

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

Thomas E. Willging, Laural L. Hooper & Robert J. Niemic

Federal Judicial Center

1996

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

Contents

Acknowledgments vii

Introduction 1

 The Rule 23 Debate in Historical Perspective 1

 The 1995 FJC Study 3

 Study Design and Methods 4

 Nature of the Data 5

Summary of Findings 7

Findings 13

(1) Individual Actions and Aggregation 13

 (a) Average recovery per class member 13

 (b) Consolidation and related cases 14

(2) Routine Class Actions 16

 (a) What was the relationship, if any, between the “easy applications” of Rule 23 and the substantive subjects of dispute? 16

 (b) How did class actions compare to other types of cases in terms of the type of outcome and the stage of the case at which the outcome occurred? 18

 (c) What was the frequency and rate of certification of (b)(1), (b)(2), and (b)(3) classes and how did these rates correspond with substantive areas? 19

 (d) How much judicial time did class actions take and how did that compare to other civil actions? 22

(3) Race to File 23

(4) Class Representatives 24

 (a) How many “repeat players”? 25

 (b) Did judges add or substitute representatives? 25

 (c) Did named representatives attend the approval hearing? 26

 (d) What was in it for the class representatives? 26

(5) Time of Certification 26

 (a) Timing of motions and certification decisions 27

 (b) Local rules on the timing of certification motions 27

 (c) Decisions on merits in relation to certification 29

 (i) Outcomes of rulings on dismissal and summary judgment and impact on the litigation 32

 (ii) Timing of rulings on dismissal and summary judgment 33

 (d) Simultaneous motions to certify and approve settlement 34

- (e) Changes in certification rulings 35
- (6) Certification Disputes 36
 - (a) How many certification contests were there and how much time did counsel spend opposing certification? 36
 - (b) Was there a relationship between disputes over certification and the nature of suit? 37
 - (c) How much effort was devoted to the choice between (b)(1), (b)(2), and (b)(3) classes and did the effort vary by nature of suit? 38
- (7) Plaintiff Classes 40
 - (a) Did defendants ever seek and win certification of a plaintiff class? 40
 - (b) How frequently did defendants acquiesce in certification of a plaintiff class by failing to oppose or by stipulating to class certification? 40
- (8) Defendant Classes 40
- (9) Issues Classes and Subclasses 41
- (10) Notice 45
 - (a) What types of notice, in what time frame, have been required in (b)(1), (b)(2), and (b)(3) actions? 45
 - (b) In what form was the notice issued, who paid the cost, and does the cost of notice discourage legitimate actions? 47
 - (c) How much litigation of notice issues occurred? 49
 - (d) Did the notices of proposed settlements contain sufficient detail to permit intelligent analysis of the benefits of settlement? 49
- (11) Opt Outs 52
 - (a) Number of opt outs and relationships with subject areas and size of claims 52
 - (b) Opt outs in (b)(1) or (b)(2) classes 54
- (12) Opt Ins 54
 - (a) Opt-in classes 54
 - (b) Claims procedures 55
- (13) Individual Member Participation 55
 - (a) Participation before settlement 55
 - (i) Attempts by class members to intervene 55
 - (ii) Attempts by nonmembers to intervene 56
 - (b) Class member participation in settlement by filing objections and attending settlement hearings 56
 - (c) Nonrepresentative class member participation by filing appeals 59
- (14) Settlement 59
 - (a) Did certification coerce settlement of frivolous or nearly frivolous claims? 59
 - (i) Outcomes of certified classes compared with outcomes for noncertified cases 59
 - (ii) Frequency of rulings on motions to dismiss, motions for summary judgment, trial dates scheduled, and trials held in certified class actions 60
 - (iii) Timing of settlements in relation to class certification 61
 - (b) Notice 62
 - (c) Attendance of nonrepresentative parties at settlement approval hearings 64

(d) Provisions favoring named representatives	64
(e) How often did magistrate judges or special masters evaluate settlements?	64
(15) Trials	66
(a) How often were trials held and with what results in what types of cases?	66
(i) Certified cases with jury trials	67
(ii) Noncertified cases with jury trials	67
(b) How did class action trial rates compare with trial rates for all other civil cases within the district?	68
(16) Fee/Recovery Rates	68
(a) What were the ratios of attorneys' fees to recoveries?	68
(b) How were fees calculated?	69
(c) How was benefit to the class taken into account?	74
(d) What percentage of the fee amounts requested were awarded and how often were objections and appeals filed concerning fees?	76
(17) Trivial Remedies; Other Remedies	77
(a) How frequently did certified (b)(3) classes lead to relief that is relatively trivial in comparison to attorneys' fees?	77
(b) How frequently did certified (b)(2) classes lead to injunctive relief that is relatively trivial in comparison to attorneys' fees?	78
(c) How often were recoveries distributed to charities or the like?	78
(18) Duplicative or Overlapping Classes	78
(19) Res Judicata	79
(20) Appeals	80
(a) How often were appeals filed?	81
(b) How often did appeals alter the prior decision of the trial judge?	82
(c) To what extent did appellate review serve to correct errors in procedural decisions relating to the class action mechanism, such as class certification?	85
(21) Class Action Attorneys	87
(a) How extensive was the class action bar across the four districts?	87
(b) How often did the same attorneys appear as counsel for the class in different cases and in different courts?	88
Conclusion	89
Appendix A: Advisory Committee Draft of Proposed Rule 23—1993	93
Appendix B: Advisory Committee Draft of Proposed Rule 23—1995	101
Appendix C: Figures and Tables	111
Appendix D: Methods	197

Acknowledgments

We are grateful to Professor Edward H. Cooper and Dean Thomas D. Rowe, Jr., for their comments on earlier drafts of this paper.

In gathering data at the courts, we became indebted to individuals too numerous to mention and in ways too numerous to document. In the U.S. District Court for the Eastern District of Pennsylvania we owe special thanks to Chief Judge Edward N. Cahn, Michael E. Kunz, Clerk of Court, and Marlene Anderson, liaison to the study; in the U.S. District Court for the Northern District of California, to Chief Judge Thelton E. Henderson, Richard W. Wiekling, Clerk of Court, and Ian Keye and Cheri Borromeo, liaisons; in the U.S. District Court for the Southern District of Florida, to Chief Judge Norman C. Roettger, Carlos Juenke, Court Administrator/Clerk of Court, and Mario Toscano, Deborah Hirshberg, and Matthew Balch, liaisons; and in the U.S. District Court for the Northern District of Illinois, to then-Chief Judge James B. Moran, H. Stuart Cunningham, Clerk of Court, and Ted Newman, Chris Lavizzo, and Larry Appelson, liaisons. We also express our appreciation to the numerous members of their staffs who made our work possible and productive.

Within the Research Division of the Federal Judicial Center, the authors received substantial assistance from Marie Cordisco, George Cort, James Eaglin, William Eldridge, David Ferro, Scott Gilbert, Jane Ganz Heinrich, Julie Hong, Yvette Jeter, Molly Treadway Johnson, Patricia Lombard, Kim McLaurin, Naomi Medvin, Melissa Pecherski, Charles Sutelan, Elizabeth C. Wiggins, Carol Witcher, and other staff members.

We are also grateful to the editorial staff of the Center's Publications and Media Division for the editing and formatting of this document.

A shorter version of this report has been published in volume 71 of the New York University Law Review as part of a spring 1996 symposium on class actions.

Introduction

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

The Rule 23 Debate in Historical Perspective

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

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

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

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

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

4. *Id.* at 665.

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

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

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

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

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

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

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

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

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

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

11. *Id.* at 198.

12. *Id.* at 199–200.

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

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

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

The 1995 FJC Study

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

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

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

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

15. Cooper, *supra* note 6, at 1.

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

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

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

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

20. *Id.* § 77Z-1(a)(3), (a)(7).

21. *Id.* § 77Z-1(a)(6).

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

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

Study Design and Methods

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

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

²² Cooper, *supra* note 6.

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

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

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

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

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

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

Nature of the Data

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

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

California in Cases Closed Between July 1, 1992, and June 30, 1994 (rev. Apr. 13, 1995) (unpublished preliminary report on file with the Information Services Office of the Federal Judicial Center).

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

Summary of Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. Res Judicata. No data were available.

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

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

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

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