, under the MDL statute, the transferee judge does not currently have the power to try all the cases assigned to her, but only to manage them for pretrial purposes. Although MDL transferee judges can and do preside over settlements of aggregate litigation, the fact that an MDL judge cannot try cases that were not originally filed in her court may undercut her ability to regulate class action outcomes. To address this issue, 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.<sup>18</sup> Some states have already developed procedures for collecting like cases within their states, analogous to the federal multidistricting procedure. 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, including trial. 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. By facilitating removal of multistate class actions to federal court, the proposed legislation would provide a means of collecting duplicative class actions, at least for pretrial purposes, using the MDL provision.<sup>19</sup> But the proposed legislation leaves other important issues unresolved.

First, a key issue pertaining to multistate class actions that arises whether they are brought in state or federal court is what law to apply when class members’ claims allege violations of different state laws. In some class

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<sup>17</sup>28 U.S.C. § 1407.

<sup>18</sup>In 1999, the House of Representatives passed a bill that broadens the transferee judge’s authority to include trial and provides for the removal of related state claims to federal court for assignment to the transferee judge. But this bill applies only to mass personal injury claims arising out of a catastrophic event. H.R. 2112, 106th Congress, 1st Sess. (1999). Similar bills were introduced in previous Congresses.

<sup>19</sup>However, the House bill passed in September is not limited to such multistate actions.

actions, defendants have argued and judges have agreed that when multiple states' laws are implicated, a lawsuit cannot meet the damage class action requirement that common issues predominate. If the proposed legislation were to be enacted into law, this might be the fate of some of the lawsuits that were removed to federal court.<sup>20</sup> Some past proposals for consolidating multistate claims include provisions for resolving choice-of-law problems,<sup>21</sup> but the proposed class action jurisdiction legislation does not address this issue.

Second, if many state class actions were removed to federal court, some federal judges could be faced with significant numbers of new and complex lawsuits. In a later section, we suggest that under the current jurisdictional rules additional resources may have to be provided to judges to ensure that they exercise their responsibilities under law to assess and approve the quality of class action settlements and determine appropriate attorney fees. The proposed legislation does not address the resource issue.<sup>22</sup>

Proposals to expand federal jurisdiction over damage class actions have evoked controversy because many believe that federal judges are now disposed against such suits. Hence the proposed legislation attracts support from business representatives and opposition from consumer advocates and class action attorneys. 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 multistate class actions and provides additional resources for federal judges who preside over such lawsuits.

### **Prohibiting Mass Tort Class Actions Would Not Solve the Mass Tort Problem**

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 suggests, to the contrary, that when claims of mass injury exist, litigation usually either proceeds in aggregate form or dies on the vine. The important public policy questions relating to mass torts are not *whether* to aggregate litigation, but *how* and *when*.

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<sup>20</sup>In other instances, judges have allowed class counsel to try class actions under multiple state laws; the jury was asked whether the claims of different class members are valid under the particular legal standards that apply to those claims.

<sup>21</sup>For example, H.R. 2112, 106th Congress, 1st. Sess. (1999).

<sup>22</sup>In July 1999, the Executive Committee of the Judicial Conference of the United States voted to express its opposition to H.R. 1875 (and its companion Senate bill) in part because of concern about its probable impact on federal judicial workload.

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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. But mass tort litigation often involves significant numbers of claimants who 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. Class action certification also gives judges control over attorney fees, and may put class action attorneys in a position to obtain the lion's share of these fees. Plaintiff attorneys who aggregate mass tort cases informally enter into contingent fee agreements with each of their clients, who may pay the attorney the same share of any settlement that they would in individual litigation, notwithstanding any savings that may accrue to such attorneys because of the scale of the litigation. Conducted in the lofty terminology of due process, the public debate over mass tort class actions masks the power struggle between these two groups of attorneys: class action specialists and the tort practitioners who bring many individual cases at a time outside the class action structure. To date, insufficient empirical evidence exists 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 currently provides.

### **Increasing Judicial Regulation of Damage Class Actions Is the Key to a Better Balance Between Public Goals and Private Gain**

Judges hold the key to improving the balance of good and ill consequences of damage class actions. If judges approve settlements that are not in class members' best interest and then reward class counsel for obtaining such settlements, they sow the seeds of frivolous litigation—settlements that waste society's resources—and ultimately of 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.

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 that impedes regulation of damage class actions, judges should also turn for help to neutral experts and to class members themselves.

### *1. Judges Need to Scrutinize Proposed Settlements More Closely*

Rule 23 requires judges to approve settlements of class actions, but does not itself specify the criteria that judges should use to decide whether or not to grant such approval. Case law requires that class action settlements be fair, adequate, and reasonable, but these elastic concepts do not offer much guidance as to which settlements judges should approve and which they should reject, and current case law and judicial reference manuals do not speak to key aspects of settlements. Based on our analysis, we think judges should:

- ask what the estimated losses were and how these losses were calculated
- exercise heightened scrutiny when settlements fall far short of reasonably estimated losses, even after properly adjusting for the likely outcome if the case were tried
- 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 are available from defendants and when a formula can be devised for calculating payments.
- exercise heightened scrutiny when coupons comprise a substantial portion of the settlement value, and require estimates of the rate of coupon redemption
- require information on the estimated *actual* payout by defendants, taking into account all of the above
- exercise heightened scrutiny when claims regarding regulatory enforcement are put forward in support of a settlement, particularly when large dollar values are assigned to alleged injunctive effects. When inquiring about changes in practice, ask whether the instant class action is the first such suit against the defendant or one in a long chain of such suits, as later suits are less valuable as regulatory enforcement tools.

- exercise heightened scrutiny when the amount of fees has been negotiated separately by class counsel and defendants prior to settlement.<sup>23</sup>

Judges' responsibility for the fairness, adequacy, and reasonableness of class action settlements should not end with their formal approval of those settlements. Judges should:

- require that settlement administrators report, in a timely fashion, both the total amounts of disbursements to class members and the total costs of administration, and 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
- require, at least, annual reports of disbursements and costs when settlements are structured to provide payments over lengthy periods, 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 so-called *cy pres* remedies (payments to parties other than class members), 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 reports 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.
- refrain from making *cy pres* awards to organizations with which they have a personal connection, to avoid the appearance of conflict of interest.

## ***2. Judges Should Reward Attorneys Only for Actual Accomplishments***

*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.*

To avoid rewarding class action attorneys for dubious accomplishments, judges should:

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<sup>23</sup>In *Evans v. Jeff D.*, 475 U.S. 717 (1986), the U.S. Supreme Court held that class counsel and defendant could negotiate fees as a component of a settlement. In our book, we review alternative approaches to fee-setting that we believe would reduce opportunities for self-dealing.

- award fees in the form of a percentage of the fund *actually disbursed* to class members or other beneficiaries of the litigation<sup>24</sup>
- award fees based on the monetary value of settlement coupons *redeemed*, not coupons offered
- reject fee awards for illusory changes in regulatory practices, such as changes made in response to independent enforcement actions by public attorneys general or other public officials, individual litigation, or previous class actions
- award less, proportionally, when the total actual value of the settlement is very large
- award less, proportionally, when settlements are disbursed to non-class members—cy pres remedies—except in instances where direct compensation to class members is clearly impracticable
- use phased awards when projected payouts are uncertain and disbursements will be made over time
- require detailed expense reports.

### ***3. Judges Should Seek Assistance from Others***

To assure that key aspects of settlements are brought to light, judges should seek assistance from knowledgeable but disinterested parties.

Judges should:

- provide sufficient information and adequate time for objectors and intervenors to come forward and participate in fairness hearings
- be wary of “false helpers”—e.g., 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 in exchange for disappearing from the scene. To help guard against collusion, payments made by one set of lawyers to another or by defendants to intervening or objecting lawyers ought to be disclosed to the judge.
- award fees to intervenors representing nonprofit organizations who significantly improve the quality of a settlement
- seek assistance from neutral experts in assessing claims of regulatory enforcement and valuing other nonmonetary settlement benefits
- appoint neutral accountants to audit attorney expense reports before making a final award of expenses.

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<sup>24</sup>In *Boeing Co. v. Van Gemert*, 442 U.S. 472 (1980), the U.S. Supreme Court held that class action attorney fees may be awarded on the basis of the negotiated size of a settlement fund, without regard to how many class members come forward to claim shares of the fund. We think this rule has perverse effects in damage class actions.

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The additional costs of intervenors and neutral experts should be split evenly between the defendant and class counsel (from the latter's already-decided share of the settlement). All such costs should also be a matter of public record.

In order to improve class members' participation, judges also should:

- provide mechanisms for class members to receive timely information about the progress and outcomes of the litigation, and encourage class members' questions and comments
- require plain-English notices. Notices of the pendency of class actions should indicate what defendants are alleged to have done, to whom, and with what effects. Notices of settlement should describe, in detail, 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 have been made for residual or supplementary payments to other organizations.
- consider appointing a committee of unrepresented class members in mass tort class actions, where class members frequently include represented and unrepresented parties, to serve as spokespeople for the latter.

## **THE ROAD TO REFORM**

If judges already have the power to regulate damage class actions but not all of them use it fully, 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 systematically expose what occurs in damage class actions to public light.

### **Change Judicial Discourse**

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 educated that damage class actions are not just about problem solving, that the rights of plaintiffs and defendants are at stake, that responsibility for case 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 deemed acceptable in another.

Judges presiding over their first damage class action need mentors to guide them, not just about the process, but also about the incentives for self-dealing inherent in representative litigation and the strategies available to judges for countering them. Judges should be reminded of their authority to dismiss cases and grant summary judgment, when appropriate. At conferences of state and federal judges, participants should share with their colleagues techniques for ensuring that settlements they approve are appropriate and that fee awards are proportionate to real outcomes. Questions about how certification criteria apply to various types of lawsuits, at what stage of the process it is appropriate to certify cases, and whether to certify cases conditionally for settlement should be debated. *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 they resolve these lawsuits.*

### **Increase Judicial Resources**

Our recommendations for judicial management of damage class actions might well require an increase in public expenditures for the courts. Judges presiding over class actions may need more administrative support and legal assistance, as well as a reduced load of other cases, so that they can devote sufficient time to class action management. They may need assistance in identifying neutral experts and experienced settlement masters to assist them. 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 also might increase the private costs of individual damage class actions. The price to settle the individual class actions that survive a more rigorous judicial approval process might be higher than the current average cost of settling damage class actions. But if the current costs of damage class actions reflect significant amounts of frivolous litigation and worthless settlements, as critics allege, these costs would diminish over the long run as such litigation is driven from the system, benefiting both defendants and consumers.

### **Open Class Action Practice and Outcomes to Public View**

As with many other public controversies, the debate over damage class actions has created a lot of heat without shedding much light on the range of practices and outcomes in these lawsuits. Shining more light on damage class action outcomes would enhance judges' incentives to regulate class actions. Comprehensive reporting of class action litigation would provide a rich resource for policymakers concerned about class action reform as well as an unbiased information source for print and broadcast reporters.

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To increase public information about class action outcomes:

- Judges should require public reporting of the number of class members who claimed and received compensation, the total funds disbursed to class members, the names of other beneficiaries and amounts disbursed to them, and the amounts paid to class counsel in fees and expenses.
- Courts and legislatures should find ways of facilitating broad public access to such data, for example, by making electronically readable case files available through the internet.

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Notwithstanding the controversy they arouse, history suggests that damage class actions for some purposes 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 judges will decide the kinds of cases that will be brought—within whatever substantive legal framework evolves—by their willingness or unwillingness to certify cases, to approve settlements, and to award fees. 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 they could go a long way toward ensuring that the public goals of damage class actions are not overwhelmed by the private interests of lawyers.

*History suggests damage class actions will survive for some purposes. Improving practice is a goal that protagonists can agree on and holds out the hope of achieving a better balance between public goals and private gain.*