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Insurance Class Actions in the United States

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RAND INSTITUTE FOR CIVIL JUSTICE

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Preface

Issues surrounding the use of the class action procedural device have received national attention of late, as exemplified by the debate over the passage of the Class Action Fairness Act of 2005 (CAFA) (Public Law 109-2). Class actions often make the headlines, especially when they result in settlements affecting millions of class members and requiring millions of dollars in restitution. But, in fact, little is known about the vast majority of class actions in this country because of a historic lack of both public and private data, often caused by shortcomings in court recordkeeping practices and by litigants' reluctance to reveal what took place in many cases seeking class certification.

This monograph presents the results of a survey of insurance companies in the United States that sought detailed information about their class action experiences over a 10-year period. With these data, we are able to describe important characteristics of the litigation, including what types of classes are sought, where these cases are being filed, what allegations are made, how these cases are resolved, and how much time it takes to bring them to resolution.

This monograph should be of particular interest to those involved in class action litigation generally and to policymakers seeking to refine the effectiveness of this important procedural device.

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Summary

Class actions, which are civil cases in which parties initiate a lawsuit that also includes as plaintiffs others not specifically named in the suit, often make the headlines, especially when they result in settlements affecting millions of class members and requiring millions of dollars in restitution. They have also aroused vocal policy debates, as exemplified during the deliberations of the U.S. Congress over CAFA (Public Law 109-2). But despite this long-standing interest, policymakers and the public know very little about the majority of class actions filed in this country—their numbers, their dynamics, or their outcomes. The lack of data is caused by shortcomings in court recordkeeping practices and by litigants' reluctance to reveal what took place in cases seeking class certification.

Study Purpose and Approach

What is known about class actions is based almost entirely on the small percentage of cases that are officially certified by judges to proceed on a class basis, not the much larger proportion of attempted (or "putative") cases that are never certified. Previous studies have also tended to focus on class actions filed in federal courts, which generally keep better records than state courts do on class status, although what little evidence is available suggests that the bulk of class action litigation is initiated in state courts.

We used a defendant-based survey to collect original data on a well-defined subset of class actions that were filed in both state and federal courts and that included all class actions, whether they were certified or not. We focused on the insurance industry. We selected insurers as the targets of our survey because class actions involving that industry were known to occur frequently enough to make the data collection effort worthwhile and we wanted to understand the interplay of class actions and regulation in an industry subject to extensive governmental oversight.

The data presented in this monograph come from responses to surveys sent to a group of the largest insurers that, taken together, account for 65 percent of all direct premiums written in the property and casualty market and in the life and health market. We received 988 case-level questionnaires from 57 large insurance companies operating

in the United States, describing 748 distinct cases that were open at some point during the 10-year period. We also conducted a separate survey to identify overlap among the issues in these cases and the traditional authority and activities of state regulators. This survey went to staff members of a number of state departments of insurance and asked them to rank the key allegations found in the insurer survey data in terms of regulator interests. We used responses from 17 states in our analysis. Together, these survey results provide a unique database on class actions against insurers and help to answer important questions about the dimensions of this type of litigation.

Some limitations, however, should be noted. We surveyed large insurance companies in two phases. In the first phase, we asked insurers whether they had been named as defendants in class actions. Those who had were sent a follow-up survey to seek more detailed information about those cases. The response rate to the initial large-insurer survey was approximately 48 percent and the response rate to the follow-up survey was 56 percent. Because many insurers did not respond, particularly those in the life and health markets and the smaller companies, our results are most generalizable to the experiences of the very largest property and casualty (P&C) insurers in the country, especially those whose primary business is writing automobile private passenger coverage. We analyzed observable characteristics of responding and nonresponding firms, but unobservable, systematic differences may also further limit our ability to characterize insurance class actions in their entirety.

Also, some respondents did not complete certain questions asking about settlements, which are often subject to confidentiality agreements. Accordingly, we advise our readers not to generalize from the results presented in the discussion on settlement outcomes. Additionally, the data do not distinguish between those cases certified for trial and those cases certified only provisionally or for settlement purposes only. Finally, as is typically the case with such surveys, the data are only as good as the respondents' records and recall. Some insurers, for example, may have been better able to provide information about more recent cases or cases that were certified.

Class Action Filings

Forum for Filing

Survey data show that 89 percent of the class actions were filed in state courts. This should not be a surprising result as insurance in the United States is regulated at the state level and presumably claims involving federal statutes would be relatively few in number.

Despite the overwhelming proportion of state court filings in our data, the issue of federal jurisdiction plays a role in many cases, even prior to the passage of CAFA (Public Law 109-2), which liberalized the rules for diversity jurisdiction for class actions in federal courts. A sizable number moved between systems as parties sought to have

the matter adjudicated in different forums: One in five cases reported removal to federal court from a state court at some point during the litigation (some of these case would have been remanded back to state court). In the end, federal courts were the final forums for 17 percent of the closed cases.

Geographic Scope of the Class

In the vast majority of reported insurance class actions (82 percent), the class consisted of residents of a single state. National classes were sought in 15 percent of the cases, and the remainder involved residents of two or more specifically identified states.

Some observers have voiced concerns about instances in which a state court judge is asked to decide on insurance-related matters affecting citizens not only in that specific jurisdiction but also those residing in as many as 49 other states and the District of Columbia. We found that this type of proposed class occurs in about 17 percent of state court filings.

Choice of Jurisdiction

In our data, 42 percent of all state court insurance class actions were filed in Illinois, Florida, and Texas. Two jurisdictions in particular—Miami-Dade County, Florida, and Cook County, Illinois—accounted for about 17 percent of our state cases. On the federal side, districts in Florida and Texas again were at the top of the list in frequency, accounting for 23 percent of all federal insurance class actions in our data.

The distribution of cases may be, at least in part, a reflection of the characteristics of the insurers that responded: where the companies are licensed to write insurance, where their corporate headquarters are located, where their articles of incorporation are filed, and their share of the overall market in each state. Local laws that provide the legal foundation for bringing these claims are another possible jurisdictional influence.

A more telling measure of jurisdictional "hot spots" than raw numbers of filings may be the types of cases filed in particular jurisdictions. For example, as already mentioned, 17 percent of the state court filings sought a class involving citizens or residents of more than one state. But some counties had a much higher percentage of cases seeking multistate classes and, perhaps more telling, exceeded the average reported for that state. In Broward County, Florida, for example, 46 percent of the state court cases were seeking multistate classes versus 11 percent for the state as a whole. Madison County, Illinois, had an even higher percentage (68 percent) of such cases, more than any other county with eight or more cases reported. These findings suggest that attorneys may be choosing these jurisdictions for multistate class litigation over other counties and states that would have been equally acceptable from a strictly procedural point of view.

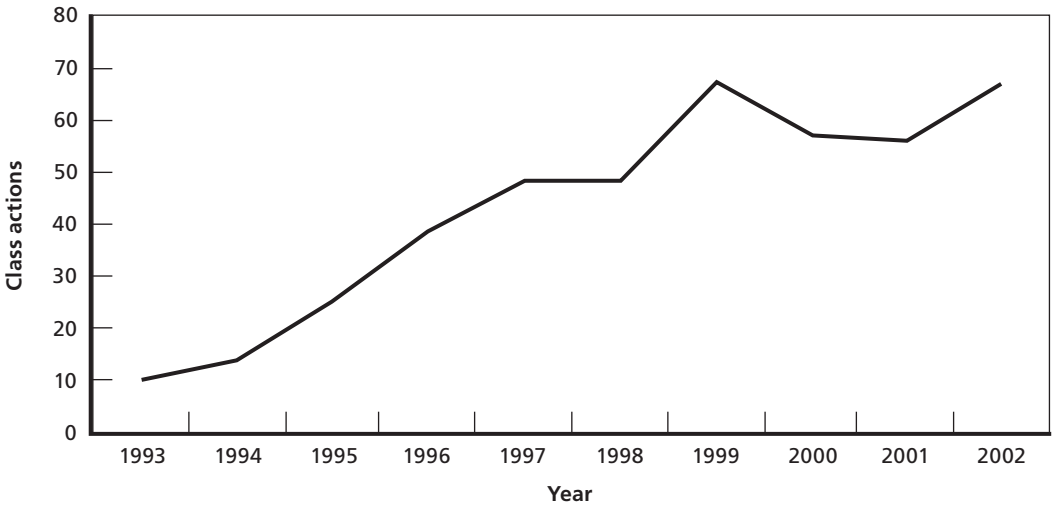
Trends in Numbers of Class Actions

We also have some data that suggest that the number of class actions filed against insurers rose during the 10-year period of 1992–2002. Of the 57 large insurance companies responding to our survey, 12 reported that they could identify every class action active in every year over the entire study period (1993 to 2002). Using data from these companies (431 cases), we found a strong growth in filings (a 23.5-percent compound annual growth rate) as shown in Figure S.1. Data from the 24 companies with complete information over the last five years of the study span (382 cases) show reduced growth compared with the 10-year rate (a 5.3-percent compound annual growth rate).

Numbers and Types of Defendants

In most instances, class action litigation was directed at a small number of insurers. The companies responding to the survey were the sole corporate defendant in 65 percent of reported cases (though one or more individuals might have been named as well) and, in 20 percent of the cases, two to three corporate defendants were named. In a few instances, the scope was much greater: In 3 percent of the cases, 40 or more insurers were named and one notable case identified more than 1,000 corporate defendants. Insurers whose business primarily involves personal automobile policies were the defendants in more than a third of all of our cases. Two out of three cases involved automobile insurance policies.

Figure S.1
Class Actions Filed During the Year Reported by Companies with Complete Records for 1993–2002



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Most Frequent Allegations

Including attempted cases in our data provides important evidence about what sorts of claims are repeatedly advanced, even if they are ultimately unsuccessful. The most common claim was that that the insurer failed to compensate policyholders for the diminished value of automobiles following repairs under the insured's first-party coverage. About half of all cases involved allegations related to the payment of medical benefits to health care providers under automobile policies, various real and personal property coverage claims, claims by policyholders or beneficiaries under automobile uninsured or underinsured motorist policies, diminished value claims related to first-party automobile coverage, or various workers' compensation issues.

The data suggest that insurance-related statutes play a significant role in these cases, often involving omnibus consumer protection acts. Of the cases in which the respondents identified what the key statutes and regulations were in the litigation, 72 percent involved state laws concerning unfair or deceptive trade practices; unfair claims, settlement, or other insurance practices; consumer protection rights or prohibitions against fraud; or unfair competition or business practices. These responses show that state legislatures have significant power to shape both the frequency and the scope of these cases.

Certification and Resolution

Because we collected information on all attempted class actions, we were able to calculate the rate of certification. Only 14 percent of the cases in our data set wound up with certified classes. The judges denied certification in 11 percent of the cases, and the remainder—about 75 percent of the total—never had a decision either way.

Case Outcomes

Table S.1 shows striking differences in final outcomes depending on the status of the motion for certification. For all attempted class actions, a negotiated settlement that bound a certified class took place in only 12 percent of all closed cases. Settlements involving only the small number of plaintiffs specifically named in the original filings, and not a class, occurred in 20 percent of the cases. The judge ruled in favor of the defendant on some sort of dispositive pretrial motion in 37 percent of the cases. In 27 percent of the cases, plaintiffs dismissed their complaints voluntarily, presumably without prejudice, which would have allowed them to refile the same case later.

For class actions in which the plaintiffs have made a motion for certification, however, the distribution of outcomes changes considerably. Class settlement in those cases is much more likely, with a third of all cases resulting in a settlement for a certified class. The frequency with which plaintiffs voluntarily drop their cases is reduced, as are pretrial dispositive rulings for the defense. When a class is, in fact, certified, the end result in nine of 10 cases is a class settlement.

Table S.1
Resolution of Class Actions

Types of Class Actions[a]	Class Settlement (%)	Individual Settlement (%)	Pretrial Ruling for the Defense (%)	Voluntary Dismissal (%)	Other Outcome (%)
All attempted class actions (564 cases)	12	20	37	27	4
All class actions with motion for certification (207 cases)	34	20	27	15	4
All certified class actions (78 cases)	90	1	4	1	4

[a] Includes closed cases only.

Terms of Settlement and Distributions

Although about 12 percent of our closed cases resulted in a class settlement, some respondents declined to provide detailed information about the terms of those settlements, the awards of attorneys' fees and costs, and the distribution of benefits to class members. We cannot determine whether the surveys with complete information on negotiated outcomes comprise a representative sample of all insurance class actions settlements in our data. Therefore, the findings we report must be understood as illustrative only. It should be added that information we collected on compensation does not include the value of any injunctive relief that might have been obtained for current and future class members. Nevertheless, although we cannot generalize from such findings, they do offer an unusual glimpse into the range of outcomes that characterize how insurance cases are resolved on a class basis.

Common Fund, Class Size, and Available Benefits. Total funds offered by the defendants to pay benefits to class members and the fees and expenses of class counsel were reported in 32 cases and ranged from $360,000 to $150,000,000 with a median fund size of $2,600,000. The common fund was less than $5 million in 63 percent of the reported cases, a finding of interest in estimating CAFA's impact.

In the 36 cases in which the respondent provided information on class size estimated at the time of settlement, the classes ranged from as small as 127 members to as large as 4,300,000 members with a median of 28,000 members.

The median benefit available to each class member in the 22 cases for which we had the data was $97. While some settlements contained the potential for a class member to collect as little as $3.50, other cases offered about $61,000. The larger-value cases involve uninsured or underinsured motorist coverage issues or disputes over the payment of contingency fees in subrogation cases.

Notification and Claiming Procedures. We also asked how class members were notified of their rights under the settlement, and we received answers in 43 cases. Of these, about half had the claimants notified by both direct mail and by publication. Another quarter was notified exclusively by direct mail and most of the remaining cases relied on publication alone. In 80 percent of the 36 cases for which we have information on the mechanism used for claiming against the fund, claimants were required to submit a written form to the insurer or settlement administrator.

Final Distributions. A mean average total payout of $9.5 million was made in the 39 cases for which we have information on the total direct monetary benefits distributed to the class, but this figure reflects a single case in which $149 million was paid out. Distributions were typically much smaller, with a median total payout of $500,000 and, in one case, the total was just $200.

In some instances, the total payout represented a fraction of the net compensation fund (which is the total common fund less class attorneys' fees and expenses) theoretically available to the class at the time of settlement. In seven of the 23 cases with complete information, fund distribution rates were at or near 100 percent (the median was 79 percent). But another quarter of the cases reflected a fund distribution rate of 13 percent or less and, in three instances, only 4 percent of the original net compensation fund was paid.

The number of class members who ultimately received at least some direct monetary benefit was reported in 33 cases. In four of these cases, payments were made to fewer than 100 individuals or businesses. Although the mean number of recipients was 27,000 class members and the median size was 1,500 members, in one instance, only a single class member received any direct benefits at all. In contrast, there were 600,000 compensated class members in the largest reported case.

The number of actual beneficiaries was often much smaller than the class size estimated at the time of settlement. In 10 of the 29 cases in which both the potential class size and the number of claims paid were reported, 100 percent of the projected number of class members received some amount of direct compensation. In one case, however, less than 1 percent of the estimated total was paid. The average case paid benefits to 45 percent of the estimated number of class members at the time of settlement, while the typical case had a much smaller claiming rate, with a median percentage of just 15 percent.

Class Counsel Fees and Expenses. We received information on the award to class counsel for fees and expenses in 48 cases. Fees and expenses in reported cases ranged from $50,000 to $50,000,000 with a median award of $554,000. We did not directly collect information on the specific percentage that the judge might have applied against the gross common fund to calculate the attorneys' fees and expenses, but we can approximate a fee and expense percentage for 27 cases: It ranged from 12 to 41 percent of the fund, with a mean of 29 percent and a median of 30 percent.

Another way to look at attorneys' fee and expense awards, however, would be to use the size of the actual monetary distribution to the class as the benchmark. This would help gauge the effectiveness of class counsel at putting compensation into the pockets of class members. "Effective" fee and expense percentages—in other words, ones based on the fee and cost awards divided by the sum of the distributed benefits, attorneys' fees, and other costs—increase to a median average of 47 percent (based on 36 cases in which this information was available). In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent.

Legislative and Regulatory Issues

What the Data Suggest About the Class Action Fairness Act of 2005

CAFA modifies the rules for federal court jurisdiction over class actions based on the diversity-of-citizenship test. Before CAFA, *all* named plaintiffs in a class action had to be citizens of states differing from those of *all* defendants, a situation that would not be met in class actions seeking national classes. In addition, there was a minimum monetary threshold of $75,000 to be met by every plaintiff in the case.

With CAFA, the rules for diversity jurisdiction have eased, though for class actions only, so that diversity of the parties could be achieved if *any* class member or *any* defendant was a citizen of a different state from any other defendant and if the aggregated, not individual, amount in controversy for all class members exceeded $5 million.

We analyzed our data to determine the potential under the new law for removal to the federal system of insurance class actions now litigated in state courts. In all, 89 percent of state court cases in our data had either a multistate class or an out-of-state defendant. The world of insurance class actions is therefore one dominated by cases with interstate implications. But location of the defendant is only half of the puzzle, because CAFA requires both diversity of citizenship and aggregate claims exceeding $5 million. Based on the limited number of class actions for which we had information on settlement funds, 63 percent of cases had gross common funds at the time of settlement worth less than $5 million. If the value of insurance class actions generally reflected these settlement figures, just 33 percent of state filings would be removable under CAFA's liberalized rules for diversity jurisdiction, compared to 89 percent if the monetary threshold issue were ignored.

Overlap of Class Action Litigation and Regulation

Because some have asserted that the outcomes of class actions can conflict with the intentions of state insurance regulators, we identified cases in our database that were most likely to have regulation-related aspects.

To do so, we conducted a separate survey of staff members of state departments of insurance to rate the issues in our cases by the degree to which the administrators believed the issues related to their regulatory authority. Cases identified as having the strongest relationship to administrative regulation involved allegations that defendants promised life insurance premiums would "vanish" over time, automobile uninsured or underinsured motorist coverage issues revolving around what took place at the time of initial policy purchase, patterns and practices involved in property claim adjustments, first-party collision or comprehensive automotive claims involving disclosure of the use of aftermarket parts, and automobile uninsured or underinsured motorist issues over multicar coverage and pricing. We found that cases with strong regulatory implications have similar outcomes (in terms of the rates of class settlements and pretrial rulings in favor of the defense) to those with more modest ties to regulatory issues.

One might expect defendants to routinely assert that issues in a class action involving a regulated entity would be better handled by administrative agencies. But in fact, in only 15 percent of insurance class actions in our data did defendants claim that state or federal regulators had either exclusive or primary jurisdiction over the issues in the case. Even in cases with issues rated as having a strong relationship to the regulatory regime, the defense was raised just 23 percent of the time. Regulatory authority is not an issue that defendants are routinely bringing to judges' attention.

We expected to see state insurance departments getting involved in many insurance class actions, especially those with strong regulatory implications. For example, the agencies might intervene directly as parties, file amicus briefs, or submit affidavits. But perhaps because defendants are not raising these issues during the litigation, only 8 percent of all class actions were reported to involve governmental agencies and entities in any way. Even in cases with issues rated as having a strong relationship to the regulatory regime, intervention of some sort occurred in just 9 percent of such cases.

It will be interesting to see whether insurance regulators become more involved in class actions in the future as a result of CAFA. One explanation for the low rate of direct regulator involvement was that the agencies were unaware of the pendency of most insurance class action litigation. But the new law now requires that regulators be notified of all class action settlements submitted for judicial review in federal courts. Since a larger percentage of insurance class actions may now find themselves in a federal forum, the notification requirement may be one of the new act's more enduring legacies.

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Abbreviations

ACV	actual cash value
BI	bodily injury coverage
BJS	Bureau of Justice Statistics
CAFA	Class Action Fairness Act of 2005
CAPA	Certified Automotive Parts Association
DPW	direct premiums written
DOI	state department of insurance
ERISA	Employee Retirement Income Security Act of 1974
FJC	Federal Judicial Center
FRCP	Federal Rules of Civil Procedure
HMO	health maintenance organization
ICJ	Institute for Civil Justice
MDL	multidistrict litigation
NADA	National Automobile Dealers Association
NAIC	National Association of Insurance Commissioners
OEM	original equipment manufacturer
P&C	property and casualty
PIP	personal injury protection
PSLRA	Private Securities Litigation Reform Act of 1995
RICO	Racketeer Influenced and Corrupt Organizations Act

UIM	underinsured motorist
UM	uninsured motorist
UR	utilization review

CHAPTER ONE

Introduction

Perhaps no other single feature of the U.S. civil justice system generates such controversy as class actions do. Champions of class actions point to a long history of success in the civil rights arena and proclaim that such cases are an efficient way for consumers to address many types of corporate wrongdoing, especially when the matters involve small sums of money on an individual basis or would otherwise escape the attention of government regulators. Detractors deride them as little more than legalized blackmail, with the threat of a headline-making verdict driving defendants to settle even meritless claims. It is a debate that thrives on anecdotes because there is very little information available about what takes place in the vast majority of these cases.

The debate has become especially heated in recent years for a number of reasons. First, some commentators have claimed that class action litigation has been increasing both in numbers of cases and in the scope of the claims being made. But exactly how frequently class actions are filed—and, perhaps more important, the rate at which they are certified and settled—is largely unknown.

Second, there have been complaints from some quarters that plaintiffs' attorneys have essentially unfettered discretion to file class actions of a national scope wherever they choose. The charge of such "forum shopping" helped motivate new federal legislation that will undoubtedly move at least some class litigation out of the state courts and into the federal courts for processing. But critics of this legislation warn that many such cases likely to be transferred to federal courts and overseen by federal judges will, in fact, deal solely with laws enacted by state legislatures and concern only consumers located within a single state.

Third, concerns have been voiced that particular class action settlements have failed to achieve the social objectives envisioned by the drafters of the procedural rules that define how these mass actions are litigated and resolved. Settlements characterized by corporate defendants buying universal peace on the cheap as a result of large payouts to class counsel with only token aggregate compensation to the class members are touted as examples of a process gone awry.

Finally, some observers claim that class actions are increasingly functioning as a substitute for administrative regulation. Some class action cases certainly deal with many of the same issues as do the government regulators who oversee the operations

of entire industries, but these observers suggest that, in some instances, the litigation outcomes either contradict regulators' decisions or sanction actions twice, opening the possibility of excessive deterrence. Others assert that, in many instances, regulators are unable or unwilling to address corporate wrongs when the losses to each consumer involve relatively small sums of money, thus leaving mass litigation as the only meaningful way to force the disgorgement of ill-gotten gains and to require corporations to adhere to consumer protection laws and administrative regulations. In the absence of data on the subject, there is no way of knowing whether there is indeed a high level of overlap between class actions and regulation as some claim, whether that overlap results in inefficiencies, and whether these two forms of oversight work in tandem to remediate harms and deter future misconduct.

This study was undertaken to supply some much-needed empirical data to address these issues. Empirical evidence about class actions, especially those litigated in state courts and those involving nonsecurities issues, is very sketchy. And what is known about them is almost entirely focused on certified class actions, not about the much larger number of attempted or putative cases.

In response to this need, this monograph provides a descriptive analysis of both certified and attempted class actions against the insurance industry, a sector of the economy in which governmental regulation is pervasive. We collected information through surveys sent to large insurers that had reported experience as defendants in class action cases. In this way, we could analyze a set of cases regardless of where they were filed or whether they were formally certified.

The Data Gap

Despite the fact that class actions can involve enormous stakes and have staggering consequences for our society as a whole, we really do not know much about how many there are, what drives them, where they are being filed, the nature of the claims being made, how much they cost to conclude, and what sorts of results are ultimately achieved. In many class actions, only those directly involved (typically the class counsel, the defendants, the defendants' attorneys, and the supervising judge) are even aware of the litigation. This lack of knowledge is not just of concern to academic researchers; without a more complete picture of what takes place in these cases, policymakers and the public will not have the tools necessary to craft legislation and procedural rules that will enhance the effectiveness of class actions while tempering any excesses.

Research has been limited primarily by the lack of public data. It is simply not possible to generate a comprehensive list of all class actions being litigated at any one time in this country or even in individual jurisdictions. For a variety of reasons, most court systems do not centrally record when a party seeks to represent others similarly situated (as reflected by language either in the original complaint or in a subsequent

motion) or even when a judge has formally certified a class.[1] In these jurisdictions, at least in terms of recordkeeping, a multimillion-member class action is often no more than just another docket number.[2]

The federal courts do perhaps the best overall job of tracking class actions active on their own dockets, but any information that might be gleaned from such records only reflects the experiences of this specialized, albeit extremely important, segment of our overall civil justice system. Unfortunately, state courts, as a general rule, are far less rigorous when it comes to keeping tabs on class actions. While staff members at individual court branches could probably identify a few recent or memorable cases if pressed, with few exceptions, obtaining accurate statewide counts is almost impossible. Yet what little evidence is out there does suggest that many more class actions are likely to be brought in state—rather than federal—courts of law (see, e.g., Hensler et al., 2000, Figure 3.4, p. 56). As a result, there are no reliable estimates of the number of class actions certified each year across the country and certainly no estimates, reliable or otherwise, of cases in which class treatment was sought but that were resolved in another manner.

Private data are even more inaccessible. Much of what takes place in these cases that is of interest to policymakers transpires outside the courtroom and therefore outside of any public scrutiny. We know, for example, little about what drives the decision to bring a representative action on behalf of large numbers of individuals who may be as yet unaware of the alleged harm, we know little about the negotiations that sometimes take place between plaintiffs' attorneys seeking to represent a class and the potential defendants in such a claim long before the matter is formally filed, and we know little about the long-term effects these cases have on corporate behavior, either in terms of deterring future wrongdoing or stifling desirable innovations in the marketplace. Perhaps most frustratingly, we often do not know much about whether the case itself ultimately achieved the most direct goals of the class action process: Despite the fact that class action settlements must typically be given judicial approval in open court, unless the judge requires ongoing disclosure, defendants and class counsel are under no continuing obligation at all to publicly report how well a settlement fund is actually being distributed to class members. Whether the class as a whole received 100 percent of the promised compensation, 50 percent, or only a tiny fraction may always remain a mystery.[3] In some instances, outsiders are barred from obtaining detailed information from the parties due to nondisclosure or confidentiality agreements exe-

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[1] See Appendix B for a discussion of court recordkeeping practices as they relate to class actions.

[2] Eyes-on reference to the court's official file that typically contains all pleadings, orders, and other documents filed in the case would certainly reveal whether an individual case had any class action characteristics. But unless that fact is recorded elsewhere in a more easily accessible form, it would essentially remain hidden to both court administrators and to outside researchers.

[3] See, e.g., discussion of judicial oversight over class fund distributions in Hensler et al. (2000, pp. 454–463).

cuted between opposing counsel at the time of settlement (and sometimes given the stamp of approval by the judge). In a process that arguably should be the most open and public of all types of civil litigation, outside scrutiny is often impossible.

Researchers have employed a number of different approaches for identifying class actions for further study, including looking at cases in just those few courts that have some means of reliably tracking the certification process, reviewing court files case by case in a small number of courthouses to locate the handful of class actions that are overwhelmed by the much larger numbers of ordinary civil litigation, performing electronic searches of the relatively few reported judicial pretrial decisions to identify cases in which class action issues have arisen, and combing through legal news sources for stories about ongoing or recently concluded litigation. Each of these approaches has potentially serious drawbacks, as we describe in Appendix B. Other avenues for understanding the class action experience, including intensive studies of selected cases and qualitative interviews with attorneys, judges, and corporate managers who may be repeat participants in this sort of litigation, are helpful in illuminating some of the darkest shadows in this area but often raise more questions than they answer.

Study Questions and Approach

This study was designed to overcome some of these limitations by using a survey to gather from defendants data that are not reasonably available from federal or state court sources. The survey was designed to answer the following questions about the world of insurance class action litigation:

- What is the balance between state and federal filings?
- What types of classes are being sought in these cases?
- Where are these cases being filed?
- Has there been a growth in the number of cases filed in recent years?
- What types of allegations are plaintiffs making?
- How are judges ruling on motions for class certification?
- What are the outcomes of these cases, both those that are certified and those that are not?
- What are the features of settlements in these cases?
- To what degree will recently enacted legislation liberalizing the rules for federal diversity jurisdiction affect insurance class actions?
- To what extent do these cases involve issues relating to our state-based system of insurance regulation, and how do outcomes differ for cases that deal with regulatory issues?

To address these questions, we surveyed a sample of insurance companies operating in the United States as well as the staff of state departments of insurance (DOIs). In the insurer-targeted data collection, we ultimately received 988 case-level questionnaires from 57 large insurance companies operating in the United States, describing 748 distinct cases that were open at at least one point during the period of 1993 to 2002. The surveys asked each responding company to describe, for each such case in which it was a named defendant, the courts of filing and disposition, the names of other defendants in the case, the lines of insurance involved, the plaintiffs' key allegations, key statutes involved, whether the defendant raised the issue of regulatory jurisdiction, the description of the actual or putative class, the geographical scope of the actual or putative class, the outcome of any certification process, the manner in which the case was resolved, and the details of any settlement or trial verdict for the plaintiffs.

To address the question of whether the issues being litigated have any regulatory ramifications, we also conducted a separate survey of staff members of a number of DOIs to rank the key allegations made by the plaintiffs in our cases by what the respondents believed to be the allegations' potential relationship to the traditional activities of insurance regulators in their states.

The survey instruments are part of a separate working paper (Pace et al., 2007).

The Term *Class Action*

We use the term *class action* to mean any civil case in which parties indicated their intent to sue on behalf of themselves as well as others not specifically named in the suit at some point prior to the final resolution of the matter. This definition would obviously include a case in which a class was formally approved by a judge (a *certified* class action) but would also include a *putative* class action, in which a judge denied a motion for certification, in which a motion for certification had been made but a decision was still pending at the time of final resolution, or in which no formal motion had been made but other indications were present suggesting that class treatment was a distinct possibility (such as a statement in a complaint that the plaintiffs intended to bring the action on behalf of others similarly situated). Thus, for purposes of this monograph, *all class actions* includes both certified and putative cases unless otherwise indicated.

In this monograph, we generally characterize class actions as if they always involve a large plaintiff class[4] against one or a handful of corporate defendants and as if the primary relief sought is always monetary compensation. In fact, defendant classes are cer-

[4] It should be noted that not all of the plaintiff classes in our data consisted of individuals who purchased the defendant's insurance policies. Examples include class actions in which the class members are small-business policyholders involved in litigation over commercial line insurance, health care providers who have received an assignment of benefits from individual insureds, third-party claimants suing the alleged tortfeasors' liability insurers for wrongful claim practices, and beneficiaries such as employees under a workers' compensation policy

tainly possible, as are cases in which the defendants are individuals and not businesses or governmental bodies. In addition, many class actions involve prayers for injunctive and other equitable relief, sometimes in addition to requests for monetary damages and sometimes as the exclusive remedy. In the world of insurance class actions that are the subject of this monograph, however, the primary defendants are indeed corporate insurers, defendant classes are likely to be rare (though it is not unknown to have cases in which dozens, or even hundreds, of insurers are named individually), and monetary compensation appeared to be the typical relief provided by class action settlements.

Organization of This Monograph

Chapter Two offers a summary description of our methods of data collection and analysis. Chapter Three presents our main findings, and Chapter Four examines survey results to clarify the relationship between regulatory issues and the claims and defenses raised in our sample of class actions. Chapter Five summarizes the study's conclusions.

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or survivors under a life insurance policy who bring an action against an insurer even though they are not the named insured.

CHAPTER TWO

Summary of Methodological Approach

In this chapter, we describe how we conducted this research, from the decision to focus on the insurance industry, to the identification of target companies, drawing the sample, fielding the surveys, and collecting and analyzing responses. We conclude by offering caveats about the limitations of our approach. Pace et al. (2007) has a complete set of the survey instruments used in this research.

The Decision to Survey Insurers

There is no practical way to reliably identify all class actions on the dockets of the nation's courts. Researchers have tried various approaches over the years with the goal of selecting a representative subset of those cases for further study but, depending on the method, the class actions collected might be concentrated in just a few, perhaps unrepresentative, jurisdictions or skewed toward particular types of cases. Although such studies have contributed significantly to what is known about class actions, our goal was to avoid an approach that would give undue weight to cases litigated in federal court or just a few select state courts or would underrepresent more routine and less publicized cases. We chose a data collection strategy targeted not at court records or secondary media sources, but at the parties themselves.

Such party-targeted data collection has its limitations. It is limited to gathering data on only those types of cases in which the identity of the potential parties could be determined in advance; it essentially requires focusing in on just a single case type; and it could be subject to significant problems in response rates, self-selection, and bias. Nevertheless, we viewed such an approach as a means of supplementing the important findings on class action litigation reported by other researchers in the past.

We initially hoped to seek information from both plaintiffs and defendants in these cases. But the universe of potential class action plaintiffs, even if only selected types of claims are of interest, can number in the millions. Focusing on attorneys rather than litigants would not be an option either, because there is no way to realistically identify all or even a substantial number of the attorneys in the United States with class action practices.

For a defendant-based survey, we realized that we would have to choose industries with businesses that were readily identifiable and in which class actions were known to occur frequently enough to make the data collection effort worthwhile. It was also our goal to select an industry subject to extensive governmental oversight to explore issues related to the interplay of class actions and regulation. We considered a number of possible industries, such as consumer finance, pharmaceutical manufacturers, and utilities, and ultimately chose the insurance industry.

Drawing the Sample

To identify insurers, we used A. M. Best Company's *Best's Key Rating Guide*, a data set that is primarily intended as an overview of company performance for the bulk of insurers admitted to do business in the United States. When we obtained a copy, the guide came in two data sets, one for U.S. property and casualty (P&C) insurers (A. M. Best Company, 2002b) and one for U.S. life and health insurers (A. M. Best, 2002a). According to A. M. Best, the two data sets taken together cover "property/casualty, life, annuity, health, health maintenance organizations (HMOs), reinsurance, and title insurance companies, . . . representing virtually all active insurers operating in the United States" (A. M. Best Company, 2004, p. vii). We used the 2002 edition for both markets, which contain records for 3,173 P&C and 1,821 life and health companies and company groups, covering the years 1997–2001.

Although the A. M. Best data sets appear to be the most comprehensive listings available of insurers in the United States, they clearly do not cover every company selling insurance policies. For example, discussions with A. M. Best representatives revealed that when the 2002 edition was produced, there were known shortcomings in the listings for HMOs, reflecting the fact that, in some states, HMOs are regulated solely by the local equivalent of a state department of corporations or a state department of health and, as such, might not have to file a financial statement with a DOI (such statements are one of A. M. Best's primary sources of data). Although later editions were intended to address that problem, the version we used would not have included companies that provided HMO services without selling more traditional versions of insurance as well. It may be that other nonstandard or very specialized types of insurers would not have made the A. M. Best listings either.

We excluded entries in the A. M. Best data that represented aggregated information for entire insurance groups (the individual companies within those groups remained as potential candidates as did companies with no group affiliation). We then collapsed the separate records for each of the five years' worth of reported data for each company by aggregating the annual values in fields representing dollar figures and other continuous amounts (such as the number of premiums written) and by using the descriptive information such as lines of insurance written and state of incorporation

as they appeared in the record for 2001. Sorting these 2,858 P&C and 1,821 life and health companies within the two markets in descending order of aggregate (1997–2001) direct premiums written (DPW),[1] we initially selected for our sample the largest companies whose combined DPW accounted for 65 percent of the total for their respective markets. This process yielded 273 large insurers (166 P&C and 107 life and health companies) for our sample of insurers.

Our primary intent was to survey these relatively larger companies because the types of cases brought against them were likely to reflect the bulk of insurance class actions filed in courts across the country. However, we also wished to see whether smaller entities were involved in suits with issues that were markedly different than those in which the largest insurers were defendants. Approximately 100 additional companies from each market that fell under the 65-percent DPW cutoff were added to a secondary sample of smaller insurers. We selected the additional companies by selecting every 26th insurer from the ranked list of about 2,600 smaller P&C companies and selecting every 17th insurer out of the ranked list of about 1,700 smaller life and health companies. In the end, some 476 insurers in all were selected as the initial targets of the data collection.

The Initial Survey

We used a two-tier survey design, with an initial canvassing of insurers to see whether they had been named as defendants in class actions and, for those who had, a follow-up survey would seek more detailed information about such cases.

Using A. M. Best's contact information, the initial package was sent to each of 269 P&C and 207 life and health insurers. The package contained a cover letter, a letter from the Class Action Insurance Litigation Working Group of the National Association of Insurance Commissioners encouraging participation, and the initial contact survey.

Of the 476 initial packages sent out, we ultimately received an answer of some kind from 205 companies (see Table 2.1). We dropped 12 companies from the sample because they were no longer operating or could not be located successfully. The remainder of companies in the initial survey mailing failed to return the surveys.

Five of the 205 respondents indicated that they would not participate in any aspect of the project and one response was unusable. Thus, 199 insurers answered the question as to whether they had been defendants in a class action over the preceding

[1] A. M. Best defines this measure as "the aggregate amount of recorded originated premiums, other than reinsurance, written during the year whether collected or not at the close of the year, plus retrospective audit premium collections, after deducting all return premiums" (A. M. Best, undated).

Table 2.1
Response from the Initial Survey

	All Surveys		Large Insurer Group		Small Insurer Group	
Response Type	**N**	**%**	**N**	**%**	**N**	**%**
Returned initial questionnaire, indicated whether defendant was ever in insurance class action, agreed to participate in any follow-up survey	184	39	116	42	68	34
Returned initial questionnaire, indicated whether defendant was ever in insurance class action, declined to participate in any follow-up survey	15	3	14	5	1	0
Returned initial questionnaire but responses not usable	1	0	0	0	1	0
Declined to participate in any aspect of study	5	1	3	1	2	1
Did not respond	259	54	139	51	120	59
Dropped; company appeared to have gone out of business	4	1	0	0	4	2
Dropped; unable to identify correct address for company	8	2	1	0	7	3

decade, an overall effective response rate of 42 percent. The rate was somewhat better for the large insurer group (48 percent versus 34 percent for smaller companies) and about the same for both market segments (43 percent for P&C insurers and 40 percent for life and health insurers.)

The initial survey primarily asked whether the company had ever been named as a defendant in any case open at any time from 1993 to 2002 in which class action status was sought, even if the case was never officially certified as a class action. Of the 199 complete respondents, 138 reported prior class action experience, 56 had not, and five companies could not say with certainty whether they had or had not. While this may appear to imply that about 71 percent of U.S. insurers (91 percent in the large insurer group, 32 percent in the smaller group, 73 percent for P&C insurers, and 69 percent for life and health insurers) were defendants in at least one attempted class action at some point from 1993 to 2002 (excluding the five respondents who were unsure), two important points should be taken into consideration. First, the 71-percent figure does not take into account the differences in the actual litigation experiences of those who completely responded to our survey and those companies for whom we do not have usable information, either because the companies declined to participate or because we were unable to contact them. It is possible, for example, that companies that had been named defendants previously would be more willing to participate in the survey than

those that did not, perhaps because of a perception that participation would ultimately help address their concerns over the use of the procedural device. It is also possible that some companies with no such experience declined to respond because they incorrectly believed that only those that had been involved in at least one case should return the initial survey. Second, the finding is not weighted either for nonresponses or for the sampling strategy used for selecting the smaller insurers in the P&C and life and health markets. In any event, because the chance that an individual company would respond may depend on the content of the response, there is a strong potential for bias and the 71-percent figure should be seen in that light.

The Secondary Survey

Of the 138 insurers reporting prior experience with class actions, 14 indicated on the initial survey that they would not provide additional information about the specific cases in which they were defendants. A second survey package was sent to the remaining 124 companies, each package containing a cover letter, a set of instructions, a general background questionnaire about company recordkeeping practices and total number of cases in which they had been involved, and a number of case-specific questionnaires to be filled out for each case in which the insurer had been a defendant.

The focus of the surveys in this round of data collection was somewhat narrower than in the initial set. Here, participants were specifically asked not to report on class actions brought by the insurers' own employees, agents, brokers, or adjusters, on securities class actions brought by the insurers' own shareholders, on cases in which the insurer is named only in relation to a direct action claim, and on any case that did not relate to the business of insurance. Conceivably, some insurers that reported class action experiences in the first round of surveys might have been solely involved in these excluded sorts of cases but, in fact, all of those responding to the second round reported that they were defendants in least one case that fit the desired profile.

The general background survey asked, for each year between 1993 and 2002, whether the company was (1) able to identify all attempted class actions in which the insurer was a defendant in a case open in that year, (2) only able to identify just those cases open in that year that were eventually certified for class action treatment, or (3) unable to provide reliable information about class actions open during that year (regardless of whether certified at some point). The intent of this question was to better understand whether there might be larger numbers of putative cases than were reported. The company was also asked to provide the number of class actions meeting the study's criteria filed in each of the years between 1993 and 2002 as well as the total of all cases filed in 1992 and earlier. This was intended to confirm whether we had received case-specific surveys for every class action known to the responding company.

The case-specific questionnaires sought descriptive information about the case such as its caption and docket number; jurisdiction at time of filing and resolution (or where open at the time of answering the survey); last known court location; dates of filing; number of corporate defendants in the case; whether removed or remanded at some point; whether subject to federal multidistrict litigation proceedings; whether similar cases were also filed; the lines of insurance that were at the center of the issues in the case; the key allegations that the plaintiffs made; the key statutes involved in the case; aspects of the case related to administrative regulation; a description of the actual or proposed class including the geographical coverage; details about the process for seeking certification; the method of disposition if resolved; and, if the case ended in a class settlement or a class trial in favor of the plaintiffs, the details of the agreement or verdict.

Of the 124 secondary survey packages sent out, we received at least case-specific information from 63 companies for a 51-percent response rate in this phase of the study.[2] As with the initial survey, larger companies were more likely to respond, with a rate of 56 percent (of 104 such companies) versus 25 percent (of 20) of the companies in the small insurer group. P&C companies (63 percent of 71 such companies) were also more likely to respond than life and health insurers (34 percent of 53 companies).

We received a total of 1,076 case-specific surveys, though we later determined some to be describing cases outside of the scope of the research. After rejecting the inappropriate cases, we had available 994 surveys from 62 companies (988 surveys from the major insurers and six surveys from the sample of smaller companies).

Shaping the Analysis Data Set

Large Versus Small Insurers

One concern involved the low response rate for the smaller company subset. Our original intention was to weight returned surveys from these insurers to reflect the manner in which the companies were selected. But with so few case-level surveys returned, the application of case weights would give this handful of responses disproportional influence on our findings. For this reason, we dropped the small companies from our sample.

Using only the data from the large insurer group, we had 988 surveys available for our analysis. Fifty-seven companies returned the surveys:[3] 904 surveys from 42 P&C

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[2] If the 14 companies who, in the initial round of surveys, reported prior class action experience but also indicated that they would not participate in the second round are treated as nonrespondents, then the effective secondary survey response rate would be 46 percent. This broader definition of nonresponse results in a 50-percent rate for larger companies, a 24-percent rate for the small insurer group, a 54-percent rate for P&C companies, and a 33-percent rate for life and health insurers.

[3] The 57 companies represented 19 insurance groups.

insurers and 84 surveys from 15 life and health insurers. The responding P&C insurers were responsible for 29.7 percent of all DPW in that market, 45.7 percent of all DPW by all large P&C insurers (i.e., those in the top 65 percent of total DPW that became the primary focus of our survey), and 72 percent of all DPW by large P&C insurers that had indicated in the first round of surveys that they had been defendants in class action litigation. Responding life and health insurers were responsible for 9.1 percent of all DPW in that market, 14.1 percent of all DPW by all large life and health insurers, and 32.8 percent of all DPW by large life and health insurers with reported class action experience.

Nonrespondents

One possible approach would have been to adjust for nonrespondents by applying nonresponse weights to cases depending on reporting company characteristics, perhaps on the basis of the DPW, the lines of insurance written, or the states in which the insurer does business.

However, our ability to develop reliable nonresponse weights is hindered by a dearth of existing empirical data on the relationship between a company's characteristics and its propensity to be named as a defendant in a class action. Although lines sold and market share might play a role, in fact, we would be more or less guessing at the factors that result in a company being a target in one of these cases. It is possible, for example, that larger companies are more likely to be sued because the stakes in these cases are larger as well due to the bigger pool of policyholders available. On the other hand, it is possible that smaller companies with less sophisticated or less experienced management might not institute adequate safeguards to reduce exposure or might be more prone to employ riskier practices in the sale and service of insurance policies. Smaller companies might also be perceived as easier targets for relatively uncomplicated litigation. Any of these assumptions would be equally speculative and, in fact, propensity to be sued might well not be reflected by any descriptor contained in the A. M. Best databases.

Another concern involved the fact that a number of target companies are part of a larger insurer group or other administrative umbrella. The characteristics that we might use for adjusting for nonresponse could be distorted if a company's decision to participate and provide detailed data were related to whether other companies in that same group also had decided to cooperate with the RAND survey.

A further issue revolved around differences in reporting capabilities among participating companies. One company might be able to fill out surveys on every class action ever brought against it while other insurers with the same set of characteristics (e.g., lines of insurance written) might be able to report on only the newest cases, or only on certified cases, or only on cases assigned to certain regional offices. Such a situation overwhelms any accuracy provided by weighing for nonresponse rates.

As a result, we thought that the application of such weights would not markedly increase the accuracy of our reporting and might, in fact, distort the results or imply an unwarranted level of precision. We instead decided to simply describe the experiences reported by the participating insurers without modification and urge the reader to take these known limitations into account when reviewing the tables and charts herein.[4]

Unit of Analysis

As indicated above, in a number of instances, we received surveys from two or more insurers that were, in fact, describing the same class action. Presumably, we could have performed our analysis on a company-case basis because, while multiple insurers might be reporting on the same court filing, outcomes may be different for different defendants in the same case (for example, some defendants might exit early because of summary judgment motions and the like, while the remaining defendants could reach an agreement to settle on a class basis). Company-case analysis would also facilitate reporting the results based on the characteristics of the defendant returning the survey. On the other hand, it gives additional, and perhaps undue, weight to those cases with multiple defendants. We collapsed multiple surveys that were discussing the same court filing (based on the court and docket number) into a single case record. In case of a conflict, we generally chose the information on the survey that appeared to described the ultimate resolution of the litigation. After this processing was completed, we were left with 748 unique cases.

When the unit of analysis is shifted from individual surveys returned to unique cases, discussing class actions in terms of the size, primary market, or other characteristics of the defendants becomes problematic because many of these cases involve more than one reporting insurer. Indeed, some cases named hundreds of defendants, the majority of whom were neither insurers who responded to our secondary survey nor even insurers targeted in the original sample. For the most part, the tables and figures in this monograph do not describe defendant characteristics, so the problem in such instances is moot. But in our discussion of the potential impact of the Class Action Fairness Act of 2005 (CAFA) (Public Law 109-2) in Chapter Four, the analysis requires the identification of the corporate citizenship of at least one defendant in the case and, in that same chapter, we provide details about the lines of insurance that the reporting defendants sold. To perform such work when multiple surveys were returned for the same case, we assigned one of the responding insurers to be the representative defendant, typically using the respondent whose survey provided the most complete information. Using the representative defendant as a guide, 670 of the unique cases

[4] A related concern involves the issue of clustering. We did not take clustering into account and, as such, our computation of confidence intervals assumes that cases are independent. However, these cases are likely correlated, since there are multiple cases from the same state or even the same company. As a result, there may be more error in the estimates than the reported margins of error indicate.

were brought against 33 P&C insurers and 78 were brought against 14 life and health insurers.

Caveats

Although the results provide important insights into the world of insurance class actions, a number of significant limitations need to be kept in mind when interpreting the tables and figures presented herein. Participation in the data collection was voluntary and many insurers chose not to respond to our surveys, including some companies that have repeatedly been named as defendants in cases attracting widespread media attention. As there is no practical way to determine which insurers with class action experience declined to participate in our study, we cannot provide a precise description as to how these results generalize to any particular population of insurers. Nevertheless, we believe that the results are most generalizable to the experiences of the very largest P&C insurers in the country, primarily those whose primary business is the writing of automobile private passenger coverage. The results are least generalizable to the experiences of life and health insurers, as such companies had a far lower response rate than we hoped for. Other known limitations include the following:

- **The cases for which survey forms were completed are a nonrandom subset of all class actions against insurers.** Given the response rate for companies that received the survey packages, and given the problems in internal recordkeeping reported by some of those who did participate in the data collection, the cases reflected in the tables and figures presented herein clearly do not represent a census of insurance class action litigation. Moreover, as described more fully in the caveats that follow, cases for which we do have data are likely to be a nonrandom subset of all insurance class actions.
- **Surveys were only sent to those domestic companies specifically identified as P&C, life, or health insurers.** This monograph does not reflect the class action experiences of companies that A. M. Best Company did not identify as involved in one of these markets. Thus, reinsurers, certain types of professional liability insurers, and others primarily writing specialty lines or other nonstandard insurance products would not have been included in our sample. Additionally, our data would not represent class actions filed in U.S. courts against foreign insurers.
- **The results reflect only the experiences of large insurers found in the top 65 percent of all premiums written in their respective markets.** Although a sample of smaller insurers were included in the initial mail-out of surveys, we believed that the response rate for those companies was too low to provide reliable data and they were dropped from our analysis. It is possible that the overall characteristics of class actions in our data would look very different had we included smaller insurers.

- **The experiences of life and health insurers are underrepresented in the data.** On the case-specific questionnaire, life insurers and health insurers had an overall response rate (both in terms of number of companies surveyed and in terms of market share) that was about half of that seen for companies in the P&C market.
- **Not all insurance-related class actions are included.** Class actions brought solely against insurance agents, insurance brokers, purchasers of insurance (such as employers), policyholders, beneficiaries, and others would not be included, even if the issues involved clearly touched on insurance-related matters, unless at least one defendant was an insurer selected as part of our sample. Additionally, participants were specifically asked not to report on certain types of class actions that do not relate to the business of insurance, such as those brought by the insurers' own employees or shareholders.
- **The jurisdictions in which the reported cases were litigated are likely to reflect the market penetration of the responding companies.** Not all insurance companies write policies in all 50 states and the District of Columbia. Even those that do have a national presence do not have the same relative share of the market in each state. If the likelihood that an insurer would be the subject of a class action in a specific jurisdiction bears any relationship to the degree to which the insurer conducts business in that same jurisdiction, then the geographical distribution of our cases will be quite different from what it would be if all companies originally contacted had responded.
- **Respondents may have been more likely to have reported certified cases.** Because of their lower profiles and because many wind up being dismissed or resolved by a modest settlement with a single plaintiff, putative class actions may not have been tracked internally in a way that would allow themselves to be readily identifiable when surveys were distributed. Information collected as part of our surveys suggested that most companies do a far better job of keeping tabs on certified class actions.
- **Respondents may have been more likely to have reported newer cases.** A number of responding insurers indicated that older class actions litigated near the start of our study period may not have been tracked in a way that would allow them to be as readily identifiable as newer ones that were still open or had been recently concluded when surveys were distributed.
- **Respondents might have self-selected the particular cases for which surveys were returned.** Although we have no evidence of respondents picking and choosing the cases that they included in their returned surveys, the possibility does exist.
- **Respondents might have self-selected the particular questions that were answered in the surveys.** Our survey did not distinguish between a respondent

refusing to answer a specific question and a respondent being unable to answer that same question because of a lack of readily available information.

- **The data include a number of cases that were litigated five or more years ago.** We generally make no distinction in our monograph as to the dates of filing or termination for any of the reported cases. It is possible that the legal environment for these older cases was very different from what existed for more recent matters and, as such, the aggregated information presented herein may hide important distinctions.
- **Our data on class certification do not distinguish between orders certifying the case for a class trial, those certifying for settlement purposes only, and those certifying on a provisional basis only.** The surveys only indicated whether certification was granted, which could be the result of a distinct motion or as part of a request for approval of a class settlement. The intent of the certification order (for trial, for settlement only, or for provisional purposes only) and the degree to which the defendant opposed the motion was not captured.
- **Our data on the characteristics of class settlements are limited in generalizability because of some responding insurers' refusal to provide any detailed information whatsoever about the terms of such settlements.** We have no way of knowing whether the surveys with complete information on class size, the size of the compensation fund, class counsel attorneys' fees and expenses, benefit distribution, and the like comprise a representative sample of all insurance class actions settlements in our data. As such, the information presented should primarily be viewed as illustrative examples of some, but not all, settlements reported to us.
- **The cases reported in the survey took place prior to CAFA's enactment.** Many of the state court cases reported by the respondents might have been successfully removed to federal court under the new rules for diversity jurisdiction brought about by CAFA in early 2005. It is possible that the outcomes of these cases would be different with federal court management; indeed, the number and character of all class actions against the responding companies may well have been different had the more liberal rules been in effect during the study period.

The Survey of State Departments of Insurance

Following the close of the case-specific data collection, we obtained an independent assessment of the relationship between the issues in the cases about which we were told and the activities and authority of the various DOIs. We made arrangements with the director of research of the National Association of Insurance Commissioners (NAIC) to distribute a survey that listed the primary claims of the plaintiffs in our cases and asked the respondents to review those approximately 360 different allegations and rate them on whether the issues surrounding them might be the routine subject of admin-

istrative rulemaking, enforcement, or adjudication activities. The director of research forwarded the surveys via email to recipients in all 50 states and the District of Columbia, primarily staff members of the office of the department's general counsel.

We assured the recipients of the surveys that their names, agencies, and states would not be identified in our report. We also provided the survey recipients with an option of returning the surveys directly to RAND if they wished to keep their responses confidential. In the end, we received responses from departments in 17 states,[5] most of which were forwarded to us by the office of the NAIC's director of research.

The survey includes only issues that were reported in the class actions in our data. No indication of the relative frequency of occurrence was provided to the regulators. The respondents used a 1-to-5 scale on which a rating of 1 implied little or no relationship between the particular claim (if asserted as part of a class action against an insurer on behalf of an entire class of policyholders or other individuals or businesses) and the activities of the insurance department in the regulator's own state, while 5 implied a significant relationship. We were seeking information on the theoretical relationship and not whether the agency had actually attempted to intervene in a prior class action involving the particular issue.

Because the issue descriptions were drawn from the surveys themselves, they were quite brief and contained no information about the facts asserted in any particular case. Mindful of the difficulties faced by a respondent in attempting to assess the potential regulatory impact of a class action distilled down to a one-sentence summary, we gave the respondents the option of indicating that they could not rate an issue based solely on the information provided.

Our goal was to identify those issues that were most likely to be ones in which state insurance regulators would take a particular interest in litigation revolving around similar claims and, in a regime in which such intervention was allowed, assert their exclusive or primary authority when they felt it necessary. To obtain some sort of consensus among the respondents, we initially dropped any issue in which a third or more of the surveys indicated that the claim or allegation could not be rated. Next, we averaged the respondents' ratings for each issue across all states but did not weigh those responses by any criteria such as state population or aggregate DPW within the state. Finally, we assigned a rank to each average rating, based on whether it was in the top 20 percent of all averaged ratings (in other words, had an average rating above 4.07) and, as such, was ranked as having the strongest relationship to a state's regulatory regime, in the bottom 20 percent of all averaged ratings (an average rating of 3.15 or below) and ranked as having the weakest relationship, or in the middle 60 percent and ranked as having a modest relationship. Note that the rankings correspond to the distribution of the averaged ratings across the approximately 260 issues identified in our

[5] Three additional states submitted survey responses but the questionnaires were not returned prior to the cutoff for data entry.

surveys and not to the frequency with which those same issues occurred in the cases in our data. A complete listing of all ranked issues along with the average ratings they received can be found in Appendix C.

In 2.4 percent of our cases, no case-level rank could be assigned either because the questionnaire returned by the insurer was unclear about what the specific issues were in the case or because the case involved only unrated issues. Of the cases with rated issues, 22 percent had at least one issue ranked as having a strong relationship to regulation. Of the remainder, 59 percent had at least one issue ranked with a modest relationship and 19 percent of the cases had only issues ranked as having a weak relationship. Though the distribution of these cases nearly matches the cutoff points we selected for classifying issues by their potential connection with regulation, it should be kept in mind that the rankings were assigned to issues, not cases. As indicated by Table 3.6, there are some issues that repeatedly pop up in the cases in our data but there are certainly those that occurred only once. Diminished value allegations related to first-party automobile coverage claims, for example, was the single most often cited issue in our data but it received a "weakest relationship" ranking. In contrast, the adjusted responses of the regulators resulted in a "strongest relationship" ranking for a claim that the insurers were allowing unlicensed people to solicit, sell, or administer contracts of insurance, but we had only a single case with this issue.

CHAPTER THREE

Survey Results

In this chapter, we generally organize our findings in terms of the evolution of a case. We start with the characteristics of the litigation: forum where cases are being brought, scope of requested class, choice of jurisdiction, number of filings over time, types of defendants, and the nature of the claims being sought. Then we report on the certification process, how attempted class actions are eventually resolved, how long it takes to resolve them, and the features of class settlements. Finally, we briefly discuss what our findings suggest about the change in rates of removal from state to federal courts brought about by the passage of recent federal legislation.

Forum of Filing and Disposition

Where are insurance class actions brought? The answer is in our state courts where 89 percent (±2.0 percent) of the 743 cases in our data with known court of origin were filed. This should not be a surprising result, as insurance in the United States is a system characterized by individual state regulation, and presumably claims that involved federal statutes and other federal law questions (the most common basis of federal jurisdiction for civil cases [Administrative Office of the United States Courts Statistics Division, 2004, Table C-2]) rather than state laws would be relatively few in number. The result also suggests that empirical studies that focus only on the federal courts, a source for relatively reliable class action data, would likely miss the majority of actual and putative class actions involving insurers.

Despite the overwhelming proportion of state court filings in our data, the issue of federal jurisdiction plays a role in many cases, even prior to CAFA's passage, which liberalized the rules for diversity jurisdiction for class actions in federal courts. A sizable number moved between systems as parties sought to have the matter adjudicated in different forums: 19.9 percent (±3.0 percent) of 702 cases reported removal to federal court or a remand into state court at some point during the litigation.[1] Of the 103 state

[1] Technically, a case can be remanded into state court only if it was filed originally in a state court and later removed to federal court. If a case originally filed in federal court was found to lack a proper basis for federal

court filings that reported removal or remand activity during their lives, 61.2 percent (±9.6 percent) found their way back into a state court for final disposition. This percentage, presumably representing unsuccessful attempts to remove state court cases with the intent of concluding them in a federal forum, appears to be markedly greater than what is seen for civil litigation generally.[2]

About 8 percent (±2.4 percent) of 502 cases originally filed in state court wound up in federal court for disposition. In the end, federal courts were the final forum for 17.4 percent (±3.2 percent) of 563 closed cases with this information. Of the 113 cases that were ultimately disposed of in federal court and in which the respondent was aware of its status with the federal Judicial Panel on Multidistrict Litigation (MDL), slightly more than 4 percent (±3.7 percent) were noted to have been transferred to the MDL panel for consolidated pretrial processing.

Geographical Coverage of Class

What kinds of classes were the plaintiffs in these cases seeking? Table 3.1 shows the geographical coverage of cases brought in all jurisdictions, in state courts, and in federal court. Most often, it was a class consisting of residents or citizens of a single state.[3] National classes were the most common type of multistate classes (in other words, actual or proposed classes involving residents of two or more states) proposed. In the fraction of cases involving several-state classes (more than one, less than all states),[4] most involved individuals and entities in 10 or more states.

In some instances, a state court judge is asked to decide on insurance-related matters affecting citizens in not only that specific jurisdiction but also those who reside in as many as 49 other states and the District of Columbia. In fact, this type of proposed class occurs in about 17 percent of state court filings (in Table 3.1, 13.1 plus 3.5 percent). As we discuss later, such multistate classes sought in state courts loom large in the

jurisdiction, the federal judge would dismiss the matter and it would be up to the plaintiff to decide whether to file a new case in a state court.

[2] One recent study found about 20 percent (the exact figure depends on the year of analysis and the claimed basis of federal jurisdiction) of all state cases removed to federal court were eventually remanded (Eisenberg and Morrison, 2005, p. 567).

[3] It should be noted that some single-state cases in our data involved class definitions related to events occurring within a very limited geographical area. For example, a 1994 earthquake centered in Northridge, California, spawned a number of class actions over the way in which property claims were adjusted and paid. As a practical matter, the cases only concerned homes and businesses located in Los Angeles and Ventura counties. However, we classified such litigation as statewide class actions because the class members themselves were limited to citizens of California.

[4] *Multistate classes* includes all classes covering more than one state, including those that encompass every state (national classes). *Several-state classes* includes multistate classes other than national classes.

Table 3.1
Geographical Coverage Sought for Attempted Classes

	Single		All States		Several States	
Forum	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
All jurisdictions (709 cases)	82.2	±2.8	14.5	±2.6	3.2	±1.3
State court (639 cases)	83.4	±2.9	13.1	±2.6	3.5	±1.4
Federal court (72 cases)	72.2	±10.3	26.4	±10.2	1.4	±2.7

potential implications of CAFA. Multistate classes occur more often in federal courts, though single-state classes continue to be the rule in both jurisdictions.

Choice of Jurisdiction

Precisely because of the expansive geographical scope of the classes in these cases, the plaintiffs' attorneys who initiate them sometimes have considerable latitude in deciding in which particular courts the complaints should be filed. This situation has led to concerns over whether there are hot-spot jurisdictions that attract a larger number of class action filings than one might expect given, for example, the size of the population or the types of economic activities that take place within their borders. Though one might argue that an attorney who ignores the relative advantages and disadvantages of filing in a particular jurisdiction when initiating new litigation may be doing a disservice to his or her clients, the phrase *forum shopping* has taken on a somewhat negative connotation in recent years as a result of repeated claims that a few small rural courts have handled a disproportional number of class actions.

Analysis of our data regarding this issue yielded some interesting results. We must reiterate that we did not have a 100-percent response rate from the insurers in the survey, so the geographical distribution of the reported cases will reflect the market penetration of the respondents in the states in which they do business. Also, the survey asked for detailed information about the court of disposition, rather than the court of filing, and, in instances in which the case's forum shifted during its life, we may not be able to pinpoint the location of the court in which the plaintiffs' attorney originally chose to litigate the case. That being said, Florida, Illinois, and Texas were where 42 percent of all state court dispositions (619 cases) were reported. Two jurisdictions in particular—Miami-Dade County, Florida, and Cook County, Illinois—accounted for about 17 percent of our state cases. On the federal side, districts in Florida and Texas

again were at the top of the list in frequency, accounting for 23 percent of all federal insurance class actions in our data (127 cases).

Even with a 100-percent response rate, it would not be possible to claim that our data prove that the courts in Florida, Illinois, and Texas are magnets for attorneys bringing insurance class actions. All three have large populations within their borders, presumably with correspondingly large numbers of policies written, losses occurring, and claims made against those policies. More importantly, there may be particular aspects of the laws and regulations that control the business of insurance in those states that provide a more fertile ground for attorneys attempting to identify wrongful practices that form the basis for a successful class action. For example, the highly structured claiming and compensation system characterizing automobile no-fault insurance regimes place additional duties and responsibilities on insurers not found in traditional tort states. With those same duties and responsibilities come additional opportunities for acts or omissions that might run afoul of the insurance code. Similarly, powerful consumer protection laws in some states provide a unique basis for bringing a class action claim not seen elsewhere. And in other states, the presence of the corporate headquarters (or the site of incorporation) of major insurers might attract a disproportional number of new filings.

What might be a more telling measure than sheer numbers is whether the types of cases that make their way into the dockets in particular jurisdictions tend to be different from the norm. For example, we can look at the scope of the proposed class by the jurisdiction in which the matter was ultimately litigated. As mentioned earlier, 17 percent of the state court filings sought a class involving citizens or residents of more than one state. But as can be seen in Table 3.2, the percent of cases seeking multistate classes in some counties exceeded the 17-percent average reported for all cases in our data and, perhaps more telling, exceeded the average reported for all other cases in that same state.

Table 3.2
Scope of Class in State Courts

County	Percent with Single-State Classes	Percent with Two or More States in Class	Cases Reported (N)
Alabama			
Jefferson County	75.0	25.0	8
Other Alabama counties	76.5	23.5	17
State total	76.0	24.0	25
Arizona			
Maricopa County	83.3	16.7	6

Table 3.2—Continued

County	Percent with Single-State Classes	Percent with Two or More States in Class	Cases Reported (N)
Other Arizona counties	100.0	0.0	3
State total	88.9	11.1	9
California			
Los Angeles County	95.8	4.2	24
San Diego County	75.0	25.0	4
Other California counties	87.5	12.5	8
State total	91.7	8.3	36
Colorado			
Boulder County	100.0	0.0	4
Denver County	75.0	25.0	4
Other Colorado counties	100.0	0.0	6
State total	92.9	7.1	14
Florida[a]			
Broward County	54.6	45.5	11
Hillsborough County	100.0	0.0	5
Lee County	100.0	0.0	9
Miami-Dade County	93.9	6.1	66
Palm Beach County	83.3	16.7	6
Pinellas County	100.0	0.0	6
Seminole County	100.0	0.0	4
Other Florida counties	66.7	33.3	6
State total	89.4	10.6	113
Georgia			
Fulton County	83.3	16.7	6
Muscogee County	100.0	0.0	5
Other Georgia counties	100.0	0.0	8
State total	94.7	5.3	19

Table 3.2—Continued

County	Percent with Single-State Classes	Percent with Two or More States in Class	Cases Reported (N)
Illinois			
Cook County	58.8	41.2	34
Madison County	31.6	68.4	19
St. Clair County	80.0	20.0	5
Other Illinois counties	42.9	57.1	14
State total	50.0	50.0	72
Louisiana			
Orleans Parish	100.0	0.0	8
Other Louisiana parishes	100.0	0.0	8
State total	100.0	0.0	16
Maryland			
Baltimore County	100.0	0.0	4
Montgomery County	75.0	25.0	4
Other Maryland counties	100.0	0.0	1
State total	88.9	11.1	9
Michigan			
Wayne County	100.0	0.0	14
Other Michigan counties	100.0	0.0	5
State total	100.0	0.0	19
Missouri			
Jackson County	100.0	0.0	4
St. Louis County	88.9	11.1	9
Other Missouri counties	100.0	0.0	4
State total	94.1	5.9	17
New Jersey			
Essex County	100.0	0.0	4

Table 3.2—Continued

County	Percent with Single-State Classes	Percent with Two or More States in Class	Cases Reported (N)
Other New Jersey counties	80.0	20.0	5
State total	88.9	11.1	9
New Mexico			
Santa Fe County	0.0	100.0	7
Other New Mexico counties	100.0	0.0	1
State total	12.5	87.5	8
New York			
New York County	100.0	0.0	4
Other New York counties	80.0	20.0	10
State total	85.7	14.3	14
Ohio[a]			
Cuyahoga County	100.0	0.0	4
Franklin County	20.0	80.0	5
Lucas County	100.0	0.0	4
Stark County	100.0	0.0	4
Other Ohio counties	80.0	20.0	5
State total	77.3	22.7	22
Pennsylvania			
Philadelphia County	94.7	5.3	19
Other Pennsylvania counties	84.6	15.4	13
State total	90.6	9.4	32
Texas			
Bexar County	100.0	0.0	4
Dallas County	88.2	11.8	17
Harris County	80.0	20.0	5
Nueces County	66.7	33.3	3
Travis County	85.7	14.3	7

Table 3.2—Continued

County	Percent with Single-State Classes	Percent with Two or More States in Class	Cases Reported (N)
Other Texas counties	84.6	15.4	26
State total	85.5	14.5	62
Washington[a]			
King County	100.0	0.0	8
Pierce County	33.3	66.7	3
Other Washington counties	100.0	0.0	2
State total	84.6	15.4	13

NOTE: All specifically identified counties in this table were reported to have a total of four or more cases disposed of or still open in that state court for all cases in our data. States in which no single county had more than four cases are not included. Only cases in which the scope of the class was reported are shown here; thus, some counties identified above may have fewer than four cases in this table.

[a] State in which percentage of single-state cases differs significantly by county; p-value < 0.05.

Several patterns are illustrated in these data. In Broward County, Florida, for example, 45.5 percent of the state court cases were seeking multistate classes, which is significantly more than the 6.9 percent rate for the rest of the state (p-value = 0.002). Multistate classes were sought in half of all Illinois state court cases, with Madison County having an even higher percentage (68.4 percent). Although this difference is not statistically significant (p-value = 0.11), this proportion is greater than any other individual county with eight or more cases reported. Other locations of interest include Santa Fe County, New Mexico, where all of the reported cases were multistate in nature (p-value = 0.125); and Franklin County, Ohio, with 80 percent versus 22.7 percent for the rest of the state (p-value = 0.003).

It should be kept in mind that the counties specifically listed here are ones that had at least four class actions reported by the respondents as open at some point during our study period and, of the cases disposed of in such counties, only the ones in which the scope of the proposed class was reported by the respondents are found in this table; as a result, the total number of cases for some counties in Table 3.2 is low enough that even a single additional multistate case could result in a percentage that is markedly over the national or state average. Still, it does suggest that attorneys might have specifically chosen these sites to litigate multistate actions given that, at least from a purely procedural standpoint, there would have been equally acceptable courts in other counties within the same state.

One can look at this from the opposite perspective as well: Los Angeles County, California, for example, exhibits a relatively low percentage of multistate classes (4.2 percent versus 8.3 percent for the entire state) as does Miami-Dade County, Florida

(6.1 percent versus 10.6 percent for the entire state) and, in some states such as Louisiana and Michigan, no multistate cases were reported at all.

As will be discussed further in a subsequent section describing CAFA's potential impact, it is this type of case, one in which counsel was requesting that a local state court judge decide issues affecting class members in other states, that was one of the targets of recent legislation to federalize many class actions. As a result, the percentages shown in Table 3.2 may well be very different in years to come when litigants, attorneys, and judges have modified their behavior in light of the new rules.

A similar table for district courts is not as helpful (see Table 3.3). The low number of federal cases in our data results in only a handful of class actions reported in any one district with the exceptions of the Southern District of Florida, the District of Colorado, and the Eastern District of Michigan.

Table 3.3
Scope of Class in Federal Courts

Federal District	Percent with Single-State Classes	Percent with Two or More States in Class	Cases Reported (N)
Alabama, Northern District of	100	0	5
Alabama, other districts	100	0	1
Arizona, District of	100	0	3
California, Southern District of	100	0	2
California, other districts	100	0	2
Colorado, District of	100	0	7
Connecticut District Court	80	20	5
Florida, Middle District of	100	0	4
Florida, Southern District of	60	40	10
Florida, Northern District of	0	100	1
Kansas, District of	100	0	3
Louisiana, Eastern District of	0	100	3
Louisiana, other districts	100	0	2
Massachusetts District Court	66.7	33.3	3
Michigan, Eastern District of	57.1	42.9	7
Mississippi, Northern and Southern Districts of	75	25	4
Missouri, Western District of	100	0	5

Table 3.3—Continued

Federal District	Percent with Single-State Classes	Percent with Two or More States in Class	Cases Reported (N)
New York, Eastern and Southern Districts of	33.3	66.7	3
Oklahoma, Western District of	100	0	5
Oregon, District of	33.3	66.7	3
Pennsylvania, Eastern District of	75	25	4
Texas, Northern District of	33.3	66.7	3
Texas, Southern District of	75	25	4
Texas, other districts	66.7	33.3	3
All other federal districts	79.2	20.8	24
Total	75.9	24.1	116

NOTE: Districts and combinations of districts in this table were ones in which the states in which the districts were located had three or more federal cases reported as being disposed or still open. Districts specifically identified had a total of three or more cases in our data. Districts located in states without three federal cases are not reported. Only cases in which the scope of class was reported are shown here; thus, some districts or aggregated districts in a single state identified above may have less than three cases in this table. The percentage of single-state classes varies significantly by district (p-value = 0.046).

See Chapter Four for similar tables that look at the geographical distribution of filings for insurance class actions by factors that that may present questions involving a state's insurance regulation regime.

Trends in the Number of New Cases

One question that repeatedly arises in the public debate over class action litigation is whether the number of cases filed each year has changed over time. Certainly there is qualitative evidence of a rise in class actions generally, especially regarding the financial services industry such as banks and insurers (Hensler et al., 2000, pp. 62–67), but without accurate counts provided by both state and federal court administrators, the stories being told by attorneys and repeat litigants about their personal impressions may not be persuasive.

Our data may help shed some light on this issue though any litigant-based survey would contain a number of inherent limitations. First, the responding insurers are far from a census of all companies in this industry and the number of cases in our data is likely to be a significant undercount of all insurance class actions in all court systems over the 10-year study period. Second, and perhaps more important, internal record-keeping practices for attempted class actions differ markedly among companies and

even differ from year to year for many of the same insurers. Of the 57 large insurance companies responding to our survey and for which we have named as the representative defendants in the cases included in our final analysis data set, 32 provided detailed information about their recordkeeping practices for cases active between 1993 and 2002. Of this latter group, 12 reported that they could identify every class action (whether or not certified and whether or not a motion for certification was filed) active in every year over the entire study period. One company reported that they knew of (and reported on) at least one class action but were unable to state with certainty whether they were also involved in other cases active during the 10-year period. The remaining 19 companies indicated that, although there were certain years for which they could reliably report upon all active litigation, there were others for which the information was less than complete. For this latter group, the problems in their records were generally more acute for the earliest years in the study period. For these reasons, a simple count of the filing years for all the cases in our data might present a distorted picture of trends over time, with a bias toward more recent years given that more of the responding companies were able to report on their class action experiences toward the end of the study period.

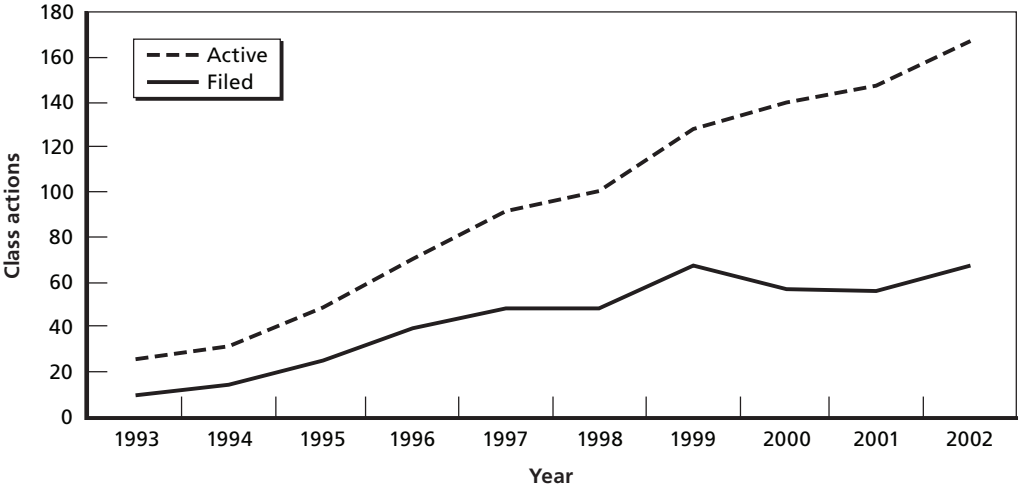
To account for these issues, Figure 3.1, which shows the trends over a 10-year period in both the number of class actions filed per year and in the number of cases active at any time during the year, uses only the responses of those 12 companies that reported that they were able to provide counts of all class actions, putative or certified, defended from 1993 through 2002. Figure 3.2, which shows trends for filed and active cases over a five-year span, uses only data from the 24 companies that reported that they could identify every class action defended from 1998 through 2002.

As discussed in Chapter Three, in many instances, the same court case involved multiple defendants with at least two of those insurers submitting a separate survey related to the same class action. In most of the tables and figures in this monograph, we only report on unique cases, using a single respondent as the representative defendant when insurer characteristics are needed for the analysis. Here we also report only unique cases but are including them in the 1993–2002 and 1998–2002 sets if *any* of the responding defendants in the case met the criteria for recordkeeping completeness.

Figure 3.1 shows that there has been a strong growth in both active cases and filings since the early 1990s. For new filings, nearly seven times as many cases were filed in 2002 as in 1993, yielding a 23.5-percent compound annual growth rate. By way of comparison, using data from 17 states, the National Center for State Courts estimates that the total number of contract case filings in general and unified jurisdiction state courts increased by 21 percent from 1993 to 2002, for about a 2-percent compound annual growth rate (tort cases, in contrast, decreased by 5 percent over the same period) (National Court Statistics Project et al., 2003, pp. 23–28).

The number of active cases in each year would be another way to measure the litigation pressure on defendants. Insurance class actions as a whole take, on the average,

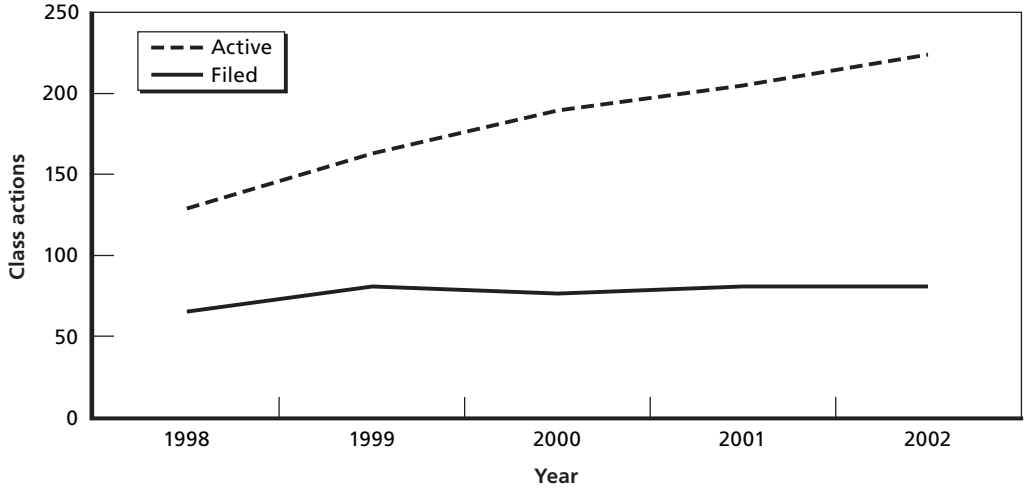
Figure 3.1
Class Actions Filed or Active During the Year Reported by Companies with Complete Records for 1993–2002



NOTES: Includes 431 case filings and 451 active cases reported by 12 insurers. Although the slope of the lines may appear to suggest that the annual number of active cases has grown much faster than the annual number of new filings, growth rates are calculated using counts in the first year as a baseline. There were 2.6 times as many active cases in 1993 as there were filed cases in that same year; in 2002, the ratio had changed only slightly to 2.5.

RAND *MG587-3.1*

Figure 3.2
Class Actions Filed or Active During the Year Reported by Companies with Complete Records for 1998–2002



NOTES: Includes 382 case filings and 449 active cases reported by 24 insurers.

RAND *MG587-3.2*

two years to resolve, while certified cases take about 3.3 years (see Time to Disposition later in this chapter). From a defendant's perspective, the burden of defending class actions would increase even more dramatically over time if more and more cases were filed in each year and if it took an increasingly longer time to remove the matter from its annual caseload. Figure 3.1 shows that there has been about the same growth in active cases over the 10-year study period as was seen in new filings: Nearly 6.5 times as many cases were being litigated at least at some point in 2002 compared to 1993 (a 23-percent compound annual growth rate).

Figure 3.1 also suggests that, at least in recent years, the growth in filings has tempered somewhat. To explore this question in greater detail, Figure 3.2 shows results of data from the companies that reported that they could identify *every* case open from 1998 to 2002. For these companies, the growth over that five-year period has flattened somewhat compared to the 10-year rate, with a 23-percent increase during this period (a 5.3-percent compound annual growth rate). The growth in active cases was also relatively modest over the five-year period of 1998–2002 compared with 1993–2002 (an overall increase of 74 percent yielding a 14.8-percent compound annual growth rate) but, at least in recent years, the number of active cases is increasing faster than filings. This may suggest that the average time to disposition of insurance class actions has increased as of late.

It should be noted that Figures 3.1 and 3.2 must be considered in light of the possibility that defendants experiencing a marked increase in the number of new filings in recent years might have been especially motivated to respond to our case-level survey.

Subjects of the Litigation

Defendants

In most instances, class action litigation is directed at a small number of insurers. The insurers responding to the survey were the sole corporate defendants in 65 percent of 723 reported cases (though one or more individuals might have been named as well) and, in 20 percent of the cases, two to three corporate defendants were named (it appears that, in most such instances, these multiple defendants were members of the same insurance group). But in some cases, the scope was much greater: In 3 percent of the class actions, 40 or more insurers were named and, in one notable instance, over 1,000 corporate defendants were identified.[5]

A. M. Best's data provide a number of ways of characterizing the primary business of the insurers in its key rating guides (A. M. Best, 2002a, 2002b). Table 3.4 reflects Best's own assessment of the area of specialization for the representative defendant in

[5] We did not collect information on the frequency with which a defendant class of insurers was sought or certified.

Table 3.4
Specialty Line of the Representative Defendant

Specialty Line	Percent of All Cases	Margin of Error
Personal auto	37.7	±3.5
Homeowners'	18.3	±2.8
Personal lines	16.7	±2.7
Multiple lines	9.0	±2.1
Commercial lines	5.0	±1.6
Individual life	4.3	±1.5
Group accident and health	2.5	±1.1
Nonstandard auto	2.1	±1.0
Individual annuities	1.3	±0.8
Group life	0.8	±0.6
Annuities	0.7	±0.6
Commercial multiple peril	0.3	±0.3
Excess and surplus	0.3	±0.3
Group pension	0.3	±0.3
Single premium deferred annuities	0.3	±0.3
Directors' and officers' liability	0.1	±0.1
Guaranteed interest contracts	0.1	±0.1
Mortgage guaranty	0.1	±0.1
Variable life	0.1	±0.1

NOTE: Based on 748 cases.

each of the 748 unique cases in our data. Insurers whose business primarily involves personal automobile policies constitute more than a third of all of the cases. It should be noted, however, that the categories shown are not mutually exclusive. For example, A. M. Best might have categorized a company as a personal lines insurer because it was primarily engaged in the sale of both personal auto and homeowner policies. Additionally, the categorization only applies to the primary area of specialization; the insurer might also sell policies in any of the other listed lines as a secondary but nevertheless important part of its business. Thus, it is probably more useful to look at the subject matter of the class actions in our data (see Table 3.5) than the primary business of the defendants to better understand what types of cases are being litigated.

Table 3.5
Top Lines of Insurance Involved in the Case

Lines	Percent of All Cases	Margin of Error
Automobile	67.5	±3.4
Homeowners'	12.8	±2.4
Life	7.1	±1.8
Workers' compensation	6.3	±1.7
Health	2.4	±1.1
Multiple lines	1.2	±0.8
Annuities	1.2	±0.8
Earthquake	1.2	±0.8
Mobile home	0.9	±0.7

NOTE: Line of insurance cited in seven or more of 748 cases; some cases had more than one line reported.

Lines of Insurance Involved

Perhaps not surprising given the distribution of the lines of specialization for the defendants in Table 3.4, automobile policies were the most commonly cited line of insurance at the core of the dispute (see Table 3.5).

Case Issues

Diminished value allegations were the single most frequently cited issue in our data (see Table 3.6). Overall, about half of the cases involved allegations related to health care providers as assignees of medical benefits in automobile policies (either as part of personal injury protection plans in no-fault states or as first-party medical payment coverage in add-on states), various real and personal property coverage claims, claims by policyholders or beneficiaries under automobile uninsured or underinsured motorist coverage, diminished value claims related to first-party automobile coverage, or various workers' compensation issues.

Key Statutes Involved

In 75 percent (±3.1 percent) of the 748 cases, the respondents indicated what they felt to be the key statutes involved in the claims and defenses asserted in the class action. Failure to identify a particular statute in the other 25 percent of the reported cases could be due to a lack of sufficient information available to the person completing the survey about the legal theories employed by both sides but it might also be the result of cases that turned solely on questions of common law. We have no way to distinguish

Table 3.6
Most Common Allegations Cited in Insurance Class Actions

Category	Cases	Allegation
Automobile first-party coverage—diminished value issues	68	Failed to reimburse policyholders for the diminished value of repaired vehicles
Automobile first-party coverage—OEM issues	34	Specified aftermarket parts for repairs rather than using OEM parts, resulting in diminished value, safety issues, or any loss (other than policy cost)
Property coverage	23	Failed to provide allowance for general contractor's overhead and profit when paying for repairs
Workers' compensation coverage	22	Conspired with the National Council on Compensation Insurance to charge more than approved by state board of insurance
Automobile no-fault, personal injury protection (PIP), or medical payments coverage—policyholder issues	21	Systematically reduced PIP benefits through bill review computer program
	21	Used medical file review firms with reviewers who were unqualified, nonmedical, biased, given improper incentives, or who colluded or conspired with insurers to deny claims
Life coverage	20	Claimed that premiums would vanish over time
Automobile uninsured or underinsured motorist (UM or UIM) coverage—policyholder issues	19	Had UM or UIM election or rejection at time of initial policy purchase issues (basic, extended, or enhanced upgrade; includes misleading representations, invalid forms, failure to offer as required, and failure to obtain written rejection)
Automobile no-fault, PIP, or medical payments coverage—health care provider issues	15	Made inappropriate fee reductions on claims submitted under PIP coverage
Property coverage	15	Systematically performed unfair or other wrongful adjustment of claims arising from a single event (e.g., hailstorm or earthquake)
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	14	Failed to pay interest on delayed claim payments
Property coverage	14	Depreciated the amount of building materials, parts, or repair and labor costs or withheld an amount for depreciation to the premises or item on partial losses to real or personal property
Automobile first-party coverage—OEM issues	12	Failed to disclose the use of aftermarket parts for repairs rather than using original equipment manufacturer parts
Automobile UM or UIM coverage—policyholder issues	12	Charged for multicar stack coverage when actually had only one car
Automobile coverage—other issues	12	Failed to fully reimburse insureds for amounts (including deductibles) insurer recovered from third-party tortfeasors; includes failure to pay interest on recovered amounts and instances in which insurer failed to obtain recovery from third parties

Table 3.6—Continued

Category	Cases	Allegation
Automobile no-fault, PIP, or medical payments coverage—health care provider issues	11	Failed to pay required interest or interest on delayed payments to health care provider on claims
Workers' compensation coverage	11	Used forms or rates other than those approved by insurance commissioner, the DOI, statute, regulation, or other authority
Automobile first-party coverage—other issues	10	Used valuation software package designed to produce offers for automobile total loss at less than fair market value, actual retail price, fair retail value, or other required measure
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	10	Denied medical claims or failed to pay claims within time limits without first obtaining report from appropriate health care provider
Automobile UM or UIM coverage—policyholder issues	9	Inappropriate offset of UM or UIM payments by multiple sources of benefits (such as workers' compensation or third-party recovery) previously received when only one offset is actually allowed
Automobile coverage—other issues	9	Offered inadequate amounts for personal mileage reimbursement
Automobile first-party coverage—increased value issues	8	Deducted portion of payments for vehicle repair based on alleged betterment in value of vehicle from upgraded parts or repairs
Automobile no-fault, PIP, or medical payments coverage—health care provider issues	8	Denied medical claims or failed to pay claims within time limits without first obtaining report from appropriate health care provider
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	8	Failed in some other undefined way to pay proper or full PIP or MedPay benefits
Property coverage	8	Reduced benefits by omitting sales taxes or other mandatory fees and charges (such as on the calculation of personal property losses or for building materials for partial real property losses)
Multiple types of coverages—modal premium issues	8	Imposed premium finance service charges (or any separate finance, service, or installment charge or fee related to periodic payments) in violation of law or in excess of legal maximums
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	7	Systematically refused to reimburse on reasonable and customary or medically necessary or other appropriate basis without investigating particular merits of the claim or without reasonable grounds for making decision
	7	Failed to make timely payments of medical and other bills under PIP
Property coverage	7	Continued to charge same or increased premiums or used an inflation coverage endorsement on property that depreciated (such as mobile homes) while paying only actual cash value rather than replacement cost

Table 3.6—Continued

Category	Cases	Allegation
Workers' compensation coverage	7	Conspired to fix prices in violation of antitrust laws
Multiple types of coverages—modal premium issues	7	Failed to disclose annual percentage rate and finance charges incurred when paying premiums periodically rather than annually
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	6	Used valuation software package designed to produce offers for personal injury claims at less than full and fair value
Automobile UM or UIM coverage—policyholder issues	6	Sold multiple UM or UIM policies to insureds with more than one car when only one was needed
	6	Denied right to stack UM/UIM and bodily injury (BI) coverages in same household
Workers' compensation coverage	6	Conspired to charge unduly high fees on businesses placed in assigned risk pool
Property coverage	5	Discriminated based on race by refusing to insure or offering only policies with fewer benefits in particular geographic areas
Property coverage	5	Wrongly limited coverage for water or mold damage or failed to test for same
	5	Improperly denied foundation or slab or other below-ground claims on the basis of earth movement, water causes, or other concurrent causations
	5	Systematically overinsured or appraised property (or used excessive replacement cost estimator, unnecessary mortgage requirements, bundling coverage, included land value, or used defective valuation process) to generate additional premiums
Multiple types of coverages—modal premium issues	5	Failed to comply with Truth in Lending Act requirements for financed portion of the annual premiums paid on a periodic basis
Multiple types of coverages—other issues	5	Failed to reimburse insureds or failed to disclose right for reimbursement for lost earnings or other expenses related to liability defense provided by own insurer or other insurer-required legal proceeding

NOTE: Includes allegations reported in five or more cases.

between the two situations, so the discussion in this section should be viewed solely as describing cases in which statutes clearly played some sort of role.

When statutes were identified (559 cases), 93 percent (±2.1 percent) involved at least one type of state law, while 10 percent (±2.5 percent) involved federal statutes either exclusively or in addition to state laws. In 72 percent (±3.7 percent) of identified cases, some sort of state law concerning unfair or deceptive trade practices; unfair claims, settlement, or other insurance practices; consumer protection rights or prohibitions against fraud; or unfair competition or business practices was cited as an impor-

tant basis for the claims. These types of laws were the most commonly cited statutes in insurance class actions regardless of whether the case was litigated in state or federal court. The lack of specificity here is a reflection of the fact that the scope of these sorts of omnibus consumer rights packages vary from state to state as do the titles of the acts and the specific rights and remedies the statutes provide. State-based unfair insurance practices acts were the single most often cited statutory basis followed closely in frequency by more generalized state-based unfair or deceptive trade practices acts that could be applied to other businesses-consumer relationships than insurance. The statutes and regulations controlling the system of no-fault automobile insurance were a commonly cited basis for the cases in those states with that type of accident compensation system. The most cited federal law was the Racketeer Influenced and Corrupt Organizations Act (RICO) (Title 18, Section 1961 et seq.), followed distantly by the Employee Retirement Income Security Act of 1974 (ERISA) (Title 29, Section 1001 et seq.) and the Fair Credit Reporting Act (Title 15, Section 1681).

Certification

Frequency of Motions for Certification

Class action litigation actually begins when the defendant receives notice that plaintiffs' counsel is considering or intending to make claims on a class basis. This initial notice can come in the form of the filing of a motion for certification or, more commonly, as a result of language in the complaint (such as indicating that the named plaintiffs were seeking relief on behalf of themselves and others similarly situated) or some other communication from plaintiffs' counsel.

About 39 percent (±4 percent) of 536 closed cases in our data reported that a motion for certification had been filed. Such motions were more common in federal class actions (about 50 percent [±10 percent] of 95 closed cases) compared to those in state courts (36 percent [±5 percent] of 440 cases). It should be noted that, in some instances, a motion for class settlement approval appears to have been made without any stand-alone motion for certification filed previously. Because the request to review and approve the class settlement would have inherently incorporated a request for a certified class, we treated such cases as having a motion for certification.

In the instances in which no motion for certification was filed, we asked the respondents why they had considered the matter to have a potential for class treatment. In all but seven of the 363 cases with such information, the belief was based at least in part upon language found in the complaint or other formal pleading.

Rulings on Certification

Frequency of the Certification Decision. Table 3.7 presents our findings on certification for all cases, state cases, and federal cases. Taking into account all closed

Table 3.7
Class Certification Status

Forum[a]	Never Decided		Certified		Denied	
	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
All courts (533 cases)	75	±3.7	14	±2.9	11	±2.7
State courts (455 cases)	78	±3.8	14	±3.2	9	±2.6
Federal courts (97 cases)	62	±9.7	16	±7.3	22	±8.2

[a] Includes closed cases only.

insurance class actions in our data, both those with and without motions for certification, about one out of seven (14 percent) wind up with a certified class. Slightly fewer (11 percent) have the motion for certification denied, while about 75 percent never have a decision one way or another.[6] This latter group consists of class actions in which no motion for certification was filed as well as those in which the case was resolved in some way prior to the judge making a decision on the motion.

Cases with a Decision on Certification. Our data make no distinction between various types of class certification. Specifically, we lump together classes certified for trial, provisional classes that are subject to reconsideration, and conditional classes certified only for the purposes of settlement. Although these can be important distinctions from a legal and procedural standpoint, they were not aspects that we could capture in our survey, regarding classifying the nature of the judge's order or the types of motions that were made. Nor can we determine in every case whether the initial motion for certification came shortly before or even simultaneously with any motion for settlement approval, a situation that suggests that the defendants were favorably disposed to the idea of certifying this particular class.

This makes any inquiry into whether state or federal judges are more or less likely to certify actions before them problematic. As Table 3.8 shows, when a decision on certification was actually made, state courts certified 57 percent of such cases, while

[6] About 14 percent of the state cases were eventually certified compared with 16 percent of those in the federal courts (Table 3.7), figures that differ somewhat from those found in a recent comparison of class actions that were remanded to state courts after federal court processing with those who were removed to and disposed in federal courts. In that study, 20 percent of the remanded state cases were certified, while 22 percent of the removed federal cases were certified. However, the class actions included in the federal court study included a wide variety of case types, not just insurance disputes. Additionally, all of the cases in the federal court study were ones that moved from one court system to another, while a similar shift in the forum was reported in just 20 percent of the cases in our data (Willging and Wheatman, 2005).

Table 3.8
Class Certification Decisions

	Certified		Denied	
Forum[a]	Percent	Margin of Error	Percent	Margin of Error
All courts (179 cases)	54	±7	46	±7
State courts (136 cases)	57	±8	43	±8
Federal courts (43 cases)	44	±15	56	±15

[a] Cases with certification decision made, including both open and closed cases.

federal courts certified 44 percent.[7] But we have no way of telling, at least from the information collected on our survey, which of these cases truly had vigorous contests over the issue of certification and which ones had the defendants either implicitly or explicitly agreeing to have a class certified in order to resolve the matter with a degree of finality through a settlement. Although in the end the judge alone must review and decide whether class treatment is appropriate, a defendant's acquiescence to plaintiff counsel's motion would be a persuasive factor in many instances.

It should be noted that the decisions presented in Table 3.8 represent the end result of the last motion in the case. It is possible, for example, that there were multiple motions with multiple decisions in these cases and that, in these instances, the earlier motions were denied; alternatively, the earlier motions might have been approved but the class definition being sought changed over the course of the litigation and a new decision was required.

Time to the Certification Decision

Another area of concern involves the time spent considering a motion to certify a class. In 2003, FRCP 23 was modified to require that the determination of whether to certify a class be made "at an early practicable time" rather than "as soon as practicable" (as the prior language had read) because the drafters of the changes to the rule felt that some time would be clearly needed to gather the information necessary to make the certification decision, perhaps to do some discovery in aid of that decision, to create a class trial plan to see whether the matter could be resolved as a class, to handle any pretrial dispositive motions, and to figure out who should be class counsel.[8]

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[7] In Willging and Wheatman's 2005 comparison of class actions that were remanded to state courts after federal court processing with those that were removed to and disposed in federal courts, 61.5 percent of the remanded state cases were certified when the judge ruled on the motion. Of the removed federal cases, 45.7 percent were certified (Willging and Wheatman, 2005).

[8] Certain states have also taken measures to formalize the process by which motions for certification are ruled upon and to prevent so-called drive-by certifications in which the decision can be made even before the defendant has answered the underlying complaint. See, for example, Ala. Code 1975 § 6-5-641 (enacted in 1999) (Code of Alabama 1975, 1999), which requires that, should a party so request, the motion cannot be decided until a full

Nevertheless, there have been reports of cases in which a motion for certification is made and class certification is granted all in the same day, sometimes almost immediately after the complaint was filed. We wanted to see whether the cases in our data reflect this sort of quick turnaround certification process but, in fact, the average case with a motion for certification took just over nine months to hand down that decision regardless of whether one looks at all cases with the motion or at certified cases only. Tables 3.9 to 3.11 show our findings for all dispositions, state dispositions, and federal dispositions. In 10 percent of all dispositions, the decision was made within 46 days following the motion's filing, a period that might not provide the opportunity for the type of review anticipated by the drafters of the current federal rule. In 5 percent of the cases, the decision was made within 21 days and there were instances in which the decision came on the same day on which the motion was filed. It should be noted that we have no way of determining whether the cases with the shortest periods from motion to decision involved instances in which the defendant vigorously contested the motion or in which the defendant was jointly seeking a certified class along with the plaintiffs' attorneys.

It should also be noted that the tables measure the time from the last motion for certification filed in the case to the latest reported decision on certification. Conceivably, a case might have multiple motions filed and multiple decisions during its lifetime, and it is possible that the first such motion triggered a considerable level of procedural activity and judicial review (and consumed a great length of time) before a

Table 3.9
Days from Filing of Motion to Certification Decision, All Dispositions

Measure	All Cases (n = 96)	Certified Cases (n = 45)
Mean	274	290
Median	211.5	259
5th percentile	21	18
10th percentile	46	54
90th percentile	597	597
Minimum	0	0
Maximum	1,845	782

evidentiary hearing is held, no sooner than 90 days after the conduct of a pretrial conference attended by all the parties in the litigation. More recently, the Supreme Court of West Virginia has underscored its intent that class actions can only be certified "after a thorough analysis" by the trial court (*W. Va. ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443 at 454, December 2, 2004).

Table 3.10
Days from Filing of Motion to Certification Decision, State Court Dispositions Only

Measure	All Cases (n = 71)	Certified Cases (n = 35)
Mean	259	268
Median	192	237
5th percentile	21	12
10th percentile	46	71
90th percentile	524	582
Minimum	0	0
Maximum	1,845	623

Table 3.11
Days from Filing of Motion to Certification Decision, Federal Court Dispositions Only

Measure	All Cases (n = 25)	Certified Cases (n = 10)
Mean	318	364
Median	286	360.5
5th percentile	44	18
10th percentile	54	36
90th percentile	676	725.5
Minimum	18	18
Maximum	782	782

decision was rendered, while the latest motion simply memorialized a finalized agreement painstakingly negotiated between the defense, the plaintiffs, and the judge.

Perhaps a more telling measure of the speed with which certification decisions are sometimes made would be to look at the time between the filing of a case and the point at which the judge has ruled on the motion. Although a short turnaround time between the filing of the motion and the decision, at least as measured by our survey, might be the result of multiple motions over a long period in a case that has been intensely and openly litigated for years, a ruling on certification that occurs soon after the case is first initiated may not allow adequate time to provide notice to potential class members or attract the attention of watchdog organizations that might intervene or act as objectors. Tables 3.12 through 3.14 show these periods. At least in the cases that were reported to us, there did not appear to be a pattern fitting the profile of a drive-by certification in which the decision was made almost immediately following

Table 3.12
Days from Case Filing to Certification Decision, All Dispositions

Measure	All Cases (n = 129)	Certified Cases (n = 59)
Mean	826	868
Median	709	785
5th percentile	179	167
10th percentile	224	221
90th percentile	1,451	1,451
Minimum	31	31
Maximum	5,758	5,758

Table 3.13
Days from Case Filing to Certification Decision, State Court Dispositions Only

Measure	All Cases (n = 95)	Certified Cases (n = 47)
Mean	835	881
Median	709	720
5th percentile	167	167
10th percentile	220	209
90th percentile	1,451	1,517
Minimum	31	31
Maximum	5,758	5,758

Table 3.14
Days from Case Filing to Certification Decision, Federal Court Dispositions Only

Measure	All Cases (n = 34)	Certified Cases (n = 12)
Mean	801	814
Median	726	910.5
5th percentile	224	280
10th percentile	280	280
90th percentile	1,289	1,238
Minimum	179	280
Maximum	2,357	1,289

case initiation. Five percent of all dispositions had a ruling on certification within six months of filing, and, in one instance, the ruling came about a month after case initiation. But on the average, the decision came approximately two years later.

Case Outcomes

All Cases

The rate of certification in all types of insurance class actions appears to impact the sorts of outcomes seen in the aggregate. Table 3.15 presents the proportion of closed cases, taken together and separated into state and federal cases, that are resolved in a variety of ways. In more than a third, the judge ultimately ruled in favor of the defendant on some sort of dispositive motion such as one seeking summary judgment or dismissal for failure to state a claim or a lack of jurisdiction.[9] The plaintiffs dismissed their complaints voluntarily in just over of a quarter of the cases, presumably without prejudice, which would allow them to refile the same case at a later point.[10] Nearly a third of the remaining cases were resolved by settlement, the end result for most traditional civil litigation, but a negotiated resolution that covered a certified class took place in only 12 percent of all closed cases. The remaining settlements (20 percent overall) only impacted the named plaintiffs in the original filings.

The remaining category (other outcome) in Table 3.15 and similar tables includes various events such as transfers to other jurisdictions and the relatively rare event of a verdict at trial.

A defendant in an insurance class action appears to have a better chance of an outcome in its favor than it would if the matter were brought on an individual basis, as 63 percent of the cases in our data were dismissed or dropped in the end. In contrast, the Bureau of Justice Statistics (BJS) found, in a 1992 survey of about 13,000 state court contract cases involving insurance companies as defendants, that 79 percent settled, 13 percent had summary judgments or dismissals, and 8 percent were resolved by arbitration, trial, or default judgment (presumably only a small fraction of the 13,000 cases in the BJS survey involved class action litigation).[11]

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[9] In this monograph, a *dispositive motion* is one seeking any type of nonvoluntary dismissal of the case. It should be noted that, although a ruling in favor of such a motion would terminate a case as far as the court's docket was concerned, in some instances, the plaintiffs would have had leave to refile the same case later. Outcome information in Table 3.15 and similar tables report on the last known key event in the case, so, if a refiling occurred after dismissal, it took place after our data collection. It should also be noted that few of these dispositive rulings involved a certified class; the majority would have applied only to the plaintiffs specifically named in the complaint. Without a certified class as the subject of the dismissal, essentially the same class action could have been filed again using different representative plaintiffs or modified allegations.

[10] To the best of our knowledge, none of the 748 unique cases used in our primary analysis contains multiple instances of an action subsequently refiled under the same docket number in the same court.

[11] DeFrances and Smith (1996, p. 4). The percentages exclude cases that transferred out to another court.

Table 3.15
Resolution of Attempted Class Actions, All Cases

	Individual Settlement		Class Settlement		Pretrial Ruling for the Defense		Voluntary Dismissal		Other Outcome	
Forum[a]	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error
All courts (564 cases)	20	±3	12	±3	37	±4	27	±4	4	±2
State courts (465 cases)	19	±4	12	±3	35	±4	29	±4	5	±2
Federal courts (98 cases)	24	±8	15	±7	43	±10	17	±7	1	±2

[a] Includes closed cases only.

Cases with Motions for Certification

The distribution of outcomes changes considerably when considering only those cases in which the plaintiff filed a motion for certification (see Table 3.16). Class settlement is now much more likely, with a third of all cases with such motions resulting in a settlement for a certified class. Summary judgments and other pretrial rulings for the defense as well as instances in which the plaintiff voluntarily drops the matter take place about 42 percent of the time in these situations.

Table 3.16
Resolution of Attempted Class Actions, Cases with Motion for Certification

	Individual Settlement		Class Settlement		Pretrial Ruling for the Defense		Voluntary Dismissal		Other Outcome	
Forum[a]	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error
All courts (207 cases)	20	±5	34	±6	27	±6	15	±5	4	±3
State courts (160 cases)	17	±6	35	±7	25	±7	17	±6	6	±4
Federal courts (47 cases)	28	±13	32	±13	34	±14	6	±7	—	—

[a] Includes closed cases only.

Certified Cases

When a class is, in fact, certified (see Table 3.17), the end result in nine of 10 cases is a class settlement (either approved or still under consideration at the time of reporting). It is not impossible for the defendants to prevail after this point (about 4 percent of certified cases resulted in a dispositive ruling in favor of the defendants and about 5 percent had some other outcome such as a consolidation with another case or a transfer to another court), but the looming possibility of what might take place in the 1 percent of certified matters that reach trial is likely to make settlement an attractive option. The results may lend credence to the claims made by some that the fact of certification creates enormous pressure to force a defendant to settle a class action,[12] but the lack of information about whether the defendant acquiesced to the motion for certification in the first place requires caution in interpreting these results.

Cases in Which Motion for Certification Was Denied

What happens when the judge denies the motion for certification, a situation that describes nearly half of all cases in which a decision is actually made? As Table 3.18 indicates, slightly more than half of all such cases end in a settlement on a individual basis, a dispositive pretrial ruling for the plaintiffs, or a voluntary dismissal—outcomes that are either in the plaintiffs' favor or, in the case of the self-dismissal, at least yield a benign result. In contrast, 90 percent of certified cases had what might be considered

Table 3.17
Resolution of Certified Class Actions

	Class Settlement (approved or pending)		Pretrial Ruling for the Defense		Tried		Other Outcome	
Forum[a]	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
All courts (78 cases)	90	±7	4	±4	1	±1	5	±5
State courts (62 cases)	89	±8	3	±4	2	±2	6	±6
Federal courts (16 cases)	94	±6	6	±6	—	—	—	—

[a] Includes cases closed or open with settlement approval pending.

[12] See, e.g., *Newton v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 259 F.3d 154 at 168, 3d Cir., October 16, 2001. But see also Silver (2003). Other explanations for the correlation between certification and settlement are certainly possible. For example, despite authority to the contrary (see, e.g., *Eisen v. Carlisle and Jacquelin*, 94 S. Ct. 2140, May 28, 1974), some judges might be taking the substantive merits of the case into account at the time of the decision.

Table 3.18
Resolution of Attempted Class Actions, Cases in Which Certification Was Denied

	Individual Settlement		Pretrial Ruling for the Plaintiffs		Pretrial Ruling for the Defense		Voluntary Dismissal		Tried		Other Outcome	
Forum[a]	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error
All courts (60 cases)	37	±12	2	±2	42	±12	13	±9	3	±3	3	±3
State courts (39 cases)	33	±15	3	±3	41	±15	13	±11	5	±5	5	±5
Federal courts (21 cases)	43	±21	—	—	43	±21	14	±14	—	—	—	—

[a] Includes closed cases only.

a proplaintiff outcome. If indeed legal and factual questions concerning the underlying claims are not on the table when the judge considers the issue of whether to certify a class and if the respective sets of certification-granted and certification-denied cases are equally meritorious (or equally nonmeritorious), then the results lend credence to the commonly made claim that the fact of certification alone is tantamount to a final victory for the plaintiffs in a class action. However, it should be remembered that the data do not indicate the degree to which settlements on a class basis were in the process of being negotiated by both sides prior to the judge's decision on the motion for certification or even prior to the filing of the motion itself. Thus, in at least some instances, reaching a settlement would have effectively laid the foundation for the certification rather than the other way around.

Cases in Which No Decision Was Made

Instances in which the case never reached a point at which a judge issued a formal ruling on certification have a different set of outcomes from those in which the motion was denied (see Table 3.19). About the same percentage of all cases winds up with a dispositive motion in favor of the defendants, but the proportion in which the plaintiffs voluntarily dismissed the complaint increases dramatically from about 13 percent to 34 percent. Similarly, although in denied cases, 37 percent resulted in an individual settlement, the corresponding percentage for cases without any decision dropped to 21 percent. One possible explanation would be that defendants perceive denied cases as being ones with enhanced settlement value (compared with those with no decision at all) given that class treatment is clearly on the agenda of the plaintiffs' attorneys and

Table 3.19
Resolution of Attempted Class Actions in Cases Without Certification Decision

	Individual Settlement		Pretrial Ruling for the Plaintiffs		Pretrial Ruling for the Defense		Voluntary Dismissal		
Forum[a]	%	Margin of Error	%	Margin of Error	%	Margin of Error	%	Margin of Error	Tried (%)
All courts (415 cases)	21	±4	1	±1	44	±5	34	±5	< 1
State courts (354 cases)	21	±4	1	±1	42	±5	36	±5	< 1
Federal courts (60 cases)	25	±11	—	—	52	±13	23	±11	—

[a] Includes closed cases only.

few barriers exist to prevent such attorneys from modifying the initially unsuccessful class definition and refiling a motion for certification. Another reason that cases with no certification decision have different outcomes from those with the motion denied might be that the figures in Table 3.19 reflect plaintiffs' attorneys' greater willingness to make tactical withdrawals in situations in which early discovery or communication with the defendants have revealed possible problems that would come to the surface if the issue of certification were formally presented to a judge. In such instances, there might be little economic return in continuing the litigation solely to obtain a small-value recovery for the named plaintiffs. Comments supplied by the responding insurers indicated that some of the voluntary dismissals were initiated for the purpose of clearing the way for parallel class actions that were moving forward with similar claims. Whatever the reason, the outcomes in these cases are not only different from those with certification denials, they are also different from what BJS found for state court insurance-related litigation,[13] suggesting that the class actions in our data, as a rule, are not simply "normal" insurance cases with a few class allegations tacked on simply to enhance individual settlement value.

Time to Disposition

The cases in our data had mean and median times from filing to disposition of 730 and 549 days respectively, as shown in Table 3.20. As might be expected, cases with motions for certification and cases in which a class was certified took longer to resolve, presumably because those with early pretrial dispositive judgments, voluntary

[13] As indicated previously, a BJS survey found that the overwhelming majority of insurance cases in state courts reached settlement (DeFrances and Smith, 1996, p. 4).

Table 3.20
Days from Case Filing to Resolution, All Dispositions

Measure	All Cases (n = 371)	Cases with a Motion for Certification (n = 147)	Certified Cases (n = 70)
Mean	730	1,034	1,219
Median	549	852	974
10th percentile	138	258	418
90th percentile	1,467	2,034	2,216.5
Maximum	6,425	6,425	6,425

dismissals, and settlements on an individual plaintiff basis would have ended the litigation relatively quickly. In one state court case that was eventually certified and resolved with a class settlement, more than 17 years elapsed between initial filing and the ultimate end of the litigation, driving up the averages across the board. (See Tables 3.21 and 3.22 for state and federal dispositions.)

Settlement Results

Although about 12 percent of our closed cases resulted in a settlement on a class basis or a trial verdict rendered in favor of the class (see Table 3.15), a number of respondents declined to provide detailed information about the terms of any settlements or verdicts in which they were defendants (though, in each instance, they did complete the balance of the survey). As such, the findings reported in this section should be viewed in light of both the issue of self-selection in reporting and the inherent problems of descriptive statistics using such low numbers of cases with reported outcome information. Missing this data is especially vexing because class settlements and trials have the

Table 3.21
Days from Case Filing to Resolution, State Court Dispositions Only

Measure	All Cases (n = 306)	Cases with a Motion for Certification (n = 115)	Certified Cases (n = 56)
Mean	730	1,048	1,274.5
Median	534	873	1,014.5
10th percentile	133	242	339
90th percentile	1,451	2,110	2,304
Maximum	6,425	6,425	6,425

Table 3.22
Days from Case Filing to Resolution, Federal Court Dispositions Only

Measure	All Cases (n = 64)	Cases with a Motion for Certification (n = 32)	Certified Cases (n = 14)
Mean	732.5	986	997
Median	592	816	800
10th percentile	150	469	572
90th percentile	1,547	1,802	1,585
Maximum	2,357	2,357	2,261

highest profile of any aspect of class action litigation, so any concerns over confidentiality should, in theory, be minimized. Cases with such outcomes are the ones most likely to be the subject of reporting by the general media and the specialized business and legal press, and we are independently aware of a number of highly publicized, high-value insurance class action settlements that our data overlook. Nevertheless, the answers on the completed surveys do provide some clues as to at least the range of outcomes that characterizes how insurance cases have been resolved on a class basis.

Because trial verdicts in our insurance class action data are so few in number and represent a very different type of class-binding result from a negotiated resolution, this section presents outcome information for class settlements only. To put the results that follow into perspective, of the 748 open and closed cases in our sample, 70 were resolved through class settlement, of which 86 percent involved a single-state class and 79 percent were concluded in a state court.[14] It should be noted that it does not appear that responding companies selectively withheld settlement outcome information for some cases but not others. With few exceptions, companies either answered most questions regarding the details of the settlements for all their relevant cases or they made a blanket refusal to provide any information whatsoever for all settlements in which they were defendants. Nevertheless, we have no way of knowing whether the surveys with relatively complete information on negotiated outcomes comprise a representative sample of all insurance class actions settlements in our data. As such, the information presented herein should be viewed primarily as illustrative examples of at least some, but not all, reported insurance class action settlements. When reviewing these findings, the primary focus should be on the range of outcome characteristics with less emphasis on the reported mean and median values.

[14] Another three cases had a settlement agreement pending approval when the survey was returned. Respondents were not expected to provide details of pending settlements.

Size of the Common Fund

In 32 cases, the respondents provided information on the aggregate pool of funds the defendant was offering to settle the claims of the plaintiff class and to pay the associated expenses of the litigation. Because we were seeking information primarily on the monetary compensation that would theoretically be available to all class members making a successful claim (such as might be made in the form of direct payments, credit to accounts, or repairs to personal or real property) plus associated transaction costs such as class counsel fees and expenses, the common fund figures do not reflect the claimed value to class members of any injunctive relief such as prohibiting the defendants from continuing the same practices that triggered the litigation. This limitation is an important one because, in some class actions, the projected value of such injunctive relief can greatly exceed the size of the common fund (or be the exclusive remedy) and can form a substantial basis for the fee award request. There also appears to have been some confusion among respondents whether their answers should reflect the net size of the common fund after attorneys' fees and costs are deducted. To get a sense of the overall value of the settlement, we were seeking the gross size. When the respondent reported only the net size, we added in the applicable figures provided for class counsel fees and expenses.

Gross compensation funds in reported cases ranged from $360,000 to $150,000,000. The mean fund size was $12,800,000 and the median $2,600,000. The common fund was less than $5 million in size in 62.5 percent of the reported cases, a finding that will be discussed in greater detail in a subsequent section describing CAFA's potential impact.

Number of Potential Class Members

Estimates of the theoretical number of individuals or entities that meet the criteria contained in the court-anointed description of the certified class can vary depending on the identity of the party making them, the purpose for which the estimates are created, and the availability of account information and other business records necessary for making an educated and accurate guess. In the 36 cases in which the respondent provided information on estimated size, the class sizes ranged from as small as 127 to as large as 4,300,000 members with a mean and median of 363,000 and 28,000 members, respectively. It is not clear when the respondents were including in their estimates the number of future class members to whom any injunctive relief was directed.

Potential Size of Benefits per Class Member

We did not separately collect information on the estimated per–class member size of the monetary benefits potentially available from the net common fund. In some class action settlements, this figure may be fixed in the approved agreement so that each class member making a successful claim might receive, for example, a check in the amount of $5. In other settlements, successful claimants would be entitled to a pro-

rata share of the common fund net of class counsel fees and expenses, so the final individual benefit would depend on how many class members successfully completed the claiming process. In still others, the benefit varies depending on the circumstances of the individual claim, such as the number of years that a policy was in force or the total value of denied medical bills. Nevertheless, we can approximate an average per–class member benefit size when we know the size of the net common fund and the estimated number of individuals and entities making up the class. Keeping in mind that the value of injunctive relief is not included here, in the 22 cases in which all such information was provided, allowing us to make the required calculation, per–class member monetary benefits ranged from about $3.50 to about $61,000, the latter figure perhaps somewhat surprising in light of the commonly held notion that consumer class actions are always about small-value claims. The large-value cases in our data (at least from the individual class member's perspective) are, for the most part, related to matters involving UM or UIM coverage disputes in which the settlement required the insurer to pay previously denied first-party property damage and personal injury claims and to those involving disputes over the payment of contingency fees in subrogation cases. In the UM and UIM coverage class actions, for example, the considerable size of the individual benefit is a reflection of the fact that class members in such cases are essentially seeking to recover what they might have received from a tort trial or settlement had the tortfeasor had sufficient assets to cover the losses. Such large per-member benefits were associated with relatively small classes; all of the reported cases with $1,000 or more available to each class member had no more than 700 potential claimants. In 18 out of the 22 settlements, however, class members had a theoretical benefit of less than $200 and, in four instances, it was less than $20 (the median estimated benefit was $97 and the mean, because of the UM and UIM coverage disputes, was $5,233).

Class Counsel Fees and Expenses

We received information on the award to class counsel for fees and expenses in 48 cases. In some instances, the respondent provided us only with a copy of the approved settlement agreement indicating the maximum size of an award that class counsel was intending to seek and that defendants had agreed not to oppose. In such situations, we used that request as the measure of the fees and expenses, though conceivably the judge might have actually awarded a different amount. When separate information on reimbursed expenses was provided, we included that as well, though it is possible that some respondents' figures do not reflect such expenses. Fees and expenses in reported cases ranged from $50,000 to $50,000,000 with a mean award of $3.4 million and a median award of $554,000.

We did not directly collect information on the specific percentage the judge applied against the gross fund to calculate the attorneys' fees. Moreover, it is possible that, in some instances a lodestar approach was used as the primary tool to calculate the fees, basing the award on the hours invested in the case rather than the fund size.

However, we can approximate a fee and expense percentage (because of data limitations, we cannot estimate a fee-only percentage) by comparing the fee and expense award with the common fund in those cases in which all such types of information were reported. Keeping in mind the facts that our figures, at least in theory, include both fees and expenses and that information we collected on the value of available compensation do not reflect injunctive relief benefits, our calculated fee and expense award percentages in 27 cases with the necessary information ranged from 12 percent to 41 percent of the gross common fund, with a mean of 29 percent and a median of 30 percent.[15]

Benefit Notification and Distribution Methods

Except in such instances in which class members automatically receive their shares of the net common fund via credits to existing accounts, offsets of future policy premiums, or direct disbursement of checks, the degree to which all available monetary benefits are ultimately distributed depends on the methods chosen for notifying class members that a settlement had been reached and for providing instructions and forms for making claims. For example, published notice in a handful of major urban newspaper editions would seem to be a less effective way than direct mail of getting the class members' attention. Similarly, a process that requires each class member to assemble receipts and other supporting documentation may be more difficult to complete successfully than one in which only the person's name need be entered on a simple claim form and mailed in. And when the size of the potential benefit is too small to be worth the trouble and expense to comply with the claiming process, even if the expense consists only of the cost of a stamp for first-class mail, the redemption rate may be reduced as well.

A combination of both direct mail and publication was used in about half of the 43 cases for which we have information about how class members were notified of their rights under the settlement. However, we do not know whether mailed notice was provided to all class members (and therefore publication was used only as a supplemental method to announce the conclusion of the case) or whether only a subclass of members whose identity and addresses were known received mail notice (and so publication was essentially intended as the exclusive method for most class members). Nor do we know about whether the mailed notice was in the form of a separate communication from the insurer or buried within premium statements and other routine mailings from the insurer. Another 12 of the 43 settlements with information about the notice campaign used direct mail exclusively and most of the remainder relied on publication alone.

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[15] Other research has found somewhat lower fee-only percentages for all consumer class actions (a category into which insurance class actions would presumably fall). Using articles from a class action litigation reporter as a data source, the authors of that study reported mean and median fee percentages of 24.3 and 25.0 percent, respectively (Eisenberg and Miller, 2004a, p. 51). However, our percentages may include expenses awarded to class counsel.

The mechanisms for getting compensation into the hands of eligible class members were described in 36 cases. In 29 of such cases, class members were required to submit some sort of written claim form to the insurer or the settlement administrator. In three other cases, the monetary benefits were automatically disbursed to known class members without the need for any overt action on their part. In the remainder, the mechanisms included combinations of automatic and claimed distributions, phone claim systems, or the use of vouchers or coupons. No information was available as to the level of complexity of the forms to be filled out or any supporting documentation required when submitting claims to the defendants.

Final Distributions

An average total payout of $9.5 million was made in the 39 cases for which we have information on the total direct monetary benefits distributed to the class. But this figure reflects the effect of a single case where $149 million was paid out. Distributions were typically much smaller, with a median payout of $500,000 and with 10 percent of all cases involving $25,000 or less (the smallest reported payout in our data was $200). Both direct monetary compensation and the value of any repairs performed are included in these figures (class counsel attorneys' fees and expenses are not included).

The number of class members who ultimately received at least some monetary benefits was reported in 33 cases. In four of these cases, payments were, in fact, made to fewer than 100 individuals or businesses. Although the mean number of recipients was 27,000 class members and the median size was 1,500 members, in one instance, only a single class member received any direct benefits at all. In contrast, there were 600,000 compensated class members in the largest reported case. But as indicated previously, our focus here is on monetary compensation, and therefore we did not take into consideration the value of injunctive relief, which conceivably would be of benefit to future consumers of the defendants' goods and services even if they did not receive any direct payments in the instant case.

We can estimate a per-claimant average payout in the 30 cases for which we have sufficient information. Although the smallest individual benefit was for about $8, the median figure was $441. The average was about $4,000, again a result of the considerable sums in dispute in cases involving denied UM or UIM coverage (the largest such average payout was nearly $50,000).

How did these distributions compare to the projections provided to the judge who reviewed and approved the settlement agreement? In 10 of the 29 cases in which both the potential class size and the number of claims paid were reported, 100 percent of the projected number of class members received some amount of direct compensation. In one case, however, less than 1 percent of the estimated total was paid. The average case paid benefits to 45 percent of the estimated number of class members at the time of settlement, while the typical case had a much smaller claiming rate, with a median percentage of just 15 percent.

It is possible, however, that some of the approved distribution plans had as their primary focus the goal of getting as much of the net compensation fund out to class members as possible, rather than maximizing the numbers of successful claimants. Pro-rata distribution schemes, for example, would essentially divide up the net fund more or less equally among successful claimants. Seven of the 23 cases with information on both the net settlement fund (i.e., the total common fund less attorneys' fees and expenses) and total payments had monetary distribution rates at or near 100 percent (mean and median distribution rates were 61 percent and 79 percent, respectively). But another quarter of the cases reflected a distribution of 13 percent or less and, in three instances, only 4 percent of the original net settlement fund was paid. Again, the issue of nonmonetary benefits looms large here, and it is possible that the figures provided for the original net settlement fund included some amounts for the value of injunctive relief.

The less-than-100-percent distribution rates (regardless of whether measured in terms of the number of class members or the size of the net compensation fund) seen in most of the reported settlements in our data suggest that an alternative perspective on attorneys' fee and expense award percentages might be useful. As described previously, awards for fees and costs typically constituted about 30 percent of the gross common fund in our reported cases (as measured by the mean and median). But if the standard for awards would be influenced by the degree to which the settlement agreement could put money directly into the hands of class members, the results might be very different. Effective fee and expense percentages—in other words, ones based on the fee and cost awards divided by the sum of the distributed benefits, attorneys' fees, expenses, and other costs—increase to a mean of 54 percent and a median of 47 percent in the 36 cases for which this information was available. In a quarter of these cases, the effective fee and cost percentages met or exceeded 75 percent and, in five instances, the effective percentages were over 90 percent.

Without making a more thorough examination of official court records in these cases, we cannot say whether the low payout rates and correspondingly high effective fee and cost award percentages are because of our inability to take injunctive relief and other types of indirect compensation into account or whether they are the sole result of the distribution and notice methods agreed to by class counsel and the defendants and approved by the supervising judge.

What the Data Suggest About CAFA

CAFA and Federal Diversity Jurisdiction

CAFA is clearly the most significant change to class litigation on a nationwide basis since passage of the federal private securities acts in the 1990s. Although CAFA does not directly modify FRCP 23 or similar rules that govern class actions in state courts,

it makes important changes to the process and the requirements for moving state court class actions into the federal system. CAFA does contain provisions addressing the standards that federal judges would apply when reviewing and approving proposed settlements, but arguably the key focus in the debate during its consideration was over its provisions for liberalizing federal court jurisdiction when class actions are involved. In the eyes of many proponents and opponents of the legislation, CAFA's rules were generally believed to be ones that would lead to a near-blanket transfer of the bulk of state class actions into the federal district courts.

The signature provision in CAFA is its modification of the rules for federal jurisdiction over class actions when the state citizenships of the parties in the case are not the same. In general, civil disputes can be litigated in federal court (either as a case originally filed there or as one first brought in a state court but later removed to a federal court) only if they satisfy one of the specific requirements set forth in the Constitution for the exercise of federal jurisdiction. For example, cases that involve federal statutes, cases in which the United States is a party, and cases in which the state citizenship of the plaintiffs and defendants differ can all be litigated in a federal court. This last basis for jurisdiction, one requiring a diversity of citizenship among the parties, is involved in about one quarter of all federal civil cases (Administrative Office of the United States Courts, 2004, Table C-2) and is the reason that a wide range of cases that do not appear to involve any federal laws or issues of national import at all, such as routine automobile accident claims, can nevertheless be heard in federal courts.

Because of their sometimes expansive geographical scope, class actions would seem to be classic examples of cases in which the diversity of the parties' citizenship would result in federal jurisdiction. But for a variety of reasons, few state court class actions that involved parties from different states were removed, regardless of whether the plaintiff classes were comprised of residents of all 50 states and the District of Columbia or whether the classes covered only single states but the defendants were out-of-state corporations or individuals. As the jurisdictional rules were developed by statute and interpreted by appellate rulings over the years, diversity of citizenship came to require that *all* named plaintiffs in a class action had to be citizens of states differing from those of *all* defendants (*Supreme Tribe of Ben-Hur v. Cauble*, 41 S. Ct. 338, March 7, 1921). This requirement of complete diversity would not be met in a case with an actual or proposed national class if class counsel identified and named at least one plaintiff located in the same state as one or more of the defendants. Even in single-state class cases with an out-of-state corporation or individual as the most important defendant, complete diversity might be avoided by simply naming a minor in-state defendant with at least the possibility, however remote, of being found liable (*Luevano v. Dow Corning Corp.*, 895 F. Supp. 135 at 137, W.D. Tex., August 2, 1994).

Moreover, Congress had set a minimum monetary threshold of $75,000 for the amount in controversy in all diversity cases with the intent of keeping low-value disputes out of federal courts (Title 28, Section 1332). Even though the size of this thresh-

old is fairly modest compared with those of the routine claims heard in our nation's trial courts every day, class actions often failed to meet this test as well. Federal appellate courts had interpreted the monetary minimum as applying to *each* plaintiff, not the aggregated value of all the claims of all class members (*Zahn v. International Paper Co.*, 94 S. Ct. 505, December 17, 1973; see also *Free v. Abbott Lab.*, 51 F.3d 524, 5th Cir., April 24, 1995). In the world of modern class action litigation, in which individual amounts sought often do not exceed $10 per class member, let alone $75,000, the opportunities for removal were few.[16]

This situation was disconcerting to some, because federal court removal was perceived to be the most obvious solution to the claimed problem of counsel selecting so-called plaintiff-friendly state courts and judges when filing cases seeking national classes. Other concerns were voiced about a lack of procedural safeguards in the rules governing class actions in certain states, especially in relation to drive-by certifications.

For many of those with such concerns, CAFA was thought to be the answer. The act would ease the rules for diversity of citizenship, though for class actions only, so that diversity of the parties could be achieved if *any* class member and *any* defendant were citizens of different states and if the *aggregated*, not individual, amount in controversy for all class members exceeded $5 million.[17] CAFA's proponents believed this aspect of the legislation to be its primary weapon against actions that were being managed inappropriately in state courts: Defendants would now have the option of having what they might characterize as a neutral decisionmaker hear a multistate case if they wished to litigate upon what they believed to be a more level playing field.

But to opponents, the relaxed requirements would achieve something far less desirable. According to them, CAFA might lead to federal court judges inappropriately overseeing cases that were, in effect, brought by thousands or even millions of citizens of a single state, involving wrongs that took place completely within the borders of that same state, against defendants with a substantial economic presence within that state, and containing claims for redress that were based solely upon the statutes the

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[16] The discussion herein applies only to class actions that lack some other basis for federal jurisdiction. Class claims involving federal laws, for example, could be filed in federal court or removed there from state court regardless of the citizenship of the parties or the individual amounts in controversy.

[17] It should be noted that some exceptions to the liberalized rules for diversity jurisdiction have been carved out for instances in which the only "foreign" parties in a case are a fraction of the plaintiff class or nonprimary defendants. Other exceptions include matters involving state officials and agencies as defendants, classes numbering fewer than 100 individuals or entities, securities litigation, and corporate governance issues. It should also be noted that, although CAFA's new rules primarily speak to class actions brought under FRCP 23 and similar statutes at the state level, so-called "mass actions" are included as well. These involve cases in which the claims of 100 or more individual plaintiffs are proposed to be tried jointly, a situation exemplified by litigation brought in Mississippi and West Virginia under their relatively liberal rules for joinder and consolidation of parties and cases. The rules for federal jurisdiction for such cases has not been overhauled to these same degree as traditional class actions; for example, the $75,000-per-individual-plaintiff requirement still applies, though the old requirement for complete diversity does not.

class members' own legislative representatives had enacted. The attraction of removal would be irresistible, it was asserted, and nearly every state class action of any consequence would wind up in federal court, resulting in an overwhelmed federal judiciary, an inappropriate development of case law as federal appellate justices would be deciding most appeals of what would be essentially state law–based class actions, and fewer legitimate claims would be able to withstand the increased time and expense of bouncing between state and federal court.

The Potential for Removal in Insurance Class Actions

Are the claims of a wholesale movement of state court class actions justified, at least in the context of insurance class actions?[18] Clearly multistate plaintiff classes are going to be prime candidates for removal under CAFA, no matter where the defendant is located. And single-state classes that involve noncitizen defendants would be eligible as well. As a matter of law, corporations are deemed to be dual citizens of the states in which they are incorporated and of the single state in which they have their principal place of business (described by appellate courts variously as the "nerve center" of the corporation for making major decisions, the place where the majority of the company's sales or production activities are conducted, or some combination of the two standards) (Title 28, Section 1332; *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 11th Cir., August 12, 2005). Although the application of this rule is just now being tested by the appellate courts within the context of CAFA as of this writing, it would seem that an insurer incorporated in Delaware but with its principal place of business in Arkansas will be treated as a local defendant in a class action brought by Arkansas class members in an Arkansas state court.

The pool of state court insurance class actions against which CAFA's liberalized standards for diversity jurisdiction could be applied is certainly substantial. According to our survey work, 89 percent of the initial filings in reported insurance class actions were in state courts. Even without CAFA, the prior rules allowed about one in 12 of these original state court filings in our data to be removed to federal court for disposition (presumably most of these would have involved federal law claims).

Alhough much of the discussion in the debate over CAFA focused on the perceived problems of multistate classes in state courts, in fact such matters comprise but a fraction of the cases about which we know from our own data collection: Just 17 percent of the insurance class actions (putative and certified) filed in state courts sought

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[18] According to the Senate Judiciary Committee report on that chamber's version of CAFA, the new rules do not apply only to formally certified cases. Rather, the rules should be "interpreted liberally" and so "lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions" (U.S. Senate, 2005, p. 35). New 28 U.S.C. 1332(d)(8) also provides that the new jurisdictional provisions apply to "any class action before or after the entry of a class certification order. . . ." Thus, CAFA's definition closely matches the one used throughout this document: a *class action* includes cases in which class treatment is either attempted or ordered (Title 28, Section 1332).

national or several-state classes (see Table 3.1). Although such multistate cases would clearly be in line for removal, the more interesting question may be regarding the other 83 percent, the ones with a single-state class: How many of those involve foreign (out-of-state) defendants?

To make this assessment, we compared the state in which the case was resolved (or where it was still being litigated when the survey was completed) with both the "state of domicile" field (as a proxy for the state of incorporation) and the corporate headquarters address field (as a proxy for the principal place of business using a "nerve center" test) provided by A. M. Best in its P&C and life and health databases for the sole insurer we chose in each case to be the representative defendant (see discussion in Chapter Two). If both the insurer's domicile and its headquarters were located outside of the state indicated as the case's last known court location, we assumed that the defendant was of different citizenship from the class members. Under this assumption, 87 percent of 527 single-state cases had an out-of-state defendant and so would have at least met the citizenship test.[19]

To be precise, the question of defendant citizenship also plays a role in certain types of multistate cases under CAFA. In simplistic terms, otherwise eligible cases in which a third or fewer of class members are from other states will not be subject to federal diversity jurisdiction if all primary defendants or any significant defendant are citizens of the filing state.[20] Our data cannot tell us what proportion of proposed class members in a multistate case were not citizens of the filing state, but, if we assume that national classes are dispersed more or less geographically so that the filing state is not likely to involve two-thirds or more of all class members, then the exceptions are most likely to apply in several-state (i.e., more than one state, fewer than all states) class cases. Such classes account for only about 3.5 percent of insurance class actions

[19] In fact, the 87-percent estimate of the percentage of single-state class cases in state court filings with out-of-state defendants is likely to understate the true figure. We determined corporate citizenship for a single representative defendant in the case, but about two-thirds of the insurance class actions in our data involved multiple corporate defendants. If *any* of these defendants were out-of-state citizens, CAFA's minimal diversity requirement would be satisfied.

[20] First, the federal courts *must* decline jurisdiction in a multistate case that otherwise meets the tests if fewer than a third of proposed class members are from outside the state of filing and all the primary defendants are from the state of filing. CAFA does not define what constitutes a primary defendant. Second, jurisdiction *must* be declined in situations in which fewer than a third of proposed class members are foreign, significant relief is being sought from at least one in-state defendant whose conduct formed a significant basis for the claims, the principal losses or injuries took place in the filing state, and no similar cases had been filed in the previous three years. CAFA does not define what constitutes significant relief or a significant basis for the claim. Finally, a court *may* decline jurisdiction when between one-third and two-thirds of class members are from out of state if the primary defendants are from the filing state and if, after taking into account a myriad of factors presented in CAFA, the judge believes that, in the interests of justice, the case should stay in state court. Given the vague definitions of primary and significant defendants and the difficulties of precisely estimating potential class size early in a case's life, it is likely that the nuances of these carve-out provisions will be strenuously litigated in both the trial courts and the appellate courts for quite some time.

filed in state courts in our data (see Table 3.1). Of these, the insurer we chose as the representative defendant was a citizen of the same state of filing in about 45 percent of the multistate classes (22 cases). Because the exceptions to CAFA's relaxed rules on diversity jurisdiction as a result might not affect more than 2 percent of all state court insurance class actions, we ignore them for the remainder of the calculations.[21]

In all, 89 percent of state court cases in our data (n = 632) had *either* a multistate class *or* an out-of-state defendant. The world of insurance class actions is therefore one dominated by cases with interstate implications. But location of the defendant is only half of the puzzle, because CAFA requires both diversity of citizenship *and* aggregate claims exceeding $5 million. Although the commonly held picture of class actions is one of cases involving megamillions or even megabillions of dollars, the stakes are, in fact, often much lower. Our data on outcomes are limited but they do provide at least some clues about the overall value of some of these cases. In the insurance class action settlements for which we were provided with information on the available fund size, 62.5 percent had gross common funds (which includes both monies potentially available for compensation and the awards for class counsel fees and expenses) at the time of settlement worth less than $5 million (see section on Settlement Results in this chapter).

Nevertheless, *settlement fund size* is not a synonym for *aggregate amount in controversy*. Settlements, by their very nature, reflect a compromise between the positions advanced by the plaintiffs and the defense; class counsel in many of these under–$5 million cases might have repeatedly claimed at an earlier point in the litigation that the potential damages owed to the class were considerably larger than that for which they ultimately settled. The defendants might have done so as well. Nevertheless, the data do suggest that the monetary threshold requirement will loom large in disputes over CAFA-triggered removals. It may even color how cases are conceived, shaped, and filed if avoiding the possibility of removal is thought to be important from a tactical standpoint.

How would the aggregate amount-in-controversy aspect of these cases impact the potential for movement between forums in the insurance class action world? If indeed 62.5 percent of interstate cases (i.e., those with a multistate class or a foreign defendant) had a value of less than $5 million as suggested by our limited data on settlement funds, then just 33 percent of state insurance class action filings would be removable under CAFA, compared with 89 percent if the threshold issue is ignored.[22]

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[21] In fact, most multistate cases involved a class definition that covered members from at least 10 states, suggesting that some of these cases might not have had a sufficiently large fraction of in-state individuals and entities and thus failed to meet CAFA's carve-out tests, regardless of the defendants' citizenship.

[22] These calculations relate only to the question of whether the case could be removed under CAFA's liberalized rules for diversity of citizenship jurisdiction. In fact, 8 percent of state court filings were eventually moved to federal court for processing (see Forum for Filing and Disposition in this chapter), presumably on the basis of federal law question jurisdiction, but possibly as a result of meeting the traditional tests for citizenship and indi-

The Unknown Factors

In fact, CAFA's ultimate effect on the forum in which insurance class actions are litigated is more complicated than simple calculations of site of citizenship or aggregate claim value might suggest. The actions and desires of both plaintiffs and defendants will be the primary factors in determining whether we see the wholesale movement that some predicted or something else far more modest. For example, plaintiffs' attorneys hoping to avoid removal might recast claims in ways that result in reduced proportions of cases with out-of-state defendants or aggregate values exceeding the new threshold. But in the end, the defendants themselves may ultimately govern how CAFA affects any shift from state to federal courts. Removal is usually on motion of the defendant in these cases and, if a defendant chooses not to make such a motion, the case will likely remain in state court, regardless of the citizenship of the parties or the scope of the monetary claims. Indeed, federal court management may not always be seen by insurers as the best way to resolve a newly filed class action. Although much of the public's attention during the debate over CAFA focused on the jurisdictional aspects of the bill, there are also important new rules governing federal court class actions that make coupon settlements far less attractive to class counsel and that require notification of an appropriate government entity (either a regulatory agency or a state or federal attorney general) of the terms of all proposed settlements. Defendants may not always perceive such changes in the rules as being in their best interest, especially in certain cases.[23]

Regardless of the size of the overall movement, clearly some state court insurance class actions will be removed to federal court as a direct result of CAFA's liberalized rules for diversity jurisdiction. Will this result in a change in the outcomes of such cases? The unknown intangibles make this question even more difficult to answer, but it should be kept in mind that, in our survey data, the most common reported statutory basis for the suits were state-enacted unfair insurance claims and settlements acts, state-enacted deceptive trade practices acts, state-enacted consumer protection statutes, and state-enacted automobile no-fault laws. Those are exactly the same laws that a federal jury would be asked to apply to the claims of the plaintiff class. It also should be remembered that nothing in CAFA prevents a multistate class. Although some observers feel that federal judges are generally more reluctant to certify such cases, there is

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vidual amount in controversy (for example, a very small class seeking to recover denied personal injury claims for UM coverage might have satisfied the old requirements). Also, some state court filings that were conceivably removable might have remained where they originated because the defendant chose not to exercise the right of removal.

[23] Settlements that include coupon distributions can result in defendants retaining a greater share of the compensation fund due to low rates of redemption by class members. CAFA's requirement that class counsel fees must be tied to the value of the coupons actually redeemed is likely to reduce markedly the frequency with which such distribution schemes are incorporated in negotiated resolutions of cases settled in federal courts. As for CAFA's provision for notifying state and federal agencies when a settlement is under review, there is always the possibility that intervention by those same agencies may result in objections to the settlement provisions, in enhanced benefits for class members, or in subsequent enforcement proceedings and investigations.

no absolute prohibition and our data certainly contain instances in which multistate classes were approved in federal district courts.

CAFA was enacted in February 2005, a relatively recent point in the timescale of civil justice events. It will take years for judges, attorneys, and litigants to adapt to the new rules and for their long-term effects to reveal themselves. The opportunity for monitoring the changes wrought by the legislation will hopefully be enhanced by the data collected as part of our current research on insurance class actions.

CHAPTER FOUR

Issues Related to Regulation

In this chapter, we discuss some similarities between class actions and the administrative regulation of an industry, the structure and goals of the nation's system of insurance regulation, and commonly voiced issues about how class action litigation and regulation can interact. We also describe a survey that attempts to rank cases in our database by their likely relationships to the activities and authority of state insurance regulators and explore differences in outcomes based upon those ranks. Regulatory aspects of cases with class members from more than one state are also discussed. Finally, we describe the degree to which defendants have raised these sorts of issues in insurance class actions and to which regulators themselves have tried to play a role.

Introduction

Administrative regulation of enterprises and their activities are designed to affect the "rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting" (Davis, 1972, p. 1). By delegating the authority to create rules and enforce them, the legislative and executive branches of government have empowered administrative agencies to implement official policy and to ensure that the actions of those who are subject to the oversight of such agencies comply with applicable laws, especially in regard to their interactions with consumers of their goods and services.

Another avenue for addressing the rights and responsibilities of private parties who are subject to regulation is through civil litigation. When such litigation involves issues outside of the scope of a regulatory agency's charter, there is little question that the courts are the appropriate vehicles for resolving such disputes and providing relief to aggrieved parties. But when the subject matter of the suit instead involves claims that relate in some way to the areas that have been previously delegated to a regulatory agency for rulemaking, adjudication, or enforcement, then complex questions can arise as to whether it should be the courts or administrative agencies that initially, or even exclusively, decide such issues. Regardless of how these questions are answered, when only a handful of individual parties (for example, a single ratepayer and the util-

ity that provides that customer with electricity) are involved in the suit, the outcome of litigation is not likely to have much of an impact on the regulated entity's relationship with its other customers or competitors or on its internal business practices, even in instances in which the allegations and defenses raised by those parties clearly have regulatory implications.

The same cannot be said about those class actions that also involve companies subject to administrative regulation. Instead of a single consumer as the sole plaintiff in the case, the claimants may consist of a considerable proportion of all past, present, and even future customers of the regulated entity. Instead of a month or two of service charges or some other relatively small amount in controversy, the relief sought may include aggregated claims worth millions or even billions of dollars. And instead of an outcome that would narrowly apply only to the specific dispute at hand, a settlement or judgment in a class action may require the regulated entity to alter companywide practices and procedures affecting all of its customers. In some instances, such outcomes effectively operate to change the behavior of all of those that are subject to the agency's authority, not just the specific defendants named in the suit. In many ways, class action litigation against an entity subject to administrative oversight can have striking similarities to the regulatory process itself: Aspects of rulemaking, adjudication, and enforcement all apply when the parties before the court include both regulated businesses and large numbers of those who conceivably are protected by administrative agencies from the unlawful or undesirable actions of those companies. Moreover, the rights being enforced through the litigation process and the outcomes generated by settlement or trial may serve to redefine how such agencies interpret and enforce laws and regulations in the future. In effect, class actions can operate as a sort of "shadow" mechanism for regulating an entire industry.

For four decades, the modern version of FRCP 23 and its state equivalents has provided aggrieved parties with powerful tools for addressing what they perceive to be violations of rights enumerated in statutes, regulations, and case law. But, in recent years, the use of representative class actions as a type of regulatory device has been the subject of criticism from some quarters. A number of observers have raised questions about how well the class action device works within the context of disputes that involve matters already subject to extensive governmental regulation. They have suggested that, although class actions can supplement regulatory mechanisms when official oversight or response may be delayed or fails to adequately address consumers' needs, in other instances, the positive aspects are not as clear. According to this view, class actions can incur unnecessary transaction costs when they act in parallel with similar efforts by regulatory agencies, and, in certain situations, they can even work at odds with the desires of policymakers and frustrate legislative and administrative goals.

In contrast, others assert that the purported conflict between regulation and class actions is a smokescreen designed to create a defendant-favorable environment in the courts, one in which regulated corporations would have the option of punting cases to

friendly regulators, in whose hands class members' claims will languish and die from neglect. They suggest that few class actions actually touch on matters within the mission and authority of regulators and that, when they do, it is a clear sign that the regulators have either abrogated their responsibilities to consumers or have implicitly chosen private enforcement as the most appropriate and most efficient vehicle for achieving compensation for aggrieved consumers. In this view, the courts are exactly where such matters should be adjudicated, especially given the powerful tools for addressing corporate wrongdoing expressly provided by legislators in the form of consumer protection statutes.

This debate may reach its peak with class actions involving insurance-related issues, with both the proponents and the critics of such mass litigation suggesting that the unique way in which this industry is regulated plays an important role in the question of whether and when agencies and the courts work at cross purposes or jointly achieve positive results for the public as a whole.

Insurance Industry Regulation

The United States has historically left the regulation of the insurance industry up to the states. Federal oversight of the insurance industry is limited as regulatory authority has generally been delegated to the states as affirmed by the passage of the McCarran-Ferguson Act in 1945 (Title 15, Section 1011) and the Financial Modernization Act in 1999 (Public Law 106-102).

The focus of the 51 separate regulatory regimes (essentially the totality of the statutes, administrative regulations and policies, and case law in a state that governs the business of insurance) in the various states and the District of Columbia have traditionally been concentrated on the related tasks of *solvency regulation* and *market regulation*. The regulation of solvency is intended to protect policyholders and beneficiaries from the financial failure of insurers, which might leave them exposed at their most vulnerable time. To address these concerns, state administrators generally require insurers to maintain appropriate levels of reserves, contribute to guaranty funds, and meet financial reporting requirements. Market regulation, on the other hand, is intended to ensure fair, nondiscriminatory, and legally permissible insurance products, practices, and prices. States differ markedly in their specific approaches within this area but, in most instances, the regulators are concerned primarily with matters such as the forms used for insurance policies, pricing (i.e., premium rates), licensing insurers, licensing insurance agents and brokers, communication between insurers and policyholders, and other aspects of the way these businesses conduct themselves in the marketplace.

Some have criticized the existing state-based system as a balkanized mishmash of rules that result in a source of confusion and complexity for those insurers that try to do business in more than one state (see, e.g., Greenberg, 2002). Others suggest that

regulation by individual states may be more vulnerable to agency capture by the very interests that are subject to the regulatory process, resulting in weakened consumer protections (see, e.g., Brown, 2005, and Hunter, 2003). There certainly are significant differences in the way each state regulates the industry within its own borders; for example, some states set mandatory rates for all insurance policies, other states only review and approve proposed rates that insurers submit but do not set them, other states require prior approval of new rates only if they involve a certain degree of change from a prior rate, and, in still others, rates are almost completely deregulated within certain lines of insurance. And the resources available to DOIs can vary as well, with agencies staffed by as few as 25 employees or as many as 1,300. The situation has led to proposals that would shift at least some of the responsibility for regulating the industry to the federal government (see, e.g., U.S. Senate, 2003). Some industry groups have called for a hybrid system in which federal regulation would preempt only limited aspects of the business such as ratemaking (see, e.g., National Association of Mutual Insurance Companies, 2004, and American Bankers Association, undated[a]) or at least give insurers the option of filing a single set of rates and forms with a federal regulator for approval rather than making separate filings with individual DOIs (see, e.g., Council of Insurance Agents and Brokers, 2002, and American Bankers Association, undated[b]). But others believe that the current variety of state-based approaches to insurance regulation provides a more fertile ground for innovation, fine-tunes regulatory systems to meet local needs, and allows a state to institute stronger protections for its citizens than might be realized with federal management (see, e.g., National Association of Insurance Commissioners, undated).

Notwithstanding any future change in the regulatory structure of the industry, the current scope of authority typically granted to each state's insurance administrator can be considerable. For example, appellate decisions suggest that laws regulating the business of insurers are any of those with "the end, intention, or aim of adjusting, managing, or controlling the relationship between the insurance company and the policyholder, directly or indirectly" (*Autry v. Northwest Premium Servs.*, 144 F.3d 1037 at 1044, 7th Cir., May 13, 1998). "Overseeing the industry and protecting the state's insurance consumers" is how one DOI views its primary responsibility, stating that the agency "regulates, investigates and audits insurance business to ensure that companies remain solvent and meet their obligations to insurance policyholders" (California Department of Insurance, undated). In great detail, another state asserts that its DOI "licenses and regulates insurance companies, risk retention and purchasing groups, motor clubs, preneed funeral homes, agents, brokers, adjusters, and consultants; approves policy filings, investigates consumer complaints; monitors financial condition and solvency of insurance companies and collects premium and surplus lines taxes" (Wyoming Insurance Department, 2004). And the legislature in another state has declared that its insurance commissioner "shall have general control, supervision, and direction over all insurance business transacted in the state, and shall enforce all

the laws of the state relating to such insurance" (Iowa Code 2005 §505.8). But, despite the broad scope of such pronouncements describing the regulated aspects of the insurance business, insureds and insurers certainly litigate disputes in the civil courts every day, even when the subject matter of the case may appear to touch upon issues related to solvency or market regulation.

Understanding When Regulation and Class Actions Interact

These expansive grants of authority to insurance regulators have led some to suggest that disputes between insurers and entire classes of insureds ought to be handled only within those agencies. In their view, judges and juries lack the expertise to deal with the technical issues related to solvency or market regulation (see, e.g., Bisbecos et al., 2002). They also suggest that the civil courts lack the sort of broad-focus, long-term vision needed to make sure the outcome of the dispute is in the best interest of the public at large, not just the individual litigants in the case (Bisbecos et al., 2002).

On the other hand are those who say that class actions can address important needs that would be overlooked by regulators who might be concentrating on the big issues but may lack the resources, time, or desire to remedy wrongs on an individual basis (see, e.g., Cabraser, 1998). For them, getting monetary losses back into the pockets of policyholders in such instances can only be achieved by the power of aggregate litigation (Cabraser, 1998). And it is argued that it makes little sense to give some corporations a free pass when it comes to court actions seeking recovery of losses caused by repeated harms on a widespread scale simply because the business happens to be subject to administrative regulation.

Trying to figure out whether and when a class action conflicts with the powers delegated to an administrative agency and what to do about such a conflict when one exists is difficult; reasonable people can strenuously disagree over the answers to these questions. Unfortunately, few bright lines distinguish between the roles that agency regulation and class action litigation ought to play in protecting the rights of those affected by the actions of regulated entities and in achieving other important public policy goals. Nevertheless, we believed it important to get a sense of degree to which such issues present themselves in insurance class actions, given the continuing dialogue among stakeholders on this topic. We wanted to know what types of claims are most likely to touch on areas that are also within the scope of the regulatory process, whether the cases adjudicating such claims are concentrated in certain jurisdictions, what the outcomes of these cases are, whether these types of cases are more or less likely to be certified than others, the degree to which regulatory aspects of the cases are brought to the courts' attention, and how often regulators attempt to intervene in these cases.

The Survey of State Departments of Insurance

We conducted a survey of staff members of a number of DOIs to rank the key allegations made by the plaintiffs in our cases by what the respondents believe to be their potential relationship to the traditional activities and authority of insurance regulators.

The opinions of regulators are not the final word on whether the issues in a particular case overlap the day-to-day functions and the legal authority of insurance departments generally, nor are they conclusive as to whether agencies can or should take an interest in or become involved with the progress and outcome of a class action working its way through the courts. As are attorneys, insurers, policyholders, consumer organizations, and others with a stake in the debate over insurance class actions, regulators comprise another interest group with its own agendas and particular biases. Our interest in collecting information from the regulators is directed primarily at identifying cases in which there was at least a possibility that a judge could be faced with the question of whether a class action should be handled administratively, an agency might consider intervening in the case or play some other role, or regulatory issues could arise in some other way. It would be up to the courts, of course, to decide whether the claims and defenses in any specific case also involved matters within the scope of a state's regulatory regime and, if so, to determine the best way to address the overlap.

We asked the department staff members to assign a value from one to five to each of the issues identified in the cases reported by responding insurers. A rating of 1 implied little or no relationship between the particular claim and the activities of the insurance department in the regulator's own state, if asserted as part of a class action against an insurer on behalf of an entire class of policyholders or other individuals or businesses, while a rating of 5 implied a significant relationship. For each issue, we then averaged the ratings across the responses from the participating states to obtain a simulated consensus from the staff members (a full list of all claims and their averaged ratings can be found in Appendix C). The averaged ratings ranged from 2.0 for claims that the defendants failed to have settlements reached with minors reviewed and approved by a judge to 4.9 for claims that the defendants discriminated based on race by charging excessive premiums in certain geographic areas. Across all issues, the mean and median averaged ratings were about 3.6.

There is no particular point in the continuum of responses we received at which an allegation in an insurance class action unquestionably becomes one intertwined with the administrative regulation of this industry. To identify a set of cases in which regulatory issues have at least the *possibility* of playing a role in the dispute, we classified issues with an averaged rating above the 80th percentile of all averaged ratings (i.e., those greater than 4.07) as having the strongest potential relationship to a state's regulatory regime. Issues in the bottom 20th percentile of all averaged ratings (3.15 and below) were ranked as having the weakest relationship, and those in the middle group were ranked as having a modest relationship. For the purposes of the analysis described below, we assigned each case in our database a single value based on the

highest rank associated with any of the claims or allegations asserted by the plaintiffs. For example, a case with three main issues with averaged ratings of 4.5, 3, and 2.5, respectively, would be ranked as a case with a strong regulatory relationship (based on the 4.5 rating). In the end, 22 percent of the cases were ranked as having a strong relationship, 59 percent were ranked as having a modest relationship, and 19 percent of the cases were ranked as having a weak relationship.[1]

Cases with the Strongest Regulatory Relationship

As can be seen in Table 4.1, issues that responding administrators identified as having a relatively strong relationship were found in cases brought in both state and federal courts. Indeed, federal class actions were more likely to involve an issue that regulators rated as having the strongest relationship to their authority: Thirty-three percent of the 78 filings in this jurisdiction were ranked in the top tier versus 20 percent of the 647 state cases. Litigation over life insurance vanishing premium claims, automobile UM and UIM coverage issues revolving around what took place at the time of initial policy purchase, patterns and practices involved in property claim adjustments, first-party collision or comprehensive automotive claims involving disclosure of the use of aftermarket parts, and automobile UM and UIM issues over multicar coverage and pricing were the most common ones in our data identified as having a strong relationship.

As with insurance class actions generally, cases ranked at the strong level most often involved either state-based unfair insurance practices acts or state-based unfair or deceptive trade practices acts when the respondent indicated the statutory basis for the case's claims and defenses. In federal court cases, the role of these types of state rules is not as prominent, though they continue to be the most common statutes reported; federal RICO and federal Fair Credit Reporting Act issues were found in nearly as many cases.[2]

Are cases with such issues more likely to be filed in particular jurisdictions? For cases in state forums (see Table 4.2), the courts in Jefferson County, Alabama; San Diego County, California; Palm Beach, Pinellas, and Seminole counties, Florida; Madison County, Illinois; St. Louis County, Missouri; and Bexar and Harris counties,

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[1] These regulators' opinions about the relationship of various class action issues to their authority and duties are not proxies for the degree to which the agencies routinely play an active role in resolving related complaints. For example, regulators might take the position that, when disputes arise, even high-rated ones, private litigation is still the most expedient method of enforcing insurance code violations or remediating harms incurred by consumers. Similarly regulators might be inclined to intervene directly in litigation with low-rated issues, depending on the case's specific circumstances.

[2] It should be noted that laws cited as controlling at least some aspect of the case are not necessarily related to the particular issues that our survey of DOIs identified as having strong relationships to their authority and activities.

Texas, all had strong-ranked cases making up a larger proportion of their insurance class action caseload than did the rest of their states. Because of the low numbers of cases in individual jurisdictions, we did not make a similar assessment for the federal district courts.

Table 4.1
Commonly Cited Allegations with Strongest Relationship to Regulation

Category	Key Allegation in Case	Forum
Automobile first-party coverage—OEM issues	Failed to disclose the use of aftermarket parts for repairs rather than using original equipment manufacturer parts	State
Automobile third-party liability coverage	Unfairly or deceptively handled claims	State
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	Systematically refused to reimburse on "reasonable and customary" or "medically necessary" or other appropriate basis without investigating particular merits of the claim or without reasonable grounds for making decision	State
	Failed to make timely payments of medical and other bills under PIP or MedPay coverage	State
	Wrongfully paid insureds' health care providers at negotiated rates, which is not possible as insurer is not legitimate preferred provider organization	State
Automobile UM or UIM coverage—policyholder issues	UM or UIM election or rejection at time of initial policy purchase issues (basic, extended, or enhanced upgrade; includes misleading representations, invalid forms, failure to offer as required, and failure to obtain written rejection)	Both
	Charged for multicar stack coverage when plaintiff actually had only one car	State
Automobile UM or UIM coverage—policyholder issues	Failed to pay UM or UIM claims on vehicles based on an unenforceable other-owned auto exclusion	State
Automobile coverage—other issues	Calculated premiums in manner not consistent with state law	State
Health insurance coverage—health care provider issues	Violated state prompt-payments laws	Federal
	Delayed payments unnecessarily without paying interest on valid claims	Both
Life coverage	Claimed premiums would vanish over time	Both
	Improperly charged excess costs of insurance, expenses, and administrative fees in violation of contract and marketing materials	Both
	Misrepresented the cash value or benefits that a policyholder would realize under a policy	Both

Table 4.1—Continued

Category	Key Allegation in Case	Forum
Property coverage	Discriminated based on race by refusing to insure or only offering policies with fewer benefits in particular geographic areas	Both
	Discriminated based on race by refusing to insure older homes or only offering policies with fewer benefits to minorities	Both
	Provided poor customer service, delayed responding to inquiries, and generally mishandling claims	State
	Systematically performed unfair or other wrongful adjustment of claims arising from a single event (e.g., a particular hailstorm or earthquake)	Both
Various types of coverages—credit issues	Failed to disclose adverse credit report that resulted in denial of insurance, rate increase, or coverage change	Federal

NOTE: Includes top-tier rank issues cited in three or more cases only.

Table 4.2
Frequency of Class Actions Involving Regulatory Issues in State Courts

County	Cases with a Strongest Relationship Ranking (%)	Number of All Cases Reported
Alabama		
Jefferson County	37.5	8
Other Alabama counties	20.0	20
State total	25.0	28
Arizona		
Maricopa County	25.0	8
Other Arizona counties	33.3	3
State total	27.3	11
California		
Los Angeles County	27.3	22
San Diego County	50.0	4
Other California counties	11.1	9
State total	25.7	35
Colorado		
Boulder County	50.0	4
Denver County	25.0	4

Table 4.2—Continued

County	Cases with a Strongest Relationship Ranking (%)	Number of All Cases Reported
Other Colorado counties	50.0	6
State total	42.9	14
Florida[a]		
Broward County	23.1	13
Hillsborough County	0.0	5
Lee County	0.0	9
Miami-Dade County	15.7	70
Palm Beach County	33.3	6
Pinellas County	83.3	6
Seminole County	40.0	5
Other Florida counties	50.0	8
State total	22.1	122
Georgia		
Fulton County	0.0	6
Muscogee County	0.0	5
Other Georgia counties	0.0	8
State total	0.0	19
Illinois		
Cook County	9.1	33
Madison County	26.3	19
St. Clair County	0.0	5
Other Illinois counties	14.3	14
State total	14.1	71
Louisiana		
Orleans Parish	37.5	8
Other Louisiana parishes	37.5	8
State total	37.5	16
Maryland		
Baltimore County	0.0	4

Table 4.2—Continued

County	Cases with a Strongest Relationship Ranking (%)	Number of All Cases Reported
Montgomery County	0.0	4
Other Maryland counties	0.0	1
State total	0.0	9
Michigan		
Wayne County	0.0	15
Other Michigan counties	0.0	5
State total	0.0	20
Missouri		
Jackson County	0.0	4
St. Louis County	22.2	9
Other Missouri counties	0.0	4
State total	11.8	17
New Jersey		
Essex County	25.0	4
Other New Jersey counties	20.0	5
State total	22.2	9
New Mexico		
Santa Fe County	28.6	7
Other New Mexico counties	100.0	1
State total	37.5	8
New York		
New York County	0.0	4
Other New York counties	20.0	10
State total	14.3	14
Ohio		
Cuyahoga County	25.0	4
Franklin County	20.0	5
Lucas County	25.0	4
Stark County	25.0	4

Table 4.2—Continued

County	Cases with a Strongest Relationship Ranking (%)	Number of All Cases Reported
Other Ohio counties	40.0	5
State total	27.3	22
Pennsylvania		
Philadelphia County	15.8	19
Other Pennsylvania counties	18.2	11
State total	16.7	30
Texas		
Bexar County	50.0	4
Dallas County	17.7	17
Harris County	40.0	5
Nueces County	25.0	4
Travis County	0.0	7
Other Texas counties	11.1	27
State total	17.2	64
Washington[a]		
King County	0.0	8
Pierce County	25.0	4
Other Washington counties	100.0	1
State total	15.4	13

NOTE: All specifically identified counties were reported to have a total of four or more cases disposed of or still open in that state court for all cases in our data. States in which no single county had more than four cases are not included. Only cases for which a maximum rank for the relationship of case issues to regulatory authority was available are shown here. Thus, some counties identified may have fewer than four cases cases in this table.

[a] Denotes states for which the percentage of cases with a strongest ranking differs significantly by county; p-value < 0.05.

How frequently do judges certify these cases with the strongest likelihood of impacting the regulatory regime? Tables 4.3a and 4.3b suggest that, when they actually rule on the matter, both state and federal court judges are less likely to certify cases with stronger regulatory relationships than they are cases with weaker relationships. For all jurisdictions taken together, the difference between the rate of certification between cases with strongest and weakest rankings (Table 4.3b) was large but not statistically significant (p-value = 0.12). As discussed earlier, however, our data do not indicate

Table 4.3a
Certification Decisions by Potential for Regulatory Impact, All Dispositions: Certified, Certification Denied, and Putative

	Strongest Relationship (n = 117)		Modest Relationship (n = 315)		Weakest Relationship (n = 110)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Certified	12.0	±6	14.6	±4	14.6	±7
Certification denied	13.7	±6	11.1	±3	7.3	±5
Putative	74.4	±8	79.3	±4	78.2	±8

NOTE: Includes closed cases only.

Table 4.3b
Certification Decisions by Potential for Regulatory Impact, All Dispositions: Certified as Percent of All Decisions

	Strongest Relationship (n = 33)		Modest Relationship (n = 114)		Weakest Relationship (n = 28)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Certified as percent of all decisions	42.4	±17	54.4	±9	64.3	±18

NOTE: Includes cases with certification decision made (includes both open and closed cases).

Table 4.4a
Certification Decisions by Potential for Regulatory Impact, State Court Dispositions Only: Certified, Certification Denied, and Putative

	Strongest Relationship (n = 87)		Modest Relationship (n = 266)		Weakest Relationship (n = 94)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Certified	12.6	±7	13.5	±4	14.9	±7
Certification denied	10.3	±6	9.0	±3	5.3	±5
Putative	77.0	±9	77.4	±5	79.8	±8

NOTE: Includes closed cases only.

the degree to which the defendant assented to the motion for certification. Thus, any direct comparison of the certification rates between forums or regulatory rankings

Table 4.4b
Certification Decisions by Potential for Regulatory Impact, State Court Dispositions Only: Certified as Percent of All Decisions

	Strongest Relationship (n = 23)		Modest Relationship (n = 87)		Weakest Relationship (n = 23)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Certified as percent of all decisions	47.8	±20	56.3	±10	69.6	±19

NOTE: Includes all cases with certification decision made (includes both open and closed cases).

Table 4.5a
Certification Decisions by Potential for Regulatory Impact, Federal Court Dispositions Only: Certified, Certification Denied, and Putative

	Strongest Relationship (n = 30)		Modest Relationship (n = 49)		Weakest Relationship (n = 15)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Certified	10.0	±10	20.4	±11	13.3	±14
Certification denied	23.3	±15	23.5	±12	20.0	±20
Putative	66.7	±17	57.1	±14	66.7	±24

NOTE: Includes closed cases only.

would have to assume that the percentages of settlement classes or de facto jointly made motions for certification are essentially the same in all subgroups.

Regardless of whether cases with a strong ranking are certified less often than weaker ones, the fact of the matter is that, despite the concerns that some voice over these kinds of issues, certification does take place. Perhaps, from the standpoint of the players in these cases, a better measure might be what the ultimate outcomes are generally, not what happened in just those cases that progressed all the way to a hearing on a certification motion. For class settlements and for pretrial dispositive rulings for the defense, the two first listed outcomes on Table 4.6, the cases turned out pretty much the same way; breakouts for state and federal courts are shown in Table 4.7 and 4.8. These are arguably the kinds of outcomes that have the most significant bearing on the underlying issues, in that a class settlement resolves them with as much finality as this process can muster and in that a defense ruling such as a summary judgment or other pretrial dispositive outcome at least presents some serious barriers to the case from arising again. The difference between strong and weak cases in either the class settlement or defense ruling rates was not statistically significant

Table 4.5b
Certification Decisions by Potential for Regulatory Impact, Federal Court Dispositions Only: Certified as Percent of All Decisions

	Strongest Relationship (n = 10)		Modest Relationship (n = 27)		Weakest Relationship (n = 5)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Certified as percent of all decisions	30.0	±28	48.1	±19	40.0	±40

NOTE: Includes all cases with certification decisions made (both open and closed cases).

Table 4.6
Outcomes of Cases by Potential for Regulatory Impact, All Dispositions

	Strongest Relationship (n = 119)		Modest Relationship (n = 323)		Weakest Relationship (n = 111)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Class settlement approved	9.2	±5	13.3	±4	12.6	±6
Pretrial ruling for defense	41.2	±9	36.5	±5	34.2	±9
Voluntary dismissal	16.0	±7	26.3	±5	40.5	±9
Individual settlement	29.4	±8	18.3	±4	10.8	±6
Other outcome	4.2	±4	5.6	±3	1.8	±1.8

NOTE: Includes closed cases only.

(p-value > 0.30). There is quite a bit more variation in the other types of case outcomes in Table 4.6, but the differences might be less important to repeat defendants and to insureds. Cases resulting in voluntary dismissals (i.e., situations in which the plaintiffs might have tactically withdrawn their complaint with the option of refiling again) and cases in which the insurer has settled with the individually named plaintiffs only on a limited basis, not on a class basis, might not have the same kinds of implications or the same level of finality for insurers and for potential class members.

Table 4.7
Outcomes of Cases by Potential for Regulatory Impact, State Court Dispositions Only

	Strongest Relationship (n = 89)		Modest Relationship (n = 273)		Weakest Relationship (n = 95)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Class settlement approved	9.0	±5.9	12.5	±3.9	12.6	±6.7
Pretrial ruling for defense	38.2	±10.1	37.4	±5.7	29.5	±9.2
Voluntary dismissal	18.0	±8.0	26.4	±5.2	47.4	±10.0
Individual settlement	29.2	±9.4	17.6	±4.5	8.4	±5.6
Other outcome	5.6	±4.8	6.2	±2.9	2.1	±2.9

NOTE: Includes closed cases only.

Table 4.8
Outcomes of Cases by Potential for Regulatory Impact, Federal Court Dispositions Only

	Strongest Relationship (n = 30)		Modest Relationship (n = 50)		Weakest Relationship (n = 15)	
Measure	Percent	Margin of Error	Percent	Margin of Error	Percent	Margin of Error
Class settlement approved	10.0	±10.0	18.0	±10.6	13.3	±13.3
Pretrial ruling for defense	50.0	±17.9	32.0	±12.9	60.0	±24.8
Voluntary dismissal	10.0	±1.0	26.0	±12.2	0.0	—
Individual settlement	30.0	±16.4	22.0	±11.5	26.7	±22.4
Other outcome	0.0	—	2.0	±3.9	0.0	—

NOTE: Includes closed cases only.

Multistate Cases

Another way to identify insurance class actions that may be perceived to be in conflict with regulatory activities would be to see whether their scope includes class members from different states. At first glance, it may be difficult to understand why such cases would have regulatory implications simply because of the residence of class members. Indeed, as Table 4.9 indicates, multistate cases are only slightly more likely than single-state cases to involve issues with the strongest regulatory rankings, though the difference is not statistically significant (p-value = 0.38). But, as suggested previously, states vary in their specific approaches to solvency and market regulation, and, although there are voluntary attempts to standardize some aspects of the administrative process nationwide,[3] ultimately the policy forms, rates, practices, and other aspects of the business that are approved by insurance regulators can differ in significant ways from state to state. As a result of the historical tradition of individual state regulation of the local insurance industry, a difference of opinion has developed about whether multistate class actions in this area are ever justified. One school of thought suggests that the regulatory structure of the industry is so unique that courts must always apply local statutes, regulations, and case law to interpret insurance contracts created or enforced locally. According to this view, when such a multistate claim is brought in a court located in a state other than where the class members reside, the result is either the inappropriate application of law developed in one jurisdiction to the citizens of another or a possibly inaccurate interpretation of a

Table 4.9
Potential for Regulatory Impact by Scope of Class, All Jurisdictions

	Multistate Classes (n = 125)		Single-State Classes (n = 571)	
Measure	Percent	Margin of Error	Percent	Margin of Error
Strongest regulatory relationship	25.6	±7.7	21.5	±3.4
Modest regulatory relationship	60.0	±8.6	58.1	±4.0
Weakest regulatory relationship	14.4	±6.2	20.3	±3.3

NOTE: Includes cases with known class scope.

[3] For example, the NAIC has adopted a number of model acts and model regulations covering a wide range of issues with the intent that the individual states would implement such proposals and standardize these particular aspects of insurance regulation. Examples include "After Market Parts Model Regulation," "Model Variable Annuity Regulation," "NAIC Insurance Information and Privacy Protection Model Act," "Unfair Discrimination Against Subjects of Abuse in Disability Income Insurance Model Act," and "Life and Health Insurance Guaranty Association Model Act" (National Association of Insurance Commissioners, 2005).

foreign jurisdiction's law by judges with limited experience. At best, critics of multistate cases assert, the significant differences in the individual experiences of class members located in multiple states would act to defeat the requirement of commonality that is critical for class certification. And at worst, a class action litigated in the courts of one state might find an insurer liable to policyholders in another state for practices that were, in fact, approved or even encouraged by local regulators.

Others assert that there are many issues that transcend state lines when it comes to insurance-related claims and that, in addition to the protections afforded by federal law (which would clearly apply to all consumers and others affected by an insurance contract, no matter where located), universally held principals of common law such as prohibitions on fraud or misrepresentation can be enforced by any court. A narrowly drawn subclass consisting of all class members using a "common denominator" reading of the case law across multiple states could be used, they suggest, for only those claims susceptible to uniform interpretation by judges and juries, while other subclasses in the same case could be state-specific. Moreover, it has been asserted that, when the insurer-defendant is a citizen of the same state in which the multistate action is filed (perhaps by having its principal place of business in that state or by having filed articles of incorporation there), that same state has a legitimate interest in ensuring that its own corporate citizens obey its own laws, no matter where the wrongful acts might take place.

As we have seen, multistate classes are certainly sought in both state and federal insurance class actions (about 17 percent of state court cases and 27 percent of federal court cases fall into this category; see Table 3.1). The most commonly cited ones involved issues related to OEM parts in automobile first-party coverage; diminished and increased value claims in automobile first party coverage; modal premium charges in a variety of lines; health care provider claims against health insurers; policyholder claims for automobile no-fault, PIP, or medical payments coverage; and vanishing premium life insurance matters. Table 4.10 lists the specific issues noted in at least two multistate cases.

Table 4.10
Common Allegations in Multistate Class Actions

Category	Key Allegation in Case	Forum
Annuities	Unnecessarily placed tax-deferred annuities into tax-deferred retirement plans	Both
Automobile first-party coverage—diminished value issues	Failed to reimburse policyholders for the diminished value of repaired vehicles	State
Automobile first-party coverage—increased value issues	Deducted portion of payments for vehicle repair based on alleged betterment in value of vehicle from upgraded parts or repairs	State

Table 4.10—Continued

Category	Key Allegation in Case	Forum
Automobile first-party coverage—OEM issues	Failed to disclose the use of aftermarket parts for repairs rather than using original equipment manufacturer parts	State
	Specified aftermarket parts for repairs rather than using OEM parts, resulting in diminished value, safety issues, or any other loss (other than policy cost)	Both
Automobile first-party coverage—other issues	Used valuation software package designed to produce offers for automobile total loss at less than fair market value, actual retail price, fair retail value, or other required measure	State
	Systematically omitted payment for necessary repairs, including safety-related issues (e.g., seat belt check or four-wheel alignment)	State
Automobile third-party liability coverage	Failed to reimburse third-party claimants for diminished value or failed to notify of right to make claim for diminished value	State
	Breached third-party beneficiary contract or other duty or understanding by specifying or using aftermarket parts for repair	State
Automobile no-fault, PIP, or medical payments coverage—health care provider issues	Made inappropriate fee reductions on claims submitted under PIP coverage	State
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	Failed to disclose practice of paying bills only at a fixed percentile of local usual and customary charges	State
	Systematic reduction of PIP benefits through bill review computer program	State
	Systematically refused to reimburse on reasonable and customary or medically necessary or other appropriate basis without investigating particular merits of the claim or without reasonable grounds for making decision	State
	Used medical file review firms with reviewers who are unqualified, nonmedical, biased, given improper incentives, or who have colluded or conspired with insurers to deny claims	State
	Used valuation software package designed to produce offers for personal injury claims at less than full and fair value	State
Health insurance coverage—policyholder issues	Failed to disclose to members how benefit and coverage decisions are made	State
Health insurance coverage—health care provider issues	Delayed payments unnecessarily without paying interest on valid claims	Both
	Disregarded medically necessary criteria in making coverage and treatment decisions	Both
	Entered into illegal capitation arrangements	Federal
	Failed to adequately explain to providers how the reimbursement fee schedule was designed and how it operates	Both

Table 4.10—Continued

Category	Key Allegation in Case	Forum
Health insurance coverage—health care provider issues, continued	Failed to make increased reimbursement payments when the treatment required extra time and resources	Both
	Interfered with providers' relationships with patients by arbitrarily denying or delaying authorizations or payments	Both
	Paid out-of-network providers less than billed charges	Federal
	Reimbursed fees to providers at levels lower than true prevailing rates	Both
	Used claim review software to bundle, drop, or downcode provider-submitted claim codes without justification	Federal
	Violated state prompt-payment laws	Federal
Life coverage	Claimed that premiums would vanish over time	State
	Provided misleading advice to churn existing policies with new ones and obtain transaction fees	State
	Premiums exceeded face value of policy through lifetime of payments; discrimination not an issue	State
Various types of coverage—credit issues	Failed to disclose adverse credit report that resulted in denial of insurance, rate increase, or coverage change	Federal
	Failed to notify of receipt of adverse credit report even if not used	Federal
	Ordered credit report without legally permissible purpose	Federal
Various types of coverage—modal premium issues	Failed to comply with Truth in Lending Act requirements for financed portion of the annual premiums paid on a periodic basis	Both
	Failed to disclose annual percentage rate and finance charges incurred when paying premiums periodically rather than annually	Both
Various types of coverage—other issues	Collected money from insureds under questionable subrogation clause	State
	Unspecified misrepresentation of scope and level of coverage	State

NOTE: Issues listed represent those reported in at least two state or two federal multistate cases.

Perhaps not surprisingly, 16 of the 17 multistate matters in federal court in which the respondent indicated a statutory basis for the litigation were brought using a federal statute as the controlling authority. But, of the 81 state court cases seeking a multistate class with a reported statutory basis, 70 involved a type of state-based consumer protection or business practices act. We cannot say, however, to what degree these cases represent attempts to conduct cross-state regulation by applying the laws of one state to citizens of another. Our surveys did not reflect whether the applicable statutes were

derived from a single state (presumably the state of filing) or were from each state in which actual or putative class members were located.

In this section, we look more closely at the state and federal systems separately rather than the usual practice of looking at combined numbers. Tables 4.11a, 4.12a, and 4.13a describe the overall rates of certification versus denial versus no decision. Tables 4.11b, 4.12b, and 4.13b show only certification versus denial.

Table 4.11a
Certification Decisions by Scope of Class, All Dispositions Only: Certified, Certification Denied, and Putative

	Multistate Classes (n = 77)		Single-State Classes (n = 446)	
Measure	**Percent**	**Margin of Errir**	**Percent**	**Margin of Error**
Certified	13.0	±7.5	14.4	±3.3
Certification denied	14.3	±7.8	10.8	±2.9
Putative	72.7	±10.0	74.9	±4.0

NOTE: Includes closed cases only.

Table 4.11b
Certification Decisions by Scope of Class, All Dispositions Only: Certified as Percent of All Decisions

	Multistate Classes (n = 28)		Single-State Classes (n = 145)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Certified as percent of all decisions	57.1	±18.3	52.4	±8.1

NOTE: Includes cases with certification decision made (both open and closed cases).

Table 4.12a
Certification Decisions by Scope of Class, State Court Dispositions Only: Certified, Certification Denied, and Putative

	Multistate Classes (n = 60)		Single-State Classes (n = 373)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Certified	13.3	±7.1	14.5	±3.6
Certification denied	11.7	±4.5	8.9	±2.9
Putative	75.0	±7.9	76.9	±4.3

NOTE: Includes closed cases only.

Table 4.12b
Certification Decisions by Scope of Class, State Court Dispositions Only: Certified as Percent of All Decisions

	Multistate Classes (n = 20)		Single-State Classes (n = 116)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Certified as percent of all decisions	60.0	±21.5	56.9	±9.0

NOTE: Includes cases with certification decision made (both open and closed cases).

Table 4.13a
Certification Decisions by Scope of Class, Federal Dispositions Only: Certified, Certification Denied, and Putative

	Multistate Classes (n = 17)		Single-State Classes (n = 72)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Certified	11.8	±11.8	13.9	±8.0
Certification denied	23.5	±20.2	22.2	±9.6
Putative	64.7	±22.7	63.9	±11.1

NOTE: Includes closed cases only.

Table 4.13b
Certification Decisions by Scope of Class, Federal Dispositions Only: Certified as Percent of All Decisions

	Multistate Classes (n = 8)		Single-State Classes (n = 29)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Certified as percent of all decisions	50.0	±34.6	34.5	±17.3

NOTE: Includes cases with certification decision made (both open and closed cases).

Because of the greater geographical scope and the possibility that important questions of law and fact might differ among class members from different states, some believe that certification of a multistate class should be more difficult to achieve than in a single-state class (see, e.g., Tager, 2001, and Moller, 2005). Others believe that federal court judges are less likely than their state court counterparts to certify such cases (see, e.g., Foundation for Taxpayer and Consumer Rights, 2003, and Goldman, 2005). Our data suggest that, when a state court judge actually rules on the issue, multistate class cases are certified at a rate very similar to single-state cases (see Table 4.12b) and that federal judges are certainly not averse to certifying classes with citizens from more than one state (see Table 4.13b). Again, our data do not indicate the degree to which the defendant assented to the motion for certification. It is possible, for example, that

when defendants are amenable to settlement at all, it is in their interests to request that class counsel move for certification of a settlement class on a multistate basis to achieve the greatest level of "universal peace," even if the matter was first brought only as a single-state class. This may be true even in instances in which a contested motion for certification for a national class might not succeed but a joint motion would.

Multistate insurance class actions also share some similarities with single-state class cases generally in terms of the ultimate outcome of the case. The rate at which a class settlement is achieved is nearly the same for both types of classes, as is the rate for individual settlements (see Table 4.14). The key difference is that a much smaller percentage of multistate cases winds up with a dispositive ruling for the defense (p-value = 0.01). Our data do not provide an explanation for this, but one possibility might involve the much higher rate at which the plaintiffs have voluntarily dropped their suits. It is possible that more than one multistate case was being litigated at the same time over the same issues involving the same defendants but in different jurisdictions and that, as the dust settled, class counsel in one jurisdiction might have dismissed their own actions in favor of subsuming their claims into stronger cases elsewhere, perhaps withdrawing before a judge would have ruled on the defense's pretrial motions. Whatever the reason, at least in terms of class settlement rates, multistate and single-state classes are the same. The rate at which a class settlement is achieved is nearly the same for both types of classes, as is the rate for individual settlements (see Table 4.14; state and federal court rates are shown in Table 4.15 and 4.16).

Table 4.14
Outcomes of Cases by Scope of Class, All Dispositions

	Multistate Classes (n = 77)		Single-State Classes (n = 456)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Class settlement approved	11.7	±7.2	12.5	±3.0
Pretrial ruling for defense	23.4	±9.5	39.7	±4.5
Voluntary dismissal	41.6	±11.0	23.7	±3.9
Individual settlement	20.8	±9.1	19.3	±3.6
Other outcome	2.6	±3.6	4.8	±2.0

NOTE: Includes closed cases only.

Table 4.15
Outcomes of Cases by Scope of Class, State Court Dispositions Only

	Multistate Classes (n = 60)		Single-State Classes (n = 383)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Class settlement approved	11.7	±8.1	12.5	±3.3
Pretrial ruling for defense	21.7	±10.4	37.9	±4.9
Voluntary dismissal	43.3	±12.5	25.6	±4.4
Individual settlement	20.0	±10.1	18.3	±3.9
Other outcome	3.3	±4.5	5.7	±2.3

NOTE: Includes closed cases only.

Table 4.16
Outcomes of Cases by Scope of Class, Federal Court Dispositions Only

	Multistate Classes (n = 17)		Single-State Classes (n = 72)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Class settlement approved	11.8	±15.3	12.5	±7.6
Pretrial ruling for defense	29.4	±21.7	48.6	±11.5
Voluntary dismissal	35.3	±22.7	13.9	±8.0
Individual settlement	23.5	±20.2	25.0	±10.0
Other outcome	0.0	—	0.0	—

NOTE: Includes closed cases only.

Cases with Both Strong Regulatory Issues and Multistate Classes

Conceivably, whatever problem exists in multistate classes regarding the application of the law of one state to citizens of another would be exacerbated if the issues involved had a potentially stronger relationship to an individual state's regulatory system (26 percent of the multistate classes involved at least one issue in the top regulatory relationship ranking; see Table 4.9).[4]

[4] In state court cases, a venue that some criticize as being least appropriate to litigate matters that affect insurance regimes in more than one state, 24 percent of the multistate cases involved top-tier issues (n = 105).

Sites of filing for multistate cases are presented in Tables 4.2 and 3.3. Many of the multistate claims listed in Table 4.10 turn out to be ones with a strong regulatory impact rating as well: First-party collision or comprehensive automotive claims involving disclosure of the use of aftermarket parts, life insurance vanishing premium claims, and claims over additional interest owed to health care providers when medical claim payments are delayed are the most common ones in these cases (see Table 4.17).

Table 4.17
Allegations with Strongest Relationship to Regulatory Regimes in Multistate Class Actions

Category	Key Allegation in Case	Forum
Automobile first-party coverage—OEM issues	Failed to disclose the use of aftermarket parts for repairs rather than using original equipment manufacturer parts	State
Automobile third-party liability coverage	Unfairly or deceptively handled claims	State
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	Systematically refused to reimburse on "reasonable and customary" or "medically necessary" or other appropriate basis without investigating particular merits of the claim or without reasonable grounds for making decision	State
Automobile coverage—other issues	Calculated premiums in manner not consistent with state law	State
Credit life coverage	Induced borrowers to purchase optional credit insurance products unknowingly	State
	Failed to disclose details about credit life premiums	State
Health insurance coverage—health care provider issues	Delayed payments unnecessarily without paying interest on valid claims	Both
	Violated state prompt-payment laws	Federal
Health insurance coverage—policyholder issues	Failed to provide members with proper appeals process	State
	Failed to provide notice of adverse health care decisions	State
Life coverage	Claimed that premiums would vanish over time	State
	Began a deceptive voluntary exchange program designed to terminate policies with prohibited cost of insurance increases	State
	Discriminated based on race by targeting small–face-value policies with benefits less than total premium payments to minorities	State
	Discriminated by setting premium levels based on race	State
	Failed to disclose early withdrawal penalties	State
	Improperly charged excess costs of insurance, expenses, and administrative fees in violation of contract and marketing materials	Both

Table 4.17—Continued

Category	Key Allegation in Case	Forum
Life coverage, continued	Failed to comply with laws and regulations pertaining to replacement of policies	State
	Improperly characterized variable life policies as mutual fund investments	State
	Misrepresented the cash value or benefits a policyholder would realize under a policy	Federal
Long-term care coverage	Premiums continued to be billed after contract cutoff date	State
Property coverage	Improperly calculated premiums, resulting in overcharges	State
Various types of coverages—credit issues	Improperly used credit histories when calculating premiums	Federal
	Increased rates based on adverse credit report	Federal
	Failed to disclose adverse credit report that resulted in denial of insurance, rate increase, or coverage change	Federal
Various types of coverages—other issues	Aided or assisted or authorized the sale of inappropriate or illegal insurance and would therefore be liable for all unpaid claims	State
	Received nondisclosed kickbacks, commissions, or other consideration from agents or brokers	State
	Unspecified misrepresentation of scope and level of coverage	State

An obvious question is whether those multistate cases with a high potential for impacting the state-based regulatory scheme have different rates of certification and outcomes than what some might characterize as less controversial litigation. Unfortunately, we only had 18 closed cases in our data that fell into that category. Of these, one was certified, four were denied certification, and the remainder were disposed of without the question being ruled on.

Regulatory Authority as a Defense

How Class Actions and Regulation Can Interact

Given that there is often little difference in key outcomes such as class settlement rates and pretrial defense rulings regardless of the types of claims or the geographical scope of the actual or proposed class, how much of a role did the issue of regulation actually play in these cases?

Regulation certainly looms large in cases in which the plaintiffs are claiming that the defendant insurers have violated legislatively enacted statutes or administratively promulgated rules that expressly deal with the business of insurance. For example, a number of the class actions in our data dealt with the expansive provisions of various

states' automobile no-fault compensation systems. A claim that the insurer failed to pay first-party benefits to its insureds within the time limits explicitly set forth in the insurance code is clearly an instance in which aspects of both insurance regulation and private insurance litigation come together. But our interest here is in identifying those instances in which a party to the litigation is overtly claiming that the goals of the lawsuit work at cross purposes with regulatory policy to see how such cases differ from others in which regulation is not an issue at all. Presumably, it would be the defendants who would be most likely to make such arguments during the progress of the case. It is therefore important to understand what defendants can ask judges to do to address what they might assert to be a conflict between regulation and class actions.

The first way in which a defendant can bring regulatory issues to a judge's attention involves the judicial doctrine of exclusive jurisdiction and its associated "exhaustion of remedies" requirement. Under this doctrine, defendants ask courts to decline to hear cases when a regulatory entity is already charged with the exclusive authority to decide the types of issues embodied in the complaint. In instances in which statute or regulation has already implemented a quasijudicial administrative tribunal to adjudicate certain types of disputes between regulated entities and consumers or to challenge the agency's actions, parties can be required to initially seek resolution within that tribunal and thereafter exhaust any administrative appeal process within the agency (see, e.g., *Rojo v. Kliger*, 52 Cal. 3d 65, December 20, 1990). In such situations, a court's involvement would be limited to reviewing the final determination of the agency (and, in some instances, determining only whether the decision was arbitrary or capricious) rather than deciding the issue de novo (Witkin, 1985, § 234, p. 265). When the doctrine of exhaustion of remedies is invoked, a class action seeking damages for the charging of excessive premium rates, for example, even if based on the remedies available under an unfair insurance practices act, could be dismissed if the judge were to decide that the legislature had previously delegated all activities involving ratemaking to the state's DOI (see, e.g., *Karlin v. Zalta*, 154 Cal. App. 3d 953, March 29, 1984).

The second way in which a defendant can bring regulatory issues to a judge's attention is by raising the doctrine of primary jurisdiction. Defense counsel would argue that the doctrine applies because the dispute is one that can be handled both by the courts *and* by administrative action. They would ask the judge to rely on the agency's special competence or expertise to address a specific issue in the case, with the expectation that any decision rendered by the agency would thereafter help guide the courts in their separate consideration of the independent remedies available at law. Presumably, defense counsel would assert that the doctrine enhances uniformity in the application of complex regulations, a goal that might be frustrated by individual judges substituting their decisions for those of the agency head. If invoked, primary jurisdiction will cause the case to be stayed (i.e., suspended temporarily) until the agency has considered the issue; when agency involvement is completed, the litigation can continue within the civil court system. For example, a case involving systematic refusal to offer certain

types of policy discounts to a class of drivers might be stayed until the DOI has had an opportunity to rule on the question of whether the discounts were, in fact, appropriate; once they rule, then a court case seeking monetary damages would resume (see, e.g., *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, April 6, 1992). But, unlike the situation with exclusive jurisdiction, courts have greater discretion if they agree with the defendant about the application of primary jurisdiction; they may choose to stay the entire action, stay only certain issues, or let the case proceed unabated.

Another way in which defendants could bring the judge's attention to regulatory matters is by requesting that the court defer to the way the agencies have interpreted regulations they have promulgated, the forms they have approved, agency-generated statements of policy and internal memoranda, the meaning of legislative enactments that address the agency's responsibilities and procedures, and other aspects of the insurance business in which the regulators have played a direct role. For example, the defendants might offer affidavits from agency staff members that discuss how the regulator has dealt with the same issues at the core of the current class action. The case would continue to progress through the civil court system (i.e., neither dismissed nor stayed) but the defendant would seek to have the agency's interpretations help the judge rule on questions of law and fact. The defendants would hope that the court defers to what the defendant would characterize as consistent and reasonable constructions by agencies of the very statutes they are charged with administering. But such interpretations are not necessarily controlling, and courts can certainly hold that the agency's views and policies run counter to the actual intent of the law or its particular application in the case before it.

Still another way that defendants might argue that regulation should trump litigation arises in the context of whether to certify the class action at all in situations in which administrators are already in the process of addressing the underlying claims. Under FRCP 23(b)(3)—the section of the federal rule that defines the type of class action most often associated with insurance disputes for monetary damages—the court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." One of the factors to be taken into consideration in making the determination that a class action is the superior approach is the "extent and nature of any litigation concerting the controversy already commenced by or against the members of the class. . . ." Conceivably, a defendant might ask the court to find that an agency's ongoing enforcement activities are, in fact, the superior approach for resolving the proposed class' claims (presumably in a situation in which the agency is also seeking monetary relief to individual class members) and deny a motion for certification.

Notwithstanding such attempts by defendants to interject regulatory issues into the case, judges can certainly find that the matter before the court is properly a subject of private litigation. And even in instances in which the court believes that a clear overlap between the claims and defenses in the case and the regulatory regime

exist, the judge may rule that civil litigation and the administrative process should be allowed to proceed independently. The court may find, for example, that administrative procedures would not result in sufficient relief for class members, perhaps because the agency is unable or unwilling to effect the return of whatever monetary losses the class is seeking. It might also determine that any rights and remedies available under the common law or statutes are cumulative to the powers the legislature might have granted to regulatory agencies.

Cases in Which Defendants Claim Conflict with Regulation

Arguably, the first two ways noted above in which courts are asked by defendants to deal with overlapping issues—invoking the doctrines of exclusive or primary jurisdiction—would conceivably achieve the most immediate benefits for the defendants in these cases. At best (at least from the defendant's perspective), the class action might be dismissed in favor of an administrative process and, at worst, the case would be stayed pending administrative action that might weaken or even eliminate the need for court-based relief to class members. Providing more powerful tools to regulated corporations to derail or at least delay class action litigation through the use of regulatory defenses has been a top priority for the business community. For example, House Bill 4, the Texas Medical Malpractice and Tort Reform Act of 2003, contained a provision to ensure that questions of agency jurisdiction, both exclusive and primary, are dealt with in class actions prior to certification should the parties make such a motion.

> 1. State Agency with Exclusive or Primary Jurisdiction
>
> 2. (a) Before hearing or deciding a motion to certify a class action, a trial court must hear and rule on all pending pleas to the jurisdiction asserting that an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies. The court's ruling must be reflected in a written order.
>
> 3. (b) If a plea to the jurisdiction described by Subsection (a) is denied and a class is subsequently certified, a person may, as part of an appeal of the order certifying the class action, obtain appellate review of the order denying the plea to the jurisdiction.
>
> 4. (c) This section does not alter or abrogate a person's right to appeal or pursue an original proceeding in an appellate court in regard to a trial court's order granting or denying a plea to the jurisdiction if the right exists under statutory or common law in effect at the time review is sought. (Texas Civil Practice and Remedies Code, 2003)

Other model legislation proposed by the National Conference of Insurance Legislators and by the former commissioner of Insurance, Securities, and Banking for the

District of Columbia would go even further, requiring the court to abate or dismiss any class action against an insurance entity unless the court found that referral to the DOI would not be useful or that the regulator would refuse or be unable to hear the dispute.[5]

Even without such enabling legislation, defendants certainly have the ability to request that a judge invoke the doctrines of primary or exclusive jurisdiction in an insurance class action. One might expect that, at least for tactical reasons, such motions would be routinely made in cases that involve insurance-related issues, even in instances in which the argument carries little legal weight. But in fact, only 15 percent of 595 insurance class actions in our data with information on regulatory defenses reported that defendants asserted that state or federal regulators had either exclusive or primary jurisdiction over the issues in the case.[6] In 496 state court dispositions, the figure was 14 percent and, in 99 federal court cases, it was 20 percent.

This is an area in which it is important not just to look at all attempted class actions, as many such cases might not have reached the stage at which these sorts of regulatory issues are likely to be raised, such as at a hearing on a motion for summary judgment or a motion to stay the proceedings. But looking only at the 241 cases in which a motion for certification was made, the percent increases just to 17 percent. And in instances of certification, only a fifth of the 82 cases had the defenses raised at one time or another. Even in cases with issues rated as having a strong relationship to the regulatory regime, the defense was raised just 23 percent of the time ($n = 128$); in cases with multistate classes, the defense was raised 22 percent of the time ($n = 106$). Clearly, the issue of regulatory authority is not at the forefront of most insurance class actions, at least not overtly. It may be looming large in the minds of the parties as potential areas to explore should the litigation take an unsatisfactory turn, but it is not something about which most judges are hearing through formal channels.

When the doctrines of primary or exclusive jurisdiction are asserted, most often the event takes place in cases involving the specification of aftermarket parts for repairs in first-party automobile policies, modal premium issues surrounding the disclosure of finance charges and annual percentage rates and diminished value issues in first-party automobile policies. The issues in Table 4.18 may seem familiar because they are, for the most part, ones that received also the highest regulatory ranking as a result of our survey of DOIs.

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[5] See, e.g., National Conference of Insurance Legislators (2002) and Mirel (2004). Another proposal would go even further by invalidating any judgment of a court of law against a regulated entity that affected, but did not invalidate, existing regulations; additionally, judgments of foreign courts would also be invalid if they were inconsistent with local regulations (Bisbecos and Schwartz, 2003).

[6] It is possible that, in at least some of these cases, the issue was not raised by the defendants but rather by the agency itself or perhaps by other intervenors. The question in the survey specifically asked whether a defendant made the assertion, but some respondent-provided comments suggested that there might have been some confusion about the scope of the inquiry.

Table 4.18
Common Allegations in Cases in Which the Authority of a Regulator Was Asserted

Category	Key Allegation in Case
Automobile first-party coverage—diminished value issues	Failed to reimburse policyholders for the diminished value of repaired vehicles
Automobile first-party coverage—OEM issues	Failed to disclose the use of aftermarket parts for repairs rather than using original equipment manufacturer parts
	Specified aftermarket parts for repairs rather than using OEM parts, resulting in diminished value, safety issues, or any other loss (other than policy cost)
Automobile UM or UIM coverage—policyholder issues	Charged for multicar stack coverage when policyholder actually had only one car
Health insurance coverage—health care provider issues	Delayed payments unnecessarily without paying interest on valid claims
	Disregarded medically necessary criteria in making coverage and treatment decisions
	Failed to adequately explain to providers how the reimbursement fee schedule was designed and how it operates
	Failed to make increased reimbursement payments when the treatment required extra time and resources
	Interfered with providers' relationships with patients by arbitrarily denying or delaying authorizations or payments
	Reimbursed fees to providers at levels lower than true prevailing rates
Various types of coverages—modal premium issues	Failed to comply with Truth in Lending Act requirements for financed portion of the annual premiums paid on a periodic basis
	Imposed premium finance service charges (or any separate finance, service, or installment charge or fee related to periodic payments) in violation of law or in excess of legal maximums
	Failed to disclose annual percentage rate and finance charges incurred when paying premiums periodically rather than annually

NOTE: Issues listed represent those reported in at least four cases involving regulatory authority.

Does raising the defense affect the outcome of these cases? As Table 4.19 suggests, a slightly greater percentage of cases winds up with a dispositive ruling for the defense when primary or exclusive jurisdiction is an issue, but the difference is not statistically significant (p-value = 0.32) and disappears altogether when looking at cases in which a motion for certification was made (see Table 4.20).[7] Even if there were marked differences in outcomes, it would not be clear that raising the defense was the driver behind

[7] Because of the low numbers of cases in which this defense was raised, we did not make a similar assessment for certified class actions.

how the cases were resolved. It is very possible that agency jurisdiction is more likely to be asserted in certain types of cases (as indicated earlier, for example, it was raised in 23 percent of cases with strong regulatory aspects compared with 15 percent overall), and it may be that those cases' other characteristics, rather than their parties having moved for primary or exclusive jurisdiction, are what influences outcomes.

Agency Intervention

Another way for the issue of regulation to be injected into these cases is through the involvement of the regulators themselves. Government bodies, which would include regulatory agencies, attorneys general, and other official entities, certainly have the ability to take an active part in shaping the outcome of a class action. Conceivably, they could be named as a party, insert themselves into the case as an intervenor, raise objections to or support approval of any proposed settlements, file amicus briefs or provide affidavits in support of or opposition to pretrial motions, help broker the dispute, issue rulings or initiate administrative processes that directly affect the rights and responsibilities of parties in active litigation, or negotiate separate resolutions with the defendants for claims brought on behalf of its constituency.

Though litigants can encourage regulators to take some sort of overt action in their cases, such intervention is not something that either side will necessarily embrace. As one defense attorney put it bluntly when discussing the potential presence of state regulators and the state attorney general in insurance class actions, "One or both of these agencies can prove to be either an active ally, or an active enemy, or a passive but authoritative interpreter, or just a good resource, or just a pain" (York, Keller, and

Table 4.19
Outcomes of Cases by Regulatory Defense Use, All Dispositions

	Exclusive or Primary Jurisdiction Asserted (n = 59)		Not Asserted (n = 410)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Class settlement approved	13.6	±8.7	12.0	±3.1
Pretrial ruling for defense	45.8	±12.7	38.1	±4.7
Voluntary dismissal	15.3	±9.2	27.6	±4.3
Individual settlement	18.6	±9.9	19.0	±3.8
Other outcome	6.8	±6.4	3.4	±1.8

NOTE: Includes closed cases only.

Table 4.20
Outcomes of Cases by Regulatory Defense Use, Cases with a Motion for Certification Only

	Exclusive or Primary Jurisdiction Asserted (n = 24)		Not Asserted (n = 146)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Class settlement approved	33.6	±18.9	33.3	±7.6
Pretrial ruling for defense	29.2	±18.2	30.1	±7.4
Voluntary dismissal	12.5	±13.2	16.4	±6.0
Individual settlement	15.8	±14.6	20.8	±6.6
Other outcome	4.2	±8.0	4.1	±3.2

NOTE: Includes closed cases only.

Field, undated). From a litigant's perspective, regulators are not always thought of as the magic bullet that will make the case go away or bring the other side to the negotiating table.

Perhaps because parties are not bringing these cases to regulators' attention, agency intervention was not a common feature of the class actions in our data: Only 8 percent of the 622 attempted class actions with information on intervention were reported as having governmental agencies and entities taking an active role in the case's progress. In state court dispositions only, the figure was 7 percent (of 511 cases) and, in federal courts, it was 11 percent (of 111 cases). As with the regulatory authority defense, the numbers did not increase much in what might be characterized as more serious class actions. Government involvement was noted in 10 percent of cases with a motion for certification (n = 258) and in 16 percent of certified cases (n = 87). Even in cases with issues rated as having a strong relationship to the regulatory regime, intervention occurred in 9 percent of 140 such cases. Just 7 percent of the 111 cases with multistate classes reported intervention.

As with raising the defense of primary or exclusive jurisdiction, it is difficult to say whether the involvement of agencies in the cases in our data influences the outcomes. But class settlements do appear to be significantly more likely (p-value = 0.046) when agencies take a direct interest in the case (see Table 4.21) and, in cases in which a motion for certification was made, the likelihood of a case ending in a dispositive motion for the defense decreases with agency involvement (p-value = 0.16) (Table 4.22).[8]

[8] Because of the low numbers of cases in which agencies were involved, we did not make a similar assessment for certified class actions.

Table 4.21
Outcomes of Cases by Agency Intervention, All Dispositions

	Indication of Agency Involvement (n = 32)		No Involvement (n = 458)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Class settlement approved	25.0	±15	11.6	±2.9
Pretrial ruling for defense	37.5	±16.8	37.6	±4.4
Voluntary dismissal	18.8	±13.5	26.2	±4.0
Individual settlement	9.4	±10.1	31.0	±4.2
Other outcome	9.4	±10.1	3.7	±1.7

NOTE: Includes closed cases only.

Table 4.22
Outcomes of Cases by Agency Intervention, Cases with a Motion for Certification Only

	Indication of Agency Involvement (n = 18)		No Involvement (n = 166)	
Measure	**Percent**	**Margin of Error**	**Percent**	**Margin of Error**
Class settlement approved	44.4	±23.0	31.9	±7.1
Pretrial ruling for defense	11.1	±11.1	29.5	±6.9
Voluntary dismissal	22.2	±19.2	14.5	±5.4
Individual settlement	11.1	±11.1	20.5	±6.1
Other outcome	11.1	±11.1	3.6	±2.8

NOTE: Includes closed cases only.

Given the concerns that some state insurance commissioners have voiced over class actions usurping regulatory authority and given that the outcomes can have enormous consequences for both the insureds whose interests the agencies are supposed to protect and the insurers whose financial health and business practices the agencies are supposed to regulate, one would think that such agencies would have a larger role in many of these cases (regardless of whether the intervention changed the results or whether the parties were receptive to the idea). But an across-the-board involvement in insurance class action litigation does not seem to be the case. The same is true even in multistate class cases and in cases with strong regulatory implications, the types of litigation in whose outcomes a DOI would appear to have the greatest interest. What

is acting to reduce the frequency of intervention? Possible explanations might include the following:

- a lack of authority to intercede in class action litigation (either at all or without the acquiescence of a reluctant state attorney general)
- a low frequency of cases that in fact deal with questions of law and fact with clearly overlapping regulatory issues
- judges' systematic refusal to allow regulators to intervene in cases despite repeated requests to do so
- a lack of resources to intercede in all cases of interest brought to regulators' attention
- a perception that intervention would have only a minimal chance for achieving outcomes that regulators desire
- a policy that prefers to avoid a proactive strategy, instead relying on the courts and the legislature to clarify or resolve the issues first
- a policy that prefers to address the underlying issues in the case through broad-based administrative action rather than through intervention in individual cases against individual insurers
- a lack of adequate notice that insurance class actions have been initiated, motions for certification have been filed, classes have been certified, and settlements have been reached except in the most notorious or well-publicized instances.

This last possible explanation is interesting because it would exemplify the very situation discussed at the start of this document: Despite the enormous consequences that some class actions pose, many are litigated in relative obscurity even when they result in a judicially reviewed and approved settlement. With no centralized clearing-house for recording the fact that such cases have begun or for tracking their progress, regulatory administrators must rely on other, mostly indirect avenues to bring class actions to their attention. But with the passage of federal legislation that changes the rules for how class actions are litigated in federal district courts, the intriguing possibility exists that, at least for settled class actions in that forum, regulatory agencies will no longer be kept in the dark. CAFA requires that an appropriate entity, such as an attorney general or a regulatory agency, be given advance notice that a federal judge will be reviewing a proposed settlement agreement. Failure to provide such notice will allow the agreement, even if approved, to be collaterally attacked in the future. Although it remains to be seen what regulatory agencies will do with this knowledge, instances in which no intervention occurs can no longer be attributed to a simplistic explanation that most class actions operate below an agency's radar.[9]

[9] An even more comprehensive notice program was proposed by the Federal Trade Commission in 2002 in which agencies would be informed of the potential certification of any class action involving areas in which there had been administrative action or ongoing investigation. See Muris (2002).

CHAPTER FIVE

Conclusions

This monograph demonstrates the value of looking beyond the highly publicized settlements that form the most visible tip of the class action iceberg. In this chapter, we discuss some of the implications of what we have learned from the surveys. As is true throughout this monograph, the reader is reminded that our findings are most generalizable to the experiences of the very largest P&C insurers in the country, primarily those whose primary business is the writing of automobile private passenger coverage, and least generalizable to the experiences of life and health insurers.

Understanding the Hidden World of Putative Class Actions

Empirical evidence about class actions, especially regarding those litigated in state courts, is sketchy enough as it is, but what is known is almost entirely about certified class actions, and not about the much larger number of attempted or putative cases. This hidden world in which a motion for certification has been made or in which the complaint clearly indicates the intent to represent others similarly situated is not a trivial matter. The numbers themselves are telling. Our study suggests that, at least in the insurance class action world, only 14 percent of all attempted class actions are ever formally certified. The other 86 percent often settle on an individual basis, are dropped, or are dismissed—outcomes resulting, in some instances, only after an aggressive prosecution and an equally aggressive defense have been mounted. For everyone involved, the stakes in these cases are considerably higher than cases involving only a single policyholder, a single health care provider, or a single third-party claimant. From the defendants' perspective, the costs of litigation may be increased as well, and the individual settlements in these cases may be higher because of the potential for class treatment. From the plaintiffs' perspective, the high rate at which such cases are ultimately unsuccessful may raise concerns about judicial resistance to legislatively enacted consumer protection laws. One thing is for certain: Class actions that are never certified are not simply routine litigation with class allegations tacked on as an afterthought; the differences in outcomes between putative insurance class actions and non–class action

insurance litigation generally is evidence that the two types are fundamentally distinct, with settlement a far more common result when class issues are *not* involved.

Including putative cases in the analysis gives us other important insights into the class action process, as summarized below:

- **Concentration on state courts.** State courts have been the primary forum in which class actions over insurance-related issues are filed, and most of those cases involved actual or proposed members from just one state. A focus on federal court data (the most comprehensive source of information for class action litigation across multiple states) would not provide as complete a picture of the insurance class action landscape. If CAFA does indeed result in a sea change in which most insurance class actions are instead litigated in federal court in the future, and if, as some claim, federal judges view class certification issues in a fundamentally different way from their state court counterparts, we may see a marked change in outcomes in the years to come.
- **Scope of classes.** Although multistate classes were one of the hot-button issues in the debate over CAFA, in fact, the overwhelming majority of classes sought in insurance class actions involved residents of but a single state. Although the potential impact of multistate class actions on the relationships between insurers and class members may loom larger than their absolute numbers suggest, and though the outcomes of single state class actions may have implications that go beyond the jurisdiction of the supervising court, insurance class actions, for the most part, involve essentially local concerns.
- **Types of claims.** The data suggest that insurance-related statutes play a significant role in these cases and, most often, state omnibus consumer protection acts were involved, implying that individual state legislatures have the ability to shape both the frequency and the scope of these cases. Regardless of whether such claims are ultimately successful, these statutes are clearly providing consumers with powerful tools to seek redress of grievances against insurers through the courts.
- **Overlap with administrative regulation.** Most cases involved only a single insurer defendant, but a few asserted allegations against many, if not most, of the major insurers in a single state. The concerns of those who have suggested that litigation has the potential to supplant administrative regulation of an entire industry are illuminated by the example of one case in our data in which more than 1,000 insurers were named. But the relatively low rates of administrators taking an active role in insurance class actions and of defendants raising regulation-related defenses suggests that the overlap issue is not one overtly before the court in most instances, perhaps limited to very specific fact patterns and legal theories.
- **Filing patterns.** The relative frequency of multistate cases in certain counties within state court systems suggests that forum shopping may have played a role

in the decision of where to file. Such data ought to be more persuasive than anecdotes in the debate over venue rules, and knowledge of it would avoid the problem of identifying a particular court as a magnet simply because of relatively low population in the surrounding community, repeated examples of cases with outcomes not in defendants' favor, or spikes in filings made by locally based attorneys.

- **Trends in number of filings.** Our data suggest that the number of insurance class actions has risen markedly since the early 1990s, compared to the growth rate for contracts cases in state courts over the same span. In more recent years, however, the annual rate of the increase appears to have tapered off somewhat. What this portends for the future of insurance class action litigation is unclear.
- **Outcomes.** About one in eight cases resulted in a class settlement, but, in most instances, the defendant was able to get the case dropped either formally as a result of a pretrial order or informally as a result of the plaintiffs voluntarily dismissing their complaint. Claims that the insertion of class action allegations in suits against insurers results in a lock for the plaintiffs to receive a favorable outcome are misinformed.

The Critical Certification Decision

Once an insurance class action is certified, then settlement is a near certainty, though, in at least some instances, what we may be observing is a situation in which the dispute was, for all intents and purposes, previously resolved through negotiation. As the certification decision looms large in the ultimate outcomes of these cases, it is quite understandable that the propensity of judges to grant or deny such motions would receive considerable attention from attorneys and policymakers. In the debate over the passage of CAFA, the attitudes of federal and state judges toward certification was the subject of heated discussion by both proponents and opponents of the legislation. Although insurance class actions in state courts are more likely than those in the federal system to be certified, comparing the two systems using our data is problematic given the lack of information about the rate at which the defendants acquiesced to motions for certification.

As a rule, courts take their time when deciding on certification in these cases and, in most instances, the ruling does not come until two years after the case has begun. However, at least in some instances, the wait is far shorter, suggesting either that the court may not be allowing enough time to consider the issues surrounding the certification question or that the defendant has effectively waived its opposition to the motion. Guidance from policymakers may be needed to determine whether the defendant's acquiescence to the motion should influence the standards used in deciding certification.

Characteristics of Class Settlements

Although our data about negotiated settlements are extremely limited, they provide insight that sometimes run counter to conventional wisdom about class actions. Not every insurance class action settlement involves hundreds of million dollars in the aggregate, hundreds of thousands of claimants, national classes, or token compensation to individual class members. Indeed, the majority of the settlements for which we have information resulted in compensation funds of less than $2.7 million, included less than 29,000 estimated class members at the time of settlement, and applied only to residents of a single state. Some settlements had the potential for class members to collect less than $5 each; compensation available in some others averaged more than $50,000 per member. The latter figure suggests that not all consumer class actions are ones in which individual legal representation would not be economically feasible, though such a situation would certainly be the exception rather than the rule.

Most insurance class action settlement distribution plans for which we received complete information seem to have achieved the important goal of putting the majority of the agreed-to compensation into the pockets of class members. But, as we have seen, class members received only a fraction of what was promised in far too many cases. In more than half of the cases with information on this aspect of the distribution, only 15 percent or less of the potential class members received any compensation at all, and, in a quarter of the cases, only 13 percent or less of the fund was ultimately distributed. It should be kept in mind that, in consumer class actions with monetary relief offered to the class, it is the defendant, or the settlement administrator chosen by the defendant, that usually has the direct oversight concerning the distribution of the compensation fund. But it is both class counsel and the defendants that jointly decide on the nature of the notice campaign and the mechanisms for making claims against the fund, key features of the settlement that are likely to be the primary drivers behind the success, or lack thereof, of the distribution.

Although our data suggest that mean and median class attorneys' fee and expense award percentages at the time of settlement approval were just under 33 percent (a benchmark commonly used for assessing the reasonableness of attorney compensation in nonclass litigation), the shortcomings observed in the way settlement distributions were completed in some cases effectively resulted in mean and median attorneys' fee and expense percentage of around 50 percent if funds were actually disbursed, rather than simply being theoretically available, are taken into account. In about a quarter of the settlements, attorneys received 75 percent or more of the amount ultimately distributed to class members, a marked increase over the one-third benchmark. The failure of some insurers to consistently provide full information about settlement outcomes makes generalizing this result problematic, but it does suggest that, in at least some cases, there would have been a wide divergence between what was contemplated at the time the settlement was reviewed and what actually took place. Arguably, the

ultimate responsibility for such shortfalls lay at the feet of the judges who approved the particular combinations of class notice and claiming procedures agreed to by defendants with interests in minimizing exposure and the expenses of litigation and by class counsel whose fees are typically based on the theoretical size of the fund and not actual benefit delivery. It is not likely that a settlement approved as being fair, reasonable, and adequate based on the estimated value of the benefits to class members would have met those same criteria if the aggregate size of the proposed benefits were cut by 87 percent or more, conditions we found in about a quarter of the cases for which we have outcome information. At the very least, judges should make their decisions to approve settlements in light of realistic projections of actual disbursements, not the optimistic claims of counsel for both sides. And if such projections are not possible, judges should retain jurisdiction over the case and periodically review the progress of the distribution, perhaps withholding final approval until the bulk of the compensation fund has been distributed to class members or cy pres recipients.

The Future Forum for Insurance Class Action Litigation

The characteristics of class actions we have outlined here may change markedly as a result of the passage of CAFA. With liberalized rules for federal diversity jurisdiction now in effect, the types of insurance class actions that have traditionally received state court treatment may find themselves routinely removed to federal court. Ironically, although much of the debate over CAFA focused on the proper forum for national classes, it will be the defendant's residency that will be the primary basis for many removals: About 17 percent of state court insurance class actions involved class members from multiple states but 72 percent involved an out-of-state insurer and a single-state class. But the unknown factor that remains is how attorneys will characterize the requested amounts in controversy in the 89 percent of state court insurance class actions that appear to satisfy CAFA's new residency requirements. If a sizable percentage of cases appears to involve less than $5 million in aggregate damages, as was suggested by our limited data on outcomes, then CAFA will have a much more muted impact on removal rates: only a third of state cases would be removable to federal court under diversity jurisdiction if the value of insurance class actions mirrored what we saw in the settlements with common fund information. Such rates could be even lower if class counsel were to creatively plead their cases in a way that kept them under the $5 million threshold or if defendants were to join with the plaintiffs to avoid federal court management.

Regulatory Implications

The controversy over how regulation and class action litigation interact is a complicated one. Although regulators have broad authority to oversee the business of insurance, it is clear that litigants, judges, regulators, and insurers acknowledge that not all insurance-related disputes should be handled administratively. Even in insurance class actions that were certified, regulators were involved in only one out of six cases. The defendants themselves raised regulatory issues in just one out of five certified cases. And our analysis shows that even cases directly involving issues about which regulators are more likely to care had similar outcomes to those without such aspects. The same appears to be true for cases involving class members from different states when compared with those with single-state classes, despite concerns voiced by some that state-to-state differences in regulatory approaches can result in less-than-optimal outcomes for consumers and the industry. We are not able to say why regulatory implications seems to matter so little in case outcomes. It may be that judges are not routinely being asked to consider alternative approaches in these cases, that judges are not favorably disposed to these sorts of defense arguments, that the specter of regulatory-litigation conflict raised by some is far less onerous or pervasive than claimed, or it may be that regulators either do not want to get directly involved or are not aware that the litigation is going on.

If the explanation is at least in part regulator ignorance, then we may see significant changes in the future, at least for cases that end up in federal court. CAFA requires that regulators be notified of all class action settlements presented to federal judges for approval. Given the potential for so many of the insurance class actions now litigated in state courts to be removed to the federal system, the possibility exists that cases settling without an insurance regulator being informed in some way will become the exception rather than the rule (as it appears to be now). This notice, however, will come only after the case has been, for all intents and purposes, resolved. At this point, the only decision that remains, in most instances, is for the judge to review the terms of the agreement and decide what to pay the attorneys. Given the late stage in the proceedings, it is unlikely that issues of exclusive or primary jurisdiction will be raised by the agency; instead, the regulator's interest may well focus on the settlement's features, not whether the case should have proceeded in the first place. Any direct intervention in the settlement review process might result in larger compensation funds for class members, smaller rates of reversion back to the defendants when the funds are not fully disbursed, and smaller fees to class counsel—outcomes that may be less attractive to some of the parties in the litigation.

Notwithstanding CAFA's clear potential for changing the insurance class action landscape, many other highly publicized reforms to the civil justice system have resulted in only modest change because opposing parties learn to adapt to the new rules, sometimes working together to craft strategies that work to their joint advantage.

It may well be that the desire to avoid notice by a regulator who, as one attorney bluntly put it, might turn out to be a pain to both sides, will trump all other considerations. Complaints may be drafted in such a way as to avoid removal or defendants may choose not to exercise their ability to shift the case to federal court. And, perhaps most importantly, regulators who have been put on notice that settlements are pending may routinely choose to do nothing, perhaps because of a lack of resources to intervene, perhaps because of agency capture or political considerations, or perhaps because they feel that such litigation addresses issues and controversies that are outside of the scope of their primary mission statement. If any of these scenarios become commonplace, we may see a more muted effect from CAFA's liberalized rules for diversity jurisdiction and notice requirements.

No matter what takes place, however, legislators and appellate judges will still be faced with the difficult task of distinguishing between instances in which class actions introduce new confusion and inefficiency to administrative activities and in which class litigation advances the public and private interests of those affected by regulated companies. Providing empirical data to help divine such instances and to better understand the class action litigation landscape will remain an important task for researchers.

APPENDIX A

Anatomy of an Insurance Class Action

In this appendix, we describe the progression of a "typical" insurance class action, from its initiation to its completion. The discussion is provided to place into context the findings from our surveys.

Rule 23

Class actions are certainly not a recent invention: Group litigation with representative plaintiffs and outcomes that bind absent parties has been possible in the United States since the mid-19th century (Hensler et al., 2000, pp. 10–11). But modern class action litigation was born in 1938 with the adoption of Rule 23 of the Federal Rules of Civil Procedure (FRCP) and later matured into the powerful tool we know today as a result of the 1966 amendments to that rule. Under the initial version of Rule 23, class members were often required to affirmatively opt into the litigation in order to be bound to any settlement, trial verdict, or other resolution of the case, thus placing practical limits on the ultimate sizes of these classes. The 1966 amendments greatly expanded the scope of these cases by allowing judges to certify certain types of classes in which participation would now be presumed for every potential member unless the individual formally opted out of the class. This change facilitated the creation of classes with memberships numbering in the hundreds of thousands or even millions in cases with aggregate monetary damage claims that would reflect the substantial size of these expanded plaintiff classes. And FRCP 23's enhanced impact would have been felt across the nation; although the rule change technically applied only to class actions sought in federal courts, the procedural framework for litigation followed in many states generally mirrors the federal rules, and most states now have a class action mechanism similar to the post-1996 version of FRCP 23.[1]

[1] Only Mississippi lacks a class action process. Virginia allows common law class actions but does not have a specific statutory rule; Iowa and North Dakota follow the Uniform Class Action Rule; Nebraska and Wisconsin follow the Field Code rule on group litigation (California does as well but has judicially adopted the equivalent of FRCP 23); Missouri and North Carolina follow their own versions of the original form of FRCP 23 (this was

Initiation

In what might be characterized as the paradigm Rule 23 class action for monetary damages resulting from consumer or contractual transactions, an attorney will file a complaint alleging some sort of harm or loss to the plaintiffs specifically named in the pleading. The pleading usually identifies no more than one or a handful of such plaintiffs. In some instances, there is language in the initial complaint (or a subsequently filed amended complaint) that suggests that the named plaintiffs are, in fact, seeking to advance the interests of both themselves as well as others who are "similarly situated" (in other words, those who are claimed to have essentially suffered the same sorts of losses caused by the same behaviors exhibited by the same defendants). In other instances, the substance and language of the complaint speak only to issues related to the specific experiences of the named plaintiffs, but communications between the parties suggest that the plaintiffs' attorneys intend (or are at least considering) to move forward on a class basis. And in some cases, the first indication to the defendants that class treatment is desired will be the service of a formal motion for class certification. Regardless of how it takes place, once the defendant is aware that the case may have consequences that go far beyond claims advanced by just a few individuals or entities, a class action has essentially begun.

As with any civil litigation, the parties in a nascent class action can initiate discovery of relevant evidence in the opponent's control and the matter is subject to the usual pretrial process, including the filing and resolution of dispositional motions such as those seeking summary judgment or dismissal for failure to state a legally valid claim. If the case is filed in a state court, the defendants may attempt to move the litigation to a federal district court for processing, usually by asserting that the matter involves questions of federal law or that the named plaintiffs and the defendants are citizens of different states. In some instances, the case will end at this point with an outcome that affects only the named plaintiffs in the complaint, perhaps as a result of a ruling on one of the dispositional motions, as a result of a settlement on an individual basis, or as a result of the plaintiffs voluntarily dismissing the suit. Voluntary dismissals are often accompanied by a request for leave to file again, a move that provides plaintiffs' attorneys with the option of initiating a similar class action again in the future.

The Motion for Certification

Should the plaintiffs' attorneys wish to move the matter forward on a formal class action basis, they must file a motion for certification. In the types of class actions that

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the case for Georgia and West Virginia as well but the two states have recently adopted the new version); and the remainder have incorporated, at least in modified form, the aspects of the current version of FRCP 23 that allows for opt-out classes. See Conte and Newberg (2002 [2005], §§ 13.1–13.3, §§ 13.12–13.13) and Grande (2004).

typically comprise those against insurers, the judge is essentially being asked to decide whether it is more efficient for those with claims similar to ones spelled out in the complaint to proceed collectively rather than individually, with the named plaintiffs' experiences acting as representative examples of the relevant questions of law and fact. The judge must agree that the issues common to both the representative plaintiffs and all the absent members of the proposed class predominate over any individual differences and that collective litigation is superior to alternative approaches.

The modern relationships between insurers and their insureds, between insurers and the beneficiaries of insurance contracts, between insurers and payees under those contracts such as health care providers and building contractors, and even between insurers and those making liability claims against the companies' insureds foster an environment in which litigation on a class action basis is possible. Companywide practices that standardize policy forms, sales presentations, advertising, employee training, employee incentive programs, underwriting requirements, loss estimation procedures and associated software, standards used for authorizing repairs and reimbursements, and claim handling may lead to more efficient and more routinized operations, but, if they are alleged to be wrongful, then there is at least the chance that a judge would find the required level of commonality in the issues of fact and law affecting all class members.

For a class to be certified, the situation must be also one in which it would be impractical to name each member of the proposed class as an identified plaintiff in a case, one in which the representative plaintiffs (as well as the attorneys seeking to act as class counsel) would fairly and adequately protect the interests of the absent class members, and one in which the claims of the representative plaintiffs are typical of all members of the class. Other factors that need to be considered include the difficulties that may arise in this type of mass litigation, the ramifications of concentrating all the claims into a single forum, the presence of similar litigation that may have been commenced elsewhere, and the interests of the proposed class members in pursuing their own claims on an individual basis.

In some ways, the motion itself changes the nature of the litigation. Class certification is no longer only a theoretical possibility; the federal rules suggest that the decision on the motion be made at the earliest practicable time and, although a ruling by a judge would not necessarily be imminent, the looming potential of that decision colors how the parties interact. The plaintiffs might conduct additional and perhaps more intensive discovery aimed at issues surrounding certification, perhaps seeking the production of business records that detail transactions between the defendant and all proposed or potential class members, not just the named plaintiffs. The defense might intensify activity related to dispositive motions to resolve the litigation before certification (though if successful, the ruling would apply only to the named plaintiffs and not other members of the proposed class). And the parties may enter into more focused

discussions over the possibility of settlement, either to resolve only the claims of the named plaintiffs or to consider an agreement on a classwide basis.

The Certification Decision

If the matter has not been resolved prior to the point at which the judge finally addresses the question of certification, there may be a hearing on the motion with live testimony from witnesses or it may be decided solely on the basis of briefs, affidavits, and oral arguments. In cases in which the motion is contested, the defendants may, for example, assert that the circumstances surrounding the claims of the individual members of the proposed class are too varied to be reflected by the specific experiences of the representative plaintiffs, that the class definition is vague and overbroad, or that the representative plaintiffs do not even meet the proposed class definition. In theory, the merits of the litigation—in other words, the validity of the plaintiffs' factual and legal claims—are not before the judge when making the decision, but often the arguments made in support of and in opposition to the motion repeatedly address these issues anyway.

If certification is denied, the case is not dismissed. The claims of the named plaintiffs can continue on an individual basis and are subject to the same pretrial process as in routine civil litigation, including dispositive motion practice. And class treatment is not ruled out; there is usually nothing to prevent the filing of a new motion for certification, presumably after curing whatever defects led to the adverse ruling. At any stage of the litigation, voluntary dismissal can provide plaintiffs' attorneys with the opportunity to return to court at a later date with modified allegations, a different set of proposed representative plaintiffs, or a redefined class.

Certified Cases

If certification is granted, members of the class (however defined in the order) must be provided with notice that litigation on their behalf is under way. The notice usually explains that, should they wish to do so, class members can opt out of the class by making a timely request for exclusion from any outcome of the case and that, if they fail to make such a request, they will be bound by that outcome. A class member who does opt out then has the option of independently advancing his or her interests on an individual basis, assuming that the value of the claim is large enough to justify the costs of hiring counsel and initiating a lawsuit. The notice is supposed to be made to each class member individually if possible, but, in many instances, it comes in the form of publication in newspapers and other mass media. The attorneys who were appointed class counsel at the time of certification (usually the attorneys who filed the original complaint on behalf of the named plaintiffs) bear the costs of such initial notice,

though, if the class is able to reach a settlement or is successful at trial, such expenses can be recovered from the defendants.

Certified cases move toward trial in a manner similar to that in individual litigation with the exception that any verdict rendered at such a trial could involve the aggregated claims of thousands or even millions of plaintiffs. The stakes are thus raised to another level entirely, along with equally increased incentives for the defendants to pursue a negotiated settlement that would avoid the burden of discovery of the defendant's records on a classwide basis and, most important, the unknown results of a trial. The end result is that, as is the situation for civil litigation generally, trials on a class basis are an extremely rare event. The defendant may continue to make dispositive motions or seek to decertify the class (perhaps through an interlocutory appeal of the certification decision to an appellate court if local rules so allow) but the pressure to settle may override all other considerations.

Settled Cases

The settlement agreement typically describes a finalized definition of the class, the total amount of money that the defendants are offering to resolve all claims of all class members and to cover other costs of the litigation (sometimes referred to as the *common fund*), the benefits available to individual class members, the mechanisms by which such compensation will be distributed, the terms of any prohibitions against the defendant from continuing certain practices and policies in the future, the various responsibilities of class counsel and the defendants for paying for the costs of notice and other expenses, and, in some instances, the amount of attorneys' fees and expenses that class counsel will be seeking. In many common fund cases, class counsel fees and expenses as well as the costs of notice and settlement administration are deducted from the fund before distributing the remainder to class members. In other class action settlements, there is not a common fund per se but rather a promise on the part of the defendants to pay all successful claims plus any court-ordered expenses; such promises are often accompanied by a cap on total expenditures.

Unlike a typical civil case settlement, the judge must review and approve any agreement reached between the parties in a class action. This settlement review process is a critical one for the absent class members, as they have no practical way to supervise or control the decisions of class counsel and the representative plaintiffs who are legally responsible for safeguarding the interests of the class following certification. Another round of notice is usually initiated (though now with the defendants shouldering the costs), this time announcing that a proposed settlement has been reached and that the judge will consider approving the agreement at a hearing on a future date. Class members are given the option of objecting to the provisional terms of the agreement and often, though not always, are also given a final opportunity to opt out at this late stage

of the litigation. Objections can come in the form of written submissions filed with the court prior to the hearing or in the form of testimony at the hearing itself. In some instances, others who were not parties to the litigation, such as state attorneys general or public interest groups, may be allowed to intervene in the case and make their views known about various aspects of the agreement.

Fairness, reasonableness, and adequacy are the standards that judges use in deciding whether to approve the proposed agreement but, without the input of objectors and intervenors, the judge is likely to hear only those arguments that are jointly advanced by class counsel and the defendants' attorneys in favor of approval. If the judge declines to approve (or informally indicates his or her reservations), there may be additional rounds of negotiation, agreement, notice, and hearing to address the judge's concerns.

Class counsels' fees and expense reimbursements are subject to judicial approval as well, sometimes considered as a matter separate from review of the settlement agreement. In many settlements, fee awards and expense reimbursements will come out of the common fund and thus reduce the aggregate amounts available to individual class members; in others, defendants will pay fees and expenses on top of whatever they will be required to pay to the class.

While class counsel and the defendants may enter into a "clear sailing agreement" in which the defendant agrees not to contest class counsel's fee and expense request (or at least to a request below a certain maximum amount), ultimately it is up to the judge to decide the size of the fee award and the amount of expenses to be reimbursed. The calculus for making the fee award differs among jurisdictions, judges, and case types, but a typical approach involves awarding a percentage of the common fund. In instances in which injunctions are part of the settlement provisions, the fee percent might be applied to the sum of the common fund plus the value of any projected benefit to class members derived from prohibitions on the defendant's practices in the future. Less common are situations in which the fees are determined by the "lodestar" method, in which class counsel is paid on the basis of hours worked at what the judge determines to be a reasonable hourly fee, adjusted by a multiplier intended to reflect the complexity of the case and the merit of the services provided to the class. Reimbursable expenses can include the costs of providing notice to the class of certification and opt-out procedures, as well as covering the same sorts of expenses often incurred in nonclass litigation such as expert witness fees and travel.

Settlement Distribution

After approval, the distribution of the settlement benefits begins. Myriad approaches are commonly employed in settled class actions to deliver monetary compensation to the class. When the identities of class members are known, when their right to a share of the common fund and the appropriate level of such benefits can be determined

in advance, and when there is an ongoing financial arrangement between the defendant and class members, the compensation is often automatically credited to existing accounts. In such instances, essentially all of the common fund, less class counsel fees and other expenses, will be distributed. In contrast, the circumstances of the litigation and the characteristics of the class in other cases may first require providing notice through mass media publication or direct mailing with the goals of informing the class of the fact of resolution and providing details about the claiming process, one that may require the submission of completed claim forms along with supporting documentation. Full distribution of the common fund is less likely under these conditions. In some instances, compensation comes not in the form of credits to accounts or negotiable instruments but in the authority to have repairs performed at the defendants' expense or in coupons that can be redeemed for discounts against future purchases of the defendants' goods and services.

Class action settlements can also differ as to what happens when not all of the net common fund is distributed, perhaps as a result of some class members identified at the time of settlement approval failing to make successful claims or as a result of an inability to identify and contact all potential class members. In many instances, unclaimed funds revert back to the defendants and, in others, the defendants are required to pay the unclaimed funds to a third party such as a charitable organization (such alternative payment plans are usually referred to as *cy pres* or *fluid recovery* distributions). But there are no hard and fast rules here, and ultimately it is up to the judge to decide whether the size of the benefits available to individual class members as well as the notice, claiming, and distribution programs agreed to by class counsel and the defendants are in the best interests of the class.

Other Scenarios

Because the explicit rules controlling class action procedures are sometimes tersely written and speak only in generalities, and because the circumstances of this type of litigation can differ greatly from case to case, there are countless variations on this process. For example, the defendants' and plaintiffs' attorneys might have successfully concluded settlement negotiations on a class basis even before the motion for certification is made (and, in some instances, before the original complaint is even filed). In such cases, the motion might be filed simultaneously along with a motion for approval of the proposed settlement agreement and there will be but a single opportunity for class members to opt out or object to either certification or the settlement. In some cases in which extensive prefiling discussions have taken place (often coming on the heels of similar litigation in the same jurisdiction or even other states), the complaint, the motion for certification, and the motion for settlement approval might all be filed at the same time.

Another notable example of variation involves the certification of so-called *settlement classes* in which the judge conditionally approves a class solely for the purposes of negotiating an agreement with the defendants. Legal authority and commentators differ as to whether such provisional classes are appropriate in instances in which the same judge would not have granted certification (perhaps because of a diversity of legal and factual questions among class members) had the request been one seeking full class treatment at trial. Such requests for provisional settlement classes are a common feature of cases where both the initial motion for certification and the motion for settlement approval are filed simultaneously.

APPENDIX B

Previous Research on Class Action Litigation

Given the nearly 40-year period in which civil cases have had the ability to turn into megasized class actions with enormous consequences for plaintiffs and defendants, it is surprising that we do not know much about their numbers, their size, their outcomes, or changes in these measures over time. In this chapter, we begin by describing the main challenges of conducting research on this type of litigation, then summarize the literature on class action in terms of research area and type of study.

Data Limitations and How Research Has Addressed Them

Researchers studying class action litigation are continually confronted with the question of how to identify cases with class issues. Part of the problem is the fact that a class action is not a type of case based on a specific theory of liability such as medical malpractice or antitrust law that a court clerk can easily take note of at the time of filing. Rather, it describes a procedural concept that may or may not be officially applied to a case at some point in its life. The term certainly applies to those cases in which a judge has certified a class but it also applies, in a broader sense, to matters in which it is clear (from the filing of a motion for certification or even language used in the original complaint) that plaintiffs intend (or have the potential) to seek formal class treatment.

Both orders for certification and the filing of the motion are procedural events that take place after case initiation, and many court information systems are not equipped to routinely identify and keep track of this type of postfiling activity.[1] Conceivably, a clerk might be tasked with reading each new complaint for any indication of class allegations, but few courts can afford to allocate scarce administrative resources

[1] Courts have traditionally kept track of significant events in a case's life, such as the filing of a pleading (such as a motion for certification) or the entry of a judicial order (such as a decision to certify a class), in hard-copy ledgers known as *dockets*. Without eyes-on review of each of these dockets, cases that become class actions cannot be separated from those that do not. However, an increasing number of courts have adopted computerized case management systems that record all case events electronically; this practice should ultimately provide court administrators and researchers with a better means of identifying class actions in jurisdictions across the country.

for this purpose. Moreover, class actions rarely reach the trial stage and many resolve quietly as voluntary dismissals, through dispositive pretrial judgments, or as a result of settlements on a nonclass basis. Even though the process of approving class action settlements under FRCP 23 and its state court equivalents are matters of public record, many, perhaps even most, escape the attention of the general media and even specialized legal publications.

Even when courts can identify which particular cases might have involved class allegations or were certified at some point, their own records and files do not provide much usable information. The most notable shortcoming involves the ultimate outcomes of the litigation, especially regarding the distribution of any settlement funds to class members. In far too many instances, judges may fail to require the parties to publicly report how many class members came forward to make claims against the fund, how many of those claims the settlement administrator approved, how much money was actually paid out, and what happened to the undistributed portion of the fund. In addition, some judges approve confidentiality orders that prohibit the class counsel and the defendant from publicly discussing any aspect of the case, including the final distribution to the class. This situation essentially prohibits outside researchers and even class members from learning how well the litigation process ultimately performed.

Even more troublesome in terms of learning about the outcomes in these cases are matters that are never certified. Here, privately negotiated settlements are common and, like all such resolutions in the civil justice system (with the exception of certified class actions, cases involving minors and incompetents, and a few specialized areas such as workers' compensation), the details of the agreements between the parties are completely beneath the radar of the court's, and therefore the public's, scrutiny.

This state of affairs has required civil justice researchers over the years to employ different approaches to collecting data on class actions. One method looks at cases in just those courts that have some means of reliably tracking the certification process. The federal district courts are the most notable example of a forum that does attempt to centrally record the fact of certification. Although significant inaccuracies in federal court data collection procedures for class action information have been noted in the past,[2] the district courts remain the single largest system in which counts are at least possible, even if they may represent an undercount of the true number of federal class actions. But the majority of class action activity (particular consumer class actions)

[2] For example, one study that assessed the accuracy of the federal courts' primary "flag" for indicating class action activity used in its computerized case management system found that the flag missed anywhere from 49 percent to 78 percent of the actual number of class actions in the four districts they examined: "Those data lead to the conclusion that information on class actions reported in the Administrative Office database substantially undercounted class action activity during the study period" (Willging, Hooper, and Niemic, 1996, p. 199). Though the federal courts subsequently took some corrective action to help address these shortcomings, the study asserted, "in the recent past there were no reliable national data on the number of class action filings and terminations in federal court" (Willging, Hooper, and Niemic, 1996, p. 199).

may well be taking place in state courts across the nation, and, moreover, the types of matters litigated in federal courts often involve issues and claims that are unique to that system. A similar problem arises when researchers use data from just those individual branches of state courts that do routinely track class action activity. Although the information collected is useful for describing the cases litigated in these few courts with more sophisticated recordkeeping practices, the data are not likely to be representative of national trends.

Another approach uses selected jurisdictions as study sites and then perform eyes-on searches of the dockets and case files of large numbers of cases to locate those with indications of class action activity. But this type of data collection is extremely expensive and, as such, the number of jurisdictions included in these sorts of efforts is small. Unfortunately, there are no reliably "typical" or "average" courts in regard to class action litigation, as these cases are not randomly distributed around the country. Indeed, a repeated criticism made of class actions revolves around the claim that some plaintiffs' attorneys carefully choose certain jurisdictions and judges in order to provide for a more favorable environment for the certification decision, other pretrial rulings, and the jury pool.

Assuming that class actions can be reliably identified, the next step is to gather more detailed information about what took place both inside and outside of the courtroom. One approach would be to perform intensive case studies that go beyond the information contained in court records by including interviews with participants in the case as well as other investigatory techniques intended to describe the range of characteristics in these cases. This may be the only way to learn about the forces that drove the parties toward formal litigation and to discover what the ultimate outcome was from the case resolution. But there are significant drawbacks to this approach, including nearly unavoidable bias in the selection of the candidates for study and the fact that only a handful of cases can be included because of the considerable expense.

One method that has been employed to learn about key activity in a large number of class actions has been to perform electronic searches of reported judicial decisions. Online legal research services such as Westlaw® and LexisNexis® greatly facilitate the identification of cases with class allegations and can provide full-text access to important rulings. But this approach works best for appellate court cases, which still would include only an unrepresentative fraction of all class actions.[3] Ideally, the searches would focus upon trial court–level cases but with few exceptions, judicial decisions

[3] The paradigm appellate case is one that is initiated following an adverse judgment at trial in a lower court. But because so few class actions receive a formal hearing on the merits and because so many are settled (thus eliminating the need for an appeal), appellate decisions involving class actions are relatively rare. This state of affairs may change, however, with the increasing number of state courts joining the federal system in allowing interlocutory appeals (i.e., appeals prior to the entry of a final judgment in the case) of certification decisions. Nevertheless, appellate opinions that deal with cases having class action activity will, in some respect, continue to be disproportionally biased toward certain types of litigation.

from such matters are rarely reported publicly. Even in the federal court system, in which there has been a tradition of publishing important or noteworthy lower court judicial decisions, and in those handful of states that follow a similar practice,[4] the selected opinions and orders that do get reported may well be atypical of day-to-day trial court work. For example, "bench rulings" would not be published because they are rendered orally rather than memorialized as a formal written decision intended for wider distribution. Judges might also reach different decisions depending on whether they know their rulings will be made public.

Another approach has been to use information found in litigation reporters such as the *Class Action Reports*, *Class Action Litigation Reporter*, *Mealey's Litigation Report: Class Actions* (Mealey Publication), *Securities Class Action Alert*, and other legal news sources. It should be remembered, however, that these publications are secondary sources for learning about class actions. They gather material from mass media stories, from industry trade publications, from press releases, from legal research services, and from voluntary submissions by attorneys and others of reports about recent class actions, but, despite their efforts, the publications can in no way be considered to be comprehensive compendiums of all class action activity. The main concerns here are shortfall and bias, with the distinct possibility of a slant toward the class actions with the highest profile (e.g., securities cases because of SEC reporting requirements, settled cases with the largest compensation funds, certified cases with the most comprehensive notice provisions, attorney-reported cases with notable outcomes or fee awards) and underreporting of more modest cases or those in which the parties have made a concerted effort to litigate and resolve the matter quietly.

Qualitative research methods have also been used to explore aspects of class action litigation that may remain hidden because of shortcomings inherent in court-based approaches. Interviews with high-profile attorneys (be they class counsel, defense, or public interest) who are repeatedly involved in these cases, as well as executives with companies that are likely targets of class action complaints, can yield important clues as to emerging trends. But impressions and opinions, even when voiced from those squarely in the middle of the class action wars, do not fully substitute for comprehensive quantitative evidence gathered from large numbers of representative cases.

As discussed elsewhere in this monograph, we have attempted to avoid some of the shortcomings described above by identifying a particular industry, contacting a sample of companies within that industry, and surveying them on their class action experiences on a case-by-case basis, including putative matters that are never certified. Although this approach is promising, there can be significant problems regard-

[4] Connecticut, Delaware, Maine, Massachusetts, New York, and Rhode Island are examples of states whose trial court level judges publish at least some of their written pretrial decisions. See, e.g., Beisner and Miller (2004).

ing response rates with this sort of voluntary cold-call survey. More importantly, what might be seen within one industry may not reflect what is happening in others.

These sorts of methodological hurdles are not unique to class action research; problems in data collection exist in all civil justice scholarship. But they may explain why there has been comparatively little empirical work in this area compared, for example, with the large number of studies of medical malpractice litigation, jury behavior, punitive damage awards, auto claiming frequency and severity, and other key topics. The studies referenced in the discussion that follows should be viewed against the reality that, for class actions, no single methodological approach can completely avoid questions of selection bias and nonresponse.

Research Areas

Class action litigation, and research on the subject, can be roughly divided up into four groups because of different rules for certification, goals for class members, types of claims, and sources for empirical data.[5] First, civil rights cases and other suits seeking *social policy reform* were, in many ways, the quintessential types of class actions envisioned at the time of the 1966 amendments.[6] Compensation for monetary losses are not the primary goals of these sorts of FRCP 23(b)(2) class actions; rather, plaintiffs usually seek injunctive and other equitable relief that directly change defendants' behavior. Examples include claims over discrimination in college admissions, over conditions in state mental hospitals, over industrial runoff polluting nearby rivers, and over mass transit agencies' funding balance between fixed rail and bus options. One important aspect of cases certified under FRCP 23(b)(2) is that class members are not given the option to opt out because the nature of any injunctive relief that might be ordered (such as prohibiting discriminatory policies) in theory would work to the benefit of all who meet the class definition; indeed, such cases often dispense with the need to notify the class of the ruling for certification.[7]

The other three important categories of class actions are Rule 23(b)(3) cases, in which monetary compensation is often the primary goal and in which potential class

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[5] It should be noted that class actions can involve multiple case types (for example, a complaint might allege issues falling into the social policy and financial injury realms) and a certified case can include one or more subclasses certified under an FRCP 23(b)(3) opt-out scheme, while other subclasses in the same case are mandatory FRCP 23(b)(2) or FRCP 23(b)(1) classes.

[6] "If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation." John Frank, member of the Advisory Committee that revised FRCP 23 in 1966 (quoted in Hensler et al., 2000).

[7] On occasion, these cases may be certified as a Rule 23(b)(1) class with similar requirements for notice and request for exclusion from the class.

members can opt out and sue on an individual basis if desired. The first of these categories involves class actions related to *securities*. These include derivative actions brought by shareholders to enforce corporate rights as well as claims of securities fraud based on violations of provisions of the Securities Act of 1933, Securities Exchange Act of 1934, and state blue sky laws. Such cases have been the subject of considerable legislative attention and operate under a somewhat different set of rules than other types of class actions (see, e.g., Public Law 104-67; Public Law 105-353; and FRCP 23.1). For a variety of reasons, securities class actions are perhaps the most thoroughly studied of all class action types. Prior to the restrictions contained in the Private Securities Litigation Reform Act of 1995 (PSLRA), which may have made the state courts a more attractive venue, the majority of these claims were litigated in federal court, which facilitated identification of cases for researchers. Securities matters also have a relatively high degree of visibility because under the PSLRA, a plaintiff must publish a notice of the pendency of the suit in a "widely circulated national business-oriented publication or wire service" within 20 days of the filing of the complaint (15 U.S.C.A. 78u-4) (except for those alleging certain types of environmental damage or law violations, other types of new class action cases are usually not mentioned in SEC filings unless they have a materially adverse effect on company operations, cash flows, or financial position [17 CFR 229.103].) Even when a securities-related class action is filed in state court, the litigation receives considerable attention because of its direct impact on corporate governance and share value. Because of the need to monitor new class action filings in this area, a wide variety of sources for information have developed, such as the Securities Class Action Clearinghouse managed by the Stanford University Law School or the Institutional Shareholder Services' Securities Class Action Services database (formally available through the Securities Class Action Alert newsletter). The increased visibility of these cases, as well as the flurry of congressional legislative activity in the mid- and late 1990s intended to reform the litigation process in securities class actions, also spurred researchers to focus their efforts in this area.

Another key Rule 23(b)(3) group is the one that involves *mass tort* claims of personal injury and property damage. Mass tort class actions have, arguably, gone in and out of legal favor over the years. The drafters of the 1966 amendments suggested that because of the likely differences in the specific nature of the damage claims for individual class members, mass torts would not ordinarily be appropriate matters for class treatment.[8] But starting in the 1980s, mass torts involving problems resulting from Agent Orange, asbestos, and breast implants began to include certified class actions in addition to individual litigation. More recently, appellate courts have stepped back from blanket approval of Rule 23 application in these cases, in part because of the

[8] "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways" (U.S. District Courts and U.S. Supreme Court, 1966, p. 103).

original concerns over a lack of commonality in claimed injuries but also because of concerns that compensation for more severely injured victims will be given short shrift in trying to forge classwide resolutions (see, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 7th Cir., March 16, 1995; *Castano v. American Tobacco Co.*, 84 F.3d 734, 5th Cir., May 23, 1996; *Georgine v. Amchem Prods.*, 1996 U.S. App. LEXIS 15416, 3rd Cir., June 27, 1996; *Amchem Prods. v. Windsor*, 117 S. Ct. 2231, June 25, 1997; *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, June 23, 1999; *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 9th Cir., June 15, 2001).

The final Rule 23(b)(3) category involves *financial injury* class actions, in which the claims usually have some sort of basis in an existing financial relationship between the class members and the defendants. The primary goals here are the restitution of any ill-gotten gains the defendants might have realized and the deterrence of similar practices in the future, on the part of the defendant and others within the same industry. Cases in this group include most consumer, employment, and antitrust matters.

The following discussion presents selected class action research findings that have made major contributions to what little we do know about this type of litigation. It should be noted that the discussion does not include studies published prior to 1995, studies primarily based on data collected from appellate decisions (except those involving interlocutory appeals), studies focusing on mass actions in which the procedural vehicle for aggregating the litigation are large-scale consolidations of individual cases, or studies that are based on information collected in traditional types of individual party cases even if the results might be relevant to class actions as well.

Empirical Studies of Class Actions

Types of Class Actions and Their Frequency

As suggested earlier, there are no reliable numbers for total class action activity in this country. However, some studies have attempted to describe the relative proportion of filings in state and federal courts and to provide a sense of the types of claims that are being brought. Using searches of electronic databases containing general media reports, specialized business press reports, and reported judicial decisions from federal and state appellate cases as well as from selected federal trial court matters, a RAND Institute for Civil Justice study of class action litigation led by Deborah Hensler (Hensler et al., 2000) suggested that social policy reform cases, despite their importance in the development of the 1966 amendments to Rule 23, comprise only a minority of all class actions. Mass tort cases, though the subject of considerable attention by academics and legal scholars in recent years, also appear to take a back seat to the frequency with which securities and financial injury matters appeared in the sources reviewed by Hensler et al. The study also attempted to better understand the degree to which state courts handle class actions as compared with the federal courts. Hensler et al. suggested

that there were about three reported judicial decisions regarding class actions in state courts for every two in federal courts, suggesting that state court class actions comprise a significant proportion of the total class action workload; however, the authors did not estimate the actual ratio of state to federal cases. Using a variety of data sources, they asserted that consumer cases, citizens' rights cases, and tort cases accounted for a larger fraction of state court class action cases than federal court class action cases, while the opposite was true for securities, employment, and civil rights cases.[9]

One issue that has been a hallmark of the debate over class actions has been whether their numbers have grown over time. Hensler et al. (2000) also conducted interviews at 15 major corporations and 12 plaintiffs' law firms with national class action practices to get a handle on the issue of growth. In these interviews, corporate representatives generally asserted that the number of attempted class actions had risen significantly in recent years with the largest number of suits reported by the financial services industry (e.g., banks and insurers). Plaintiffs' attorneys also reported their caseloads growing.

One attempt to ascertain the growth of class actions involved a Federalist Society survey of selected Fortune 500 companies with corporate or general counsel membership in tort reform advocacy organizations as well as large employers in Texas ("Analysis," 1999a; "Analysis," 1999b). The 32 companies responding to the survey reported that, compared with 1988, putative class actions against them pending during 1998 had increased by 1,315 percent in state courts and by 340 percent in federal courts (by way of comparison, revenues for those companies doubled on average during that period).

Choice of Forum and Movement Between Systems

Forum choice is another topic that has received considerable attention recently. Hensler et al. (2000) looked at reports in the general media, business press, and judicial decisions and found that the cases mentioned in these sources were most often from the most populous states, but that, when rated on the basis of cases per 100,000 residents, jurisdictions such as Alabama, Alaska, Colorado, Delaware, District of Columbia, Illinois, Louisiana, and Massachusetts could be considered hot states for class action activity.

Exploring the question of whether Louisiana and Texas courts attracted class action filings, Geoffrey Miller (2000) compared the experiences in those states with those in California and New York. Searching the published written opinions of trial court judges as the source for the cases in the study, Miller asserted that Texas' rate of class action litigation (when controlled for population) is below the national average,

[9] This finding is consistent with Willging, Hooper, and Niemic (1996), who found that securities cases appeared to constitute the bulk of Rule 23(b)(3) certifications in federal courts, while civil rights and ERISA matters dominated Rule 23(b)(2) certifications.

while Louisiana's is far above it and that both states had seen increased frequency of new cases.

John H. Beisner and Jessica Davidson Miller (2001) reviewed dockets and the court's computerized databases in Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida, to identify putative and certified class actions. The researchers concluded that the three counties chosen for the review experienced disproportionally high volumes of these cases when measured against the counties' populations and the size of each courts' overall workload. Because of the lack of data for statewide and national filing patterns, the researchers extrapolated the per capita figures for each county to national levels and concluded that the results for Madison County (42,349) and Jefferson County (22,331) had to be larger than the total number of state court cases across the country, which they thought "probably does not approach 20,000." They also identified what they believed to be rapid rises in the number of new class actions filed in these jurisdictions over the course of the study period, especially for nationwide classes. For example, one county had just two cases reported in one year and 39 two years later.[10] Beisner and Miller felt that other measures helped to confirm that the courts had become magnets for multistate and nationwide class actions: Depending on the county, anywhere from none to half of the defendants sued were located outside the county, not all of the named plaintiffs were residents of the county of filing, most of the few law firms that brought the cases were located elsewhere, there was a large proportion of duplicate cases even within the same court, and a high percentage of cases sought national classes. However, it should be noted that the three courts chosen for the study have achieved not inconsiderable notoriety in the public debate over so-called *magnet courts* and it is not likely that the experiences seen on their dockets are typical of the nation's state courts generally.

In a follow-on work that used data from published trial court decisions involving class actions in six states as well as from class actions identified through an eyes-on review of files in a single county, Beisner and Miller (2004) estimated the effects of proposed federal legislation that would expand federal diversity jurisdiction to include class actions involving citizens of different states and $5 million or more in aggregate claims. According to the authors, "More than half of the class actions for which decisions were available on-line would not be removable under the bill." However, the researchers were unable to assess the dollar value of the aggregate claims in the remaining cases; thus they could not say with certainty how many of the potentially removable matters met the $5 million threshold.[11]

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[10] An update of the figures for Madison County, Illinois, can be found in Beisner and Miller (2002).

[11] It should be noted that the Hensler et al. (2000) study, the Miller (2000) study of Gulf State class action activity, and the Beisner and Miller (2004) study of the effects of Senate bill 2062 all used published trial court opinions (and sometimes media reports) for their identification of class action activity levels, a technique that would inevitably result in a shortfall of the actual count of these cases.

A Federalist Society survey of attorneys indicating in the Martindale-Hubbell lawyer directory that class actions formed at least a part of their practice received responses from 464 plaintiffs' attorneys and 61 defense attorneys ("Federalist Society Surveys Class Action Lawyers," 1999; "Summary of Survey," 2001). About 58 percent of the plaintiffs' attorneys and 73 percent of the defense attorneys agreed with the assertion that greater incentives to file class actions in state courts were available because of tighter requirements for certification mandated by the federal appellate courts. But the attorneys' perception of an easier path to certification in state courts generally may not reflect the actual situation, as suggested by a study by Thomas E. Willging and Shannon R. Wheatman (2005) of the Federal Judicial Center. Willging and Wheatman surveyed attorneys from a sample of class actions litigated at least at some point in the federal courts (many of which were originally filed in state courts but subsequently removed by one of the parties). The attorney's choice of federal versus state courts appeared to be related to his or her perceived attitude of judges about the issues of class certification and level of scrutiny for any proposed settlements (to a lesser degree, the applicable law within the jurisdiction, the residence of the potential class members, and the location of the incident in question also played a role in their opinions). Nevertheless, the information collected during the survey suggested that both forums were equally *unlikely* to certify cases as class actions. State court settlement funds were generally larger than were those in federal courts, but the numbers of class members were typically larger as well, ultimately leading to smaller individual awards.

In addition to changes in the rules regarding federal diversity jurisdiction, other factors can affect movement between state and federal systems as well. Robert J. Niemic and Thomas E. Willging (2002) of the Federal Judicial Center (FJC) looked at the number of federal court filings following the Supreme Court's decision in *Amchem Products v. Windsor* (117 S. Ct. 2231, June 25, 1997) and *Ortiz v. Fibreboard Corp.* (119 S. Ct. 2295, June 23, 1999) that were thought to make it more difficult for federal judges to certify settlement classes in mass tort cases, especially when the settlement included future claimants.[12] The study was designed to explore the possibilities that plaintiffs would be filing fewer cases in federal courts as a result, that defendants would be more likely to seek removal, and that there would be fewer class actions resulting in settlements. Although the researchers did find statistically significant changes in filing patterns following the delivery of the Supreme Court's decision, they were unable to distinguish the effects of the opinions from other factors that might have affected filings. Subsequently, Willging and Wheatman (2002) used a set of cases similar to the ones employed in their study of attorney decisionmaking regarding choice of forum to conduct further exploration into *Amchem* and *Ortiz*'s impact. Surveys of attorneys

[12] Niemic and Willging (2002). Federal class actions were identified by performing electronic searches of docket sheets in the district courts that kept the dockets online and supplemented with a cross-check of the federal case management system; however, the complexities encountered in the search underscore the difficulties of identifying class actions even in the federal courts.

involved in class actions terminated in federal court (regardless of origin) suggested that neither case directly affected the plaintiff's choice of filing forum or the defendant's decision to remove the case from state court in most instances.

Origins

To try to understand the origins and outcomes of class actions, Hensler et al. (2000) performed intensive case studies of 10 selected financial injury and mass tort class actions. In even such a limited number of cases, the authors found a wide range in the roles of the class action attorneys in initiating the lawsuits (ranging from discovering the alleged unlawful practice independently to responding to specific complaints from clients to simply "jumping onto a litigation bandwagon" that other attorneys had already begun), in the responses of defendants (ranging from aggressive defense of the allegations to almost immediately joining with the plaintiffs' attorney to seek approval of a settlement), and in the choice of forums (ranging from a local court over a matter of limited geographical scope to remote rural counties far removed from the majority of class members). The range of values seen in the case studies was not asserted to reflect the minimums and maximums present in contemporary U.S. class actions; rather, the intent was to explore the notion that "all class actions are alike" and to suggest that proposals for reform need to take into account the wide variety of claims and outcomes to target cases that need addressing and to avoid a chilling effect on class actions in which the public interests were being served adequately.

Duplicative Actions

An FJC study led by Thomas E. Willging (Willging, Hooper, and Niemic, 1996) that is considered to be the most comprehensive and thorough description of class action litigation available found that 20 percent to 39 percent of the class actions in four federal district courts studied appeared to be related to other cases as reflected by interdistrict or multidistrict litigation consolidations or were duplicative or overlapping in terms of the issues in the cases, perhaps lending credence to a claim that class actions are often marked by races to the courthouse in order for the filing attorney to be named as lead counsel. But only a fraction of these related cases were not already subject to consolidation with similar litigation pending in state or federal court. The authors felt that, although the nonconsolidated duplicative cases exhibited procedural problems, the problems were not insurmountable. It should be noted that the Willging, Hooper, and Niemic study would have had only cases in the four districts to use for determining whether there were nonconsolidated overlapping cases elsewhere; thus, the true count might have been much higher.

The Federalist Society took another approach to the question of duplicative cases with a survey of Fortune 500 companies with corporate or general counsel membership in tort reform advocacy organizations ("Analysis," 2002). The 24 companies that responded indicated that, between 1990 and 2000, they had been involved in 465

clusters of multiple cases concerning essentially the same facts and the same type of plaintiffs (one responding company, however, accounted for about half of the total). About a third of the clusters involved similar cases only in state courts, four out of 10 were in federal courts only, and the remainder had cases in both systems. About one out of four clusters were reported to have the same plaintiffs' attorney involved in at least two of the cases within the cluster. The largest of the clusters reportedly involved more than 100 separate cases.

Amounts in Controversy and the Scope of the Proposed Class

Willging, Hooper, and Niemic (1996) thought that the amounts sought by class members in federal cases appeared unlikely to support individual lawsuits. The largest median per-member award (not reduced for attorneys fees) in the four districts studied was $528 and the maximum award was $5,331, a level that was not believed to be able to induce private attorneys to represent on a contingency fee basis or worth the cost for individuals to retain counsel, regardless of whether the case involved securities.

The Federalist Society's survey that used responses from 32 companies (either Fortune 500 companies with corporate or general counsel membership in tort reform advocacy organizations or large employers in Texas) indicated that 27 percent of the class actions pending in state courts against the respondents were seeking plaintiff classes with members from two or more states ("Analysis," 1999b). A follow-up survey of companies with representation on boards of defense-oriented associations (not including those on the first survey) indicated that 73 percent of the state court actions involving the 31 responding companies had proposed or actual multistate classes ("Analysis," 1999b). The difference in the figures reported in the two surveys was thought to be related to the larger proportion of toxic tort and property damage cases (and the correspondingly smaller proportion of consumer fee and fraud cases) in the first set of respondents. The initial survey reported that 86 percent of the cases pending in 1988 involved classes of fewer than 10,000 members and none was over a million; cases pending in 1998 had a greater proportion of larger classes, with 53 percent having 10,000 or fewer members and 15 percent with over a million ("Additional Findings," 1999).

The Certification Decision

Willging, Hooper, and Niemic (1996) reported median times from the motion for certification to the decision of 2.8 to 8.5 months in four federal district courts. The decisions generally took place after rulings on motions to dismiss or for summary judgment. Over half of the cases had some sort of opposition raised against certification. In the end, certification occurred in 37 percent of the cases (with the defendants stipulat-

ing to certification or failing to oppose the motion in about half of these cases).[13] Of the certified cases, 39 percent contained classes certified for the purposes of settlement only and, of these, 40 percent had the proposed settlement submitted at about the same time as the motion for certification. In 86 percent of such cases with simultaneous motions for certification and approval, the judge approved the settlement without any changes.

Using data from Alabama state courts (because its judicial system is one of the few that tracks class actions), Stateside Associates (1998 [2000]) examined court records in six selected counties over a two-year period to identify putative and certified class actions. The researchers found 91 such cases, of which 43 were ultimately certified (many of the uncertified cases were still open at the time that data collection ended). In 38 of the 43 certified cases, the class was certified ex parte (i.e., prior to the point at which the defendants have been served or filed an answer) and often on the date the complaint was filed. However, it is not clear why the researchers chose the six specific counties over others in the state of Alabama.

Brian Anderson and Patrick McLain (2004) assessed the use of the more liberal rules for interlocutory (i.e., prior to final judgment) review of certification decisions in federal court (Anderson and McLain, 2004). After the court of appeals was given the discretion to hear appeals of orders to approve or deny certification,[14] the number of interlocutory reviews increased from 1.8 per year to 4.4. Of 53 requests for review, 44 were granted with some circuits granting every petition. Defendants filed four times as many petitions and, when petitions were granted, defendants won 70 percent of the appeals.

Putative Class Actions

Although certified class actions may receive considerable attention if they are reported publicly, defendants must also deal effectively with putative cases that contain the potential for class treatment as a result of filing a motion for certification or because of allegations in the original complaint that assert that the named plaintiffs seek to represent others similarly situated. Even if such cases are never actually certified, the possibility of the matter expanding into a formal class action raises the stakes significantly, perhaps requiring a more aggressive (and costlier) defense or resulting in a settlement on an individual basis at a premium.

The Willging, Hooper, and Niemic (1996) study of two years' worth of filings in four federal district courts sought to include putative class actions in its analysis. The researchers in that effort identified class actions by using the court's database in

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[13] Not all classes sought involved plaintiffs, but defendant classes comprised only four of the 407 cases in the study. For purposes of simplification, this discussion speaks only of plaintiff classes against individual defendants.

[14] Prior to the rule change in 1998, interlocutory review was only possible if the court making the initial certification decision certified an order for immediate review or if the court of appeals issued a writ of mandamus.

which a flag is supposed to be set when a party makes a motion for certification and by a review of the electronic dockets for any occurrence of the word *class* or the entry of class action-related event codes such as ones that might be used for the filing of a motion for certification. A researcher then reviewed the pleadings in each preliminarily identified case to confirm the potential for class treatment. The team concluded that, depending on the district court, the official class action flag only picked up 22 percent to 51 percent of all attempted or certified class actions.

Other Pretrial Decisions

The Willging, Hooper, and Niemic (1996) study found that about two out of three cases in four federal districts had a ruling on some sort of dispositive issue such as a motion to dismiss or a motion for a summary judgment. Overall, about three out of 10 cases were terminated as a result. Based on data collected about the decisions made prior to and after certification, the authors felt that it would be wrong to assume that there are no judicial examinations of the merits of the claims in federal class actions. There were mixed results as to whether judges performed such merit decisions before or after certification depending on the specific rules and opinions applicable to the individual district. Motions to dismiss were filed and ruled upon more frequently than in traditional civil cases.

Court Resources

Using data from a federal court time study of judicial involvement in various types of cases, Willging, Hooper, and Niemic (1996) compared the time required to process 51 class actions with that required to process 8,269 other civil cases and found that class actions required 4.71 times more effort than the average civil case. Certified cases required about 5.5 times more effort than uncertified class actions.

Notice to the Class and Hearing

Willging, Hooper, and Niemic (1996) study found a small number of cases in its sample drawn from four federal districts in which no notice to the class regarding settlement was given and in which no hearings on settlement approval were held. Even when notice was provided, a substantial number of cases had such notice delayed until time of resolution, presumably to shift such costs directly to defendants. Most notice processes included individual notice to class members along with publication, and the median cost of notice exceeded $36,000. About a quarter of the certified cases in which notice was made included some sort of litigation activity over the nature of that notice. In the authors' view, typical settlement notices reviewed failed to provide the net amount of the settlements, the estimated sizes of the class, any estimates of the size of the individual recoveries, the amounts of attorneys' fees, or the costs of administration and other expenses (however, claiming procedures and the processes for opting out or objecting were usually explained). It should be noted that the Willging, Hooper,

and Niemic study came at a time when less-than-adequate attention might sometimes have been paid to the important question of providing realistic and informative notice to the class. In subsequent years, practices may well have improved as a result of revisions to the federal rules.[15]

Opt-Outs, Objectors, and Intervenors

Willging, Hooper, and Niemic (1996) found that, although opt-outs do occur in a substantial number of cases, the total number of potential class members requesting exclusion is usually quite small: 75 percent of the cases with any opt-outs at all had rates of 1.2 percent or less (none of the cases studied involved opt-in procedures for the purpose of being included in the certified class). About half of the cases with settlement hearings involved objectors, either by in-person appearance or by written objection, but, in the end, the courts approved 90 percent or more of the proposed settlements without changes. Outside intervention was infrequent.

Theodore Eisenberg and Geoffrey P. Miller (2004b) reviewed published trial court opinions and concluded that opt-out and objector rates in class actions are usually tiny percentages of total class size. The level of dissent (using opt-out and objectors as the measure) appeared to be inversely related to class size and directly related to per-capita class recovery (proposed, not actual); dissent was also found to be more common in mass torts and civil rights cases, with the data suggesting a decrease in frequency over time. No relationship was found between opt-out or objector rates and the amount of fees awarded, regardless of whether the rates are compared to absolute size of fees or the percentage that the fee comprises of the total fund. Settlements that were not approved by the judge in the form originally presented had higher objection rates than those that were approved; interestingly, the percentage of the class opting out was much larger in approved settlements.

Fees

Unlike typical civil litigation in which compensation for the plaintiffs' attorneys is a privately contracted matter, proposed class counsel fees in certified class actions are subject to review and approval by the judge overseeing the litigation. But no preset benchmarks exist for determining whether fee requests are excessive.

In cases in which monetary compensation is sought, judges in most jurisdictions will usually award fees as a percentage of the common fund or common benefit (the total monetary value of the compensation that the defendant will ultimately pay to resolve the case, sometimes also including estimated future savings to the class as a result of injunctive relief) achieved for the class. In others, the effort expended in

[15] In 2003, FRCP 23(c)(2)(B) was revised to require that notice be written "concisely and clearly" and in "plain, easily understood language." Moreover, new examples have been developed by the FJC to guide federal judges in approving proposed notice (see Federal Judicial Center, undated).

advancing the claims of the class is the primary measure taken into account; this method uses the number of hours worked on the case multiplied by a reasonable hourly wage for attorneys and the product is then multiplied by a lodestar factor that reflects, among other things, the preclusion of other employment while the attorneys were involved in the case, the complexity of the litigation, the risk undertaken by counsel, the special expertise needed, and the benefit to the class. The lodestar method is also the one employed in certain types of class actions in which the primary purpose is injunctive relief (rather than monetary compensation) as is the case in most social policy cases; in these matters, fee-shifting statutes that provide the basis for bringing the claim require defendants to pay for reasonable attorneys' fees when the plaintiffs have prevailed at trial or as a result of settlement.[16]

In another study, Theodore Eisenberg and Geoffrey P. Miller (2004a) used 10 years' worth of published judicial decisions as well as cases found in *Class Action Reports*, a source for news about reported class actions, to compare fee decisions with settlement size. The cases found in the data sources the researchers used suggested that the percentage that the fees represented of the overall recovery decreased as the recovery increased, regardless of whether the matter involved fee-shifting statutes employing the lodestar method. The study found that "high risks" inherent in the litigation (the researchers used the wording employed by the judge as an indicator of the level of risk) and federal court jurisdiction were associated with higher fees. But other potential determinants (such as the presence of objectors, the use of settlement classes, or the inclusion of injunctive relief or coupon redemption schemes into the settlement) did not seem to have statistically significant effects on fee size. Overall, the mean fee award in non–fee-shifting cases was 21.9 percent and the median was 23.2 percent.

One of the sources of data for the Eisenberg and Miller fee study (2004a) was a report by Stuart J. Logan, Jack Moshman, and Beverly C. Moore (2003). Using 1,120 cases collected by *Class Action Reports*, the authors estimated that the average contingency fee rate was 18.4 percent across all type of claims, though cases in which the fund size was under $10 million had average contingency fees just over 30 percent.

In the Willging, Hooper, and Niemic (1996) study, both mean and median fee rates (when they could be calculated from the monetary award to the class) ranged from about 24 percent to 30 percent depending on the district. When the fees exceeded 40 percent, the cases involved nonquantifiable benefits (such as injunctions) or relatively small fund sizes. Percentage of the recovery calculations (rather than the lodestar) was used most often when a distribution fund was created.

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[16] The goals of judicial oversight of a fee award is somewhat different for these types of cases given that, in fee-shifting matters, the defendants pay the fees over and above any monetary assessments against the defendant. In such cases, the court is ensuring that the fees that the defendant pays are reasonable. In non–fee-shifting cases, the fees come out of the common fund set up to compensate the plaintiff class members. As a result, the court is tasked with making sure that the fees the plaintiffs pay are reasonable.

In some instances, competing attorneys submit bids to the judge supervising the class action that contain their requested amounts for handling the case, and the court then selects the lead class counsel primarily based on that basis, though other qualitative factors (such as prior experience in handling similar litigation) is often taken into account as well. In theory, the auction replicates to some degree the private marketplace that is generally absent in class action litigation as a result of the attorney choosing the clients and not the other way around. Laural L. Hooper and Marie Leary (2001) examined the procedures and outcomes in 14 federal class actions in which fee auctions were employed, 12 of which involved securities litigation (Hooper and Leary, 2001). Judges chose the lowest bidder in all of the cases for which the information for making that assessment was available to the researchers. Perhaps as a result, the majority of the fee awards in these cases was 9 percent or less of the common fund (with the highest at 22.5 percent), markedly smaller than what had been reported by Willging, Hooper, and Niemic (1996) for federal court class actions generally.

Outcomes

Hensler et al. (2000) saw large variation in just 10 case studies in the size and scope of the claims both individually (ranging from less than $5 loss per class member to allegations of death) and in the aggregate (total compensation ranging from less than $1 million to more than $800 million), in changes in defendant practices (ranging from direct or indirect to no meaningful change), in attorneys' fees as a percent of negotiated settlement value (ranging from 5 percent to 50 percent, with most of the case studies reflecting percents of one-third or less), and in such important areas such as the process for certification, the types of notice provided to the class, the manner in which claims could be made, intervenors' roles, and the oversight of fee award requests.

Focusing on five selected federal court cases involving mass torts that resulted in proposed settlement classes, Jay Tidmarsh (1998a, 1998b) found marked variation in the procedures and standards used to certify the class and rule on the fairness of the settlement, the manner in which notice was provided, and the basic terms of the resolution of the cases. Tidmarsh believed that variations observed and concerns over inadequacy of the representation afforded to the plaintiffs' class suggested that guidelines were needed for handling future mass tort settlement case actions.

Willging, Hooper, and Niemic (1996) found that the median recoveries for individual class members (based on the potential value at the time of settlement) in four selected federal district courts ranged from $315 to $528 with maximum awards of approximately $5,300. Only a few cases resulted in per-member awards of less than $100, suggesting that such cases are outliers compared with all class action recoveries in federal courts. Trial rates for nonprisoner federal class actions were generally the same for all types of claims. But federal class actions took considerably longer to resolve than nonclass cases and consumed five times as much judicial resources, whether or not certified. Most certified cases (excluding those certified only for the purposes of settle-

ment) resulted in class settlements; depending on the district, the rate ranged from 62 percent to 100 percent (for those not certified, 20 percent to 30 percent resulted in individual settlements with the rest mostly being disposed of by motion). Four percent of class actions resulted in a trial.

Eisenberg and Miller (2004a) collected information about settlement size in cases from 1993 through 2002. In the 370 cases they found by searching published legal opinions, the mean recovery in 2002 dollars was $100 million and the median $11.6 million. In the 630 cases contained in the *Class Action Reports* data for the same period, the comparable numbers were $35.4 million and $7.6 million, a difference attributable to the much higher percentage of securities class actions in that publication.[17] Addressing the issue of changes over time using both data sets, the researchers could "find no robust evidence that either recoveries for plaintiffs or fees of their attorneys as a percentage of the class recovery increased during the time period studied."

The Eisenberg and Miller fee study (2004a) received wide publicity because of the subsidiary assertion of relatively flat recoveries and fee percentages over the 10-year period (see, e.g., Glater, 2004). One critical review by George L. Priest (2005) that reexamined the tables in the Eisenberg and Miller fee study claimed that the true meaning of *common fund* (recovery for the class plus attorneys' fees plus reimbursed ancillary costs and expenses) was closer to $140 million in 2002 dollars and that the average for the top 10 percent of cases exceeded $1 billion. It was also asserted that security class actions were overrepresented and that important case types such as civil rights, employment, ERISA benefits, and mass torts were underrepresented in the data (as were reported decisions that did not discuss fees), resulting in misleading findings regarding outcomes. Priest's recalculation of average aggregate settlements and judgments per year of about $5 billion was accompanied by a claim that such a number would have to be multiplied by "five, ten, or twenty times" or perhaps "twenty to forty times" to approach the real magnitude of all class action outcomes. Moreover, Priest suggested that, because of the potential impact that class actions can have on a company or an industry, the mean and median figures for outcomes were far less important than what might be thought of as outliers, the cases that cast the longest shadow over defendants' decisions to litigate a certified case to an unknown conclusion or to choose the certainty of settlement, even at a premium price. Priest also criticized the study for failing to take noncertified putative class actions into account when calculating the overall financial impact of class action litigation.

Rates of Claiming

There is often a significant difference between what was claimed to be available to class members in the form of a compensation fund created at the time of settlement

[17] The authors acknowledged the selection problems inherent in using published pretrial decisions, which may not be representative of the universe of all cases.

and what is in fact distributed after class members successfully meet the requirements for making claims against that fund. A lack of knowledge that a class action had been initiated, a lack of knowledge that a settlement had been reached, a lack of knowledge of how to make a claim, and lack of interest in expending the time and effort needed can result in significant portions of the fund going unclaimed and, in many instances, reverting to the defendant. In the Hensler et al. (2000) study, the percent of the settlement funds that was actually paid to class members in 10 illustrative class actions ranged from 100 percent to about 30 percent, with some subclasses receiving less than 1 percent. Viewing settlement outcomes from the perspective of actual distribution rather than the hypothetical available value may lead to different conclusions about the adequacy of the settlement and the value of the litigation; in those case studies, attorneys' fees as a percent of real settlement value when actual disbursements to class members are taken into account were as high as 50 percent, with half of the case studies reflecting percentages of one-third or more, and transaction costs (excluding defense costs) as a percentage of real settlement value were as high as 75 percent.

The rates of claiming observed by Hensler et al. (2000) appeared to be influenced by the mechanisms incorporated in the settlement agreement for providing notice to class members of the case's resolution and the process for making claims, the use of automatic distribution schemes versus the need for class members' affirmative action to participate (such as clipping a claim form out of a newspaper announcement and mailing it in), and individual claim size. Despite the clear need for judges to have access to reliable data on how different approaches result in better or worse claiming rates when assessing a settlement's adequacy, it does not appear that any empirical study has directly assessed this question. This gap in knowledge is primarily due to the judges' own failure to routinely require parties to report on the final distribution of the settlement fund. Reflecting this problem, Willging, Hooper, and Niemic (1996) remarked, "Unfortunately, the parties generally did not report the number of claims received; thus, our data on claims received are too incomplete to present."

Other Measures

Surveys of senior attorneys at large companies conducted by Humphrey Taylor, David Krane, Regina Corso, and Anna Welch (U.S. Chamber Institute for Legal Reform and Harris Interactive, 2005) found that the attorneys ranked Delaware, Nebraska, North Dakota, Iowa, and Utah at the top in their treatment of class actions, while West Virginia, Alabama, Louisiana, Illinois, and California were at the bottom. According to the survey questionnaire, the rankings were based on how well the respondents perceived the state's liability system to be creating a "fair and reasonable litigation environment." Public Citizen (2005) has criticized the survey for exhibiting a "pervasive pro-industry bias."

APPENDIX C

State Departments of Insurance Survey Results

Table C.1
State Departments of Insurance Ratings of Class Action Issues

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Annuities	3.86	Modest	Claimed minimum floor for variable interest rate
	3.65	Modest	Figured death claim benefit at time of election rather than at time of death, which is what contract says (e.g., changed market conditions, mortality and expense fees charged over time)
	2.86	Weak	Failed to disclose payments made to annuity provider by mutual fund companies
	4.07	Modest	Failed to disclose that annuity offered was a type of insurance product
	3.65	Modest	Failed to fully inform prospective and current policyholders about withdrawal penalty for transferring or switching policies
	3	Weak	Failed to inform when variable contracts purchased in tax-deferred plans provided no additional benefit to the customer
	3.81	Modest	Falsely represented that assets could be transferred among funds offered in the contracts without charge
	3.69	Modest	Misrepresented that tax benefits in tax-deferred plans were only available if they were funded with an annuity contract
	3.38	Modest	Unnecessarily placed tax-deferred annuities into tax-deferred retirement plans
Automobile first-party coverage—diminished value issues	3.15	Weak	Failed to reimburse policyholders for the diminished value of repaired vehicles

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile first-party coverage—Increased value issues	3.27	Modest	Deducted portion of payments for vehicle repair based on alleged betterment in value of vehicle from upgraded parts or repairs
Automobile first-party coverage—OEM issues	3.56	Modest	Conspired with other insurers to manipulate the price of auto physical damage coverage with the use of aftermarket parts
	3.25	Modest	Created Certified Automotive Parts Association (CAPA) to conceal flaws in aftermarket parts
	4.44	Strong	Failed to disclose the use of aftermarket parts for repairs rather than using original equipment manufacturer parts
	3.44	Modest	Failed to pass along savings to policyholders realized by the use of aftermarket parts for repairs rather than using OEM parts
	3.5	Modest	Specified aftermarket parts for repairs rather than using OEM parts, resulting in diminished value, safety issues, or any loss (other than policy cost)
Automobile first-party coverage—other issues	4.07	Modest	Added inappropriate or unfair surcharge on first-party policies for auto theft prevention authority or other separate or voluntary program
	3.31	Modest	Calculated cost of repair using artificially low competitive bids or prevailing competitive prices
	2.91	Weak	Did not include payment for identification and measurement procedure
	3.71	Modest	Double-with: Multiple parties in accident with the same insurance (a) paid deductible when no one was at fault, (b) both paid full deductible, (c) did not have deductible prorated at relative degree of fault, or (d) were unable to recover from own or other policies
	4.27	Strong	Failed to initiate investigation, acknowledge claim, provide estimate, communicate with insured, or take other required action (other than make payment or deny claim) within required time limits
	3.44	Modest	Failed to obtain salvage title after totaling vehicles
	3.75	Modest	Failed to reimburse insureds for salvage value of vehicle when given to insurer following total loss
	3.4	Modest	Limited repairs to visual inspection alone
	2.8	Weak	Sales tax on losses issue

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile first-part coverage—other issues (continued)	4.13	Strong	Systematically denied or undervalued claims arising from single event (e.g., hailstorm or hurricane)
	3.75	Modest	Systematically omitted payment for necessary repairs, including safety-related issues (e.g. seat belt check or four-wheel alignment)
	3.69	Modest	Systematically referred policyholders to auto repair shops that use substandard replacement parts and repair methods
	3.6	Modest	Unspecified problem involving insufficient valuation of total loss claims
	3.6	Modest	Unspecified problem with premium charges for comprehensive or collision coverage
	3.13	Weak	Used collection methods or entity that sought reimbursement from third-party tortfeasors for amounts paid to insureds in an unlawful or deceptive manner
	3	Weak	Used National Automobile Dealers Association (NADA) Official Used Car Guide as sole basis for calculating total loss of insured's vehicle
	3.63	Modest	Used remanufactured, used, substandard, or incorrect parts rather than new and appropriate in vehicle repair (but not non-OEM)
	4.06	Modest	Used valuation software package designed to produce offers for automobile total loss at less than fair market value, actual retail price, fair retail value, or other required measure
Automobile third-party liability coverage	3.6	Modest	Third-party OEM: Breached third-party beneficiary contract or other duty or understanding by specifying or using aftermarket parts for repair
	3.13	Weak	Discouraged claimants from seeking counsel
	2.73	Weak	Failed to pay attorneys' fees to third-party claimants when sued as real party in interest as subrogee of damages arising from personal injuries
	3.88	Modest	Failed to pay necessary taxes, fees, and other ancillary expenses required to fully reimburse total loss suffered by third-party claimants
	3.25	Modest	Failed to pay pro rata cost of third-party claimants' collision damage waiver (e.g., such as might be incurred from car rental)
	3.38	Modest	Failed to reimburse third-party claimants for diminished value or failed to notify of right to make claim for diminished value

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile third-party liability coverage (continued)	3.63	Modest	Failed to reimburse third-party claimants for loss of use of their autos
	4.07	Modest	Procured liability settlement with third party in a manner that violated statutes or rules
	4.56	Strong	Unfairly or deceptively handled claims
	3.93	Modest	Unnecessarily delayed payment of concluded settlements without including interest payments
	3.86	Modest	Wrongfully used mandatory insurance statute to deny liability to uninsured parked cars damaged by own insureds
Automobile no-fault, PIP, or medical payments coverage—health care provider issues	3.73	Modest	Denied medical claims or failed to pay claims within time limits without first obtaining report from appropriate health care provider
	2.79	Weak	Denied payments to health care providers for failure to attend examination under oath or provide a sworn statement
	2.77	Weak	Failed to pay MRI exam benefits at the highest possible rate as per medical regulations
	2.86	Weak	Failed to pay or reduced bills in manner not in accordance with annual state medical consumer price index or other mandated inflation index
	2.93	Weak	Failed to pay providers when obtaining medical records of insureds
	3.27	Modest	Failed to pay required interest or interest on delayed payments to health care provider on claims
	3.75	Modest	Made inappropriate fee reductions on claims submitted under PIP coverage
	3.4	Modest	Other or unexplained delay in making payments to health care providers
	3.36	Modest	Reduced or denied payments to health care providers based on outside-entity database or software
	3.53	Modest	Systematically or arbitrarily denied health care provider claims for MRI or thermograph services
	3.25	Modest	Wrongfully paid charges according to MRI fee schedule, Medicare or Medicaid schedule, workers' compensation fee schedule, or a participating or non-participating provider fee schedule instead of schedule, criteria, or rate required by law or contract

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile no-fault, PIP, or medical payments coverage—health care provider issues (continued)	3.64	Modest	Wrongfully paid insured's health care providers at negotiated rates, which is not possible as insurer is not legitimate preferred provider organization
	3.46	Modest	Wrongfully reduced benefits to providers using new statute without possessing state-approved plan as required by statute
	3.67	Modest	Wrongfully refused to pay bills for medical services rendered more than 30 days before submission
Automobile no-fault, PIP, or medical payments coverage—policyholder issues	3.94	Modest	Allowed invasion of privacy and disclosed confidential medical records by use of outside medical file review firms
	3	Weak	Asserted subrogation claim for PIP or MedPay benefits paid against insured's recovery from third-party tortfeasor, UM, or UIM proceedings but failed to pay pro rata share of litigation fees and expenses
	3.73	Modest	Denied (in whole or in part) claims or delayed payment based upon generalized criteria not specific to claimant's injuries
	3.46	Modest	Denied chiropractic care or other types of treatments after claiming not curative or that insureds reached maximum medical improvement stage despite right to palliative or maintenance care under state PIP or MedPay law
	2.62	Weak	Denied insured's claims for TV, phone, and other reasonable ancillary charges while hospitalized
	3.87	Modest	Denied medical claims or failed to pay claims within time limits without first obtaining report from appropriate health care provider
	3.64	Modest	Denied or reduced PIP payments to insureds when all or part of expenses already paid by collateral source
	3.07	Weak	Denied PIP or MedPay claim because incident was work-related accident that was eligible for workers' compensation benefits
	3.27	Modest	Denied the right to stack additional PIP or MedPay policies existing in the same household
	3.93	Modest	Failed to automatically include PIP or MedPay coverage as part of standard auto policy
	3.09	Weak	Failed to disclose at time of purchase that policies would not cover expenses paid by collateral sources

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile no-fault, PIP, or medical payments coverage—policyholder issues (continued)	3.29	Modest	Failed to disclose existence or details of medical cost containment program or that claims might be subjected to retrospective utilization review (UR) or that treatment would require preauthorization as reasonable and necessary
	3.64	Modest	Failed to disclose practice of paying bills only at a fixed percentile of local usual and customary charges
	4.07	Modest	Failed to initiate investigation, acknowledge claim, provide estimate, communicate with insured, or take other required action (other than make payment or deny claim) within required time limits
	3.21	Modest	Failed to inquire at purchase or renewal whether expecting to require wage loss reimburse benefits because of age or other reason; including unnecessary charges for lost wage coverage or failing to offer or provide notice of option
	3.71	Modest	Failed to pay benefits by claiming that insured's HMO was other insurance so PIP or MedPay coverage was secondary
	3.57	Modest	Failed to pay benefits by claiming that Medicare or Medicaid was primary coverage
	3.63	Modest	Failed to pay interest on delayed claim payments
	2.42	Weak	Failed to pay lost wages for illegal immigrants when wage claims were unsupported by tax returns
	3.5	Modest	Failed to provide additional statutory benefits available to those who exceeded PIP or MedPay policy limits
	2.86	Weak	Failed to provide PIP or MedPay benefits to pedestrians by providing only minimum limits rather than extended limits
	4.43	Strong	Failure to make timely payments of medical and other bills under PIP
	3.23	Modest	Improperly required reimbursement or denied all or part of PIP or MedPay benefits when asserting subrogation rights to third-party settlement
	3.07	Weak	Improperly used accident reconstruction experts or other external entities or individuals to review causation issues and deny claims
	2.85	Weak	Incorporated medical cost containment program that, because of predetermined criteria for cost and type of treatment, results in managed care coverage rather than indemnity coverage

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile no-fault, PIP, or medical payments coverage—policyholder issues (continued)	3.69	Modest	Limited payment to usual and customary charges in the claimant's area for which state law actually requires payment of a reasonable and necessary charge
	3.62	Modest	Offset policy limits payoff by previous payments under PIP or MedPay coverage
	3.92	Modest	Other or undefined failure to pay proper or full PIP or MedPay benefits
	3.15	Weak	Paid claims based upon unconstitutional PIP or MedPay threshold statute
	2.87	Weak	Paid fees to broker (such as those for MRI services) rather than making payments directly to health care providers, which ultimately reduced insured's policy benefits
	2.85	Weak	Paid interest on delayed claim only starting at end of time limit and not from the first day claim was payable
	3.58	Modest	PIP or MedPay election, rejection, or waiver at time of initial policy purchase issues (basic, extended, or enhanced upgrade; includes misleading representations, invalid forms, failure to offer as required)
	3	Weak	Reduced benefits available to insureds by paying out subrogation claims to health care recovery companies
	4.08	Strong	Reduced medical payments for preexisting conditions or prior impairment though state law or policy requires full payment
	3.38	Modest	Refused to preauthorize or precertify requested medical treatment when good faith and fair dealing would give such authorization
	3.15	Weak	Required independent medical examinations either when unnecessary or in violation of law or policy or used examiners who were unqualified, biased, or given improper incentives
	3.23	Modest	Required insureds to first seek payment against other PIP or MedPay carriers and exhaust those policies before paying
	3.57	Modest	Required screening, examination, report, or other process at the time of policy purchase or at time of making claims that inherently discriminated against those with disabilities

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile no-fault, PIP, or medical payments coverage—policyholder issues (continued)	3.79	Modest	Sought reimbursement of PIP or MedPay benefits before the insureds had been made whole for all economic and noneconomic losses (includes failing to investigate to ensure insureds made whole)
	3.07	Weak	Sought subrogation or reimbursement from third-party tortfeasors in a way that interfered with PIP or MedPay policy insured's own pursuit of claims with third-party (including attempts prior to completion of insured's own negotiations)
	3.6	Modest	Systematically or arbitrarily denied policyholder's claims for cost reimbursement for MRI or thermograph or other testing
	4.33	Strong	Systematically denied claims in whole or in part solely to meet quotas or other internal cost-cutting needs
	3.27	Modest	Systematically denied or reduced chiropractor services as excessive or not reasonably necessary
	3.31	Modest	Systematically reduced PIP benefits through bill review computer program
	3.47	Modest	Systematically reduced PIP or MedPay benefits through the use of medical file review firms or other retrospective UR process
	4.13	Strong	Systematically refused to reimburse on reasonable and customary or medically necessary or other appropriate basis without investigating particular merits of the claim or without reasonable grounds for making decision
	4.46	Strong	Used ambiguous or misleading language in policy to be able to construe coverage issues in insurer's favor when needed
	4.07	Modest	Used medical file review firms with reviewers who are unqualified, nonmedical, biased, given improper incentives, or who have colluded or conspired with insurers to deny claims
	4	Modest	Used valuation software package designed to produce offers for personal injury claims at less than full and fair value
	3.43	Modest	Violated PIP or MedPay statute by binding coverage prior to providing written explanation of coverage
	3.87	Modest	Wrongfully enforced statute of limitations on coverage

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile no-fault, PIP, or medical payments coverage—policyholder issues (continued)	4.08	Strong	Wrongfully paid insureds' health care providers at negotiated rates, which is not possible as insurer is not legitimate preferred provider organization
	3.47	Modest	Wrongfully required policyholders to give recorded statements under oath, attend examination under oath, or provide a sworn statement
	3.58	Modest	Wrongfully required preapproval of nonemergency medical care under patient selected provider or similar option
	3.67	Modest	Wrongfully set premiums based on payment of reasonable and necessary medical expenses even though, in practice, paid claims at a discounted rate for preferred providers
Automobile UM or UIM coverage—policyholder issues	4.13	Strong	Charged for multicar stack coverage when insured actually only owned one car
	2.93	Weak	Chose biased arbitrator or failed to disclose prior relationship with arbitrator for UM or UIM arbitration
	3.29	Modest	Deducted third-party recovery from UM or UIM limits paid to policyholders in breach of contract (includes claims that UM limits were the same as mandatory bodily injury coverage (BI) limits which makes coverage illusory)
	3.57	Modest	Denied right to stack UM, UIM, and BI coverages in same household
	3.86	Modest	Denied the right to stack additional UM or UIM policies existing in the same household
	2.71	Weak	Denied UM or UIM claim because incident was work-related accident that was eligible for workers' compensation benefits
	4.13	Strong	Failed to initiate investigation, acknowledge claim, provide estimate, or take other required action (other than make payment or deny claim) within required time limits
	2.71	Weak	Failed to learn of amounts insureds were legally entitled to recover from tortfeasors or failed to use this amount as the basis to settle claims
	4.38	Strong	Failed to pay insureds' claims for injuries incurred by relatives caused by UM or UIM
	2.27	Weak	Failed to pay fair share of attorney contingency fees in first-party proceedings under common fund doctrine due to offset of prior payments

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile UM or UIM coverage—policyholder issues (continued)	3.75	Modest	Failed to pay for reasonable loss of use
	3.29	Modest	Failed to pay last offer made at arbitration or pay all undisputed amounts
	4.15	Strong	Failed to pay UM or UIM claims on vehicles based on an unenforceable other-owned auto exclusion
	3.47	Modest	Failed to reduce rates or lower premiums when antistacking clause introduced into coverage
	4.19	Strong	Failure to make timely payments of claims
	3.57	Modest	Illegally required insureds to share in cost of arbitrators' fees and expenses
	2.94	Weak	Inappropriately offset UM or UIM payments by multiple sources of benefits (such as workers' compensation or third-party recovery) previously received when only one offset is actually allowed
	3.36	Modest	Inappropriately offset UM or UIM payments by PIP or MedPay benefits or third-party tortfeasor payments previously received
	3.63	Modest	Made unreasonable offers to settle UM or UIM claims forcing insureds to arbitrate and incur unnecessary expenses
	4.44	Strong	Nonspecified discrimination on basis of race, national origin, language spoken, or other reason
	3.15	Weak	Offered less in UM or UIM benefits than what was paid for PIP or MedPay payments
	3.19	Modest	Offset third-party tortfeasors limits of liability rather than the actual amount of settlement
	2.64	Weak	Offset recovery from third parties from UM or UIM benefits without adjusting (either 100 percent or pro rata share) for insured's attorneys' fees and costs to obtain such recovery
	3.15	Weak	Paid tortfeasor-caused damage under collision or comprehensive rather than UM or UIM coverage resulting in failure to pay diminished value, higher deductibles, or higher premiums
	3.27	Modest	Reduced payment of BI claim under UM or UIM due to bad-faith use of independent medical exams
	4.06	Modest	Sold multiple UM or UIM policies to insureds with more than one car when only one is needed

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile UM or UIM coverage—policyholder issues (continued)	3.93	Modest	Sold multiple UM or UIM policies to policyholders with more than one car even though doing so would not increase coverage
	3.07	Weak	Sought reimbursement or subrogation from third-party tortfeasor in a way that prevented or interfered with UM policy insureds own pursuit of claims with third-party (includes attempts prior to completion of insured's own negotiations)
	3.73	Modest	Systematically excluded motorcycles from the definition of uninsured auto in order to deny claims
	4.31	Strong	UM or UIM election or rejection at time of initial policy purchase issues (basic, extended, or enhanced upgrade; includes misleading representations, invalid forms, failure to offer as required, failure to obtain written rejection)
	3.31	Modest	Raised UM or UIM limits without permission to match liability coverage or limits exceeded minimum financial responsibility limits without permission or similar issues
	4.29	Strong	Wrongfully advised insured that UM or UIM coverage was not available
	3.2	Modest	Wrongfully offset UM or UIM benefits by any extrapolicy collateral sources such as workers' compensation or disability insurance or any other sources
Automobile coverage—other issues	2.44	Weak	Offered inadequate amounts for personal mileage reimbursement
	3.29	Modest	Auto insurer failed to reimburse any part of personal transportation expenses (such as for medical treatment)
	4.65	Strong	Calculated premiums in manner not consistent with state law
	3.63	Modest	Conspired with other insurers to fix prices for reimbursement of health care providers under all types of auto policies
	4.88	Strong	Discriminated based on race by charging excessive premiums in certain geographic areas
	4	Modest	Failed to fully reimburse insureds for amounts (including deductible) insurer recovered from third-party tortfeasors; including failure to pay interest on recovered amounts and instances in which insurer failed to obtain recovery from third parties

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile coverage—other issues (continued)	3.31	Modest	Failed to give rate discounts for passive restraint devices or antitheft devices
	3.56	Modest	Failed to pay interest accruing from date of settlements with insureds or third parties arising from any and all types of claims
	3.69	Modest	Failed to properly account for fines in its reporting to the state for the purposes of rate making
	3.15	Weak	Handled double-with claims in which multiple parties in same incident insured by same insurer without seeking insureds' consent
	3.13	Weak	Improperly allowed adjuster on third-party liability claim access to file and information related to first-party claim made by insured against own insurer (which insured all vehicles in incident)
	3.93	Modest	Included owned but not insured exclusion in policies without a corresponding premium adjustment
	3.62	Modest	Made misleading representations, used invalid or defective forms, failed to offer as required, or failed to fully disclose differences regarding full tort and limited tort choice election or rejection at time of initial policy purchase
	3.8	Modest	Other or undefined auto policy rating problem
	3.5	Modest	Retroactively applied premiums to date of acquisition when car purchased if no accident and prospectively if accident occurs
	3.56	Modest	Surcharged for accidents without first determining fault
	3.88	Modest	Surcharged or denied insurance or other adverse action due to minor traffic infractions, nonmoving violations, or other unrelated or irrelevant criminal or civil situation
	3.21	Modest	Unexplained issues regarding auto policies and antitrust or restraint of trade issues
	3.18	Modest	Unspecified issues related to the applicability of no-fault versus limited tort thresholds
	3.93	Modest	Used unverifiable accident record surcharge in violation of prohibition of underwriting and rating based on lack of prior insurance

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Automobile coverage—other issues (continued)	3.87	Modest	Wrongfully denied business policy as including coverage for UM, UIM, PIP, or MedPay even though policy had auto liability provisions and by law must include such coverage
Commercial general liability—third party claimants	3.13	Weak	Knew of dangers of asbestos or other toxic substances but conspired with insureds to avoid liability or deny obviously legitimate claims
Credit life coverage	3.75	Modest	Conspired to fix the price of credit life insurance
	4.29	Strong	Failed to disclose details about credit life premiums
	4.12	Strong	Induced borrowers to purchase optional credit insurance products unknowingly
	3.41	Modest	Sold policies without required federal Truth in Lending disclosures
Disability coverage	3.35	Modest	Agents issued incorrect policies compared to policyholders' needs, wants, and contractual arrangements
	3.47	Modest	Denied claims solely on the basis of unverifiable income
	4.53	Strong	Failed to file disability policies with or obtain approval on those policies from state insurance commissioner or agency before offering for sale
	3.07	Weak	Refused to grant an increase in benefits on the grounds that allowing such an increase would exceed the policies issues and participation limits
Health insurance coverage—health care provider issues	2.94	Weak	Arbitrarily changed provider reimburse rates
	4.31	Strong	Delayed payments unnecessarily without paying interest on valid claims
	3.88	Modest	Disregarded medically necessary criteria in making coverage and treatment decisions
	3.44	Modest	Entered into illegal capitation arrangements
	2.56	Weak	Failed to adequately explain to providers how the reimbursement fee schedule was designed and how it operates
	3.5	Modest	Failed to maintain consistent medical utilization and quality management and administration of covered services
	3	Weak	Failed to make increased reimbursement payments when the treatment required extra time and resources

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Health insurance coverage—health care provider issues (continued)	3	Weak	Failed to update average wholesale price of drugs on a timely basis
	3.6	Modest	Interfered with providers' relationships with patients by arbitrarily denying or delaying authorizations or payments
	3.31	Modest	Paid out-of-network providers less than billed charges
	3.88	Modest	Provided services to, had relationship with, or failed to determine status of nonadmitted or sham insurer in violation of law
	3.06	Weak	Reimbursed fees to providers at levels lower than true prevailing rates
	3.63	Modest	Used claim review software to bundle, drop, and downcode provider-submitted claim codes without justification
	4.88	Strong	Violated state prompt-payments laws
	3.38	Modest	Wrongfully excluded certain medical specialties (such as chiropractors) from provider network
Health insurance coverage—policyholder issues	3.31	Modest	Claimed type of treatment classified as experimental or investigational should have been covered
	3.19	Modest	Collected deductible and copayments calculated on original billing rather than on negotiated, discounted rate
	3.56	Modest	Failed to disclose to members how benefit and coverage decisions are made
	2.75	Weak	Failed to disclose to members how providers are compensated
	4.2	Strong	Failed to provide or denied claim for emergency treatment counter to policy or legal requirements
	4.38	Strong	Failed to provide members with proper appeals process
	4.13	Strong	Failed to provide notice of adverse health care decisions
	3.87	Modest	Failed to reimburse members for out-of-pocket expenses for alternative care despite legal requirement to do so
	3.44	Modest	Improperly denied benefits for particular treatment in unauthorized setting though approved by health care provider

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Health insurance coverage—policyholder issues (continued)	4.5	Strong	Made marketing misrepresentation regarding membership fees in health coverage
	3.69	Modest	Terminated depositor medical insurance without adequate warning
	4	Modest	Used renewal rating methodology in violation of law
	3	Weak	Violated nonprofit status by failure to keep premiums in line
Life coverage	3.59	Modest	Agents issued incorrect policies compared with policyholders' needs, wants, and contractual arrangements
	4.41	Strong	Began a deceptive voluntary exchange program designed to terminate policies with prohibited cost of insurance increases
	2.75	Weak	Burial policy actually worth less than respectable funeral
	4.35	Strong	Claimed premiums would vanish over time
	3.88	Modest	Collected premiums for the period prior to the delivery of the policy or prior to coverage start
	4.71	Strong	Discriminated based on race by targeting small–face-value policies with benefits less than total premium payments to minorities
	4.71	Strong	Discriminated by setting premium levels based on race
	4.53	Strong	Failed to comply with laws and regulations pertaining to replacement of policies
	3.75	Modest	Failed to credit back unused portion of interest on loans taken out on policy value following lapse
	4.18	Strong	Failed to disclose early withdrawal penalties
	4	Modest	Failed to disclose that money paid would be used to pay charges and fees and would not earn any interest or investment income
	4.24	Strong	Improperly characterized variable life policies as mutual fund investments
	4.18	Strong	Improperly charged excess costs of insurance, expenses, and administrative fees in violation of contract and marketing materials
	3.8	Modest	Improperly charged rates on juvenile policies based on smoker mortality tables

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Life coverage (continued)	3.87	Modest	Improperly sold or converted life policies into 403(b) plans
	3.75	Modest	Made loans against life policies that exceeded cash surrender value, causing lapse
	3.81	Modest	Made loans against life policies that included unauthorized or excessive interest charges
	3.71	Modest	Misrepresented the benefits from and suitability of rolling over some or all of an existing life insurance policy's cash value
	4.41	Strong	Misrepresented the cash value or benefits a policyholder would realize under a policy
	3.13	Weak	Premiums exceeded face value of policy through lifetime of payments (discrimination not an issue)
	4.06	Modest	Provided misleading advice to churn existing policies with new ones and obtain transaction fees
	4.12	Strong	Provided misleading advice to churn existing policies with new ones with higher premiums or reduced benefits
Long-term care coverage	4.31	Strong	Premiums continued to be billed after contract cutoff date
Property coverage	4.08	Strong	Conspired with state insurance department or commissioner to approve higher deductibles for certain types of properties
	4	Modest	Continued to charge same or increased premiums or used an inflation coverage endorsement on property that depreciated (such as mobile homes) while paying only actual cash value rather than replacement cost
	2.88	Weak	Denied claims after expiration of policies' one-year limitation provision
	3.75	Modest	Depreciated the amount of building materials or parts or repair or labor costs or withheld an amount for depreciation to the premises or item on partial losses to real or personal property
	4.31	Strong	Discriminated against low-income and minority insureds by applying surcharge for age of utilities which results in a de facto surcharge for age of the home
	4.53	Strong	Discriminated based on race by refusing to insure older homes or only offering policies with fewer benefits to minorities

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Property coverage (continued)	4.47	Strong	Discriminated based on race by refusing to insure or only offering policies with fewer benefits in particular geographic areas
	4.31	Strong	Failed to adequately explain or provide a factual basis for or put in writing reasons for full or partial denial of claims
	3.88	Modest	Failed to adequately explain terms of property policy coverage at time of purchase
	4.06	Modest	Failed to advise insureds of appraisal process or failed to make appraisal process available or failed to hire independent appraiser or refused to grant appraisal request
	3.56	Modest	Failed to advise insureds of their right to property repaired or receive cash settlement following partial losses
	3.38	Modest	Failed to determine that property was in special zone, or failed to advise insureds, which prevented insureds from participating in federal, state, or pooled risk flood or fire programs
	3.69	Modest	Failed to fully reimburse insureds for any amounts (including deductibles) insurer recovered from third-party tortfeasors; includes failure to pay interest on recovered amounts
	3.88	Modest	Failed to make commensurate reduction in premiums when coverage was decreased as a result of property appraisal or inspection
	4.06	Modest	Failed to notify policyholders of a material change in the policy that removed automatic coverage for certain types of losses
	3.67	Modest	Failed to pay full replacement cost of personal property lost in theft
	3.47	Modest	Failed to provide allowance for general contractors overhead and profit when paying for repairs
	3.81	Modest	Failed to provide notice or opportunity to object to changes in terms, benefits, or premiums triggered by inflation coverage
	4.25	Strong	Improperly calculated premiums, resulting in overcharges
	3.56	Modest	Improperly denied foundation or slab or other below-ground claims on the basis of earth movement, water causes, or other concurrent causations

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Property coverage (continued)	3.25	Modest	Made replacement cost coverage illusionary by paying depreciation or actual cash value (ACV) on partial property losses until repair or replacement completed
	3.67	Modest	Miscellaneous or unspecific adjusting improprieties
	4	Modest	Misled policyholders about the nature and extent of damage to their properties
	3.94	Modest	Provided misleading or fraudulent coverage for collapse losses
	4.12	Strong	Provided poor customer service, delayed responding to inquiries, and generally mishandling claims
	3.75	Modest	Reduced benefits by omitting sales taxes or other mandatory fees and charges (such as on the calculation of personal property losses or for building materials for partial real property losses)
	3.93	Modest	Required void and unenforceable contractual appraisal provision requiring each side to bear own costs in every instance
	3.38	Modest	Sold illusory homeowner coverage for libel, slander, invasion of privacy, and false arrest because of practice of denying coverage for intentional conduct
	3.88	Modest	Systematically denied (or failed to adjust, settle, and pay) hail or wind damage claims as either preexisting or as due to other causes
	3.81	Modest	Systematically denied total replacement of completely damaged properties (including those sustaining damage in excess of 50 percent of value) by granting only partial replacements or requiring repairs
	4.06	Modest	Systematically estimated damage at lower than actual cost of repair
	3.69	Modest	Systematically failed to properly adjust soft metal items such as gutters and siding
	3.67	Modest	Systematically overinsured or appraised property (or used excessive replacement cost estimator, unnecessary mortgage requirements, bundling coverage, included land value, or used defective valuation process) to generate additional premiums

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Property coverage (continued)	4.41	Strong	Systematically performed unfair or other wrongful adjustment of claims arising from a single event (e.g., hailstorm or earthquake)
	3.67	Modest	Systematically refused to pay for repairs to property that required creating access to fixtures or appliances even when repairs were needed to prevent further damage
	3.75	Modest	Systematically undervalued, underappraised, or failed to exercise reasonable care when estimating repair or replacement value or appraising property resulting in underinsured property
	4.06	Modest	Used biased or wrongly incentivized or unqualified estimators, adjusters, contractors, or engineers for damage evaluation
	3.63	Modest	Violated contract with policyholders by increasing deductible on certain types of properties
	3.53	Modest	Wrongfully denied claims for hail damage to concrete driveways, patios, and other concrete aggregate structures
	3.69	Modest	Wrongfully withheld amounts for debris removal on partial real property losses
	3.6	Modest	Wrongly limited coverage for lead testing or lead abatement
	4	Modest	Wrongly limited coverage for water or mold damage or failed to test for same
	3.29	Modest	Wrongly shifted hurricane deductibles from a flat dollar amount to percentage basis or increased percentage
Structured settlements	3.5	Modest	Coerced use of annuities at above market rates
	3.5	Modest	Coerced use of annuities by particular seller
	3.38	Modest	Failed to disclose rebate of portion of the commission paid to annuity broker
Workers' compensation coverage	3.6	Modest	Administered experience readjustments unfairly
	3.38	Modest	Conspired to charge unduly high fees on businesses placed in assigned risk pool
	3.47	Modest	Conspired to fix prices in violation of antitrust laws
	3.08	Weak	Conspired to overload assigned risk pool

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Workers' compensation coverage (continued)	3.64	Modest	Conspired with the National Council on Compensation Insurance to charge more than approved by state board of insurance
	2.83	Weak	Employees: Conspired with state workers' compensation agency or commission to deny full delivery of all legally entitled benefits
	2.31	Weak	Employees: Failed to pay employees of workers' compensation insureds interest on funds withheld for payment of attorneys' fees
	2.31	Weak	Employees: Failed to segregate and safely keep monies that employees of workers' compensation insureds requested be set aside from award for future services
	2.57	Weak	Employees: Miscellaneous denial or delay in paying workers' compensation benefits to employees (includes conspiracy to deny or delay)
	2.38	Weak	Employees: Systematically undercompensated employee or beneficiaries receiving workers' compensation disability benefits
	2.92	Weak	Failed to properly allocate medicolegal expenses
	3	Weak	Health care providers: Failed to pay interest or fines to health care providers on delayed or denied claims
	2.23	Weak	Health care providers: Failed to periodically adjust rates for medical procedures
	3.43	Modest	Illegally passed through residual market assessments to customers in the voluntary market
	3.87	Modest	Improperly sold retrospectively rated policies
	4	Modest	Paid broker fees out of monies owed to or belonging to insureds without insureds' knowledge or consent
	3.56	Modest	Sold occupational health insurance as workers' compensation insurance
	3.5	Modest	Sold useless contingent workers' compensation policy rather than one required by law
	3.79	Modest	Used forms or rates other than those approved by insurance commissioner, the DOI, statute, regulation, or other authority
Multiple types of coverages—credit issues	4.35	Strong	Denied coverage solely based on adverse credit report

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Multiple types of coverages—credit issues (continued)	4.12	Strong	Failed to disclose adverse credit report that resulted in denial of insurance, rate increase, or coverage change
	3.82	Modest	Failed to disclose any use of or request for credit report
	3	Weak	Failed to notify of receipt of adverse credit report even if not used
	4.35	Strong	Improperly used credit histories when calculating premiums
	4.18	Strong	Increased rates based on adverse credit report
	3.29	Modest	Ordered credit report without legally permissible purpose
Multiple types of coverages—modal premium issues	2.71	Weak	Failed to comply with Truth in Lending Act requirements for financed portion of the annual premiums paid on a periodic basis
	2.88	Weak	Failed to disclose annual percentage rate and finance charges incurred when paying premiums periodically rather than annually
	3.76	Modest	Imposed premium finance service charges (or any separate finance, service, or installment charge or fee related to periodic payments) in violation of law or in excess of legal maximums
Multiple types of coverages—other issues	3.75	Modest	Accumulated excessive surplus or overcapitalized without declaring adequate dividends or retained in other manner that would be to the detriment of the policyholders
	4.65	Strong	Agents forged insureds' signature on applications
	4.59	Strong	Aided or assisted or authorized the sale of inappropriate or illegal insurance and would therefore be liable for all unpaid claims
	4.82	Strong	Allowed unlicensed persons to solicit, negotiate, contract for, sell, or administer contracts of insurance
	4.06	Modest	Allowed unlicensed telemarketers or others not formally connected to insurers to misrepresent on whose behalf policies were being sold
	3.71	Modest	Changed terms of policy to require binding arbitration of disputes, which effectively resulted in a reduction in coverage

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Multiple types of coverages—other issues (continued)	4.71	Strong	Charged more for premiums than quoted in application, including undisclosed fees, charges, or other considerations (does not include issues related to taxes or modal payments)
	3.47	Modest	Collected money from insureds under questionable subrogation clause
	2.41	Weak	Conspired to obtain money from the investing public in violation of the registration and antifraud provisions of federal securities laws
	4.53	Strong	Failed to file policies with or obtain approval on those policies from state insurance commissioner or agency before offering for sale
	2	Weak	Failed to have settlements with minors approved by courts
	3.41	Modest	Failed to pay interest on delays in paying liability settlements
	3.88	Modest	Failed to pay premium taxes on behalf of insureds though insurers were unauthorized or nonadmitted or otherwise failed to comply with legal requirements for doing business
	2.27	Weak	Failed to pay proper amount of contingency fees in subrogation matters under common fund doctrine
	4.53	Strong	Failed to provide legally mandated disclosures at the time of sales presentation
	4	Modest	Failed to refund portions of unused premiums for uncovered gap period when fully paid policies were cancelled and then reinstated
	3.25	Modest	Failed to reimburse insureds or failed to disclose right for reimbursement) for lost earnings or other expenses related to liability defense provided by own insurer or other insurer-required legal proceeding
	3.65	Modest	Failed to use returned or unused premiums for paying off existing balance or applied to next installment (e.g., using as collateral instead)
	4.41	Strong	Fraudulent inducement to settle through false inspections, inaccurate adjustments, and the like
	3.53	Modest	Improper apportionment to policyholders of surplus or other funds from catastrophic, pooled risk, or other special fund

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Multiple types of coverages—other issues (continued)	3	Weak	Influenced, steered, failed to inform, or induced purchases of own policies rather than less expensive government preferred risk, subsidized pool, or other more appropriate program
	3	Weak	Miscellaneous issues related to claims against directors and officers of associations and corporations
	4.35	Strong	Misrepresented policy as replacement coverage when in fact it was for actual cash value
	3.24	Modest	Other problem regarding settlement with minor (other than failure to obtain court approval or improper use of biased counsel); includes inadequate offers, fraud, bad faith, and misrepresentations
	4.65	Strong	Pattern and practice of denial of claims made
	4.71	Strong	Provided inadequate, improper, or misleading notices to policyholders concerning changes in coverage
	4.06	Modest	Received excess profits in violation of state insurance laws
	4.59	Strong	Received nondisclosed kickbacks, commissions, or other consideration from agents or brokers
	4	Modest	Required membership in organization (such as nonprofit association) as eligibility criterion in violation of contract or law
	4.06	Modest	Sold, solicited, underwrote, or other action taken on surplus lines without making good faith effort to find proper insurer in admitted market
	3.44	Modest	Made unconscionable, improper, unauthorized, or illegal use of excess surplus or premiums collected or dividends (e.g., for political advertising)
	4.12	Strong	Underreported amounts of bad faith or class action settlements and judgments when submitting rate bases
	3.82	Modest	Unspecified breach of contract, bad faith, or prohibited practice
	4.59	Strong	Unspecified misrepresentation of scope and level of coverage
	2.38	Weak	Used in-house or selected counsel to assist in getting settlements with unrepresented third-party minors approved by the court or failed to disclose prior relationship with said counsel

Table C.1—Continued

Category	Average DOI Rating	Ranked Relationship to Regulatory Regime	Allegation
Multiple types of coverages—other issues (continued)	2.06	Weak	Used nonadmitted in-house counsel in defense of claims against insured in violation of rules against unauthorized practice of law
	4.71	Strong	Used policy forms other than approved or required by law or regulation or order
	4.69	Strong	Used prohibited class (e.g., age, sex, length of driving experience, or physical handicaps) in underwriting or rating
	3.47	Modest	Wrongfully collected premium taxes that were higher than state average

NOTE: Based on responses from 17 states.

Bibliography

A. M. Best Company, "Glossary of Insurance Terms," undated Web page. As of January 12, 2007: http://www.ambest.com/resource/glossary.html

———, *Best's Key Rating Guide: Life/Health United States and Canada*, Oldwick, N.J.: A. M. Best Company, 2002a.

———, *Best's Key Rating Guide: Property/Casualty United States and Canada*, Oldwick, N.J.: 2003–, A. M. Best Company, 2002b.

———, *Best's Insurance Reports, L/H: US and Canada*, Oldwick, N.J.: A. M. Best Company, 2004.

———, "Rating Members of Insurance Groups," *Methodology*, January 31, 2005. As of December 27, 2006:
http://www.ambest.com/ratings/membergroups.pdf

"Additional Findings," *Class Action Watch*, Vol. 1, No. 3, Fall 1999, p. 3. As of May 3, 2007: http://www.fed-soc.org/doclib/20070321_classv1i3.pdf

Administrative Office of the United States Courts Statistics Division, *Federal Judicial Caseload Statistics*, Washington, D.C.: The Division, March 31, 2004. As of December 18, 2006: http://www.uscourts.gov/caseload2004/contents.html

Amchem Prod. v. Windsor, 117 S. Ct. 2231, June 25, 1997.

American Bankers Association, *State Modernization and Regulatory Transparency Act*, discussion draft of proposed legislation from the House Committee on Financial Services, undated(a).

———, *Summary of the National Insurance Chartering and Supervision Act*, undated(b).

"Analysis: Class Action Litigation—A Federalist Society Survey," *Class Action Watch*, Vol. 1, No. 1, 1999a. As of May 3, 2007:
http://www.fed-soc.org/publications/pubID.251/pub_detail.asp

"Analysis: Class Action Litigation—A Federalist Society Survey, Part II," *Class Action Watch*, Vol. 1, No. 2, Spring 1999b. As of May 3, 2007:
http://www.fed-soc.org/publications/pubID.24/pub_detail.asp

"Analysis: Duplicative Class Action Litigation," *Class Action Watch*, Vol. 3, No. 1, Winter 2002. As of May 3, 2007:
http://www.fed-soc.org/publications/pubID.235/pub_detail.asp

Anderson, Brian, and Patrick McLain, "A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals," *Legal Backgrounder*, Vol. 19, No. 5, March 19, 2004.

Autry v. Northwest Premium Servs., 144 F.3d 1037, 7th Cir., May 13, 1998.

Bajaj, Mukesh, Sumon C. Mazumdar, and Atulya Sarin, "Empirical Analysis: Securities Class Action Settlements," *Santa Clara Law Review*, Vol. 43, No. 3, 2003, pp. 1001–1031.

Beisner, John H., and Jessica Davidson Miller, "They're Making a Federal Case Out of It . . . in State Court," *Civil Justice Report*, Vol. 3, September 2001. As of January 12, 2007: http://www.manhattan-institute.org/pdf/cjr_03.pdf

———, "Class Action Magnet Courts: The Allure Intensifies," *Civil Justice Report*, Vol. 5, July 2002. As of January 12, 2007: http://www.manhattan-institute.org/pdf/cjr_05.pdf

———, "An Empirical Study of S. 2062's Effects on Class Actions," *Mealey's Tort Reform Update*, Vol. 1, No. 9, April 2004, p. 16.

Bisbecos, Peter, Victoria E. Fimea, David F. Snyder, and Kenneth A. Stoller, "Consumer and Markets Suffer When Lawyers Regulate Insurance," *Legal Backgrounder*, Vol. 17, No. 46, October 18, 2002. As of December 19, 2006: http://www.wlf.org/upload/101802LBBisbecos.pdf

Bisbecos, Peter A., and Victor A. Schwartz, *The Damaging Effect of Regulation of Insurance by the Courts*, Indianapolis, Ind.: National Association of Mutual Insurance Companies, July 22, 2003. As of December 19, 2006: http://www.namic.org/pdf/CJR_22JULY2003.pdf

Brown, Elizabeth F., "E Pluribus Unum—Out of Many, One: Why the United States Needs a Single Financial Services Agency," *University of Miami Business Law Review*, Vol. 14, Fall–Winter 2005, pp. 1–101.

Buckberg, Elaine, Todd Foster, Ronald Miller, and Stephanie Plancich, *Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements*, New York: NERA Economic Consulting, February 14, 2005. As of December 27, 2006: http://www.nera.com/publication.asp?p_ID=2367

Cabraser, Elizabeth J., *Access, Equity and Finality of Adjudication: The Role of Class Actions in Our Civil Justice System*, Testimony Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, United States House of Representatives, Oversight Hearing on Mass Torts and Class Action Lawsuits, March 5, 1998. As of November 7, 2005: http://judiciary.house.gov/legacy/41163.htm

California Department of Insurance, "Overview of CDI Operations," undated.

Carroll, Stephen J., Deborah R. Hensler, Allan Abrahamse, Jennifer Gross, J. Scott Ashwood, Elizabeth M. Sloss, and Michelle White, *Asbestos Litigation Costs and Compensation: An Interim Report*, Santa Monica, Calif.: RAND Corporation, DB-397-ICJ, 2002. As of December 27, 2006: http://www.rand.org/pubs/documented_briefings/DB397/

Castano v. American Tobacco Co., 84 F.3d 734, 5th Cir., May 23, 1996.

Choi, Stephen J., "Do the Merits Matter Less After the Private Securities Litigation Reform Act?" Boalt Working Papers in Public Law paper no. 130, Berkeley, Calif.: University of California, June 1, 2004. As of December 27, 2006: http://repositories.cdlib.org/boaltwp/130/

Class Action Litigation Reporter, Wayne, Pa.: Andrews Publication, monthly since 2002.

Class Action Reports, Washington, D.C.: Class Action Reports, quarterly since 1972.

Code of Alabama 1975, Title 6, Section 6-5-641, Certification of Classes, 1999.

Code of Federal Regulations, Title 17, Section 229.103, Legal Proceedings, revised April 1, 2006.

Conte, Alba, and Herbert B. Newberg, *Newberg on Class Actions*, 4th ed., Vol. 4, St. Paul, Minn.: Thomson/West, 2002, January 2005 update.

Council of Insurance Agents and Brokers, "The Council's President to Join Other Industry Leaders in Support of Optional Federal Charter for Insurers," press release, June 17, 2002. As of July 7, 2005: http://www.ciab.com/Template.cfm?Section=Home&CONTENTID=1539&TEMPLATE=/ContentManagement/ContentDisplay.cfm

Cox, James D., and Randall S. Thomas, "Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?" *Washington University Law Quarterly*, Vol. 80, No. 3, Fall 2002, pp. 855–882. As of December 27, 2006: http://law.wustl.edu/WULR/80-3/p855CoxThomasbookpages.pdf

———, "SEC Enforcement Actions for Financial Fraud and Private Litigation: An Empirical Inquiry," Vanderbilt Law and Economics Research Paper, No. 03-08, May 23, 2003. As of December 27, 2006: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=429140

———, "Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements," Vanderbilt Law and Economics Research Paper No. 05-01, December 2004. As of December 27, 2006: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=655181

Davis, Kenneth Culp, *Administrative Law Text*, 3rd ed., St. Paul, Minn.: West Pub. Co., 1972.

DeFrances, Carol J., and Steven K. Smith, *Contract Cases in Large Counties: Civil Justice Survey of State Courts, 1992*, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1996. As of December 19, 2006: http://purl.access.gpo.gov/GPO/LPS4439

Eisen v. Carlisle and Jacquelin, 94 S. Ct. 2140, May 28, 1974.

Eisenberg, Theodore, and Geoffrey P. Miller, "Attorney Fees in Class Action Settlements: An Empirical Study," *Journal of Empirical Legal Studies*, Vol. 1, No. 1, 2004a, pp. 27–78.

———, "The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues," *Vanderbilt Law Review*, Vol. 57, No. 5, October 2004b, pp. 1529–1568.

Eisenberg, Theodore, and Trevor W. Morrison, "Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal," *Journal of Empirical Legal Studies*, Vol. 2, No. 3, November 2005, pp. 551–576.

Farmers Ins. Exchange v. Superior Court, 2 Cal. 4th 377, April 6, 1992.

Federal Judicial Center, "The Federal Judicial Center's 'Illustrative' Forms of Class Action Notices," undated Web page. As of December 20, 2006: http://www.fjc.gov/public/home.nsf/pages/376

"Federalist Society Surveys Class Action Lawyers," *Class Action Watch*, Vol. 1, No. 3, Fall 1999, p. 6. As of May 3, 2007: http://www.fed-soc.org/publications/pubID.25/pub_detail.asp

Foundation for Taxpayer and Consumer Rights, "13 of 16 Cabinet Members Have Ties to 'Class Action' Targeted Companies: President Bush Backing Major Overhaul of Class Action Lawsuits," press release, October 20, 2003. As of September 21, 2005: http://www.citizen.org/documents/Foundation_Taxpaper_Consumer_Rights.pdf

Free v. Abbott Lab., 51 F.3d 524, 5th Cir., April 24, 1995.

Georgine v. Amchem Prods., 1996 U.S. App. LEXIS 15416, 3rd Cir., June 27, 1996.

Gibson, S. Elizabeth, *Case Studies of Mass Tort Limited Fund Class Action Settlements and Bankruptcy Reorganizations*, Washington, D.C.: Federal Judicial Center, 2000. As of December 27, 2006: http://www.fjc.gov/public/pdf.nsf/lookup/MassTort.pdf/$file/MassTort.pdf

Glater, Jonathan D., "Study Disputes View of Costly Surge in Class-Action Suits," *The New York Times*, January 14, 2004, p. C1.

Goldman, T. R., "Class Action: One Bill, Two Worldviews," *Legal Times*, February 7, 2005. As of September 1, 2005:
http://www.law.com/jsp/article.jsp?id=1107550996358

Grande, Thomas R., *Survey of State Class Action Law, 2004: A Report of the State Laws Subcommittee of the Class Actions and Derivative Suits Committee, Section of Litigation, American Bar Association*, St. Paul, Minn.: Thomson/West, 2004.

Greenberg, Maurice, *Statement of M. R. Greenberg, Chairman and Chief Executive Officer, American International Group, Inc., on Insurance Regulation and Competition for the 21st Century, Presented to the House Committee on Financial Services, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises*, June 18, 2002. As of July 11, 2005:
http://financialservices.house.gov/media/pdf/061802mg.pdf

Hensler, Deborah R., "Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation," Santa Monica, Calif.: RAND Corporation, RP-979-ICJ, 2002. As of December 27, 2006:
http://www.rand.org/pubs/reprints/RP979/
Originally published in *Duke Journal of Comparative and International Law*, Vol. 11, No. 2, Spring–Summer 2001, pp. 179–214. As of December 27, 2006:
http://www.law.duke.edu/shell/cite.pl?11+Duke+J.+Comp.+&+Int'l+L.+179

Hensler, Deborah R., Nicholas M. Pace, Bonita Dombey-Moore, Beth Giddens, Jennifer Gross, and Erik K. Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Santa Monica, Calif.: RAND Corporation, MR-969-ICJ, 2000. As of December 18, 2006:
http://www.rand.org/pubs/monograph_reports/MR969/

Hoffman, D. Bruce, "To Certify or Not: A Modest Proposal for Evaluating the 'Superiority' of a Class Action in the Presence of Government Enforcement," *The Georgetown Journal of Legal Ethics*, Vol. 18, Fall 2005, pp. 1383–1393.

Hooper, Laural L., and Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, Washington, D.C.: Federal Judicial Center, 2001.

Hunter, J. Robert, *Statement of J. Robert Hunter, Director of Insurance Before the Committee on Commerce, Science and Transportation of the U.S. Senate*, October 22, 2003. As of July 11, 2005:
http://commerce.senate.gov/pdf/hunter102203.doc

In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 7th Cir., March 16, 1995.

Iowa Code 2005, Section 505.8, General Powers and Duties.

Johnson, Marilyn F., Karen K. Nelson, and Adam C. Pritchard, "Do the Merits Matter More? Class Actions Under the Private Securities Litigation Reform Act," Michigan Law and Economics Research Paper no. 02-011 and Stanford Law and Economics Olin Working Paper No. 249, September 2002. As of December 27, 2006:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=349500

Kakalik, James S., Elizabeth M. King, Michael Traynor, Patricia A. Ebener, and Larry Picus, *Costs and Compensation Paid in Aviation Accident Litigation*, Santa Monica, Calif.: RAND Corporation, R-3421-ICJ, 1988. As of December 27, 2006:
http://www.rand.org/pubs/reports/R3421/

Karlin v. Zalta, 154 Cal. App. 3d 953, March 29, 1984.

Logan, Stuart J., Jack Moshman, and Beverly C. Moore, Jr., "Attorney Fee Awards in Common Fund Class Actions," *Class Action Reports*, Vol. 24, No. 2, 2003, p. 169.

Luevano v. Dow Corning Corp., 895 F. Supp. 135, W.D. Tex., August 2, 1994.

MacGinnitie v. Hobbs Group, LLC, 420 F.3d 1234, 11th Cir., August 12, 2005.

Mealey Publication, *Mealey's Litigation Report: Class Actions*, King of Prussia, Pa.: Mealey Publications, semimonthly since 2001.

Miller, Geoffrey P., "Class Actions in the Gulf South Symposium—Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype," *Tulane Law Review*, Vol. 74, No. 5, 2000, pp. 1681–1708.

Mirel, Lawrence H., District of Columbia Commissioner of Insurance, Securities, and Banking, *Proposed Standards for Judicial Review of Disputes Involving Regulated Industries*, June 5, 2004.

Moller, Mark, "The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform," *Harvard Journal of Law and Public Policy*, Vol. 28, No. 3, Summer 2005, pp. 855–908.

Muris, Timothy J., "Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure," letter to the Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, February 15, 2002. As of April 29, 2005: http://www.ftc.gov/os/2002/02/rule23letter.pdf

National Association of Insurance Commissioners, *State Insurance Regulation: History, Purpose and Structure*, undated brochure. As of December 19, 2006: http://www.naic.org/documents/consumer_state_reg_brief.pdf

———, *Model Laws, Regulations, and Guidelines*, Kansas City, Mo.: NAIC, May 2005.

National Association of Mutual Insurance Companies, "NAMIC Statement to the NAIC Industry Liaison Committee on the Oxley Baker 'State Modernization and Regulatory Transparency Act' (SMART Act) Discussion Draft," press release, Anchorage, Alaska: September 11, 2004. As of July 7, 2005: http://www.namic.org/newsreleases04/040915nr2.asp

National Conference of Insurance Legislators, *Exhaustion of Administrative Remedies Model Legislation*, adopted November 22, 2002.

National Court Statistics Project, National Center for State Courts, Conference of State Court Administrators, and State Justice Institute, *Examining the Work of State Courts: A National Perspective from the Court Statistics Project*, Williamsburg, Va.: National Center for State Courts, 2003. As of December 18, 2006: http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html

Newton v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 259 F.3d 154, 3d Cir., October 16, 2001.

Niemic, Robert J., and Thomas E. Willging, *Effects of Amchem/Ortiz on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules*, Washington, D.C.: Federal Judicial Center, September 9, 2002. As of December 20, 2006: http://www.fjc.gov/public/pdf.nsf/lookup/AmChem.pdf/$file/AmChem.pdf

Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, June 23, 1999.

Pace, Nicholas M., Stephen J. Carroll, Ingo Vogelsang, and Laura Zakaras, *Survey Instruments: Insurance Class Actions in the United States*, Santa Monica, Calif.: RAND Corporation, WR-405-ICJ, 2007. As of February 13, 2007: http://www.rand.org/pubs/working_papers/WR405/

Page, William H., "Class Certification in the Microsoft Indirect Purchaser Litigation," *Journal of Competition Law and Economics*, Vol. 1, No. 2, 2005, pp. 303–338.

Perino, Michael A., "Did the Private Securities Litigation Reform Act Work?" *University of Illinois Law Review*, Vol. 2003, No. 4, 2003, pp. 913–978. As of December 27, 2006: http://home.law.uiuc.edu/lrev/publications/2000s/2003/2003_4/perino.pdf

Priest, George L., "What We Know and What We Don't Know About Modern Class Actions: A Review of the Eisenberg-Miller Study," *Civil Justice Report*, Vol. 9, February 2005.

Pritchard, Adam C., and Hillary A. Sale, "What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act," John M. Olin Center for Law & Economics, Paper No. 03-011, University of Michigan, June 2004.

Public Citizen, "New U.S. Chamber of Commerce Poll Ranking States' Liability Systems Is Part of a Disinformation Campaign to Restrict Consumer Rights," press release, March 8, 2005. As of March 17, 2005:
http://www.citizen.org/pressroom/release.cfm?ID=1893

Public Law 104-67, Private Securities Litigation Reform Act of 1995, December 22, 1995.

Public Law 105-353, Securities Litigation Uniform Standards Act of 1998, November 3, 1998.

Public Law 106-102, Gramm-Leach-Bliley Act, November 12, 1999.

Public Law 109-2, Class Action Fairness Act of 2005, February 18, 2005. As of December 18, 2006: http://purl.access.gpo.gov/GPO/LPS66058

Rojo v. Kliger, 52 Cal. 3d 65, December 20, 1990.

Securities Class Action Alert, Cresskill, N.J.: Investors Research Bureau, monthly since 1989.

Selmi, Michael, "The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects," *Texas Law Review*, Vol. 81, No. 5, April 2003, pp. 1249–1336.

Silver, Charles, "'We're Scared to Death': Class Certification and Blackmail," *New York University Law Review*, Vol. 78, October 2003, pp. 1357–1430.

Stateside Associates, "Class Action Lawsuits in State Courts: A Case Study of Alabama," memorandum, February 26, 1998, in U.S. House of Representatives, *Mass Torts and Class Action Lawsuits: Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session*, *March 5, 1998*, Washington, D.C.: U.S. Government Printing Office, 2000. As of March 1, 2005: http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.htm

"Summary of Survey," *Class Action Watch*, Vol. 2, No. 1, Spring 2001. As of May 3, 2007: http://www.fed-soc.org/publications/pubID.247/pub_detail.asp

Supreme Tribe of Ben-Hur v. Cauble, 41 S. Ct. 338, March 7, 1921.

Tager, Evan M., "The Constitutional Limitations on Class Actions," *Mealey's Litigation Report: Class Actions*, January 2001.

Texas Civil Practice and Remedies Code, Title 2, Section 26.051, State Agency with Exclusive or Primary Jurisdiction, September 1, 2003.

Tidmarsh, Jay, *Mass Tort Settlement Class Actions: Five Case Studies and Their Implications for the Reform of Rule 23*, unpublished manuscript, April 22, 1998a.

———, *Mass Tort Settlement Class Actions: Five Case Studies*, Washington, D.C.: Federal Judicial Center, 1998b.

U.S. Chamber Institute for Legal Reform, and Harris Interactive, *2005 State Liability Systems Ranking Study*, Washington, D.C.: U.S. Chamber Institute for Legal Reform, 2005.

U.S. Code, Title 15, Section 1011, Declaration of Policy, March 9, 1945.

———, Title 28, Section 1332, Diversity of Citizenship; Amount in Controversy; Costs, June 25, 1948.

———, Title 15, Section 1681, Fair Credit Reporting Act, October 26, 1970.

———, Title 29, Section 1001 et seq., Employee Retirement Income Security Program, September 4, 1974.

———, Title 18, Section 1961 et seq., Racketeer Influenced and Corrupt Organizations, January 3, 1995.

U.S. Code Annotated, Title 15, Section 78u-4, Private Securities Litigation, November 3, 1998.

U.S. District Courts, and U.S. Supreme Court, *Amendments to Rules of Civil Procedure for the United States District Courts*, Mundelein, Ill.: Callaghan, 1966.

U.S. General Accounting Office, *Insurance Regulation: Common Standards and Improved Coordination Needed to Strengthen Market Regulation*, Washington, D.C.: GAO, GAO-03-433, September 2003. As of December 27, 2006:
http://www.gao.gov/new.items/d03433.pdf

U.S. Senate, *Insurance Consumer Protection Act of 2003*, S. 1373, 108th Congress, 1st Session, July 8, 2003.

———, *The Class Action Fairness Act of 2005: Report Together with Additional and Minority Views (to Accompany S.5) (Including Cost Estimate of the Congressional Budget Office)*, Washington, D.C.: U.S. Government Printing Office, 2005. As of December 19, 2006:
http://purl.access.gpo.gov/GPO/LPS61092

U.S. Supreme Court, and U.S. House of Representatives Committee on the Judiciary, *Federal Rules of Civil Procedure with Forms*, Washington, D.C.: U.S. Government Printing Office, 2005. As of December 18, 2006:
http://judiciary.house.gov/media/pdfs/printers/109th/civil2005.pdf

W. Va. ex rel. Chemtall, Inc. v. Madden, 216 W. Va. 443, December 2, 2004.

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

Willging, Thomas E., and Shannon Renee Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation*, Washington, D.C.: Federal Judicial Center, 2005.

Witkin, B. E., *California Procedure*, 3rd ed., Vol. 3, Actions, San Francisco, Calif.: Bancroft-Whitney, 1985.

Wyoming Insurance Department, "Who We Are and What We Do," June 30, 2004. As of August 6, 2005:
http://insurance.state.wy.us/whoweare.html

York, Keller and Field, LLP, "Defending Insurance Companies in Class Actions," undated. As of August 5, 2005:
http://www.yorkkellerfield.com/CM/Articles/Articles3.asp

Zahn v. International Paper Co., 94 S. Ct. 505, December 17, 1973.

Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 9th Cir., June 15, 2001.