IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER,
AUDRICIA BROOKS,
DEBORAH PLAGEMAN,
JENNIFER ALLRED,
MICHELE GAVIN,
STEPHEN DOYLE, on behalf of themselves
And all others similarly situated,

Plaintiffs,

v.

No. 12-920C
(Judge Kaplan)

THE UNITED STATES,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, AND EXPENSES, AND CASE CONTRIBUTION AWARD TO CLASS REPRESENTATIVES

APPENDIX

INDEX

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v.

No. 12-920C
(Judge Kaplan)

THE UNITED STATES OF AMERICA,

Defendant.

DECLARATION OF CLASS REPRESENTATIVES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CLASS COUNSELS' MOTION FOR ATTORNEYS' FEES AND EXPENSES AND CASE CONTRIBUTION AWARDS TO CLASS REPRESENTATIVES

Stephanie Mercier, Audricia Brooks, Deborah Plageman, Jennifer Allred, Michele Gavin and Stephen Doyle, declare as follows:

1. We are Class Representatives in this lawsuit.

2. We submit this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Class Counsels' Motion for Attorneys' Fees and Expenses and Case Contribution Awards to Class Representatives.

3. We have been employed by the VA as either an Advanced Practice Registered Nurse ("APRN") or Physician's Assistant (PA") within the class period during which time we performed unpaid overtime work in the Computerized Patient Record System.

4. In the fall of 2012, I, Stephanie Mercier, I, Audricia Brooke, I, Deborah Plageman and I, Jennifer Allred retained David Cook of Cook & Logethetis, LLC to represent us and a putative class of APRNs in a lawsuit against the VA to recover unpaid overtime. David Cook enlisted the services of Michael Hamilton of Provost Umphrey Law Firm, LLP, Douglas Richards of E. Douglas Richards, PSC and Robert Stropp of Mooney Green Saindon Murphy & Welch, P.C. as Co-Counsel. We agreed to serve as Class Representatives for APRNs.

5. The original Complaint (ECF No. 1) was filed on December 28, 2012. Before the Complaint was filed, we had lengthy meetings and/or teleconferences with David Cook, his then-associate Clement Tsao, Doug Richards and/or Michael Hamilton.

6. In the fall of 2015, I, Michele Gavin retained David Cook and his Co-Counsel to represent a putative class of PAs in this lawsuit and agreed to serve as a Class Representative for PAs. The First Amended Complaint, adding PAs, was filed on November 16, 2015. (ECF No. 56). Before the First Amended Complaint was filed, I had extensive discussions with counsel.

7. In the summer of 2018, I, Stephen Doyle retained class counsel, David Cook and his Co-Counsel to represent a subclass of APRNs and PAs from nine VA facilities that were not included in the class definition that had been previously adopted in the Court's Class Certification Order of June 7, 2018 (ECF No. 138). I agreed to serve as Class Representative for APRNs and PAs from the "New Facilities" sub-class. The Second Amended Complaint (ECF No. 155) adding the "New Facilities" sub-class was filed on August 29, 2018. Before the Second Amended Complaint was filed, I had extensive discussions with counsel.

8. From the outset of this litigation, we have been committed to prosecuting this case and maximizing the recovery for the class. We have understood that, as Class Representatives, we owed a fiduciary duty to all class members to provide fair and adequate representation and have diligently worked with counsel to prosecute the case vigorously.

9. We had regular communication with our counsel throughout this litigation. We closely monitored and were actively involved in all material aspects of this lawsuit. We received periodic updates from counsel on case developments, discussed with them the strengths and weaknesses of our case and weighed the pros and cons of a potential settlement.

10. During discovery, we were served with discovery requests. In consultation with counsel, we searched for and produced responsive documents and helped answer Defendant's interrogatories.

11. In total, we six Class Representatives gave twelve depositions. To prepare for these depositions, we met with counsel the day before the depositions. We also spoke to counsel several times before the depositions to prepare. Each of the depositions by Defense counsel lasted several hours.

12. We attended the mediation session with Judge Horn along with our counsel. We also discussed strategy with our counsel before the mediation.

13. Based on our involvement, we believe that the Settlement is an outstanding recovery for the class, particularly considering the risks and uncertainties of trial and continued litigation and the delays that would entail.

14. We understand that our lawyers are asking the Court for an award of attorneys' fees in the amount of 30% of the settlement and out of pocket litigation expenses in the

amount of $463,544.33. We are pleased with the settlement and the high-quality work of our counsel throughout the eight plus years of this litigation. Accordingly, we support Counsels' request for attorneys' fees and expenses. We have reviewed the expenses our counsel incurred in this litigation and they appear to be reasonable and necessary for the prosecution of the case.

15. We are aware of and understand the terms of the agreement between Plaintiffs' counsel regarding the division of fees and expenses among the firms and have no objection to that agreement.

16. In conclusion, we strongly endorse the settlement. We believe it is an excellent recovery for the class. We also support Class Counsel's and Co-Counsels' Motion for An Award of Attorneys' Fees and Expenses. Finally, we request a case contribution award of $20,000 each as compensation for our diligent service to the class.

I declare under penalty of perjury that the foregoing is true and correct.

Stephanie Mercier — Stephanie Mercier

7.21.2021 — Date

_____ — Audricia Brooks

_____ — Date

_____ — Deborah Plagemon

_____ — Date

_____ — Jennifer Allred

_____ — Date

_____ — Michele Gavin

_____ — Date

_____ — Stephen Doyle

_____ — Date

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Deborah Plagemon	Date
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Stephanie Mercier	Date
Audricia Brooks	Date
Deborah Plageman	July 20, 2021 Date
Jennifer Allred	Date
Michele Gavin	Date
Stephen Doyle	Date

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Jennifer Allred	7-19-21 Date
Michele Gavin	Date
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Deborah Plagemon	Date
Jennifer Allred	Date
Michele Gavin	Date
Stephen Doyle	Date 7/19/21

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Mercier et al. v. The United States of America

No. 12-920C

DECLARATION OF BRIAN T. FITZPATRICK

I. My background and qualifications

1. I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the NYU Journal of Law & Business, the Fordham Law Review, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, 2017, and 2019; and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the

Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute. Earlier this year, I became the co-editor of *The Cambridge Handbook of Class Actions: An International Survey* (with Randall Thomas).

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is still what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to one subject matter or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period (2006-2007). *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is also several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. Since then, this study has been relied upon regularly by a number of courts, scholars, and testifying experts.[1] I have attached this study as Exhibit 2 and will draw upon it in this declaration.

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[1] *See, e.g., Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *In re Wells Fargo & Co. S'holder Derivative Litig.*, 2020 WL 1786159 at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*,

2020 WL 949885 at *52 (D. Mass. Feb. 27, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at *17 (S.D.N.Y. Apr. 24, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

4. In addition to my empirical works, I have also published many law-and-economics papers on the incentives of attorneys and others in class action litigation. *See*, *e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 (2021) (hereinafter "A Fiduciary Judge"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book I recently published with the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively and that courts should provide proper incentives to encourage such private attorney general behavior. This work, too, has been relied upon by courts and scholars.[2] I have attached the most recent piece—*A Fiduciary Judge*—as Exhibit 3 and will draw upon it in this declaration.

5. I have been asked by class counsel to opine on whether the attorneys' fees they have requested here are reasonable according to the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel; I have attached a list of these documents in Exhibit 4 (and describe there how I refer to them herein). As I explain, based on my study of settlements across the country, I believe the request here is within the range of reason.

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[2] *See, e.g.*, *Briseno v. Henderson*, 998 F.3d 1014, 1025, 1029 (9th Cir. 2021); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 960 (11th Cir. 2020) (Jordan, J., dissenting); *Tershakovec v. Ford Motor Co.*, 2021 WL 2700347, at *18 (S.D. Fla. July 1, 2021); *Vita Nuova, Inc. v. Azar*, 2020 WL 8271942, at *3 n.5 (N.D. Tex. Dec. 2, 2020).

II. Litigation background

6. The plaintiffs in this lawsuit are nurse practitioners and physician assistants in the hospital system of the federal government's Department of Veterans' Affairs; they allege that the Department failed to pay them and a class of other employees for all of the hours they worked. The lawsuit was filed in December 2012, but this Court dismissed the lawsuit on the ground that the plaintiffs had not been ordered to work the hours for which they sought compensation. But the Federal Circuit reversed that determination, holding that so long as the hours were induced by the government, then compensation was due. Thereafter, the parties engaged in discovery related to class certification, and, over the defendant's opposition, this Court certified an opt-in class of nurses and physician assistants. Some 3200 class members ultimately chose to opt in. The parties then engaged in even more extensive merits discovery, including hundreds of millions of electronic health and payroll records, dozens of depositions, and exchanging reports of expert witnesses. Six weeks before trial was scheduled to begin, the parties engaged in mediation and, finally on July 9, 2021 executed a settlement agreement. This Court preliminarily approved the settlement on July 16, 2021.

7. The settlement includes the some 3200 class members who opted in to the class following this Court's certification order. Settlement Agreement ¶ 1. These class members will release the United States of "all claims . . . arising out of the second amended complaint or otherwise involved in this case . . . ." *Id*. at ¶ 12. In exchange, the United States will pay the class $160 million in cash. *See id*. at 9. After deducting withholding for various federal taxes, settlement administration expenses, attorneys' fees and expenses, and service payments to the class representatives, the class will share in the remaining monies *pro rata* in proportion to the amount

of back pay and interest due to them, with the exception that no class member will receive less than $250. *See id*. at ¶¶ 15-16 & Attachment A. Any monies that remain undeposited after two years will be returned to the United States. *See id.* at ¶ 23.

8. Class counsel have now moved the court for an award of attorneys' fees equal to 30% of the settlement. It is my opinion that the fee request is reasonable according to the empirical studies and research on economic incentives in class action litigation.

III. The reasonableness of the requested fee

9. When a class action reaches settlement or judgment and no fee shifting statute is triggered and the defendant has not agreed to pay class counsel's fees, class counsel is paid by the class members themselves pursuant to the common law of unjust enrichment. This is sometimes called the "common fund" or "common benefit" doctrine. It requires the court to decide how much of their class action proceeds it is fair to ask class members to pay to class counsel.

10. At one time, courts awarding fees under the common fund doctrine used the lodestar method. Under the lodestar method, courts multiplied the number of hours worked by class counsel by a reasonable hourly rate as well as by a multiplier for taking on risk and other reasons. The court then deducted this product from the class's recovery and awarded it to class counsel. But the lodestar method has fallen out of favor, largely for two reasons. First, it is difficult to calculate the lodestar because courts have to review voluminous time records and the like. Second, and most importantly in my view, the lodestar method does not align the interests of counsel with the interests of the plaintiffs because counsel's recovery does not depend on how much the class recovers. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2051-52. Consequently, according to my empirical study, very few courts use the lodestar method anymore in class actions.

See Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of class action settlements). The other large-scale studies—the ones by the late Ted Eisenberg and Geoff Miller—are in agreement. *See* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (hereinafter "Eisenberg-Miller 2017") (finding the lodestar method used only 6.29% of the time from 2009-2013, down from 13.6% from 1993-2002 and 9.6% from 2003-2008).

11. Instead, most courts today use what is known as the "percentage method." Under the percentage method, courts select a percentage that they believe is fair to counsel, multiply the settlement amount by that percentage, and then award counsel the resulting product. The percentage method overcomes both of the deficiencies of the lodestar method. First, the percentage method is easy to calculate because courts need not review voluminous time records and the like. Second, and, again, most importantly in my view, the percentage method aligns the interests of counsel with the interests of the plaintiffs because the more the class recovers, the more class counsel receives. *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052. This is why private parties—including sophisticated corporations—that hire lawyers on contingency always use the percentage method and not the lodestar method. *See, e.g.,* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012).

12. In this Court, judges have the discretion whether to use the percentage method or the lodestar method. *See, e.g., Moore v. United States*, 63 Fed. Cl. 781, 786 (2005) ("We do not view ourselves as bound by any one methodology."). Nonetheless, in light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage method, it is my opinion that courts should use the percentage method in common fund cases whenever the value of the settlement or judgment can be reliably calculated. Courts should use

the lodestar method only where the value cannot be reliably calculated and the percentage method is therefore not feasible. In this case, the settlement is all cash. Thus, its value can be easily and reliably calculated. As such, it is my opinion that the percentage method should be used here.

13. Courts usually examine a number of factors to select the right percentage under the percentage method. *See* Fitzpatrick, *Empirical Study, supra*, at 832. Although "[t]he Federal Circuit has not specified what considerations govern the assessment of fee requests in common fund cases," a number of decisions in this Court have considered the following factors: "(1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award." *Kane County v. United States*, 146 Fed. Cl. 15, 18 (2019) (citing cases). In my opinion, the fee requested here is reasonable because it is supported by all six of the relevant factors that can be determined at this time.[3]

14. Consider first factor (4): "the fee that likely would have been negotiated between private parties in similar cases." It is well known that when plaintiffs retain lawyers on contingency to represent them in labor and employment matters, the typical agreement is usually 33⅓%—i.e., *above* the request here. The most famous study of contingency fees is the one by Herbert Kritzer of Wisconsin lawyers. Unlike most studies which focus on tort cases, he examined all types of cases, including labor and employment. He found that the most common fee

[3] The seventh factor—"(5) class members' objections to the settlement terms or fees requested by class counsel"—is not yet applicable because the deadline to file an objection has not yet passed.

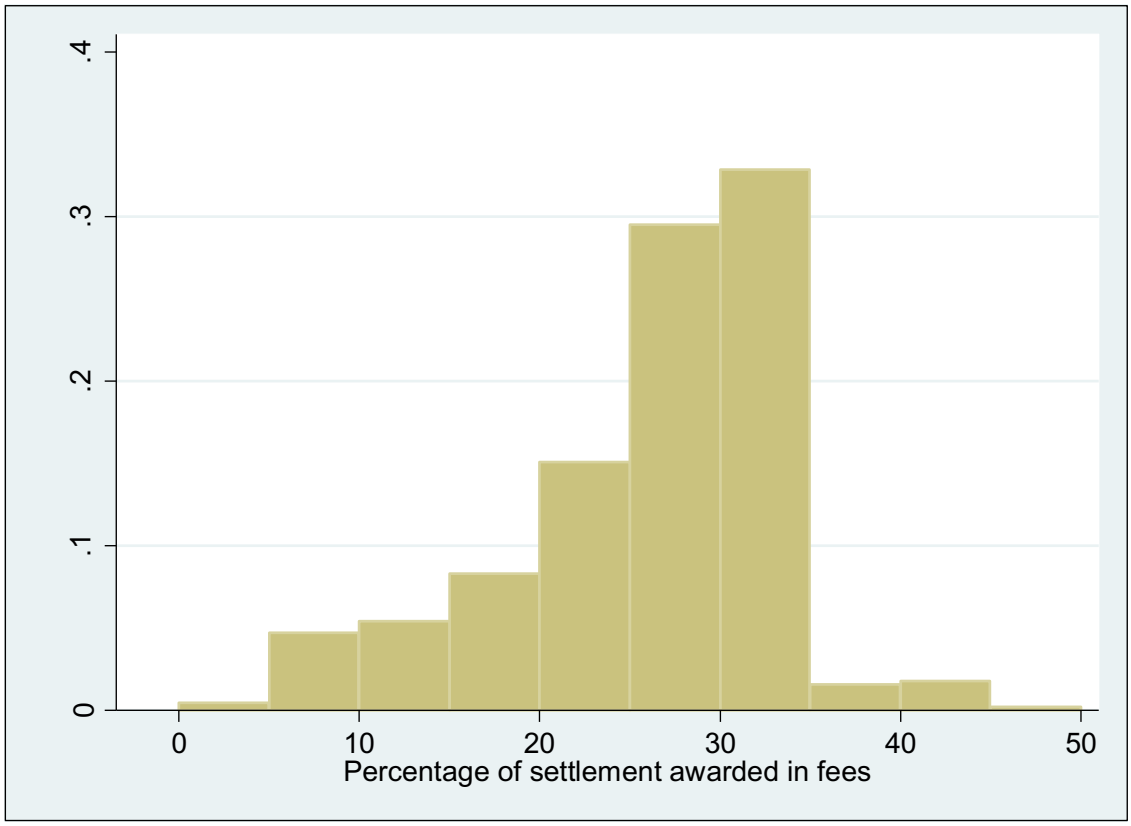
percentage is 33⅓%. *See* Herbert Kritzer, Risks, Reputations, and Rewards 39-40 (2004) (finding over 60% of contingency agreements set fees at a flat 33.3% and another third or so set fees at variable rates, usually escalating up to as high as 50% as the case went on). Indeed, confirming this data, all of the representative plaintiffs in this very case agreed to pay class counsel 33⅓% at the outset of this litigation. *See* Hamilton Declaration ¶ 14. Although I often do not put much stock in the agreements class representatives strike with class counsel because the representatives often have so little at stake that the agreements do not mean much, this case is very different. According to class counsel's damages expert, the amount of money the representative plaintiffs had at stake at the outset of this litigation ranged from $58,000 to $341,000. This is really money. Thus, these were not meaningless agreements, and, in my opinion, they confirm that the fee that would have been negotiated with private parties in the free market for a case like this is higher than what class counsel are seeking from this Court.

15. It is important to note that the Kritzer data in the previous paragraph comes from individual litigation and not class litigation. This is by design. Factor (4) addresses negotiated fee percentages; fee percentages are only negotiated in individual litigation and with the representative plaintiffs in class litigation; for other class members, fee percentages are set by courts not by negotiation. The fee percentages that courts set in class litigation is addressed by factor (6). I mention this now, however, because it is commonly assumed that fees should be lower in class litigation than individual litigation on account of economies of scale—e.g., it is not 1000 times more difficult to represent a class of 1000 plaintiffs as a class of one plaintiff—that would be passed on to clients if fees were negotiated in a market. But, in my opinion, this common assumption may be mistaken: when I recently examined the data on this question, I could not find any evidence that clients agreed to lower fee percentages when they hired lawyers on contingency

in cases that would present these economies. *See A Fiduciary Guide, supra*, at 1159-62. Rather, clients—including very sophisticated clients like corporations who hired contingency lawyers in patent and antitrust cases—agreed to pay the same standard percentages that everyone else pays. *See id*. The reason for this is most likely because the lawyer-client relationship is a dynamic one: what the fee agreement at the outset says will affect what the lawyer does or does not do later on. *See id.* at 1162-63. Clients—again, even very sophisticated ones—want their lawyers to have a lot of skin in the game because they want their lawyers to work hard and not shirk when the client is not looking. In other words, clients do not want to be "penny wise and pound foolish."

16. Consider next factors (6) and (7): "the percentage applied in other class actions" and "the size of the award." The fee award requested here is 30% of the settlement. This is a very typical fee award. According to my empirical study, the most common percentages awarded in class actions by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study, supra,* at 833-34, 838. This can be seen graphically in Figure 1, which shows the distribution of all of the percentage-method fee awards in my study. In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). The request here would fall into the meatiest part of the distribution, the one comprising awards between 30% (inclusive) and 35%. My numbers largely agree with the Eisenberg-Miller studies. *See* Eisenberg-Miller 2010, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) (hereinafter "Eisenberg-Miller 2010") (finding mean and median of 24% and 25%, respectively); Eisenberg-Miller 2017, *supra*, at 951 (finding mean and median of 27% and 29% respectively).

Figure 1: Percentage-method fee awards among all federal courts, 2006-2007



17. It should be noted that the recovery in this case is very large. This is notable because my empirical study showed that settlement size had a statistically significant but inverse relationship with the fee percentages awarded by federal courts—*i.e.*, that some federal courts awarded lower percentages in cases where settlements were larger. *See id*. at 838, 842-44. This relationship was found in the Eisenberg-Miller studies as well. *See Eisenberg-Miller 2010*, *supra*, at 263-65; *Eisenberg-Miller 2017, supra*, at 947-48. Thus, for example, the mean and median fee percentages awarded in the percentage-method settlements in my dataset between $100 million and $250 million were 17.9% and 16.9%, respectively. *See* Fitzpatrick, *Empirical Study, supra*, at 839. (The Eisenberg-Miller studies do not report fee-percentage averages and medians in bands like this for very large settlements.)

18. In my opinion, it is a mistake to cut fee percentages because class counsel recovered more money as opposed to less money for the class. This does nothing other than give class counsel the incentive to resolve a case for less opposed to more. *See, e.g.*, *In re Synthroid I*, 264 F.3d 712, 718 (7th Cir. 2001) ("This means that counsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients . . . . Why there should be such a notch is a mystery. Markets would not tolerate that effect . . . ."); *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 n.55 (3d Cir. 2001) ("Th[e] position [that the percentage of a recovery devoted to attorneys' fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply." (alteration in original)). Consider the following example: if courts award class action attorneys 30% of settlements when they are under $100 million but only 20% of settlements when they are over $100 million, then rational class action attorneys will prefer to settle cases for $90 million (*i.e.*, a $27 million fee award) than for $125 million (*i.e.*, a $25 million fee award). As Judge Easterbrook noted in the *Synthroid* case, no rational client would ever agree to such an arrangement. This is why I did not find any such practice when I investigated how real clients—including very sophisticated corporations—hire lawyers on contingency in big cases. Given that clients would never choose this fee arrangement, it is my opinion that courts should therefore not *force* such arrangement on clients when they set fees in class actions. *See A Fiduciary Guide, supra*, at 1154 ("[A] judge should do what absent class members would have done if they had been able to interact with class counsel directly."). This is what it means to be a "fiduciary" for the class, something judges in class actions say they

are acting as. *See* 4 William B. Rubenstein, Newberg on Class Actions § 13:40 (5th ed. 2021) ("[T]he law requires the judge to act as a fiduciary . . . .").

19. Moreover, it should be remembered that the average and median fee percentage numbers cited above are only reflections of middle points of a distribution of fee awards. When the facts and circumstances justify it, courts award 30% (and more) in cases of this size (and bigger). *See, e.g.*, *Allapattah Servs. Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) (31.33% of $1.075 billion); *In re Urethane Antitrust Litig*., No. 04 Civ. 1616, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (33.33% of $835 million); *Dahl v. Bain Capital Partners*, *LLC*, No. 07-cv-12388, Dkt. 1095 (D. Mass. Feb. 2, 2015) (33% of $590.5 million); *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (33% of $510 million); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) (30% of $410 million); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), 2001 WL 34312839, at *10, 14 (D.D.C. July 16, 2001) (34% of $359 million); *In re Tricor Direct Purchaser Antitrust Litig.,* No. 05-340-SLR, ECF No. 543 (D. Del. 2009) (33% of $250 million). As I explain below, it is my opinion that the other factors show that the facts and circumstances justify it here.

20. Consider finally the remaining factors, factors that go to the results obtained by class counsel in light of the risks presented by the litigation: "(1) the quality of counsel," "(2) the complexity and duration of the litigation," and "(3) the risk of nonrecovery." These factors are important because class counsel should be rewarded with higher fee awards when they recover more compensation for class members and obtain more deterrence for the benefit of society relative to the expected value of their cases. By this measure, the recovery here is very successful: the class's damage expert opined that the maximum recovery here would have been approximately $245 million in backpay and interest if everything went the class's way. Thus, the settlement will

recover 65% of the maximum possible damages. Although we do not have studies of recovery rates in cases like this one, the studies we do have—from securities fraud and antitrust cases—suggest that class actions typically recover 20% of damages or less. *See, e.g.,* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 Iowa L. Rev. 1997, 2010 (2015) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 and 2014). Indeed, in securities fraud cases, the typical recovery is less than 3% of the class's damages.[4] The recovery here is therefore a *multiple* of the typical recovery in the areas in which we have data.

21. But the recovery is only one side of the equation. We must evaluate the recovery against the difficulty of the case. There is no doubt this case was difficult. To begin with, class counsel lost the case before they won it: this Court initially granted the motion to dismiss on the ground that there was no legal entitlement to overtime here and class counsel had to get this judgment reversed on appeal. This has required class counsel to fight longer and harder than most class action lawyers to recover for the class; this case has already lasted nine years whereas the average class action settles in three. *See Fitzpatrick, Empirical Study, supra*, at 820. But even after winning the appeal, there were still plenty of risks left to overcome. Much of the class's damages case is based on a contested analysis and interpretation of data; this opened up questions of whether the class would be able to carry its burden of proof. Moreover, even if the class could have carried this burden, the government's expert would no doubt have interpreted the data very

[4] *See, e.g.,* NERA, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* at 20, *available at* http://www.nera.com/publications/archive/2020/recent-trends-in-securities-class-action-litigation--2019-full-y.html (finding median recoveries of best-case damages to vary from 1.3% to 2.6% between 2010 and 2019 in securities fraud class actions).

differently and it is always uncertain which expert would be found more credible. Further, the government changed its employee handbook during the class period to make it more difficult to earn overtime; this made the legal entitlement to compensation here less certain thereafter. Finally, as I learned firsthand the hard way as a young lawyer, it is difficult to recover interest against the government because there must be a separate unambiguous waiver of sovereign immunity for interest. *See Mobil Oil Co. v. United States*, 374 F.3d 1123 (Fed. Cir. 2004). For this reason, it was not clear whether the class could have recovered any interest at all here. In short, in light of all this, recovering 65% of the maximum possible damages—including interest—is very impressive in my opinion. This was not mere "average" or "median" class representation.

VI. Conclusion

22. For all these reasons, it is my opinion that class counsel's fee request is reasonable.

23. My compensation in this matter is a flat fee in no way dependent on the outcome of class counsel's fee petition.

Brian T. Fitzpatrick

Nashville, TN

August 9, 2021

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Milton R. Underwood Chair in Free Enterprise*, 2020 to present

- *Professor of Law*, 2012 to present
- *FedEx Research Professor*, 2014-2015; *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018

- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010

- Classes: Civil Procedure

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000

- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997

- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (Cambridge University Press 2021) (ed., with Randall Thomas)

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press 2019)

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Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

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A Fiduciary Judge's Guide to Awarding Fees in Class Actions, The Judicial Role in Professional Regulation, Stein Colloquium, Fordham Law School, New York, NY (Oct. 9, 2020)

Objector Blackmail Update: What Have the 2018 Amendments Done?, Institute for Law and Economic Policy, Fordham Law School, New York, NY (Feb. 28, 2020)

Keynote Debate: The Conservative Case for Class Actions, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Jan. 24, 2020)

The Future of Class Actions, National Consumer Law Center Class Action Symposium, Boston, MA (Nov. 16, 2019) (panelist)

The Conservative Case for Class Actions, Center for Civil Justice, NYU Law School, New York, NY (Nov.11, 2019)

Deregulation and Private Enforcement, Class Actions, Mass Torts, and MDLs: The Next 50 Years, Pound Institute Academic Symposium, Lewis & Clark Law School, Portland, OR (Nov. 2, 2019)

Class Actions and Accountability in Finance, Investors and the Rule of Law Conference, Institute for Investor Protection, Loyola University Chicago Law School, Chicago, IL (Oct. 25, 2019) (panelist)

Incentivizing Lawyers as Teams, University of Texas at Austin Law School, Austin, TX (Oct. 22, 2019)

"Dueling Pianos": A Debate on the Continuing Need for Class Actions, Twenty Third Annual National Institute on Class Actions, American Bar Association, Nashville, TN (Oct. 18, 2019) (panelist)

A Debate on the Utility of Class Actions, Contemporary Issues in Complex Litigation Conference, Northwestern Law School, Chicago, IL (Oct.16, 2019) (panelist)

Litigation Funding, Forty Seventh Annual Meeting, Intellectual Property Owners Association, Washington, DC (Sep. 26, 2019) (panelist)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, International Class Actions Conference, Vanderbilt Law School, Nashville, TN (Aug. 24, 2019)

A New Source of Class Action Data, Corporate Accountability Conference, Institute for Law and Economic Policy, San Juan, Puerto Rico (April 12, 2019)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, FL (Dec. 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (Nov. 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (Oct. 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (Sep. 11, 2018)

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability*,* Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

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The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

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An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

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Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

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"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

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On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

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Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

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Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

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Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

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Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Reviewer, Oxford University Press
Reviewer, Supreme Court Economic Review
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights
Board of Directors, Tennessee Stonewall Bar Association
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia

COMMUNITY ACTIVITIES

Board of Directors, Nashville Ballet, 2011-2017 & 2019-present; Board of Directors, Beacon Center, 2018-present; Nashville Talking Library for the Blind, 2008-2009

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An Empirical Study of Class Action Settlements and Their Fee Awards

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This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

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[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

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[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

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[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

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[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

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[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

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[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

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[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

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[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

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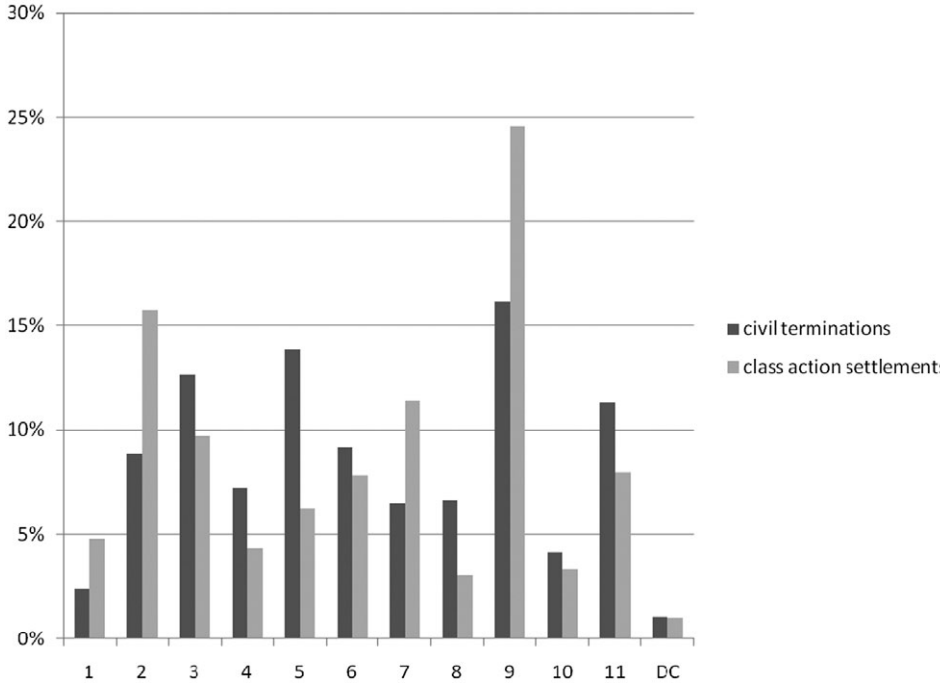
[43]See Eisenberg & Miller, supra note 15, at 59–60.

[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



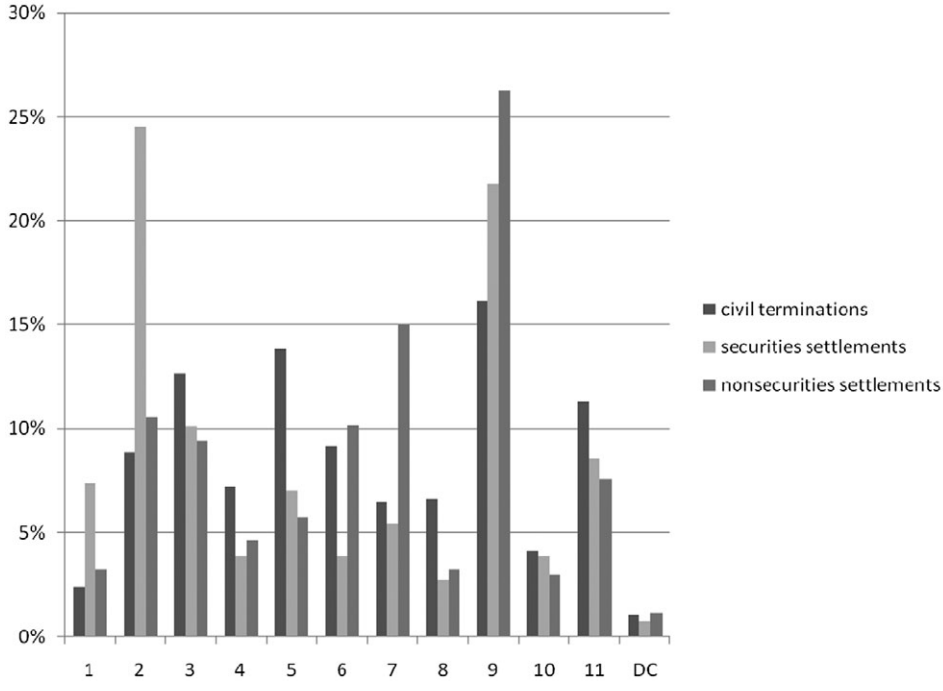
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006* (n = *304*)		*2007* (n = *384*)	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

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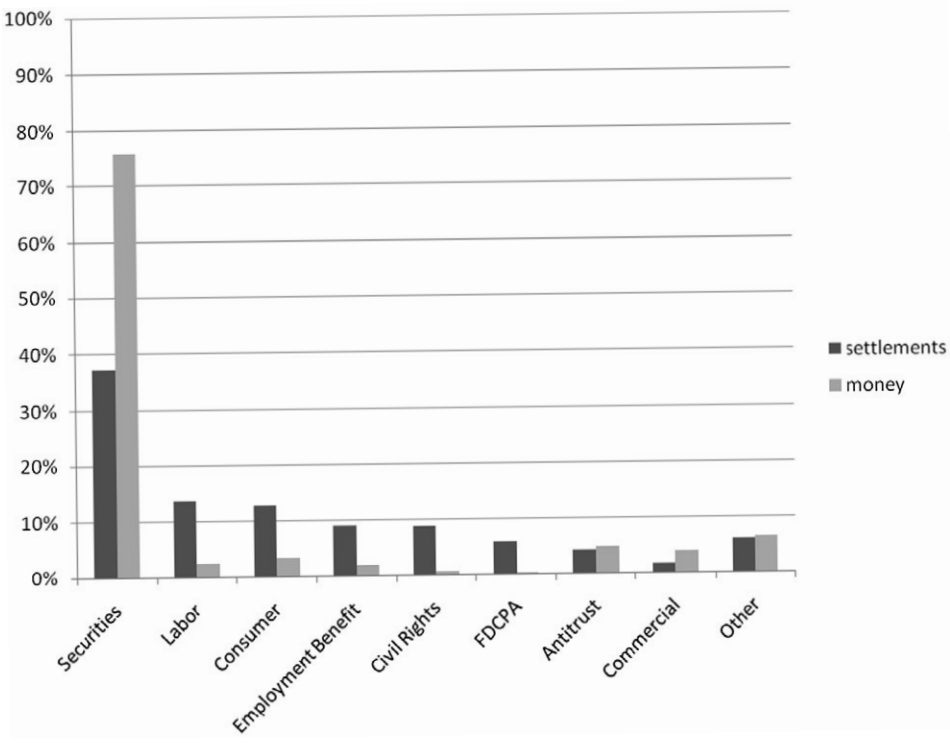
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

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($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

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[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

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[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

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[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

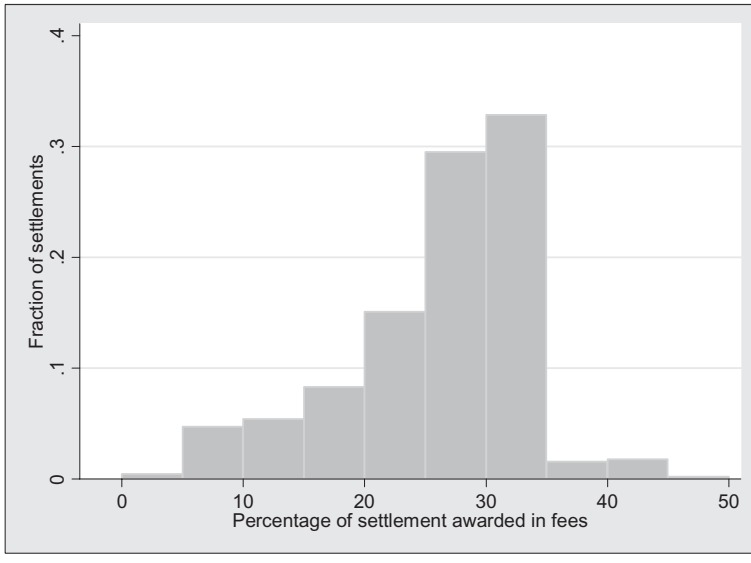
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

SOURCES: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

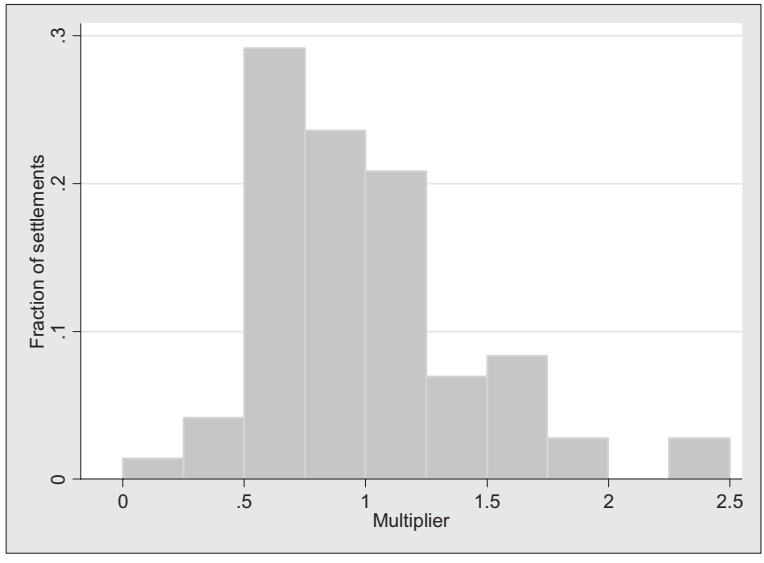
SOURCES: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

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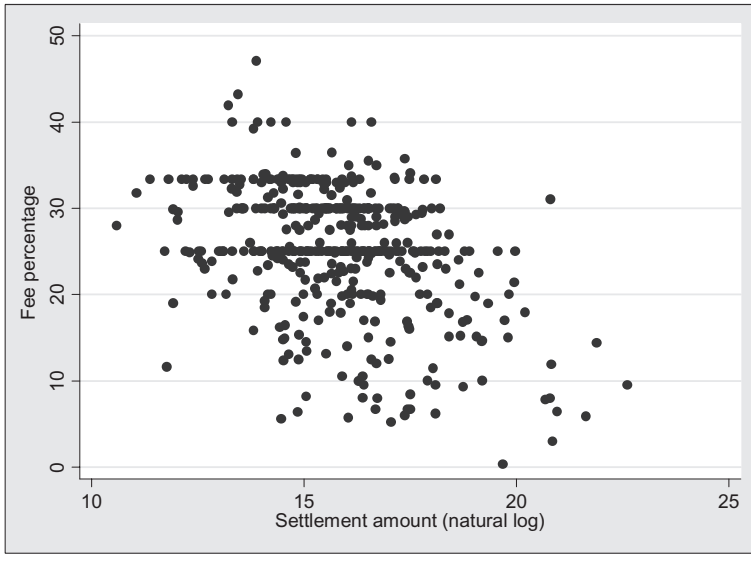
[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

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[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

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appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	−1.77	−1.76	−1.76	−1.41	−1.78
	(−5.43)**	(−8.52)**	(−7.16)**	(−4.00)**	(−8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	−0.630	−0.345	0.657	−1.43	−0.232
	(−0.83)	(−0.49)	(0.76)	(−1.20)	(−0.34)
Settlement class		0.150	0.873	−1.62	0.124
		(0.19)	(0.84)	(−1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	−0.813	2.93	−2.23
		(0.44)	(−0.61)	(1.14)	(−1.98)**
3d Circuit		2.25	4.00	−1.11	—
		(1.99)**	(3.85)**	(−0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	−0.227
		(2.23)**	(2.36)**	(1.46)	(−0.20)
8th Circuit		2.12	−0.759	3.73	−0.586
		(0.97)	(−0.24)	(1.19)	(−0.28)
9th Circuit		—	—	—	−2.73
					(−3.44)**
10th Circuit		1.45	−0.254	3.16	—
		(0.94)	(−0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		−1.65		−4.39	−1.62
		(−0.88)		(−2.20)**	(−0.88)
Employee benefits case		−0.306		−4.23	−0.325
		(−0.23)		(−2.55)**	(−0.26)
Civil rights case		1.85		−2.05	1.76
		(0.99)		(−0.97)	(0.95)
Debt collection case		−4.93		−7.93	−5.04
		(−1.71)*		(−2.49)**	(−1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.

SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

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[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

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[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

A FIDUCIARY JUDGE'S GUIDE TO AWARDING FEES IN CLASS ACTIONS

*Brian T. Fitzpatrick**

It is often said that judges act as fiduciaries for the absent class members in class action litigation. If we take this seriously, how then should judges award fees to the lawyers who represent these class members? The answer is to award fees the same way rational class members would want if they could do it on their own. In this Essay, I draw on economic models and data from the market for legal representation of sophisticated clients to describe what these fee practices should look like. Although more data from sophisticated clients is no doubt needed, what we do know calls into question several fee practices that are in common use today: (1) presuming that class counsel should earn only 25 percent of any recovery, (2) reducing that percentage further if class counsel recovers more than $100 million, and (3) reducing that percentage even further if it exceeds class counsel's lodestar by some multiple.

INTRODUCTION

Judges take a much more active role in class action litigation than they do in individual litigation. First and foremost, they decide whether the case will proceed as a class action on behalf of absent parties.[1] In doing so, they decide whether the litigation will bind the absent class members at all. They also decide which lawyers will represent absent class members,[2] whether and on what terms absent class members will settle,[3] and how much absent class members must pay their lawyers.[4]

Judges do these things because absent class members are involuntary plaintiffs. Sometimes they are stuck in the class action whether they like it

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1. *See* FED. R. CIV. P. 23(c)(1)(A).
2. *Id.* r. 23(g).
3. *Id.* r. 23(e).
4. *See id.* r. 23(h).

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or not because they are not allowed to opt out.[5] Even when they can opt out, sometimes they do not receive notice that they are even part of the class action.[6] Even when they can opt out and do receive notice, there may be no point to opting out because they have so little at stake they would never sue on their own.[7] Judges therefore step in to make decisions on their behalves.

For this reason, it is often said that judges act as fiduciaries for absent class members.[8] This description may be more figurative than literal because judges do not dwell on the implications of that description when they discharge their duties in class actions.[9] But in this Essay, I take the description seriously and ask what it means for one of those duties: the duty to decide how much absent class members must pay the lawyers appointed to represent them.

It is important to note that this is not the only perspective from which we might try to guide fee decisions in class action litigation. For example, we might put to the side the private interests of class members and focus instead on what fees are best for social welfare. I have taken that perspective in the past.[10] But in this Essay, I wish to try something different: how should judges set fees if they are really acting as fiduciaries to class members?

Drawing on agency law, my answer is that judges should set fees in the same way rational class members would have set them at the outset of the case if they had had the opportunity to do so. If judges could perfectly

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5. *Id.* r. 23(c)(2)(B)(v).

6. *Id.* r. 23(c)(2)(B) (requiring courts to direct only "the best notice that is practicable under the circumstances"); *see also* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (holding that notice need only be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

7. *See* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 59–61 (2019) (noting that class actions are necessary because individuals lack the incentive to sue to remedy small harms); *id.* at 88 (noting that class members often do expend much effort to collect payments from the class fund); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533 (2004) (finding that "opt-out . . . rates increase as per capita recovery increases").

8. *See, e.g.*, Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Emps. Ret. Sys., 814 F.3d 652, 657 (2d Cir. 2016); Ehrheart v. Verizon Wireless, 609 F.3d 590, 594 (3d Cir. 2010); Rodriguez v. West Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009); *In re* Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class."); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 225 (5th Cir. 1981); Ray v. Mechel Bluestone, Inc., No. 15-CV-03014, 2018 WL 1309731, at *4 (S.D.W. Va. Mar. 13, 2018); Jackson v. Innovative Sec. Servs., LLC, 283 F.R.D. 13, 15 (D.D.C. 2012); *In re* Lupron Mktg. & Sales Pracs. Litig., 345 F. Supp. 2d 135, 138 (D. Mass. 2004); *see also* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:40 (5th ed. 2020) (noting that in class action litigation "the law requires the judge to act as a fiduciary" of absent class members).

9. *See, e.g.*, Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1322 ("[C]ourts portraying themselves as fiduciaries fail to articulate what the status requires in this context, much less what they have done to satisfy their fiduciary duties for the benefit of absent class members.").

10. *See generally* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010).

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monitor class counsel, any fee arrangement that class counsel would accept would work because the judge could always ensure that counsel would work hard for the class. But it is not realistic to think that class counsel can be monitored perfectly—and it may not even be realistic to think that class counsel can be monitored well (particularly when the monitoring is usually done at the end of the process rather than during). What would rational class members want then? In this Essay, I draw on two sources to answer this question: economic models of rational actors and data from marketplaces where clients exhibit their actual preferences.

According to the economic models, there is no fee formula that entirely relieves clients of monitoring lawyers who work on contingency, like class counsel does. Moreover, the models are indeterminate: the optimal formula depends on *how well* clients can monitor and *what* clients can monitor best. For example, the well-known formula that pays lawyers a percentage of what they recover requires clients to monitor against their lawyers settling cases prematurely for a smaller recovery than would have been obtained had the litigation continued; the lower the percentage, the greater the need to monitor. This danger of premature settlement can be mitigated by paying a percentage that escalates as the litigation matures or the recovery increases. The danger can be all but eliminated by a formula that pays a percentage plus a fee equal to the lawyer's normal hourly rate for the hours worked to achieve the recovery—i.e., contingent lodestar plus percentage—but then this requires the client to verify the lawyer's lodestar. Whether the percentage method or the contingent-lodestar-plus-percentage method is preferable will therefore depend on which sort of monitoring the client prefers: verifying the lodestar or guarding against premature settlement.

The data we have from the marketplace for contingent representation shows that clients prefer to monitor against premature settlement over verifying the lodestar. No one—not even the most sophisticated client—appears to use the contingent-lodestar-plus-percentage formula. Rather, drawing on preexisting data and new data I recently collected, I show that even sophisticated clients use the percentage method. Moreover, they use the same fixed and escalating percentages that unsophisticated clients use. These clients do this even in the most enormous cases, where we would expect the lawyers to benefit from economies of scale.

What does this mean for judges in class action cases? I think it means that judges have two options. If judges believe they are better at monitoring class counsel's lodestar than they are at monitoring against premature settlement, then they could try to use the contingent-lodestar-plus-percentage method. But to use this method, judges must have some way to determine the right percentage. In the absence of any data from the marketplace—as I said, this method is not used in the marketplace—the only way for judges to do that is to hold an auction for class counsel. But that introduces a host of other problems that I will discuss. If judges do not believe they can make auctions work, or, like sophisticated clients, they believe they are better at monitoring against premature settlement, then judges should probably pay class counsel a fixed percentage of one-third of the recovery or percentages that escalate

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even higher as litigation matures. These conclusions call into question several fee practices commonly used by judges today: (1) presuming that class counsel should earn only 25 percent of any recovery, (2) reducing that percentage further if class counsel recovers more than $100 million, and (3) reducing that percentage even further if it exceeds class counsel's lodestar by some multiple.

I. JUDGES AS FIDUCIARIES

What does it mean to say that judges act as fiduciaries for absent class members? If we want to take this claim seriously, it means that judges are acting as agents for absent class members.[11] Like any other agent, that means a judge should do what absent class members would have done if they had been able to interact with class counsel directly.[12]

The Restatement (Third) of the Law of Agency says that agents should do what their principals would "reasonably" want them to do unless they receive explicit instructions otherwise.[13] This means that when acting on behalf of absent class members, judges should assume that such members would be *rational* when interacting with class counsel. We are all familiar with the findings from behavioral economics showing that we are often systematically irrational.[14] But judges should ignore these findings; by definition, absent class members are not in a position to give judges explicit instructions to follow irrational practices. Thus, judges should assume that absent class members would interact with class counsel as their best, most rational selves.

My focus in this Essay is on attorneys' fees. Judges almost always set attorneys' fees in class actions after the cases are over and class counsel has already won recovery for class members.[15] At that moment, the rational thing for absent class members to want is to keep all the recovery for

11. *See* RESTATEMENT (THIRD) OF THE L. OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf.").

12. *See id.* § 8.01 ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

13. *Id.* § 8.10 ("An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise."); *id.* § 2.02 cmt. f ("The agent's fiduciary duty to the principal obliges the agent to interpret the principal's manifestations so as to infer, in a reasonable manner, what the principal desires to be done in light of facts of which the agent has notice at the time of acting."); *id.* cmt. h ("[I]f it is normally not reasonable to believe that the principal will benefit from an act, a reasonable agent should not infer that the principal wishes the agent to do the act and therefore should not commit the act unless the principal communicates specifically that the principal wishes the act to be done.").

14. *See* FITZPATRICK, *supra* note 7, at 104 (noting that "people, it turns out, are not very rational," briefly discussing the wealth of literature "showing how all of us make the same types of mistakes over and over again when we try to process information," and citing sources).

15. *See id.* at 91 ("[J]udges almost always set the fee award at the end of the case."); *id.* at 87 ("[M]any courts wait to see how many class members apply for money before awarding fees.").

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themselves and give none of it to class counsel.[16] But, of course, if that is what judges did, then lawyers would never take on class action cases because they would know that they would get stiffed at the end. Absent class members would obviously not want that in the long run. Thus, when it comes to attorneys' fees, absent class members acting as their best, most rational selves would want to pay class counsel at the end of the case the amount they would have paid class counsel to take the case to begin with—what we often call "ex ante." As good fiduciaries, then, that is exactly what judges should do as well.

II. HOW WOULD RATIONAL CLASS MEMBERS PAY THEIR LAWYERS EX ANTE?

The lawyers who take on class action cases are usually paid only from the class's recovery.[17] This means they are lawyers who work on contingency: if they recover nothing, they get paid nothing; even if they recover something, their fees will be limited by the size of the recovery.[18] How would rational absent class members want to pay lawyers, ex ante, who work on contingency like this? There are two sources of insight we can call on to answer this question: economic models of rational actors and data from the marketplace where clients exhibit their actual preferences. I will draw on these sources in turn below, but it is important to note that they both come with limitations. First, economic models are purely theoretical and one always worries theoretical models are incomplete. Second, most of the data comes from the marketplace for representation of unsophisticated clients. One might worry that the findings from behavioral economics mentioned above taint this data. Moreover, this data comes from cases involving individual representation, not class cases. This is because, other than auctions for class counsel (which I will address below), there is no market in class cases. Fees are set by judges, not by clients. This is important because some think that lawyers who take class cases benefit from economies of scale compared to individual cases; therefore, the individual-case market may not be very probative of what absent class members would need to pay a lawyer to take a class action.[19] One possible way to overcome both of these

16. *See id.* at 91 (noting that the short-term rational decision for a class member paying his lawyer at the end of the case is to "give him as little as possible so I can keep as much as possible for myself!").

17. *See* Fitzpatrick, *supra* note 10, at 2051 ("In most cases, . . . fee awards come from proceeds that would otherwise go to class members."). An interesting example to the contrary is *Hyland v. Navient Corp.*, No. 18-CV-9031, 2019 WL 2918238 (S.D.N.Y. Oct. 9, 2020), which describes a class counsel who was paid noncontingent fees by the American Federation of Teachers.

18. *See* Alon Klement & Zvika Neeman, *Incentive Structures for Class Action Lawyers*, 20 J.L. ECON. & ORG. 102, 108–09 (2004) (noting that "[a]ny noncontingent fee [is] infeasible in this context" and "the attorney can never collect a fee higher than the actual amount recovered").

19. *See* Fitzpatrick, *supra* note 10, at 2063 ("[A]ggregate litigation permits plaintiffs to reap the benefits of economies of scale in litigation, and, in a competitive marketplace, one might expect those economies to be passed on to clients in the form of lower attorneys' fees.").

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limitations is to focus on data from sophisticated corporate clients who hire lawyers in high-stakes cases—i.e., clients for whom the behavioral findings are less relevant[20] and cases that might offer their own economies of scale. This will be my strategy below.

A. Economic Models

How do the economic models suggest rational class members should pay lawyers who work on contingency, like class counsel? Most of the literature compares two formulas: the lodestar method and the percentage method.[21] The lodestar method pays the lawyer a fee equal to the number of hours the lawyer worked multiplied by the lawyer's normal hourly rate. The percentage method pays the lawyer a fee equal to some percentage of the amount recovered for the client. But most of the literature compares the percentage method to the *non*-contingent-lodestar method.[22] The *contingent*-lodestar method that must be considered here is typically assessed only in the literature on class actions,[23] statutory fee shifting,[24] and the English civil justice system (where the percentage method is forbidden and contingent agreements can only use the lodestar method).[25] The contingent-lodestar method differs from the noncontingent method not only because payment is guaranteed only in the latter but because the former permits enhancement of the lodestar by a discretionary number (the multiplier) to compensate for that risk of nonpayment.[26]

If clients could perfectly monitor their lawyers and thereby eliminate agency costs—that is, if clients could ensure their lawyers would do exactly what they wanted them to do every time—it would not matter which of these arrangements was employed. Indeed, clients could even pay their lawyers fixed fees. In all these arrangements, the outcome for the clients would be exactly the same. Clients would presumably want the arrangement that

20. *See* FITZPATRICK, *supra* note 7, at 104 (noting that behavioral law and economics does not suggest that "the teams of people who run corporations are systematically irrational in the same way the rest of us are").

21. *See, e.g.*, Lynn Baker, Comment, *Facts About Fees: Lessons for Legal Ethics*, 80 TEX. L. REV. 1985, 1986 (2002).

22. *See, e.g.*, *id.*; Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 415, 416 (Peter Newman ed., 2002) ("It is common to compare a contingency fee arrangement with the alternative in which an attorney is paid an hourly wage.").

23. *See, e.g.*, FITZPATRICK, *supra* note 7, at 85–98 (explaining the pros and cons of the contingent-lodestar method and the percentage method); Klement & Neeman, *supra* note 18, at 108–110; William Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 J. LEGAL STUD. 185, 191–95 (1994).

24. *See, e.g.*, Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021, 1048–61 (2020) (discussing different fee arrangements, including statutory fee shifting); Martha Pacold, Comment, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007 (2001).

25. *See, e.g.*, Winand Emons & Nuno Garoupa, *US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and the Supply of Legal Services*, 27 MANAGERIAL & DECISIONS ECON. 379 (2006).

26. *See, e.g.*, Fitzpatrick, *supra* note 10, at 2051.

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would be cheapest in a given case, but depending on the relative risk aversion of client and lawyer, we could imagine them agreeing to any arrangement.

We can quickly put aside the model where clients can perfectly monitor their lawyers. I doubt any client can do that—this is why there is an entire field of economics that studies agency costs—but it is certainly not possible in class action cases. The clients—class members—are, by definition, absent.[27] Moreover, their monitor—the judge acting as their fiduciary—is an imperfect monitor at best. As scholars have long noted, judges do not exercise day-to-day, week-to-week, month-to-month, or sometimes even year-to-year oversight of class counsel.[28] They are passive monitors until a milestone like settlement presents itself in the litigation.[29] Asking a judge to enter the litigation at a milestone and understand the intricacies of what has transpired is a tall order.[30] It is an even taller order in light of the docket pressure that incentivizes judges to rubber-stamp whatever class counsel and the defendant have agreed to.[31] For class actions, we need a model that assumes clients cannot monitor their lawyers perfectly—or even well.

What do models like this tell us? I will assume that client and attorney have the same information about the merits of the case for simplicity.[32] Moreover, I will assume that any recovery will come in cash; the client's options become much narrower if the recovery is injunctive or declaratory. Even with these assumptions, there is no formula that frees clients entirely from monitoring.[33] The contingent-lodestar method is perhaps worst of all

27. I am ignoring the possibility that monitoring will take place by the class representative. Outside of securities fraud class actions, most class representatives are unsophisticated figureheads. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 5 (1991) ("The named plaintiff does little—indeed, usually does nothing—to monitor the attorney in order to ensure that representation is competent and zealous, or to align the interests of the attorney with those of the class or corporation.").

28. *See, e.g.*, Alon Klement, *Who Should Guard the Guardians?: A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 45 (2002) ("[C]ommon law courts are institutionally incapable of obtaining information unless presented to them by the litigants.").

29. *See id.* at 45–46 ("[T]he paradigmatic common law court is passive and relies solely on the adversary process for its education about the case.").

30. *See id.* at 45 ("Constrained by the institutional requirements of neutrality and passivity set by the adversary system . . . courts have been left, by and large, uninformed about the parameters necessary to effectively regulate class attorneys.").

31. *See id.* at 47 ("On top of these institutional barriers, courts are also constrained by their limited resources. Dockets are full, and support personnel are scarce. Conducting meaningful investigations without the necessary means is often unworkable. Moreover, in the specific context of attorney fee applications, courts are expected to apply restraint and limit the extent of factual investigations. They are urged not to allow protracted satellite litigation and to control and expedite fee award determinations." (footnote omitted)).

32. For models that relax that assumption, see, for example, James Dana & Kathryn Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. ORG. 349 (1993); Klement & Neeman, *supra* note 18; *see also* Rubinfeld & Scotchmer, *supra* note 22, at 417–18 (summarizing these models).

33. The only thing that frees clients from monitoring is the outright sale of their claims to their lawyers. *See* Macey & Miller, *supra* note 27, at 108 (proposing an auction approach where "[t]he winning bidder becomes the owner of the claim, and therefore acts as its own agent").

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because it renders the lawyer completely indifferent to the magnitude of recovery and adverse to the client on the speed with which it comes about; the client would have to monitor to ensure the lawyer does not prolong the case or recommend an inadequate settlement.[34] It is true that the lawyer might feel constrained by professional or ethical norms, but those, too, are hard to monitor. The percentage method is better because the lawyer is not indifferent to the size or speed of recovery; like the client, the lawyer wants a big recovery and the lawyer wants it quickly.[35] But the percentage causes the lawyer to want to settle *too* quickly: if the fee percentage is less than 100 percent, then the lawyer must bear all the effort of going forward with the litigation while collecting only a fraction of the return on the effort. This incentivizes the lawyer to want to settle prematurely, even if it means a smaller recovery, so the client must monitor to ensure that does not happen.[36] The lower the percentage, the greater the divergence between the interests of client and lawyer. The optimal fixed percentage therefore depends on how well the client can monitor against premature settlement.[37] The danger of premature settlement can be mitigated if the fee percentage escalates as the recovery increases or the litigation matures, but it cannot be eliminated.[38]

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34. *See* Emons & Garoupa, *supra* note 25, at 380 ("[C]ontingent fees are more efficient than conditional fees."); Fitzpatrick, *supra* note 10, at 2051–52 ("Under the lodestar method, class counsel's compensation increased the longer the litigation wore on; class members, by contrast, prefer cases to end as quickly as possible so they can receive their compensation as quickly as possible. Moreover, class counsel were compensated irrespective of how much they recovered for the class; class members, by contrast, prefer to receive as much as possible."); Klement & Neeman, *supra* note 18, at 108–10; Lynk, *supra* note 23, at 191–95.

35. *See* Emons & Garoupa, *supra* note 25, at 380; Fitzpatrick, *supra* note 10, at 2052 ("To better align the interests of class counsel and the class, judges began compensating class counsel by awarding them a percentage of the class's recovery. This way, the more the class recovers, the more class counsel are paid, and class counsel have no incentive to drag cases on unnecessarily.").

36. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 435 (2009) ("Under contingency fee arrangements . . . the lawyer . . . press[es] for settlement more often than when the settlement offer exceeds the expected judgment net of litigation costs because the lawyer bears all the litigation costs but obtains only a percentage of the settlement."); Lynk, *supra* note 23, at 194; Murray Schwartz & Daniel Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970). *But see* Mitchell Polinsky & Daniel Rubinfeld, *A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers*, 22 INT'L REV. L. & ECON. 217, 217 (2002) ("[T]he lawyer could have an insufficient motive to settle, the opposite of what is usually believed.").

37. *See* Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503, 508–11 (1996) (noting that the optimal fee minimizes the agency costs generated from a lawyer's underinvestment in the claim and rent-seeking behavior).

38. *See* John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 697 (1986) ("[T]he most logical answer to this problem of premature settlement would be to base fees on a graduated, increasing percentage of the recovery formula—one that operates, much like the Internal Revenue Code, to award the plaintiff's attorney a marginally greater percentage of each defined increment of the recovery. While this approach cannot be said to eliminate the inevitable tension between the interests of plaintiff's attorneys and their clients in class actions, it can at least partially counteract the tendency for premature settlements."); Jill E. Fisch, *Lawyers on the Chopping Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 679 (2002) ("By increasing the reward to counsel, increasing percentage bids reduce the incentive for

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The closest we can come to eliminating the danger of premature settlement is to use the formula devised many years ago by Kevin Clermont and John Currivan: contingent lodestar plus percentage.[39] Here, the client pays the lawyer an hourly rate, only if there is some recovery, plus a percentage of that recovery.[40] This formula pits the contingent-lodestar and percentage methods against one another to improve on them both: the percentage component of the formula incentivizes the lawyer to care about the magnitude and speed of the recovery, while the lodestar component mitigates the incentive to settle prematurely. But even this formula does not entirely eliminate the problem of premature settlement.[41] Moreover, it introduces a new monitoring need: the client needs to verify that the lawyer's lodestar is not inflated.

The economic models are therefore indeterminate. It is possible the contingent-lodestar-plus-percentage formula is what a rational absent class member would want, but it is also possible that a rational absent class member would want the percentage method. It depends on whether it would be easier to monitor against premature settlement or monitor the lodestar. It is possible a rational absent class member would want to pay a low fixed percentage, a high fixed percentage, or a marginally escalating percentage. It depends on how easy it is to monitor against premature settlement.

B. Data from Sophisticated Clients

The data on the contingent-fee arrangements clients choose in the marketplace strongly suggests that clients prefer to monitor against premature settlement than to monitor the lawyer's lodestar. The most famous

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cheap settlements and motivate counsel to pursue high levels of recovery."); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259, 260 (1997) ("[T]he bifurcated fee structure is preferable to the unitary structure . . . . The optimal bifurcated fee often couples a relatively high trial percentage for the lawyer (one that would be excessive if the case were actually going to trial) with a relatively low settlement percentage. The rationale of the large trial percentage is that it generates a large settlement; the rationale of the small settlement percentage is that it avoids paying the lawyer for (trial) work he does not perform.").

39. *See* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 530 (1978).

40. *See id.* at 581 ("The contingent hourly-percentage fee is payable only in the event of recovery and equals the sum of two components: (1) the lawyer's time charge for the hours devoted to the case; and (2) a percentage (x) of the amount by which the recovery (s) exceeds that time charge." (footnotes omitted)).

41. *See* A. Mitchell Polinsky & Daniel Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 182 n.30 (2003) ("This payment scheme is only fully successful, however, if the plaintiff is certain to obtain a settlement or a trial victory."). Although there are ways to perfect the formula, they are complex and involve third parties; as such I am not sure how realistic the perfections are. *See id.* at 166–69 (proposing a variation in which a third-party administrator "will contract with the lawyer and agree to pay him for the appropriate fraction of his time"); Alon Klement et al, Auctioning Class Action Representation 4 (Sept. 8, 2020) (unpublished manuscript) (on file with the *Fordham Law Review*) ("The proposed auction is divided into two stages. In the first stage, risk neutral insurers bid the highest percentage they are willing to pay the representing lawyer, over the hours she invests in the case.").

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studies come from Herbert Kritzer, who surveyed lawyers who work on contingency in Wisconsin.[42] Ninety-five percent of clients chose the percentage method.[43] Most of the time, the agreements employed fixed percentages (most often one-third but occasionally one-fourth), but sometimes the agreements employed percentages that escalated as the litigation matured.[44] None of the percentages escalated or deescalated with the size of the recovery except percentages that escalated for clients who already had a settlement offer when they hired the lawyer.[45] The other 5 percent was split among a variety of methods with a contingent component, but none of them appeared to be contingent lodestar plus percentage.[46]

The Kritzer studies are largely based on fee agreements with unsophisticated clients.[47] For the reasons I noted above, I doubt whether such agreements reflect our best, most rational selves. As I said, I prefer to examine fee agreements with sophisticated clients like large corporations.

Unfortunately, it is difficult to find systematic data from large corporations. Most of the time, of course, they do not hire lawyers on contingency at all; rather, they pay them by the hour with a non-contingent-lodestar method. But there are two areas of litigation where this is not true: patent cases and, of all things, class action cases—in particular, the small number of class action cases comprised of corporate class members. Although there is not much systematic data on the fee agreements sophisticated clients use in these areas, the data that exists all points to the same conclusion: sophisticated clients are just like unsophisticated ones. That is, they use the percentage method, either with fixed percentages or escalating percentages as litigation matures. Moreover, despite the enormous stakes in some of these cases, the percentages are the same ones that unsophisticated clients with smaller cases choose. The contingent-lodestar-plus-percentage formula is nowhere to be found.

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42. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS 19 (2004) ("[T]he geographical focus of my research is the state of Wisconsin . . . . My initial data collection was a survey of Wisconsin contingency fee practitioners . . . ."). Eric Helland and Seth Seabury have surveyed the other studies and found that they all "are quite consistent in their findings. Fees are typically 33 percent." Eric Helland & Seth A. Seabury, *Contingent-Fee Contracts in Litigation: A Survey and Assessment*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 383, 385 (Jennifer Arlen ed., 2013).

43. KRITZER, *supra* note 42, at 39.

44. *See id.* at 39–40.

45. *See id.* at 40.

46. *See id.* Although some of these methods combined lodestar and percentage components, none of the lodestar components were contingent. *See id.* The only examples of the contingent lodestar plus percentage I have seen are in cases where there could be fee shifting: the lawyer might be able to receive a lodestar-based fee-shifting award as well as a percentage of the recovery. *See* 1 ROBERT L. ROSSI, ATTORNEY'S FEES § 10.6 (3d. ed. 2020) ("[Some] courts have held or indicated that an attorney may retain both the fee award and the contingent fee where the fee agreement provides for such a result.").

47. KRITZER, *supra* note 42, at 35 (noting that "personal injury was the dominant type of case" handled by the lawyers who responded to the survey).

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Let me begin with patent litigation. The best study here comes from Professor David Schwartz.[48] Professor Schwartz interviewed patent lawyers and their clients in 2010 and 2011 and obtained copies of their contingent-fee agreements.[49] Many of these cases presented enormous potential damages.[50] Nonetheless, he found that corporations that hire patent litigators on contingency use the same two types of fee agreements that unsophisticated clients do. Those two types were fixed percentages (he found a mean of 38.6 percent) or escalating percentages as the litigation matured (he found a mean upon filing of 28 percent and, through appeal, of 40.2 percent), with more clients choosing the latter over the former.[51] No one escalated or deescalated based on recovery size.

Now consider corporate class action litigation. One place to find data here is in the antitrust cases in the pharmaceutical industry where large corporations sue each other.[52] With a research assistant, I recently collected systematic data in these cases. The cases pitted a class of approximately twenty drug wholesalers—many of which are Fortune 500 companies, some at the very top of that list—against drug manufacturers accused of exploiting their monopolies to inflate drug prices. The potential damages in many of these cases were enormous. The first case in the series settled in April 2003, and, although the cases continue, I stopped collecting them for this Essay in April 2020. During those seventeen years, there have been thirty-three cases; in the Appendix, I set forth the following details about them: how much each case resolved for, how much was sought by class counsel in fees, what the retainer agreements between class counsel and the corporate class representative said, and any positive or negative reaction to the fee requests from the corporate class members. Although the fee requests ranged from a fixed percentage of 27.5 percent to a fixed percentage of one-third, one-third *heavily* dominated: the average was 32.85 percent. (The requests in the Appendix that were near one-third were one-third requests inclusive of

48. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 356–57 (2012).

49. *See id.* at 356–57.

50. *See id.* at 363 ("[The most elite contingent-fee patent litigators] select cases that they perceive to be strong on the merits, and importantly, to have extremely high potential damages. For example, one lawyer in this category explained: '$25 million expected value against one infringer. That's the general rule.' Others had similar high cut points, saying things like 'we'd like to be at $100 million on our cases. Those are good cases. The very least, I don't take a case unless we think we could pull in well into 8 figures.'" (footnote omitted)).

51. *See id.* at 360.

52. Securities fraud class actions are another area of potential data because large sophisticated institutions serve at least as the representative class members. But efforts to systematically collect retainer agreements here have thus far failed because the agreements are rarely publicly disclosed. *See* Lynn A. Baker et al., *Is the Price Right?: An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1389–91 (2015) ("The study's analysis began by looking for cases in which proposed lead plaintiffs offered the court proof of the ex ante fee agreements they had negotiated. Although Congress and the drafters of the lead plaintiff mechanism seemed to anticipate that such agreements would be the norm, there is little evidence that they play a significant role in a court's selection of the lead plaintiff. There were very few cases—just 11.29%—in which the lead plaintiff candidate or the court discussed an ex ante agreement during the appointment process.").

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litigation expenses.) Moreover, although I was able to find retainer agreements in only three of the cases, in all of them, the agreement called for a fixed percentage of one-third. Finally, in the vast majority of cases, one or more of these corporate class members—often the biggest class members—came forward to voice affirmative support for the fee requests, and not a single one of these corporate class members objected to the fee request in any of the thirty-three cases. Although this support among class members for class counsel's fee requests is not formally ex ante market data—the support came at the end of the cases—because it was the same class of corporations in case after case and often the same counsel in case after case, class members could have tried to alter this pattern at any time. But they did not; they have gone along with it for seventeen years. In other words, the corporations in these cases appear perfectly happy with the percentage method and perfectly happy with the same fixed percentage of one-third that most unsophisticated clients also choose.

Although we obviously need more corporate data to draw any firm conclusions, the data we do have forces us to ask why even sophisticated clients eschew the elegance of the contingent-lodestar-plus-percentage formula. One possibility is that the economic modeling is simply missing something. As I noted at the outset, this is one of the limitations of using economic models that are unconfirmed by empirical investigation. Another possibility is path dependence: contingency agreements have been using the percentage method with a one-third percentage for a very long time; maybe inertia explains why that has not changed.[53] On the other hand, the Clermont-Currivan paper has been around for decades and corporate clients are experimenting with many other fee arrangements; why not with this one too? The best answer in my view is something I mentioned above: monitoring preference. Sophisticated clients may find it easier to monitor against premature settlement than they do their lawyers' lodestars. Hence, they choose the percentage method over the contingent lodestar plus percentage. Indeed, dissatisfaction with the lodestar is what has driven them to consider alternative fee arrangements in the first place.[54]

Why these sophisticated clients did not negotiate lower fee percentages than those unsophisticated clients pay is a more difficult question. The sizes of the cases discussed above are large enough that one would think they would present similar economies of scale to the largest class actions;[55] indeed, some of the cases *were* the largest class actions.[56] It may be that it is

53. *Cf.* Peter B. Rutledge & Christopher R. Drahozal, "*Sticky" Arbitration Clauses?: The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 959 (2014) ("[C]ontracts . . . may be 'sticky' and resistant to change.").

54. *See generally* 1 JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 4:7 (2020).

55. *See* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013) ("Many costs of litigation do not depend on the outcome; it is almost as expensive to conduct discovery in a $100 million case as in a $200 million case . . . . There may be some marginal costs of bumping the recovery from $100 million to $200 million, but as a percentage of the incremental recovery these costs are bound to be low.").

56. *See* Appendix.

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expensive to negotiate away from the default one-third arrangement; there are not only transaction costs but strategic uncertainties to consider if the parties have asymmetric information about the merits (something I assumed away when discussing the economic models).[57] A further explanation is that the investment needed to win the cases examined above may have correlated with the stakes of the cases. If this was so, the optimal fixed percentage would remain constant even as the stakes increased.[58] A final explanation is simply that they do not want to exacerbate agency costs and thereby increase the burden of monitoring against premature settlement that comes along with lower percentages.[59]

In any event, although more data is certainly needed, the data we have from sophisticated clients shows that they prefer the same arrangements that unsophisticated clients do: the percentage method with fixed percentages of one-third or escalating percentages as the litigation matures.

III. WHAT SHOULD JUDGES DO IN CLASS ACTIONS?

The previous part showed that economic modeling is indeterminate on how rational absent class members would want to pay class counsel. If it is easier to verify class counsel's lodestar than it is to monitor against premature settlement, then the models suggest the contingent-lodestar-plus-percentage method is ideal. But if it is easier to monitor against premature settlement, the percentage method is better. Whether the percentage should be fixed or escalating and what the percentage should be depends on how well the client can monitor against premature settlement. The (albeit limited) data from sophisticated clients in the market suggests that they believe it is easier to monitor against premature settlement, because they uniformly select the percentage method. The data is mixed between fixed and escalating percentages, but all of the escalation comes from litigation maturity, not recovery size.

Where does that leave our judges overseeing class actions? Although more data is needed to draw firm conclusions, based on what we know, I think judges acting as good fiduciaries could responsibly discharge their duties with either the percentage method or the contingent-lodestar-plus-percentage method. But, for the reasons I explain now, I think judges should usually choose the percentage method. I also think this percentage should either be fixed or escalate with litigation maturity.

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57. *See supra* note 32 and accompanying text. Another explanation comes from Eyal Zamir et al., *Who Benefits from the Uniformity of Contingent Fee Rates?*, 9 REV. L. & ECON. 357, 359 (2013) ("The non-negotiability of the . . . rate precludes lawyers from exploiting their private information about the expected value of the lawsuit and the amount of work it might entail. Clients with a good sense of the ranking of lawyers are able to hire the best lawyer among the ones who are willing to handle the case. The uniformity also enables the clients to retain the transaction's entire surplus.").

58. *See* Hay, *supra* note 37, at 519 ("[C]ases in which the ceiling is high but in which it is costly for the lawyer to move upward should involve the same fee as cases in which the ceiling is low but in which it is easy for the lawyer to move upward." (emphasis omitted)).

59. *See id*. at 511.

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A. Best Practices

First, for the same reason sophisticated corporations seem to opt for the percentage method, so should judges: it will usually be easier for judges to monitor against premature settlement than to verify the lodestar. It is true that judges have experience verifying lodestars; they do it frequently in fee-shifting and bankruptcy cases.[60] But that was true of our corporate clients as well; they pay lawyers noncontingent lodestars all the time. Even still, corporate clients apparently believe it is easier to guard against premature settlement when they hire on contingency. I think the same is probably true for judges. They should be able to look at a case and assess what it is worth in light of the various legal and factual risks more easily than they can assess how many hours it should take to litigate it. Many judges are long out of practice or never practiced in class actions at all. Yet, they observe the outcomes in a variety of cases every single day.

Second, the contingent-lodestar-plus-percentage method comes with an added challenge: it is more difficult to choose the percentage. As I noted above, although the economic models are indeterminate on the right percentage for the percentage method, we at least have data on what even sophisticated clients in enormous cases choose when they use this method. We can use this data to set percentages in class action cases if we use the percentage method. But we do not have such data for the contingent-lodestar-plus-percentage formula because no one uses it. That means judges will have to figure out what the "market" percentage is in this formula through other means.

One way to do this is to create market-like competition by holding an auction for class counsel. Judges could ask lawyers to compete for the right to represent the class by bidding on the smallest percentage they would be willing to accept in the contingent-lodestar-plus-percentage formula. In theory, the lowest bid would represent the market price for a class action lawyer in that particular case. Auctions have great theoretical appeal[61] and judges have even tried them a handful of times in class action cases.[62] But judges and scholars have soured on auctions for a variety of reasons I address below. Although judges and scholars have not considered auctions using the contingent-lodestar-plus-percentage formula, I am not sure the reasons they have soured on them can be overcome by it.

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60. *See* Perdue v. Kenny A. *ex rel*. Winn, 559 U.S. 542, 551 (2010) ("[T]he 'lodestar' figure has . . . become the guiding light of our fee-shifting jurisprudence."); 1 JOAN N. FEENEY ET AL., BANKRUPTCY LAW MANUAL § 4:38 (5th ed. 2020) ("Courts use a lodestar calculation to determine reasonableness of any fee application.").

61. *See* FITZPATRICK, *supra* note 7, at 98 (noting that an auction would in theory "drive down the winning fee percentage to the lowest possible price"); Macey & Miller, *supra* note 27, at 108–10 (noting that an auction could reduce agency costs and transaction costs).

62. For a detailed review of litigation where the presiding judge used an auction to select class counsel, see LAURAL L. HOOPER & MARIE LEARY, FED. JUD. CTR., AUCTIONING THE ROLE OF CLASS COUNSEL IN CLASS ACTION CASES: A DESCRIPTIVE STUDY (2001), https://www.fjc.gov/sites/default/files/2012/auctioning.pdf [https://perma.cc/7QJR-F54H].

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Perhaps the most serious concern with fee auctions is that judges have difficulty picking the winning bid. Part of this concern stems from the fact that the judges who tried auctions permitted lawyers to submit bids that were so complex—the lawyers often did not bid fixed percentages—that it was difficult to figure out which bid was the lowest one.[63] I think this concern is easy to overcome by using the contingent-lodestar-plus-percentage formula: judges could allow the lawyers to bid only on the percentage component and only a fixed percentage. But part of the concern stems from the fact that the lowest bidder may not be the best lawyer and it is difficult for judges to trade quality for price.[64] This concern is not so easy to overcome. In public contracting, this trade-off is made either by restricting bidders to those that are well qualified for the job or by using a scoring system that tries to assign points for price along with other considerations.[65] I could imagine using the former approach in auctions for class counsel—for example, the judge could limit bidders to the ten or twenty most experienced class action firms. However, that would lock incumbents into class counsel positions and make it difficult for new firms to enter the market. That is good neither for competition nor for furthering the desire many have to diversify the profession.[66] The latter approach strikes me as hopelessly subjective and

63. Fisch, *supra* note 38, at 674–82 (discussing the difficulty of selecting the lowest bidder in auctions for class counsel); *see also* THIRD CIR. TASK FORCE ON THE SELECTION OF CLASS COUNS., FINAL REPORT 49–51 (2002), https://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf [https://perma.cc/7G8Y-Q7ZF] (same).

64. *See* Fisch, *supra* note 38, at 683–90 (noting that "a lead counsel auction cannot select among competing bids solely on the basis of price" and discussing the difficulties posed by incorporating an analysis of firm quality into the auction process).

65. 48 C.F.R. § 9.201 (2020) ("Qualified bidders list (QBL) means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements. Qualified manufacturers list (QML) means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product."); *id.* § 15.305 ("Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings."); 1 STEVEN FELDMAN, GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING § 10:20 (2020) (providing an example of a scoring system).

66. *See* Ralph Chapoco, *Calls for Lawyer Diversity Spread to Complex Class Litigation*, BLOOMBERG L. (July 30, 2020, 4:45 AM) https://news.bloomberglaw.com/social-justice/calls-for-lawyer-diversity-spread-to-complex-class-litigation [https://perma.cc/CQZ6-KSGH] ("Judge James Donato of the U.S. District Court for the Northern District of California declined to certify two firms . . . as interim co-lead class counsel in a securities action . . . . In a July 14 order, Donato cited 'a lack of diversity in the proposed lead counsel,' noting that all four lead counsel were male, and [had] been lead counsel in other cases, what legal experts refer to as 'repeat players.'" (quoting Order Re: Consolidation & Interim Class Counsel, *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 6130884 (N.D. Cal. July 14, 2020))); *see also* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity*, 17 CARDOZO J.L. & GENDER 321, 324–27 (2011) (discussing Judge Harold Baer's orders imposing a diversity requirement on class counsel).

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therefore unlikely to inspire much more confidence in fee auctions than we have today.[67]

Another concern with auctions is that they can exacerbate agency costs.[68] For example, in auctions that use the percentage method, the lawyer winning the auction with the lowest bid will also have the strongest incentive to settle the case too early for too little. If the judge cannot monitor the lawyer well enough, then this could end up making absent class members worse off rather than better: they will end up paying a smaller fee percentage but on an even smaller recovery. The contingent-lodestar-plus-percentage formula solves this monitoring problem, but as I noted, it introduces another monitoring problem and, if I am correct above, a worse one: verifying the lodestar component. In short, contingent-lodestar-plus-percentage auctions are no more promising than the percentage auctions that have largely failed. Better, then, to stick to the percentage method where we have preexisting data to draw on.

Third, when judges use the percentage method, the percentages should be fixed or escalate with litigation maturity. Although it is not unheard of to use deescalating or escalating percentages based on recovery size, I believe they were not found in the data discussed above because it is too difficult to set the cut points ex ante.[69] Before discovery and the like, it is difficult to know how good or bad the case is and where to start escalating or deescalating. The cut points for litigation maturity are well known (even if imperfect[70]): trials, appeals, and maybe a few others.

B. Current Practices Revisited

The conclusions in the previous section affirm some of what judges do now to award fees in class actions, but they call into question some of what they do, too.

67. *See* 2 FELDMAN, *supra* note 65, § 12:2 ("[C]ontracting officials usually have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results [to award a contract]."); THIRD CIR. TASK FORCE ON THE SELECTION OF CLASS COUNS., *supra* note 63, at 51 ("The courts that have conducted auctions have recognized that price cannot be the sole factor in awarding class counsel; there must be some quality control as well. Yet if the court takes into account anything other than price to choose among competing bids, it enters into the same kind of subjective determinations as occur under the traditional method of appointing class counsel.").

68. *See* Fisch, *supra* note 38; *see also* THIRD CIR. TASK FORCE ON THE SELECTION OF CLASS COUNS., *supra* note 63, at 45 ("The auction method could encourage firms to submit unduly low bids in order to win the position of class counsel. Underbidding can result in lawyers cutting corners or settling too early in order to maintain a profit margin.").

69. *See* Fisch, *supra* note 38, at 674–78 (discussing the difficulty of evaluating bids with changing percentages).

70. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 201 (1987) ("It is at best a rough corrective . . . because it substitutes a small number of discrete increments for what is in fact a continuous process—the reduction in the attorney's expected future costs as the case progresses.").

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Let me begin with the good: judges often use the percentage method to award fees in class actions.[71] This was not always the case, and much to the credit of our judges, they have been persuaded by economic models and market data to replace the lodestar method with the percentage method in large numbers.[72] But now the bad.

First, many judges do not use a "pure" percentage method but instead something called the "percentage method with a lodestar cross-check." This is something of the opposite of the Clermont-Currivan formula. Rather than contingent lodestar *plus* a percentage of the recovery, this method awards a contingent percentage *capped* at some multiple of the lodestar. What multiple is used in the cap? It is up to the discretion of judges, and they seem most interested in preventing the appearance of a "windfall" to the lawyer.[73] I have never seen the lodestar cross-check formally modeled, but it would seem this method would behave like the percentage method when the lodestar is high but like the contingent-lodestar method when the lodestar is low. Because it will not be known at the outset whether a case will be a high or low lodestar endeavor, for all the same reasons rational clients who could not monitor well would reject the lodestar method, they would reject this method too.[74] Indeed, I have never seen this method used in the market for contingency representation, whether among sophisticated or unsophisticated clients. If judges want to do what rational absent class members would want to do, then they should not do this.

Second, judges that use the percentage method presume that the fee percentage in class actions should be lower than one-third. I and others have found that the average fee percentage is only 25 percent,[75] and some circuits even go so far as to explicitly require district courts to presume that 25 percent is the right number.[76] But, if the data discussed above is

71. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 832 (2010) (finding that courts use the percentage method 69 percent of the time, more often than not without the lodestar cross-check); *see also* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937, 945 (2017) (finding the percentage method with lodestar cross-check was used approximately 38 percent of the time versus approximately 54 percent for the percent method without lodestar cross-check).

72. *See* Fitzpatrick, *supra* note 10, at 2052.

73. 5 RUBENSTEIN, *supra* note 8, § 15:85 ("[M]any courts also undertake a lodestar cross-check as a means of ensuring that the percentage award is not a windfall.").

74. *See* FITZPATRICK, *supra* note 7, at 92 (explaining that the lodestar cross-check is "the same thing as the lodestar method, just dressed up in nicer clothing"); *see also* Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 636 (7th Cir. 2011) ("The . . . argument . . . that any percentage fee award exceeding a certain lodestar multiplier is excessive . . . echoes the 'megafund' cap we rejected in *Synthroid*.").

75. *See* Fitzpatrick, *supra* note 71, at 833 (finding that "[t]he average award [under the percentage method] was 25.4 percent and the median was 25 percent"); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD., 241, 260 (2010) (finding that "[t]he median and mean fee to recovery ratios were 0.24 and 0.25, respectively" in percentage method cases).

76. Fitzpatrick, *supra* note 71, at 833 ("[T]he Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases."); *see also* Eisenberg & Miller, *supra* note 75, at 259 ("The Ninth Circuit has a 25 percent benchmark fee in common

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representative, 25 percent is lower than the fixed percentages that even sophisticated clients pay in the market for contingency representation.

The lower percentage could be justified for class settlements if judges awarded higher percentages after class trials. This would be consistent with the models that recommend escalating percentages as the litigation matures as well as the market data that often shows escalating fees in patent cases (where average percentages began at 28 percent and rose to over 40 percent if an appeal was taken). But because trials are so rare in class actions, there are no published studies that demonstrate that is what judges are in fact doing.[77]

Rather, the lower percentage in class actions has been justified on account of the economies of scale that come from class versus individual representation. The notion here is that it is not one thousand times harder to represent a class of one thousand than it is a class of one, and a competitive market would bring marginal price down to marginal cost.[78] It is true that the economic models show that the optimal percentage is lower in higher stakes cases if the investment required to win the cases does not go up as quickly.[79] But the data discussed above suggests that sophisticated clients do not negotiate lower percentages in bigger cases where we would expect the same economies: it is not one thousand times harder to win a $10 billion patent case than it is a $10 million one.[80] As I noted, I am not sure why sophisticated clients do not negotiate lower percentages in their biggest contingency cases despite the economies of scale. It could simply be a function of the limited data, but the best explanations I can think of are that bringing marginal price down to marginal cost is not free (it increases the burden of monitoring against premature settlement) and negotiation introduces transaction costs and strategic uncertainty. If corporate clients do not think they can discharge these burdens, should judges think they can? I don't think so; as I noted above, it is doubtful that judges are better lawyer monitors than sophisticated corporations. Moreover, we have no way of knowing how great the economies of scale are in any given case and, therefore, no way of knowing what the marginal price should be—unless we hold an auction and take on the difficulties with that, as discussed above. All of this argues against deviating from the data from sophisticated clients in the market for large-case contingency representation. If judges want to be good fiduciaries for absent class members, then they should probably presume that one-third is the correct fixed percentage, not one-fourth.

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fund cases but allows departures based on individual case factors, and the Eleventh Circuit has indicated that its district courts view 25 percent as a benchmark.").

77. Professor Bill Rubenstein, however, has proprietary data suggesting judges do this. *See* Expert Declaration of William B. Rubenstein in Support of the Plaintiffs' Motion for Attorney's Fees & Expenses at 12, Hale v. State Farm Mut. Ins. Co., No. 12-cv-00660 (S.D. Ill. Oct. 16, 2018), ECF No. 954-3.

78. Fitzpatrick, *supra* note 10, at 2063 ("[A]ggregate litigation permits plaintiffs to reap the benefits of economies of scale in litigation, and, in a competitive marketplace, one might expect those economies to be passed on to clients in the form of lower attorneys' fees.").

79. *See* Hay, *supra* note 37, at 517–23.

80. *See* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013).

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Third, many judges choose percentages even below 25 percent when class counsel recovers more than $100 million simply because the recovery is so large. As I and others have found, the average percentages judges choose are lower in recoveries over $100 million, and they get even lower until they reach around 10 percent in billion dollar recoveries.[81] This is even worse than the practice I described above that presumes lawyers should get less than one-third in a class action because the case is a class action. Rather, here, courts are paying the lawyer a different percentage at the end of the very same case depending on whether the lawyer recovered a lot or a little; the more the lawyer recovered, the lower the fixed percentage awarded at the end. This sort of arrangement would obviously fare terribly in economic models because it dramatically exacerbates agency costs: now the lawyer can be made better off by settling cases for smaller recoveries than larger recoveries, even if lawyer effort is kept constant.[82] That only happens with fixed percentages that do not vary with recovery size if lawyers can save effort.[83] For this reason, varying a fixed percentage on recovery size like this is unheard of in the marketplace.[84]

In the Seventh Circuit, courts sometimes decrease percentages *marginally* with recovery size—for example, paying the lawyer one-third of the first $100 million of a recovery and 25 percent of the next $100 million.[85] As I noted above, the economic models prefer fixed or marginally increasing percentages; marginally decreasing percentages exacerbate rather than mitigate agency costs.[86] Although the data from sophisticated clients that I

81. Fitzpatrick, *supra* note 71, at 838 ("[I]t appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent."); *see also* Eisenberg & Miller, *supra* note 75, at 265 (reporting a mean fee of 12.0 percent and a median fee of 10.2 percent for recoveries over $175.5 million).

82. *See In re* Synthroid Mktg. Litig., 264 F.3d 712, 718 (7th Cir. 2001) (noting that "[u]nder the district court's approach" of capping attorneys' fees at 10 percent of recovery for settlements over $75 million, "no sane lawyer would negotiate a settlement of more than $74 million and less than $225 million; even the higher figure would make sense only if it were no more costly to obtain $225 million for the class than to garner $74 million"); FITZPATRICK, *supra* note 7, at 93–94 (providing an example and explaining "if you pay the lawyer a bigger percentage of smaller sums, he or she is better off sometimes resolving cases for smaller sums").

83. *See supra* note 36 and accompanying text.

84. *In re Synthroid*, 264 F.3d at 718 ("[C]ounsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients (the consumer fund, recall, is $88 million). Why there should be such a notch is a mystery. Markets would not tolerate that effect; the district court's approach compels it.").

85. *Id.* ("A notch could be avoided if the 10% cap in 'megafund' cases were applied only to the *portion* of the recovery that exceeded $74 million, but that is not what the district court did; it capped fees at 10% of the whole fund.").

86. *See* Fisch, *supra* note 38, at 678 ("Because it fails to align counsel's interests with those of the plaintiff class at high levels of recovery, a declining percentage of recovery fee structure is especially likely to create a significant moral hazard problem."); *see also In re Synthroid*, 264 F.3d at 721 ("[D]eclining marginal percentages . . . create declining marginal

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discussed did not find any marginally decreasing rates, such rates are at least not unheard of in the marketplace.[87] Nonetheless, given that they increase agency costs and even sophisticated clients apparently do not use them often (as I said, I suspect because it is so difficult to set the cut points ex ante),[88] judges should not use them either, unless judges believe they can monitor and set cut points better than even large corporations believe they can—something, I have said, that I find implausible. Rather, judges should either stick with fixed percentages that do not vary with recovery or use percentages that escalate with litigation maturity, like sophisticated clients usually do. (Although escalating percentages based on recovery size are, too, not unheard of,[89] they introduce the same cut-point problem discussed above.)

CONCLUSION

If judges want to act as fiduciaries for absent class members like they say they do, then they should award attorneys' fees in class actions the way that rational class members who cannot monitor their lawyers well would do so at the outset of the case. Economic models suggest two ways to do this: (1) pay class counsel a fixed or escalating percentage of the recovery or (2) pay class counsel a percentage of the recovery plus a contingent lodestar. Which method is better depends on whether it is easier to verify class counsel's lodestar (which favors the contingent-lodestar-plus-percentage method) or to monitor against premature settlement (which favors the percentage method) as well as whether it is possible to run an auction to determine the market percentage for the contingent-lodestar-plus-percentage method. The (albeit limited) data from sophisticated clients who hire lawyers on contingency shows that such clients overwhelmingly prefer to monitor against premature settlement, since they always choose the percentage method. Whether the percentage should be fixed or escalating depends on how well clients can do this monitoring. Data from sophisticated clients shows both that they choose to pay fixed one-third percentages or even higher escalating percentages based on litigation maturity just like unsophisticated clients do, and they do so even in the most enormous cases. Unless judges believe they can monitor

returns to legal work . . . . This feature exacerbates the agency costs inherent in any percentage-of-recovery system.").

87. *See* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013) ("Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards)."); *In re Synthroid*, 264 F.3d at 721 (noting that "negotiations and auctions often produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case").

88. Daniel Rubinfeld and Suzanne Scotchmer have reported that such arrangements are "quite common," but they did not cite anything for that assertion. *See* Rubinfeld & Scotchmer, *supra* note 22, at 415.

89. *See, e.g.*, *In re* AT&T Corp., 455 F.3d 160, 163 (3d Cir. 2006). This case described the following fee agreement between class counsel and "the lead plaintiff New Hampshire Retirement Systems": "The formula provided attorneys' fees would equal 15% of any settlement amount up to $25 million, 20% of any settlement amount between $25 million and $50 million, and 25% of any settlement amount over $50 million."

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differently than sophisticated corporate clients can, judges acting as good fiduciaries should follow these practices as well. This conclusion calls into question several fee practices commonly used by judges today: (1) presuming that class counsel should earn only 25 percent of any recovery, (2) reducing that percentage further if class counsel recovers more than $100 million, and (3) reducing that percentage even further if it exceeds class counsel's lodestar by some multiple.

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APPENDIX

Direct Purchaser Pharmaceutical Antitrust Settlements, April 2003–April 2020

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
November 9, 2018	Hartig Drug Co. v. Senju Pharmaceutical Co.[90]	$9,000,000	33.33%	N/A	None	No
October 24, 2018	*In re* Blood Reagents Antitrust Litigation[91]	$41,500,000	33.33%	N/A	None	No
September 20, 2018	*In re* Lidoderm Antitrust Litigation[92]	$166,000,000	27.11%	33.33%	None	Yes
July 18, 2018	*In re* Solodyn (Minocycline Hydrochloride) Antitrust Litigation[93]	$76,846,250	31.45%	N/A	None	No
April 18, 2018	American Sales Co. v. Pfizer, Inc.[94]	$94,000,000	32.69%	33.33%	None	Yes

90. Settlement Agreement Between Plaintiff Hartig Drug Co. Inc. & Defendants Senju Pharmaceutical Co. Ltd., Kyorin Pharmaceutical Co., Ltd. & Allergan, Inc., Hartig Drug Co. v. Senju Pharm. Co., No. 14-00719 (D. Del. Feb. 16, 2018).

91. Order Granting Plaintiffs' Motion for (1) an Award of Attorneys' Fees, (2) Reimbursement of Litigation Expenses & (3) Service Awards for the Class Representatives, *In re* Blood Reagents Antitrust Litig., MDL No. 09-2081 (E.D. Pa. Oct. 24, 2018).

92. Order Granting Final Approval of Settlement with Direct Purchaser Class & Entering Final Judgment of Dismissal with Prejudice, *In re* Lidoderm Antitrust Litig., No. 14-md-02521 (N.D. Cal. Sept. 20, 2018).

93. Settlement Agreement Between Implax Laboratories, Inc. & the Direct Purchaser Class, *In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., MDL No. 14-md-2503 (D. Mass. Mar. 10, 2018).

94. Order Granting Direct Purchaser Class Plaintiffs' Unopposed Motion for Final Approval of Settlement & Distribution Plan, Attorneys' Fees, Reimbursement of Expenses, Service Awards to the Class Representative Plaintiffs & Entry of Final Judgment & Order of Dismissal, Am. Sales Co. v. Pfizer, Inc., No. 14-cv-00361 (E.D. Va. Apr. 18, 2018).

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Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
December 19, 2017	*In re* Aggrenox Antitrust Litigation[95]	$146,000,000	33.33%	33.33%	None	Yes
December 7, 2017	*In re* Asacol Antitrust Litigation[96]	$15,000,000	33.33%	N/A	None	Yes
October 23, 2017	Castro v. Sanofi Pasteur, Inc.[97]	$61,500,000	33.33%	N/A	None	Yes
October 5, 2017	*In re* K-Dur Antitrust Litigation[98]	$60,200,000	33.33%	N/A	None	Yes
October 15, 2015	King Drug Co. of Florence v. Cephalon, Inc.[99]	$512,000,000	27.50%	N/A	None	Yes
May 20, 2015	*In re* Prograf Antitrust Litigation[100]	$98,000,000	33.33%	N/A	None	Yes

95. Final Judgment & Order of Dismissal, *In re* Aggrenox Antitrust Litig., No. 14-md-02516 (D. Conn. Dec. 19, 2017).

96. Order & Final Judgment Finding Notice to Satisfy Due Process, Approving Settlement, Awarding Attorneys' Fees & Expenses, Approving Service Awards to Representative Plaintiffs & Ordering Dismissal with Prejudice, *In re* Asacol Antitrust Litig., No. 15-cv-12730 (D. Mass. Dec. 7, 2017).

97. Order for an Award of Attorneys' Fees, Reimbursement of Expenses & Payment of Service Awards to the Class Representatives, Castro v. Sanofi Pasteur, Inc., No. 11-cv-7178 (D.N.J. Oct. 23, 2017).

98. Order Granting Final Judgment & Order of Dismissal Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against Defendants, *In re* K-Dur Antitrust Litig., MDL No. 1419, No. 01-cv-01652 (D.N.J. Oct. 5, 2017).

99. Order Granting Final Judgment & Order of Dismissal Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against the Cephalon Defendants, King Drug Co. of Florence v. Cephalon, Inc., No. 06-cv-01797 (E.D. Pa. Oct. 15, 2015).

100. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal with Prejudice, *In re* Prograf Antitrust Litig., MDL No. 2242 (D. Mass. May 20, 2015).

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Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
January 20, 2015	*In re* Prandin Direct Purchaser Antitrust Litigation[101]	$19,000,000	33.33%	N/A	None	Yes
September 15, 2014	Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co.[102]	$15,000,000	33.33%	N/A	None	No
August 6, 2014	Louisiana Wholesale Drug Co. v. Pfizer, Inc.[103]	$190,416,438	33.33%	N/A	None	Yes
June 30, 2014	*In re* Skelaxin (Metaxalone) Antitrust Litigation[104]	$73,000,000	33.33%	N/A	None	Yes
April 16, 2014	*In re* Plasma-Derivative Protein Therapies Antitrust Litigation[105]	$64,000,000	33.33%	N/A	None	No

101. Order & Final Judgment Approving Class Action Settlement, *In re* Prandin Direct Purchaser Antitrust Litig., No. 10-cv-12141 (E.D. Mich. Jan. 20, 2015).

102. Order, Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co., No. Civ. 12-3824 (E.D. Pa. Sept. 15, 2015).

103. Final Judgment & Order of Dismissal Approving Proposed Class Settlement & Dismissing Actions, La. Wholesale Drug Co. v. Pfizer, Inc., Nos. 02-1830 & 02-2731 (D.N.J. Aug. 6, 2014).

104. Order Granting Class Counsel's Motion for Attorney Fees, Reimbursement of Expenses & Awards for the Named Plaintiffs, *In re* Skelaxin (Metaxalone) Antitrust Litig., MDL No. 2343, No. 12-cv-83 (E.D. Tenn. June 30, 2014).

105. Corrected Order & Judgment Approving Settlement & Dismissing with Prejudice Baxter International, Inc. & Baxter Healthcare Corporation, *In re* Plasma-Derivative Protein Therapies Antitrust Litig., MDL No. 2109, No. 09 C 7666 (N.D. Ill. Apr. 16, 2014).

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Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
June 14, 2013	American Sales Co. v. Smithkline Beecham Corp.[106]	$150,000,000	33.33%	N/A	None	Yes
April 10, 2013	Louisiana Wholesale Drug Co. v. Becton Dickinson & Co.[107]	$45,000,000	33.33%	N/A	None	Yes
November 7, 2012	*In re* Wellbutrin XL Antitrust Litigation[108]	$37,500,000	33.33%	N/A	None	Yes
May 31, 2012	Rochester Drug Co-Operative, Inc., v. Braintree Laboratories Inc.[109]	$17,250,000	33.33%	N/A	None	Yes
January 12, 2012	*In re* Metoprolol Succinate Antitrust Litigation[110]	$20,000,000	33.33%	N/A	None	Yes

106. Final Order & Judgment Approving Settlement, Am. Sales Co. v. Smithkline Beecham Corp., No. 08-cv-3149 (E.D. Pa. June 14, 2013).

107. Order & Final Judgment Approving Direct Purchaser Class Settlement, Awarding Attorneys' Fees & Expenses, Awarding Incentive Awards to Class Representatives, Approving Plan of Allocation & Dismissing Claims Against Defendant, La. Wholesale Drug Co. v. Becton Dickinson & Co., MDL No. 1730, No. 05-cv-1602 (D.N.J. Apr. 10, 2013).

108. Final Order & Judgment Approving Settlement, *In re* Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012).

109. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to the Defendant, Rochester Drug Co-Operative, Inc., v. Braintree Lab'ys, Inc., No. 07-142 (D. Del. May 31, 2012).

110. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiffs Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Metoprolol Succinate Antitrust Litig., No. Civ 06-52 (D. Del. Jan. 12, 2012).

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Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
November 28, 2011	*In re* DDAVP Direct Purchaser Antitrust Litigation[111]	$20,250,000	33.33%	N/A	None	Yes
November 21, 2011	*In re* Wellbutrin SR Antitrust Litigation[112]	$49,000,000	33.33%	N/A	None	Yes
August 11, 2011	Meijer, Inc. v. Abbott Laboratories[113]	$52,000,000	33.33%	N/A	None	Yes
January 31, 2011	*In re* Nifedipine Antitrust Litigation[114]	$35,000,000	33.33%	N/A	None	Yes
January 25, 2011	*In re* Oxycontin Antitrust Litigation[115]	$16,000,000	33.33%	N/A	None	Yes
April 23, 2009	*In re* Tricor Direct Purchaser Litigation[116]	$250,000,000	33.33%	N/A	None	Yes

111. Order & Final Judgment Approving Settlement Between Purchaser Class Plaintiffs & Defendants Ferring B.V., Ferring Pharmaceuticals, Inc. & Aventis Pharmaceuticals, Inc., *In re* DDAVP Direct Purchaser Antitrust Litig., No. 05 Civ. 2237 (S.D.N.Y. Nov. 28, 2011).

112. Order & Final Judgment Approving Direct Purchaser Class Settlement & Awarding Attorneys' Fees, Reimbursement of Costs & Class Representative Awards, *In re* Wellbutrin SR Antitrust Litig., No. Civ. 04-5525 (E.D. Pa. Nov. 21, 2011).

113. Order Granting Final Approval of Settlement & Entering Final Judgment of Dismissal with Prejudice, Meijer, Inc. v. Abbott Lab'ys, No. C. 07-5985 (N.D. Cal. Aug. 11, 2011).

114. Order Granting Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Additional Expenses & Awards to Certified Class Representatives, *In re* Nifedipine Antitrust Litig., MDL No. 1515, No. 03-MC-223 (D.D.C. Jan. 31, 2011).

115. Order & Final Judgment Approving Settlement Between Direct Purchaser Class Plaintiffs & Defendants Purdue Pharma L.P., Perdue Frederick Co., P.F. Laboratories, Inc., Purdue Pharmaceuticals L.P. & Purdue Pharma Inc., Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Oxycontin Antitrust Litig., No. 04-md-1603 (Jan. 25, 2011 S.D.N.Y.).

116. Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Tricor Direct Purchaser Litig., No. 05-340 (D. Del. Apr. 23, 2009).

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Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
April 20, 2009	Meijer, Inc. v. Barr Pharmaceuticals, Inc.[117]	$22,000,000	33.33%	N/A	None	Yes
November 9, 2005	*In re* Remeron Direct Purchaser Antitrust Litigation[118]	$75,000,000	33.33%	N/A	None	Yes
April 19, 2005	*In re* Terazosin Hydrochloride Antitrust Litigation[119]	$74,572,327	32.41%	N/A	None	Yes
November 30, 2004	North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.[120]	$50,000,000	33.33%	N/A	None	No
April 9, 2004	*In re* Relafen Antitrust Litigation[121]	$175,000,000	33.33%	N/A	None	No

117. Order & Final Judgment Approving Settlement Between Direct Purchaser Class Plaintiffs & Defendant Barr Pharmaceuticals, Inc., Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, Meijer, Inc. v. Barr Pharms., Inc., No. Civ. 05-2195 (D.D.C. Apr. 20, 2009).

118. Final Judgment & Order of Dismissal Approving Proposed Settlement & Dismissing Actions, *In re* Remeron Direct Purchaser Antitrust Litig., No. 03-CV-0085 (D.N.J. Nov. 9, 2005).

119. Order & Final Judgment, *In re* Terazosin Hydrochloride Antitrust Litig., MDL No. 99-1317, Nos. 98-3125 & 99-7143 (S.D. Fla. Apr. 19, 2005).

120. Final Order & Judgment Approving Settlement Between Class Plaintiff & Defendant Bristol-Myers Squibb Company, N. Shore Hematology-Oncology Assocs., P.C. v. Bristol-Myers Squibb Co., No. 04cv248 (D.D.C. Nov. 30, 2004).

121. Order & Final Judgment, *In re* Relafen Antitrust Litig., No. 01-12239 (D. Mass. Apr. 9, 2004).

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Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
April 11, 2003	Louisiana Wholesale Drug Co. v. Bristol-Myers Squibb Co.[122]	$220,000,000	32.96%	N/A	None	Yes
			N = 33 Median = 33.33% Mean = 32.85%	3/33	0/33	26/33

122. Order & Final Judgment, La. Wholesale Drug Co. v. Bristol-Myers Squibb Co., MDL No. 1413, No. 01-CV-7951 (S.D.N.Y. Apr. 11, 2003).

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Documents reviewed:

- Opinion (of the Federal Circuit on appeal of the order granting the motion to dismiss) (document 28, filed 5/15/15)
- Plaintiffs' Pre-Mediation Statement and exhibits thereto (undated)
- Plaintiffs' Motion to Certify Class Action (document 127, filed 11/30/17) and Appendix thereto (document 127-1)
- Plaintiffs' Reply in Support of Motion to Certify Class Action (document 133, filed 2/23/18) and Appendix thereto (document 133-1)
- Opinion and Order (granting motion for class certification) (document 138, filed 6/7/18)
- Second Amended Complaint (document 155, filed 8/29/18)
- Plaintiffs' Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Action Settlement and Approval of Notices of Class Action Settlement (document 245, filed 7/12/21) and the Appendix thereto (document 245-1), including Exhibit 2 ("Settlement Agreement")
- Opinion and Order (granting motion for preliminary approval) (document 248, filed 7/16/21)
- Declaration of Michael Hamilton in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Litigation Expenses and Case Contribution Awards ("Hamilton Declaration") (filed herewith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER,
AUDRICIA BROOKS,
DEBORAH PLAGEMAN,
JENNIFER ALLRED,
MICHELE GAVIN,
STEPHEN DOYLE, on behalf of themselves
And all others similarly situated,

Plaintiffs,

v. No. 12-920C
(Judge Kaplan)

THE UNITED STATES,

Defendant.

DECLARATION OF MICHAEL HAMILTON IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AGREEMENT AND MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION EXPENSES AND CASE CONTRIBUTION AWARDS

I, Michael Hamilton, pursuant to 28 U.S.C § 1746, declare as follows:

1. I am Lead Counsel for the Plaintiffs in the above-captioned lawsuit.

2. I have engaged in a civil litigation practice since 1977, concentrating on the representation of unions and employees in labor and employment litigation, consumers in class action litigation and whistleblowers in False Claims Act litigation.

3. I received my undergraduate degree from the University of Denver in 1974 and my law degree from the University of Arkansas, Leflar Law Center in 1977.

4. I am admitted to practice in Arkansas, Tennessee, the U.S. Court of Federal Claims, the U.S. District Courts for the Eastern and Western Districts of Arkansas, the

Eastern, Middle and Western Districts of Tennessee, Central District of Illinois, Southern and Northern Districts of Iowa, Western District of Michigan, Eastern District of North Carolina District of Nebraska, Southern District of Ohio and the Southern District of Texas. I am also admitted to practice before the U.S. Courts of Appeal for the Sixth and Eighth Circuits.

5. I have received Martindale Hubbell's AV Preeminent rating. I was elected as a Fellow of the College of Labor and Employment Lawyers in 2001 and I have been a member of the AFL-CIO Union Lawyers Alliance, previously the AFL-CIO Lawyers Coordinating Committee since 1982.

6. Since 1998, I have been the resident partner in the Nashville, Tennessee office of Provost Umphrey Law Firm, LLP.

7. Before practicing with Provost Umphrey, I was a partner at Gardner, Middlebrooks, Fleming & Hamilton, P.C., Associate General Counsel of the United Paperworkers International Union, AFC-CIO, CLC, and Of Counsel to Kaplan, Brewer & Bilheimer, P.A. I also served as Counsel to Member Betty Murphy of the National Labor Relations Board.

8. Examples of notable cases in which I have served as lead or co-lead counsel in class and/or collective action wage and hour and consumer litigation include the following:

a. *Bouaphakeo v. Tyson Foods, Inc*., 136.S.CT. 1036 (2016), a FLSA and state law collective and class action on behalf of over 3,300 current and former employees.

b. *Bogner v. Precision Broadband Inc*., Case No. 2:12-cv-431 (S.D. Ohio), a FLSA collective action involving broadband installers in Kentucky and Ohio.

c. *Miner, et al. v. Philip Morris Companies, Inc*., et al., Case No. 60-cv-03-4661 Pulaski County, Arkansas Circuit Court, class counsel for Arkansas consumers in Deceptive Trade Practices Act case.

d. *Hootman et al. v. Excel Corporation*, Case No. 4:98-cv-90538 (S.D. Iowa), a FLSA and state law collective and class action on behalf of approximately 3,000 current and former employees.

e. *Anderson et al. v. Swift and Company*, Case No. 99-cv-798 (D. Minn.), a FLSA collective action on behalf of approximately 4,000 current and former employees.

f. *Churchill et al. v. Farmland Foods, Inc*., Case No. 4:06-cv-4023 (CD Ill.), a FLSA and state law collective and class action on behalf of approximately 2,000 current and former employees.

g. *Bessey et al v. Packerland Plainwell, Inc*., Case No. 4:06-cv-0095 (W.D. Mich.), a FLSA and state law collective and class action on behalf of approximately 1,800 current and former employees.

h. *Brown et al. v. Sanderson Farms, Inc*., Case No. 2:06-cv-2946 (EDLa.), a FSLA multi-state collective action on behalf of approximately 8,000 current and former employees.

i. *Guyton et al. v. Tyson Foods, Inc*., Case No. 307-cv-88 (S.D. Iowa), a FLSA and state law collective and class action on behalf of approximately 2,500 current and former employees.

j. *Acosta et al. v. Tyson Foods, Inc*., Case No. 8:08-cv-0021 (D. Neb.), a FLSA and state law collective and class action involving over 2,500 current and former employees.

k. *Edwards et al. v. Tyson Foods, Inc*., Case No. 4:08-cv-00113-JAJ-TBS (S.D. Iowa), a FLSA and state law collective and class action on behalf of approximately 10,000 current and former employees.

l. *Gomez et al. v. Tyson foods, Inc*., Case No. 8:08-cv-00021-JFB-TDT (D. Neb.), a FLSA and state law collective and class action involving over 1,900 current and former employees.

m. *Briles et al. v. Cargill Meat Solutions Corporation*, Case No. 4:10-cv-00163-JAJ-RAW (SD Iowa), a FLSA and state law collective and class action involving thousands or current and former employees.

n. *Lee Lewis and Janice Hosler, et al. v. Smithfield Packing Company, Inc.*, Case No. 7:07-cv-166-H (EDN.C.) a FLSA collective action involving thousands of current and former employees.

o. *Rayanne Regmund, et al. v. Talisman Energy USA, Inc*., Case No. 4:16-cv-02960 (SDTX), a class action on behalf of over 3,000 oil and gas royalty owners.

My partner Guy Fisher entered this case in August, 2016 to assist in class and merits discovery and to serve as co-lead trial counsel with me. Mr. Fisher graduated from the University of Houston School of Law in 1990 and has concentrated his practice on mass tort and complex civil litigation including serving as co-class counsel in *Miner, et al. v. Philip Morris Companies, Inc*. referenced in sub-paragraph (c) above.

9. I have been involved in the prosecution of this lawsuit since its inception. I have served as Co-Counsel, then as Co-Lead Class Counsel and finally as Lead Class Counsel following David Cook's withdrawal. In these roles, I have been involved in every aspect of the case including the first meeting with Ms. Mercier in September, 2012, case development, investigation, legal research and analysis, communication with clients, drafting discovery requests, retaining experts, reviewing documents, taking depositions, directing case strategy, drafting and editing pleadings and coordinating the work of the team of lawyers from five firms who have served as Co-Counsel in litigating this case. The legal team's work included meetings with Class Representatives, meetings with collective bargaining representatives, research of thousands of pages of VA regulations, handbooks, and other official documents in preparation of the pleadings and related analysis of large numbers of cases decided by federal courts. Legal services performed also included drafting three Complaints, a response to a Motion to Dismiss, appellate briefs, the Motion for Class Certification, Notices to putative class members, three sets of interrogatories and three sets of requests for production, and numerous motions and hearings related to the Defendant's discovery responses. In addition, the legal team's work included review of over a million pages of documents, development of a damage model, coordination of the expert analysis of over 318 million payroll and CPRS records, preparation for and participation in 48 depositions, preparation of the pre-mediation statement, participation in the mediation, and drafting of settlement approval papers and notices. Moreover, it was necessary for counsel to answer the questions and complaints of inquisitive (and sometimes impatient) class members as the case continued without resolution for more than eight years.

10. In order to avoid duplication of effort, each of the five (5) law firms took primary responsibility for certain categories of legal work. Cook Allen & Logothetis had primary responsibility for the pre-suit investigation, legal research, drafting pleadings and legal memorandums, motion practice, drafting written discovery and communicating with Class Representatives and class members until merits discovery commenced. Mr. Cook also was primarily responsible for Plaintiffs' appellate brief. Provost Umphrey had primary responsibility for developing case strategy, handling depositions, developing a damage model, retaining and supervising the work of damage and liability experts, serving as lead spokesman for the Plaintiffs after class certification, selecting witnesses, preparing Plaintiffs' trial plan, financing the lawsuit, retaining and coordinating the work of Brown Greer, the administrator of the opt-in process as well as the appointed settlement administrator, drafting preliminary approval papers and since class certification, communicating with Class Representatives and class members.

Douglas Richards was primarily responsible for drafting and analyzing discovery related to the technical aspects of the VA's Computerized Patient Record System which included indentifying and collecting data demonstrating work beyond the tour of duty. Mr. Richards reviewed and analyzed over one million documents produced by the VA and worked extensively with Plaintiffs' damage expert to develop an evidence-based damage model. Mr. Richards also assisted with depositions.

Robert Stropp had primary responsibility for consulting with unions and their officials who represent APRN's and PA's at the VA on contract negotiations and application of pertinent contract provisions related to overtime pay, scheduling,

professional standards and state licensure provisions and analyzing all documents related to those subjects. Mr. Stropp also handled several depositions.

Motley Rice entered the case in 2019, taking on primary responsibility for legal research and drafting legal memorandums after David Cook's role diminished due to his illness.

In retrospect, the prosecution of this action can be broken down into six (6) major phases. A summary of each phase, and a general description of the major work performed by Plaintiffs' counsel during that time is as follows.

In Phase 1, Plaintiffs' counsel, among other things, met with Plaintiffs, investigated Plaintiffs' claims, reviewed documents, conducted research and prepared the complaint to initiate this lawsuit. Phase 1 ran from August 13, 2012 to December 28, 2012, the date the complaint was filed.

In Phase 2, after case management conferences, the Government filed their Motion to Dismiss the complaint. Plaintiffs' counsel drafted and filed their response to the Motion to Dismiss, prepared for and argued that Motion and analyzed the Court's Order granting the Motion to Dismiss. This phase ran from approximately December 29, 2012 to February 27, 2014.

In Phase 3, Plaintiffs' counsel prepared and filed a Notice of Appeal to the Federal Circuit and briefs seeking reversal of the dismissal. Plaintiffs' counsel prepared for and argued the appeal and analyzed the decision of the Federal Circuit. Phase 3 ran from February 28, 2014 through May 15, 2015.

In Phase 4, class discovery commenced with written discovery and document review followed by 17 depositions. Once class discovery was completed, Plaintiffs'

counsel prepared and filed the Motion for Class Certification and replied to the Government's Opposition. Once the class was certified, Plaintiffs' counsel engaged Brown Greer as administrator and prepared and coordinated the dissemination of opt-in notices to 16,000 putative class members. Phase 4 ran from May 16, 2015 through January 15, 2019, the deadline for submission of opt-in forms.

In Phase 5, merits discovery began with multiple rounds of written discovery and discovery disputes. Plaintiffs' counsel and their experts reviewed and/or analyzed over 300 million records and took or defended another 31 depositions. Plaintiffs' counsel vetted and selected trial witnesses, started preparation of Proposed Findings of Fact and Conclusions of Law, prepared a mediation statement and participated in mediation. Phase 5 ran from January 16, 2019 through January 4, 2021.

In Phase 6, Plaintiffs' counsel negotiated with the Government over the specific terms of the settlement in principle and participated in drafting the terms of the Settlement Agreement. Counsel also coordinated the allocation of settlement proceeds among class members by Plaintiffs' damage expert. In addition, Plaintiffs' counsel drafted and filed a Motion for Preliminary Approval, a Motion for Final Approval, and a Motion for Award of Attorneys' Fees, Costs, Expenses and Case Contribution Awards, Memorandums in Support of those Motions, Notices of Class Action Settlement, declarations for the class representatives and counsel and proposed orders. Phase 6 ran from January 5, 2021 through the present.

11. Throughout this litigation, the Defendant has vigorously contested liability, class certification and Plaintiffs' damage estimates. Specifically, the Defendant initially asserted in a Motion to Dismiss that Plaintiffs were required but failed to plead that Title 38 APRNs

were expressly approved to work overtime. The Court granted the Motion to Dismiss. After the successful appeal from the dismissal, the Defendant asserted that Plaintiffs could not meet their burden of proving their overtime work was induced. The Defendant also asserted that merits discovery had revealed evidence that supported decertification of the class. And, the Defendant claimed that Plaintiffs' damages expert had made unreasonable assumptions that inflated Plaintiffs' back pay estimates which warranted striking the Plaintiffs' expert's report. The Defendant also asserted that a policy change to the VA's overtime approval procedure cut off any backpay liability as of September 3, 2017 reducing the scope of potential damages.

12. The Parties have determined that 3,207 current and former APRNs and PAs from covered facilities timely opted into the lawsuit. Analysis of CPRS records and opt-in forms revealed that thirteen (13) of these opt-ins did not work as APRNs or PAs during the class period which was confirmed by the VA. Based on payroll records and other documents produced by the VA, Plaintiffs were able to determine the dates of employment and rates of pay of each class member. Based on date and time stamped records, view alert logs and log-in and out records from the CPRS, Plaintiffs were able to reasonably approximate the amount of time each individual class member worked in the CPRS outside of their tour of duty and over forty (40) hours in a workweek. Based on the analysis of CPRS and payroll records produced, Plaintiffs' expert estimated the VA's maximum exposure to be $190,339,825.08 in back pay and $54,616,838.96 in interest through January 16, 2021 for a total of $244,956,664.04. The Settlement Agreement provides for payment by the United States of $160,000,000 to the Settlement Fund which represents only a 34.7 % discount to Plaintiffs' estimated maximum exposure of the VA. Based on my informal investigation, I believe this

settlement to be one the largest overtime litigation recoveries against the Federal Government and perhaps the largest recovery in any lawsuit where Plaintiffs were required to prove that the unpaid overtime was induced rather than merely suffered or permitted. As Class Counsel, I unequivocally endorse this Settlement as fair, reasonable and adequate and in the best interest of the Class Members.

13. Proportionate share payments to eligible class members, or their heirs, will be made by the Settlement Administrator in accordance with paragraph six (6) of the Settlement Agreement. As is customary in the distribution of funds in class action settlements, the Settlement Administrator proposes to create a "Reserve" of $265,000 from the Settlement Fund to cover the payment of administrative fees and expenses that are necessary to complete the settlement notice process, distribution of funds to class members and the reporting responsibilities imposed on them by the Settlement Agreement.

14. Pursuant to the Court's directions in the Preliminary Approval Order of July 16, 2021, I changed Section 9 of the Notices of Class Action Settlement to advise class members that they could call into the Final Fairness Hearing and to provide to them the dial-in instructions. I also amended Section 7(b) of the Notices to advise class members that written objections shall be mailed solely to me, rather than also to the clerk of court and government counsel. The amended Notices were then sent BrownGreer who mailed them to class members and posted them on the website dedicated to the Settlement on August 2, 2021 in accordance with the Order.

15. Class Counsel and Co-Counsel agreed to serve as attorneys for Plaintiffs on a contingency fee basis. We have not received any compensation whatsoever from any members of the class at any time during the almost nine- year duration of this case. The six

Class Representatives each agreed that Counsel would receive up to 33 1/3% of the gross recovery from settlement or judgment plus reasonable costs and litigation expenses. In the opt-in Notice approved by the Court, putative class members were advised that if successful, Counsel would seek attorneys' fees and expenses either pursuant to contingency fee agreement or based on a common fund award. The Notice also advised putative class members that by opting into the case, they would be bound by any settlement reached on behalf of the class and that Class Counsel and the Class Representatives would represent their interests. Counsel have explained the agreement of Counsel regarding the division of fees and expenses to the Class Representatives to which they have expressed no objections or reservations.

16. The legal work performed by Plaintiffs' counsel in this case, meetings with Class Representatives and class members, putative class members, witnesses, experts and union representatives, and the communications by telephone and email with thousands of class members on multiple occasions over more than eight years collectively consumed almost fourteen thousand hours to date and is continuing. Each of the five law firms will submit a separate declaration summarizing the time they expended performing legal work in this case and attesting to the litigation expenses they incurred.

17. Attached as Exhibit A is a summary of the time lawyers from Provost Umphrey (Guy Fisher and myself) expended performing legal work in each of the six phases of this lawsuit through August 10, 2021 and a lodestar calculation for Provost Umphrey based on the number of hours of work performed and the applicable hourly rate. Our hourly rates are based on the Adjusted Laffey Matrix which Courts have overwhelmingly recognized as an appropriate benchmark for attorneys' fees in the Washington, D.C. market. Provost

Umphrey's lodestar is $3,793,465.60. Because time spent from August 10, 2021 including time that will be spent preparing for the Final Fairness Hearing and monitoring and addressing matters related to the administration of the settlement and distributions therefrom is not included, the lodestar calculation is actually underinclusive of the hours that will be reasonably spent by Provost Umphrey on this case. During this litigation, Provost Umphrey also incurred unreimbursed "out of pocket" costs and expenses totaling $424,451.57. A summary of Provost Umphrey's costs and expenses by general category is attached as Exhibit B. The information contained in Exhibits A and B to this declaration has been documented in time and expense reports prepared and maintained in the ordinary course of business. Time and expense reports were reviewed to confirm their accuracy as well as the necessity for, and reasonableness of, the time and expenses committed to this litigation. The time spent and expenses incurred were necessary and reasonable for the efficient prosecution and successful resolution of this case. In addition, all the expenses incurred are of a type that would normally be charged to a fee-paying client in the private legal marketplace.

18. If Plaintiffs' Counsels' Motion for Award of Attorneys' Fees, Costs, Expenses and Case Contribution Awards is granted in its entirety, Class Members will have received legal representation including litigation expenses and settlement administration costs for 30.5% of their gross recovery.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Michael Hamilton
PROVOST UMPHREY LAW FIRM, LLP
4205 Hillsboro Pike, Suite 303
Nashville, TN 37215
(615) 297-1932--phone
mhamilton@provostumphrey.com
Class Counsel for Plaintiffs

Date: August 12, 2021

EXHIBIT A

Provost Umphrey Law Firm, LLP
(8/13/12-8/10/21)

Phase 1	Pre-suit Investigation; Preparing and Filing Complaint	8/13/2012-12/28/2012	Total Hours: 22.90 Michael Hamilton: 22.90 x $914	 $20,930.60 $20,930.60
Phase 2	Responding to Motion to Dismiss and Hearing on Motion to Dismiss; Analysis of Decision on Motion to Dismiss	12/29/2012-2/27/2014	Total Hours: 59.60 Michael Hamilton: 59.60 x $914	 $54,474.40 $54,474.40
Phase 3	Preparing and Filing Appeal to Federal Circuit and Hearing; Analysis of Appeal Decision	2/28/2014-5/15/2015	Total Hours: 32.40 Michael Hamilton: 32.40 x $914	 $29,613.60 $29,613.60
Phase 4	Class Discovery; Preparing and Filing Class Certification Papers; Hearing; Notice Process	5/16/2015-1/15/2019	Total Hours: 1,492.90 Michael Hamilton: 769.20 x $914 Guy Fisher: 723.70 x $914	 $703,048.80 $661,461.80 $1,364,510.60
Phase 5	Merits Discovery; Trial Preparation; Preparation	1/16/2019-1/4/2021	Total Hours: 2,223.70	

	of Mediation Statement; Mediation		Michael Hamilton: 1,029.00 x $914 Guy Fisher: 1194.70 x $914	$940,506 $1091,955.80 $2,032,461.80
Phase 6	Drafting of Settlement Agreement; Preparing Preliminary and Final Approval Papers, Notices and Fee Motion	1/5/2021-8/10/21	Total Hours: 286.60 Michael Hamilton: 261.70 x $914 Guy Fisher: 32.30 x $914	 $261,952.40 $29,522.20 $291,474.60
TOTAL				$3,793,465.60

TOTAL HOURS FOR ALL PHASES: 4,150.40

LODESTAR

Guy Fisher: $914/hour x 1,950.70 = $1,782,939.80
Michael Hamilton: $914/hour x 2,199.70 = $2,010,525.80

EXHIBIT B
Provost Umphrey Law Firm, LLP Litigation Expenses

Experts and Consultants:	$177,981.59
Travel Related Expenses:	$94,714.90
Opt-In Administration Services:	$93,655.54
Deposition Expenses:	$49,478.03
Teleconferencing Costs:	$3,863.09
Overnight Delivery and Postage:	$2,114.44
Copying and Printing Costs:	$1,606.60
Court Fees and Costs:	$562.00
Online Research and Document Management Services:	$475.38
Total:	$424,451.57

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER,
AUDRICIA BROOKS,
DEBORAH PLAGEMAN,
JENNIFER ALLRED,
MICHELE GAVIN,
STEPHEN DOYLE, on behalf of themselves
And all others similarly situated,

Plaintiffs,

v. No. 12-920C
(Judge Kaplan)

THE UNITED STATES,

Defendant.

DECLARATION OF BENNETT ALLEN IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CLASS COUNSELS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS, EXPENSES AND CASE CONTRIBUTION AWARDS

I, Bennett Allen, pursuant to 28 U.S.C § 1746, declare as follows:

1. I am Co-Counsel for the Plaintiffs in the above-captioned lawsuit.

2. I have engaged in a civil litigation practice since 2016, concentrating on the representation of unions and individuals in labor and employment-law litigation, wage and hour litigation, and ERISA litigation.

3. I received my undergraduate degree from the Columbia University in 2004 and my law degree from the University of Cincinnati, College of Law in 2016.

4. I am admitted to practice in the State of Ohio, the U.S. Court of Federal Claims, the U.S. District Court for the Southern District of Ohio, and the U.S. Courts of Appeals for the Sixth Circuit.

5. I have been a member of the AFL-CIO Union Lawyers Alliance, previously the AFL-CIO Lawyers Coordinating Committee since 2016.

6. Since May 2019, I have been a partner at what is now Cook, Allen & Logothetis, LLC, and I became managing partner in November 2020.

7. I served as lead counsel in *Hahn et al. v. The United States*, Case No. 1:19-cv-00827, a Title V wage and hour case brought in the Court of Federal Claims on behalf of ten DEA special agents and two support staff stationed in the agency's Kabul, Afghanistan office.

8. I have been involved in the litigation of this lawsuit since 2016. As Co-Counsel, I have been involved in various aspects of the case including legal research and analysis, communication with class representatives and class members, and the initial drafting and subsequent editing of the Motion for Class Certification. My partner David Cook served as lead or co-lead Class Counsel until his withdrawal on December 1, 2020 due to illness. Mr. Cook passed away on December 14, 2020. Mr. Cook and other lawyers from this firm were involved in this litigation from its inception and had primary responsibility for the pre-suit investigation, legal research, drafting of pleadings and legal memorandums, motion practice, drafting written discovery and communicating with class representatives and class members until merits discovery began. Mr. Cook also made appearances before this Court on the Motion to Dismiss and the class certification motion and before the Federal Circuit on the appeal.

9. Attached as Exhibit A is a summary of the time lawyers from Cook, Allen & Logothetis expended performing legal work in each of the six phases of this lawsuit and a

lodestar calculation based on the number of hours of work performed and the applicable hourly rate. Our hourly rates are based on the Adjusted Laffey Matrix which Courts has overwhelmingly recognized as an appropriate benchmark for attorneys' fees in the Washington, D.C. market. Collectively, Cook, Allen & Logothetis' lodestar is $3,545,697.50. Because time spent from August 16, 2021 including time that will be spent in preparing for the Final Fairness Hearing and monitoring and addressing matters related to the administration of the settlement and distributions therefrom, is not included, the lodestar calculation is actually underinclusive of the hours that will be reasonably spent on this case. During this litigation, Cook, Allen & Logothetis also incurred unreimbursed "out of pocket" costs and expenses totaling $14,204.62. A summary of our firm's costs and expenses by general category is attached as Exhibit B. The information contained in Exhibits A and B to this declaration has been documented in time and expense reports prepared and maintained in the ordinary course of business. Time and expense reports were reviewed to confirm their accuracy as well as the necessity for, and reasonableness of, the time and expenses committed to this litigation. The time spent and expenses incurred were necessary and reasonable for the efficient prosecution and successful resolution of this case. In addition, all the expenses incurred are of a type that would normally be charged to a fee-paying client in the private legal marketplace.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Bennett Allen
COOK, ALLEN & LOGOTHETIS, LLC
525 Vine Street, Suite 2320
Cincinnati, Ohio 45202
(513) 287-6992
ballen@econjustice.com
Co-Counsel for Plaintiffs

Date: August 12, 2021

EXHIBIT A
Cook, Allen & Logothetis, LLC
(8/13/12-8/10/21)

Phase 1	Pre-suit Investigation; Preparing and Filing Complaint	8/13/2012-12/28/2012	Total Hours: 276.30 Claire Bushorn: 29.1 x $672 David Cook: 44.70 x $914 Dan Sponaugle: 18.1 x $759 Clement Tsao: 184.40 x $672	 $19,555.20 $40,855.80 $13,737.90 $123,916.80 $198,065.70
Phase 2	Responding to Motion to Dismiss and Hearing on Motion to Dismiss; Analysis of Decision on Motion to Dismiss	12/29/2012-2/27/2014	Total Hours: 793.60 Jennie Arnold: 0.30 x $914 Claire Bushorn: 164.70 x $672 David Cook: 149.2 x $914 Jamie Craddock: 30 x $206 Sarah Moorhouse: 5.7 x $206 Dan Sponaugle: 81.3 x $759 Clement Tsao: 362.4 x $672	 $274.20 $110,678.40 $136,368.80 $6,180.00 $1,174.20 $61,706.70 $243,532.80 $559,915.10
Phase 3	Preparing and Filing Appeal to Federal Circuit and Hearing; Analysis of Appeal Decision	2/28/2014-5/15/2015	Total Hours: 531.8 Claire Bushorn: 15.9 x $672 David Cook: 65 x $914 Jamie Craddock: 39.7 x $206 Sarah Moorhouse: 16.2 x $206 Clement Tsao: 332.6 x 672 Rachael Valley: 62.4 x $206	 $10,684.80 $59,410.00 $8,178.20 $3,337.20 $223,507.20 $12,854.40

				$317,971.80
Phase 4	Class Discovery; Preparing and Filing Class Certification Papers; Hearing; Notice Process	5/16/2015-1/15/2019	Total Hours: 3323.9 Bennett Allen: 126.8 x $465 Claire Bushorn: 26.1 x $672 David Cook: 887.1 x $914 Tricia Roth: 82.8 x $206 Clement Tsao: 1328.3 x $672 Rachael Valley: 872.8 x $206	 $58,962.00 $17,539.20 $810,809.40 $17,056.80 $892,617.60 $179,796.80 $1,976,781.80
Phase 5	Merits Discovery; Trial Preparation; Preparation of Mediation Statement; Mediation	1/16/2019-1/4/2021	Total Hours: 628.40 Bennett Allen: 54.2 x $465 David Cook: 453.6 x $914 Rachel Rekowski: 6.1 x $206 Tricia Roth: 65.0 x $206 Clement Tsao: 49.5 x $672	 $25,203.00 $414,590.40 $1,256.60 $13,390.00 $33,264.00 $487,704.00
Phase 6	Drafting of Settlement Agreement; Preparing Preliminary and Final Approval Papers, Notices and Fee Motion	1/5/2021-8/10/21	Total Hours: 12.9 Bennett Allen: 7.5 x $465 Tricia Roth: 8.6 x $206	 $3,487.50 $1,71.60 $5,259.10
TOTAL				$3,545,697.50

TOTAL HOURS FOR ALL PHASES: 5,570.1

LODESTAR

Bennett Allen: $465/hour x 188.5 = $87,652.50
Jennie Arnold: $914/hour x 0.30 = $274.20
Claire Bushorn: $672/hour x 235.8 = $158,457.60
David Cook: $914/hour x 1,599.60 = $1,462,034.40
Jamie Craddock: $206/hour x 69.70 = $14,358.20
Sarah Moorhouse: $206/hour x 21.9 = $4,511.40
Rachel Rekowski: $206/hour x 6.10 = $1,256.60
Tricia Roth: $206/hour x 156.40 = $32,218.40
Dan Sponaugle: $759/hour x 99.40 = $75,444.60
Clement Tsao: $672/hour x 2,257.20 = $1,516,838.40
Rachael Valley: $206/hour x 935.20 = $192,651.20

EXHIBIT B
Cook, Allen & Logothetis, LLC Litigation Expenses

Travel Related Expenses:	$7,068.12
Online Research:	$4,404.74
Court Fees:	$2,170.00
Overnight Mail and Postage:	$313.50
Other Expenses (hard drives):	$202.26
Copying Costs:	$46.00
Total:	$14,204.62

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER,
AUDRICIA BROOKS,
DEBORAH PLAGEMAN,
JENNIFER ALLRED,
MICHELE GAVIN,
STEPHEN DOYLE, on behalf of themselves
And all others similarly situated,

Plaintiffs,

v. No. 12-920C
(Judge Kaplan)

THE UNITED STATES,

Defendant.

DECLARATION OF E. DOUGLAS RICHARDS IN SUPPORT OF CLASS COUNSELS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

I, E. Douglas Richards, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am Co-Counsel for the Plaintiffs in this lawsuit. I am the founder of the firm of E. Douglas Richards, PSC located at Chevy Chase Plaza, 836 Euclid Avenue, Suite 321, Lexington, Kentucky 40502. Since about 1992, I have focused my practice on employee benefit litigation under ERISA, on wage and hour and other employment law matters and on various civil rights cases. In all of these fields, I have represented plaintiffs individually and in groups, including class actions. I am a solo practitioner but will almost always affiliate with other firms on cases involving multiple or class plaintiffs.

2. I hold a bachelor's degree in Economics from Harvard College (1980), Cambridge, Massachusetts, and Juris Doctor from Tulane Law School (1984), Tulane University, New Orleans, Louisiana.

3. I have been admitted to practice before the following courts:

Supreme Court of Kentucky – 1984
U.S. Court of Appeals for the Sixth Circuit – 1985
U.S. Court of Federal Claims – 2012
U.S. District Court, Eastern District of Kentucky – 1985
U.S. District Court, Western District of Kentucky – 1986

4. I have represented groups of employees in other class actions relating to employee benefits or other employment-related matters:

a. *Horn v. McQueen,* 215 F.Supp.2d 867 (W.D. Ky. 2002), and 353 F.Supp. 2d 785 (W.D. Ky. 2004) (ERISA claims for breach of fiduciary and for redress for prohibited transactions);
b. *Holman v. Parker Hannifin Corp.*, Madison Circuit Court (Ky.), Civil Action No. 02-CI-166 (age discrimination relating to plant closure);
c. *Worthington v. Corbin, et al.*, E.D. Ky. (Ashland), Civil Action No. 03-26-HRW, and In re Corbin, Ltd., No. 03-12143 (Bankr. S.D.N.Y), Adv. Case No. 05-03284 (recovery of unpaid health insurance claims under ERISA);
d. *Durand The Hanover Insurance Group, Inc.*, W.D. Ky., Civil Action No. 07-CV-130-S (calculation of lump sum distributions from conversion of cash balance pension under ERISA);
e. *Thomas v. Paragon Family Medical, et al.*, E.D. Ky., Civil Action No. 13-253 (KKC) (ERISA action alleging failure to fund employee benefit plans).

5. I have been involved with this case since an August 2012 contact from David M. Cook, who asked me to participate in the initial meeting with Plaintiff, Stephanie Mercier, in Lexington, Kentucky. Mr. Cook and I had worked together several times, including in *Horn v. McQueen*, where I served as lead counsel, and in *Thomas v. Paragon Family Medical*, where Mr. Cook served as lead counsel.

6. I have been involved in this litigation since before the first meeting with Ms. Mercier in early September 2012. My work includes helping to frame and prepare the original

Complaint; responding to the motion to dismiss; working on all aspects of the appeal to the Federal Circuit; meeting with potential class members at five VA facilities in five different states; formulating and taking Class discovery (including depositions in six different states); drafting and editing the class certification motion and reply memorandum in support of that motion, developing and implementing the strategy of and requesting electronic signatures and other electronic data to determine when each Class member worked off the clock; reviewing and analyzing more than one million documents produced by the VA in discovery; working with staff and with Dr. Liesl Fox in developing damages calculations from hundreds of millions of electronic time-sensitive records; conducting merits discovery that included taking multiple depositions and traveling to South Carolina and Oregon to present the depositions of Class representatives; preparing for and attending the mediation conducted by Judge Horn; and working with Dr. Fox, co-counsel and the Department of Justice in preparing materials to support the requests for preliminary and final approval of the settlement.

7. Attached as Exhibit A is a chart summarizing the time that I have spent performing legal work in each of the six phases of this case. Page 2 of that Exhibit A sets forth my hourly rate for legal work in this case and a lodestar calculation based on applicable hourly rates. The hourly rate of $914 is based on the Adjusted Laffey Matrix, which courts have consistently adopted as an appropriate benchmark for prevailing hourly rates in the Washington, D.C. area. The lodestar for the 2,107.3 hours of work done by me through E. Douglas Richards, P.S.C. is $1,926,072.20.

8. During this litigation, E. Douglas Richards, PSC also has incurred unreimbursed out-of-pocket litigation expenses in the mount of $15,785.01. A description of those expenses by category is attached hereto as Exhibit B.

9. The information in this Declaration and exhibits thereto regarding my firm's time and expenses has been documented in time and expenses reports prepared and maintained in the ordinary course of business. I reviewed these time and expense reports to confirm their accuracy as well as the necessity for, and reasonableness of, the time and expenses committed to this litigation. The time spent on the litigation, and the expenses incurred, were necessary and reasonable for the efficient and successful prosecution of this case. In addition, all the expenses incurred are usual and customary litigation expenses that would normally be charged to a fee-paying client in the private legal marketplace.

I declare under penalty of perjury that the foregoing is true and correct, on this 11th day of August 2021.

/s/ E. Douglas Richards

E. Douglas Richards, PSC
Chevy Chase Plaza
836 Euclid Avenue, Suite 321
Lexington, KY 40502
859-259-4983
edr@richardslawky.com
Co-Counsel for Plaintiffs

EXHIBIT A

Summary of Work in Phases 1 through 6

E. Douglas Richards, PSC
(8/13/12-8/10/21)

Phase 1	Pre-suit Investigation; Preparing and Filing Complaint	8/13/2012-12/28/2012	Total Hours: 40.50 E. Douglas Richards: 40.50 x $914 Total	 $37,017.00 $37,017.00
Phase 2	Responding to Motion to Dismiss and Hearing on Motion to Dismiss; Analysis of Decision on Motion to Dismiss	12/29/2012-2/27/2014	Total Hours: 54.40 E. Douglas Richards: 54.40 x $914 Total	 $49,721.60 $49,721.60
Phase 3	Preparing and Filing Appeal to Federal Circuit and Hearing; Analysis of Appeal Decision	2/28/2014-5/15/2015	Total Hours: 74.20 E. Douglas Richards: 74.20 x $914 Total	 $67,818.80 $67,818.80
Phase 4	Class Discovery; Preparing and Filing Class Certification Papers; Hearing; Notice Process	5/16/2015-1/15/2019	Total Hours: 1,025.40 E. Douglas Richards: 1,025.40 x $914 Total	 $937,215.60 $937,215.60
Phase 5	Merits Discovery; Trial Preparation; Preparation of Mediation Statement; Mediation	1/16/2019-1/4/2021	Total Hours: 808.50 E. Douglas Richards: 808.50 x $914 Total	 $738,969.00 $738,969.00
Phase 6	Drafting of Settlement Agreement; Preparing Preliminary and Final Approval Papers, Notices and Fee Motion	1/5/2021-8/10/21	Total Hours: 104.30 E. Douglas Richards: 104.30 x $914 Total	 $95,330.20 $95,330.20
TOTAL			2,107.3 Hours @ $914/hour	**$1,926,072.20**

TOTAL HOURS FOR ALL PHASES: **2,107.2**

LODESTAR (Adjusted Laffey Matrix)

E. Douglas Richards, PSC
(8/13/12-8/10/21)

E. Douglas Richards

Time worked	2,107.30 hours
Adjusted Laffey Matrix	x $ 914/hour
	$1,926,072.20

EXHIBIT B

E. Douglas Richards, PSC Litigation Expenses

Travel Related Expenses:	$15,217.47
Copying Costs:	$514.24
Postage and Overnight Mail:	$55.30
Total:	**$15,787.01**

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER,
AUDRICIA BROOKS,
DEBORAH PLAGEMAN,
JENNIFER ALLRED,
MICHELE GAVIN,
STEPHEN DOYLE, on behalf of themselves
And all others similarly situated,

Plaintiffs,

v. No. 12-920C
(Judge Kaplan)

THE UNITED STATES,

Defendant.

DECLARATION OF ROBERT H. STROPP, JR. IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION EXPENSES AND CASE CONTRIBUTION AWARDS FOR CLASS REPRESENTATIVES

I Robert H. Stropp, Jr., pursuant to 28 U.S.C. 1746, declare as follows:

1. I am Co-Counsel for the Plaintiffs in this lawsuit.
2. I have been actively practicing as a labor and employment lawyer for the past 46 years.
3. I have a BA from the University of Maryland, 1969, and a J.D. from Samford University, Cumberland School of Law, 1975, in Birmingham, Al.
4. I practiced law as an associate and partner (1978) with the labor law firm of Cooper Mitch & Crawford in Birmingham and throughout the Southeast. I started my own law firm in 1985 in Birmingham. In 1989 I was the General Counsel of the United Mine Workers of America (UMWA) in the District of Columbia until 1997. From 1997 to date

I have been Of Counsel to the law firm of Mooney Green Saindon Murphy & Welch, P. C. (Mooney Green) in DC.

5. I have been admitted and practiced law in the State of Alabama and the District of Columbia and I have practiced in trial and appellate cases in several states in the Southeast. I have been admitted and practiced in the Federal District Courts in Alabama and District of Columbia including the U.S. Court of Federal Claims and its Appellate Court. I have been admitted and practiced before the U. S. Supreme Court and the following Federal Circuits: DC, First through Seventh Circuits, Tenth and Eleventh Circuits.
6. Mooney Green has represented the interests of working people and their representatives in many industries and fields in the private and public sectors. Mooney Green also represents employee pension and benefit plans of all sizes. The Firm represents its clients in federal and state courts up to and including cases before the U.S. Supreme Court.
7. I have been actively involved in prosecution of this lawsuit since its inception in 2012.
8. Attached as Exhibit A is a chart summarizing my time and time that lawyers from Mooney Green have expended performing legal work in each of the six phases of this case. Exhibit A also includes a lodestar calculation based on applicable hourly rates. The hourly rates are based on the Adjusted Laffey Matrix which courts have overwhelmingly adopted as an appropriate benchmark for prevailing hourly rates in the Washington, D.C. area. The lodestar for this work is $$1,270,714.90.
9. During this litigation, Mooney Green also has incurred unreimbursed “out of pocket” litigation expenses in the mount of $6,352.18. A description of those expenses by category is attached hereto as Exhibit B.

10. The information in this Declaration regarding my time and other Mooney Green lawyers' time and expenses is documented in time and expenses reports and supporting documentation kept in the ordinary course of business. I believe the time and the expenses incurred were necessary and reasonable for the efficient and successful prosecution of this case. In addition, the expenses incurred are usual and customary litigation expenses that would normally be charged to a fee-paying client in the private legal marketplace.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert H. Stropp, Jr.
Robert H. Stropp, Jr.
MOONEY, GREEN, SAINDON, MURPHY & WELCH, P.C.
1920 L. Street, NW, Suite 400
Washington, DC 20036
202.783.0010--phone
rstropp@hotmail.com
Co-counsel for Plaintiffs

Date: August 12, 2021

EXHIBIT A

Mooney, Green, Saindon, Murphy & Welch Law, P.C.

(8/13/12-7/31/21)

Phase 1	Pre-suit Investigation; Preparing and Filing Complaint	8/13/2012-12/28/2012	Total Hours: 20.70 Robert H. Stropp, Jr.: 13.80 x $914 Lauren Powell: 6.90 x $672	 $12,613.20 $4,636.80 $17,250.00
Phase 2	Responding to Motion to Dismiss and Hearing on Motion to Dismiss; Analysis of Decision on Motion to Dismiss	12/29/2012-2/27/2014	Total Hours: 62.40 Robert H. Stropp, Jr.: 61.60 x $914 Lauren Powell: 0.80 x $672	 $56,302.40 $537.60 $56,840.00
Phase 3	Preparing and Filing Appeal to Federal Circuit and Hearing; Analysis of Appeal Decision	2/28/2014-5/15/2015	Total Hours: 55.25 Robert H. Stropp, Jr.: 42.50 x $914 John R. Mooney: 12.25 x $914 Lauren Powell: 0.50 x $672	 $38,845.00 $11,196.50 $336.00 $50,377.50
Phase 4	Class Discovery;	5/16/2015-1/15/2019	Total Hours: 540.70	

	Preparing and Filing Class Certification Papers; Hearing; Notice Process		Robert H. Stropp, Jr.: 540.70 x $914	$494,199.80 $494,199.80
Phase 5	Merits Discovery; Trial Preparation; Preparation of Mediation Statement; Mediation	1/16/2019-1/4/2021	Total Hours: 639.90 Robert H. Stropp, Jr.: 639.90x $914	 $584,868.60 $584,868.60
Phase 6	Drafting of Settlement Agreement; Preparing Preliminary and Final Approval Papers, Notices and Fee Motion	1/5/2021-7/31/21	Total Hours: 73.50 Robert H. Stropp, Jr.: 73.50 x $914	 $67,179.00 $67,179.00
TOTAL				$1,270,714.90

TOTAL HOURS FOR ALL PHASES: 1,392.45

LODESTAR

Robert H. Stropp, Jr.: $914/hour x 1,372.00 = $1,254,008.00

John Mooney: $914/hour x 12.25 = 11,196.50

Lauren Powell: $672/hour x 8.20 = $5,510.40

EXHIBIT B

Mooney Green Saindon Murphy & Welch, P. C. Litigation Expenses

Travel Related Expenses:	$5,841.58
Copying Costs/Office Supplies:	$347.87
Dropbox:	$119.88
Overnight Mail and Postage:	$42.85
Total:	$6,352.18

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER,
AUDRICIA BROOKS,
DEBORAH PLAGEMAN,
JENNIFER ALLRED,
MICHELE GAVIN,
STEPHEN DOYLE, on behalf of themselves
And all others similarly situated,

Plaintiffs,

v.

No. 12-920C
(Judge Kaplan)

THE UNITED STATES,

Defendant.

DECLARATION OF WILLIAM H. NARWOLD FILED ON BEHALF OF MOTLEY RICE LLC IN SUPPORT OF APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

I, William H. Narwold, declare as follows:

1. I am a member of Motley Rice LLC ("Motley Rice" or the "Firm"), one of the law firms serving as Class Counsel in the above-captioned action (the "Action"). I lead all of the Firm's non-mass-tort litigation, including securities, antitrust, ERISA, employment, and false claims act matters. I submit this declaration in support of Class Counsel's application for an award of attorneys' fees in connection with services rendered in the Action, as well as for reimbursement of expenses incurred in connection with the Action. I have personal knowledge of the facts set forth herein and, if called upon could and would testify thereto.

2. I received my B.A. from Colby College in 1974 and graduated with my J.D. from the University of Connecticut School of Law in 1979.

3. I am licensed in Connecticut, the District of Columbia, New York, and South Carolina. I am admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits, and for the U.S. District Courts for the Districts of Connecticut, Eastern District of Michigan, Eastern and Southern District of New York, and the District of South Carolina.

4. Prior to joining Motley Rice in 2004, I directed corporate, securities, financial, and other complex litigation on behalf of private and commercial clients for 23 years at Cummings & Lockwood in Hartford, Connecticut, including 10 years as managing partner. Prior to my work in private practice, I served as a law clerk to the Honorable Warren W. Eginton of the U.S. District Court for the District of Connecticut from 1979 to 1981.

5. Motley Rice is devoted to advocating for the rights of workers and consumers. Motley Rice has over 100 lawyers and 200 support staff with its founding office located in South Carolina and offices in D.C., Connecticut, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, and West Virginia. Motley Rice has served as class counsel representing workers, consumers, and defrauded individuals in a wide range of class actions and multidistrict litigation.

6. Motley Rice's work has resulted in numerous large and impactful trials, settlements and favorable results, including:

a. Advancing the landmark case against the tobacco industry for the State Attorneys General based on restitution theories and negotiating the $246 billion Master Settlement Agreement.

b. Leading negotiations in the BP Deepwater Horizon Economic and Property Damage and Medical Benefits Settlements worth over $10 billion.

c. Prevailing in the liability trial against Arab Bank of Jordan for its material support of international terrorist activity.

d. Achieving a $500 million appellate ruling on behalf of asbestos victims and their families against Travelers Insurance Company for fraud.

e. Advancing litigation through leadership positions on a range of consumer cases, including, e.g., *In re: General Motors LLC Ignition Switch Litigation*, MDL No. 2543 (S.D.N.Y.), and *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 (N.D. Cal.).

7. In my practice, I have substantial experience in the prosecution of class actions and have been involved in this area of practice for many years. I maintain an active class action practice in federal and state courts throughout the United States.

8. Motley Rice has been involved in this Action since January 2019. The Firm's role has focused on litigation strategy, merits discovery, legal research, trial preparation, and mediation and settlement efforts. Attached hereto as **Exhibit A** is a biography of the Firm and attorneys in the Firm who were principally involved in this Action.

9. The schedule attached hereto as **Exhibit B** is a summary indicating the amount of time spent by each attorney and professional support staff employee of my firm who was involved in this Action, and the lodestar calculation for those individuals based on the following billing rates:

Name		Rate
Mathew Jasinski	(M)	$800 per hour
William Narwold	(M)	$1,100 per hour

Jessica Colombo	(A)	$425 per hour
Erin Williams	(A)	$550 per hour
James Geisler	(LC)	$300 per hour
Evelyn Richards	(LC)	$350 per hour
Viola LePine	(PL)	$325 per hour

(M) Member (LC) Law Clerk
(A) Associate (PL) Paralegal

10. Motley Rice establishes hourly rates for its attorneys and professional staff each year based on each individual's experience, practice area, and other relevant, market-based considerations including rates charged by comparable, nationwide plaintiffs' law firms.

11. **Exhibit B** was prepared from contemporaneous daily time entries for the above professionals, which are regularly prepared and maintained by my firm. These reports were reviewed in connection with the preparation of this declaration. The purpose of this review was to confirm both the accuracy of the entries as well as the necessity for, and reasonableness of, the time committed to the litigation. My firm's lodestar for their work on the case since January 2019 is $295,422.50.

12. My firm's lodestar figures do not include charges for certain expense items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

13. As detailed in **Exhibit C**, my firm is seeking reimbursement for a total of $2,750.98 in expenses incurred in connection with the prosecution of this Action from January 16, 2019 through and including February 17, 2021. The expenses reflected in Exhibit C are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

14. I believe that the foregoing expenses are reasonable in amount and were necessary for the effective and efficient prosecution and resolution of the litigation. In addition, I believe that the expenses are all of a type that would normally be charged to a fee-paying client in the private legal marketplace.

I declare, under penalty of perjury, that the foregoing facts are true and correct. Executed on August 16, 2021 in Hartford, Connecticut.

/s/ William H. Narwold
William H. Narwold

FIRM RESUME

MotleyRice® LLC

FIRM OVERVIEW

Motley Rice attorneys have been at the forefront of some of the most significant and monumental civil actions over the last 30 years. Our experience in complex trial litigation includes class actions and individual cases involving securities and consumer fraud, occupational disease and toxic tort, medical drugs and devices, environmental damage, terrorist attacks and human rights abuses.

Tobacco Master Settlement Agreement

In the 1990s, Motley Rice attorneys and more than half of the states' attorneys general took on the tobacco industry. Armed with evidence acquired from whistleblowers, individual smokers' cases and tobacco liability class actions, the attorneys led the campaign in the courtroom and at the negotiation table to recoup state healthcare funds and exact marketing restrictions from cigarette manufacturers. The effort resulted in significant restrictions on cigarette marketing to children and culminated in the $246 billion Master Settlement Agreement, the largest civil settlement in U.S. history.

Asbestos Litigation

From the beginning, our lawyers were integral to the story of how "a few trial lawyers and their asbestos-afflicted clients came out . . . to challenge giant asbestos corporations and uncover the greatest and longest business cover-up of an epidemic disease, caused by a product, in American history."1 In addition to representing thousands of workers and family members impacted by asbestos, Motley Rice has represented numerous public entities, and litigated claims alleging various insurers of asbestos defendants engaged in unfair settlement practices in connection with the resolution of underlying asbestos personal injury claims. This litigation resulted in, among other things, an eleven-state settlement with Travelers Insurance Company.

Anti-Terrorism and Human Rights

In *In re Terrorist Attacks on September 11, 2001,* Motley Rice attorneys brought a landmark lawsuit against the alleged private and state sponsors of al Qaeda and Osama bin Laden in an action filed on behalf of more than 6,500 family members, survivors, and those killed on 9/11—including the representation of more than 900 firefighters and their families. In prosecuting this action, Motley Rice has undertaken a global investigation into terrorism financing.

Our attorneys also initiated the *In re September 11 Litigation* and negotiated settlements for 56 families that opted out of the Victim Compensation Fund that far exceeded existing precedents at the time for wrongful death cases against the airline industry.

BP PLC Oil Spill Litigation

In April 2010, the Deepwater Horizon disaster spilled approximately 4.9 million gallons of oil into the water, killed 11 oil rig workers, devastated the Gulf's natural resources and profoundly harmed the economic and emotional well-being of hundreds of thousands of people. The Deepwater Horizon Economic and Property Damages Settlement is the largest civil class action settlement in U.S. history. Motley Rice co-founder Joseph Rice is a Plaintiffs' Steering Committee member and served as one of the primary negotiators of that Settlement and the Medical Benefits Settlement. In addition, Rice led negotiations in the $1.028 billion settlement between the PSC and Halliburton Energy Services for its alleged role in the oil spill. Motley Rice attorneys continue to hold leadership roles in the litigation and are currently working to ensure that all qualifying oil spill victims are fairly compensated.

Volkswagen 'Clean Diesel' Litigation

In 2015, Volkswagen Group's admission that it had programmed more than 11 million vehicles to cheat emissions tests and bypass standards sparked worldwide outrage. Motley Rice co-founder Joe Rice served as one of the lead negotiators in the nearly $15 billion settlement deal reached in 2016 for U.S. owners and lessees of 2.0-liter TDI vehicles, the largest auto-related consumer class action settlement in U.S. history. Rice and other Motley Rice attorneys also helped recover up to $4.4 billion with regards to affected 3.0-liter vehicles.

Transvaginal Mesh Litigation

Motley Rice attorneys represent thousands of women and have played a leading role in litigation alleging debilitating and life-altering complications caused by defective transvaginal mesh devices. In 2014, Joe Rice, with co-counsel, negotiated the original settlement deal reached in I*n re American Medical Systems, Inc., Pelvic Repair Systems Products Liability Litigation* that numerous subsequent settlements with the manufacturer were modeled after.

Opioid Litigation

Motley Rice is at the forefront of national litigation involving opioid manufacturers and distributers for alleged deceptive marketing and other business practices that contributed to the opioid crisis. Firm co-founder Joe Rice one of three co-leads for the National Prescription Opiate Litigation coordinated in the Northern District of Ohio. Also holding leadership positions in the MDL are Motley Rice attorneys Linda Singer (DC, NY), co-chair of the Manufacturer/Marketing Committee and Lou Bograd (DC, KY), co-chair of the Law & Briefing Committee. Singer, the former Attorney General for the District of Columbia, continues to serve as lead counsel for the first jurisdictions to file complaints in the most recent wave of litigation against pharmaceutical companies regarding the opioid crisis—the City of Chicago and Santa Clara County. The firm also represents multiple state Attorneys General, local governments and other public entities in state-filed matters related to the opioid epidemic, which is reported to claim 175 American lives each day.

LITIGATION PROFILES *Motley Rice has held leadership roles in numerous cases. Highlights include:*

DEFECTIVE DRUGS AND DEVICES

Plaintiffs' Executive Committee ***In re Paragard IUD Products Liability Litigation***, MDL 2974 (N.D.Ga.)

Plaintiffs' Steering Committee and Co-Chair of Leadership Development Committee ***In re: Zantac (Ranitidine) Products Liability Litigation***, No. 9:20-md-02924 (S.D. Fla.).

Plaintiffs' Steering Committee ***In re Allergan Biocell Textured Breast Implant Products Liability Litigation***, No. 2:19-md-02921, (D.N.J.)

Bellwether Committee Co-Chair ***In re Xarelto Products Liability Litigation***, MDL 2592

Plaintiffs' Steering Committee ***In re Proton-Pump Inhibitor Prods. Liability Litigation*** (No. II), D.N.J.

Plaintiffs' Steering Committee ***In re Zimmer NexGen Knee Implant Products Liability Litigation***, N.D. Ill.

Plaintiffs' Steering Committee and Co-lead Counsel ***In re Ethicon Physiomesh Flexible Composite Hernia Mesh Products Liability Litigation,*** MDL 2782

Lead Counsel; Plaintiffs' Executive Committee **Essure Permanent Sterilization Device California State Court Consolidation**

Lead counsel and Plaintiffs' Executive Committee in ***In re Atrium Medical Corp. C-QUR Mesh Products Liability Litigation,*** MDL 2753

Plaintiffs' Steering Committee, Co-lead Counsel and Liaison Counsel in ***In re Davol/ C.R. Bard Hernia Mesh*** (PC-2017-1929)

Plaintiffs' Steering Committee ***In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation,*** *MDL No. 2738*

Co-lead counsel and Plaintiffs' Steering Committee ***In re Zofran (Ondansetron) Products Liability Litigation,*** MDL No. 2657

Plaintiffs' Executive Committee in ***In re Viagra (Sildenafil Citrate) and Cialis (Tadalafil) Products Liability Litigation,*** MDL 2691

Plaintiffs' Steering Committee in ***In re Bard IVC Filters Products Liability Litigation***, MDL 2641

Plaintiffs' Steering Committee of ***In re Lipitor® (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation***, MDL 2502.

Co-lead plaintiffs' counsel and liaison counsel ***In re Kugel Mesh Hernia Patch Products Liability Litigation,*** MDL No. 07-1842 Rhode Island federal court's first consolidated MDL, on behalf of thousands of people alleging injury by the hernia repair patch manufactured by Davol, Inc., as well as liaison counsel for the nearly 2,000 lawsuits consolidated in Rhode Island state court.

Co-lead coordinating counsel of ***In re Ethicon, Inc., Pelvic Repair Systems Products Liability Litigation***, MDL 2327 (S.D.W.Va.)

Co-lead counsel in ***In re American Medical Systems, Inc., Pelvic Repair Systems Products Liability Litigation,*** MDL 2325 (S.D.W.Va.)

Co-liaison counsel ***In re C.R. Bard, Inc., Pelvic Repair Systems Products Liability Litigation,*** MDL 2187 (S.D.W.Va.)

Co-lead counsel ***In re Boston Scientific Corp., Pelvic Repair Systems Products Liability Litigation,*** MDL 2326, (S.D.W.Va.)

Co-liaison counsel ***In re Pelvic Mesh Litigation/Bard,*** No. L-6339-10 in New Jersey state court.

State court liaison counsel of ***In re Bard Litigation*** in Massachusetts and Delaware

Co-lead counsel of the **Mirena MDL** (S.D.N.Y.)

Co-lead counsel in the ***In re Mirena Product Liability*** state court consolidation in New Jersey

Plaintiffs' Steering Committee of ***In re Power Morcellator Products Liability Litigation,*** MDL No. 2652

Plaintiffs' Steering Committee of ***In re Zoloft (Sertraline Hydrochloride) Products Liability Litigation***, MDL 2342

Plaintiffs' Steering Committee of ***In re NuvaRing Products Liability Litigation,*** MDL 1964

Plaintiffs' Steering Committee of ***In re DePuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation,*** MDL 2197

Plaintiffs' Steering Committee of ***In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation***, MDL 2244

In re A.H. Robins Co., Inc., "Dalkon Shield" IUD Products Liability Litigation (No. II), MDL 631

Plaintiffs' Steering Committee of ***In re Medtronic, inc., Sprint Fidelis Leads Products Liability Litigation,*** MDL 1905

Plaintiffs' Steering Committee of ***In re Trasylol Products Liability Litigation,*** MDL 1928

Plaintiffs' Steering Committee of ***In re Levaquin Products Liability Litigation***, MDL 1943

Plaintiffs' Steering Committee and co-lead counsel of ***In re Digitek Products Liability Litigation,*** MDL 1968

Plaintiffs' Steering Committee of ***In re Avandia Marketing, Sales Practices and Products Liability Litigation,*** MDL 1871

Plaintiffs' Steering Committee of ***In re Hydroxycut Marketing and Sales Practice Litigation,*** MDL 2087

Plaintiffs' Steering Committee of ***In re Zicam Cold Remedy Marketing, Sales Practices and Products Liability Litigation,*** MDL 2096

Plaintiffs' Steering Committee and co-lead counsel of ***In re Human Tissue Products Liability Litigation,*** MDL 1763

In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation, MDL 1001

In re Abbott Laboratories Omniflox Products Liability Litigation, MDL 1004

Plaintiffs' Steering Committee and liaison counsel of ***In re Showa Denko K.K. L-tryptophan Products Liability Action***, MDL No. 865

CONSUMER PROTECTION

Co-Lead Counsel ***In re National Prescription Opiate Litigation***, No. 17-md-02804 (N.D. Ohio).

Co-Lead Counsel ***In re Blackbaud, Inc., Customer Data Breach Litigation,*** MDL 2972 (D.S.C)

Co-Lead Counsel on the Coordinating Committee for the Pennsylvania Coordinated Cases ***County of Delaware v. Purdue Pharma L.P., et al.***

Plaintiffs' Steering Committee of ***In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,*** MDL No. 2672 CRB (JSC)

Plaintiffs' Steering Committee of ***In re Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices and Products Liability Litigation,*** No. 17-md-02777-EMC (N.D. Calif.)

Co-liaison counsel and Plaintiffs' Steering Committee in ***In re 21st Century Oncology Customer Data Security Breach Litigation***, MDL 2737 (M.D. Fla.)

CATASTROPHIC INJURY AND WRONGFUL DEATH

Plaintiffs' Executive Committee of ***In re General Motors LLC Ignition Switch Litigation,*** MDL 2543

Hoover, et al. v. NFL, et al., MDL #2:12-cv-05209-AB (E.D. Pa.).

Lead counsel in ***Charleston Firefighter Litigation v. Sofa Super Store, Inc., et.al.,*** No. 07-CP-10-3186 (Ct. of Common Pleas, Ninth Jud. Cir.), consolidated complex litigation involving the families of nine firefighters who died in a furniture store disaster.

Clifton Chesnut, a minor v. Waupaca Elevator Company, Inc., et al., *No. 2013-CP-10-2060 (Ct. of Common Pleas, Ninth Jud. Cir.).*

Veronica Lynne Tario v. SOCO, Holding, LLC et al., *No. 2013-cp-26-2499 (Ct. of Common Pleas, Fifteenth Jud. Cir.).*

Satterfield et al. v. Napa Home & Garden Inc., et al., *No. 7:11-1514-JMC (D.S.C.).*

Plaintiffs' Steering Committee and multiple plaintiffs' counsel, ***In re San Juan DuPont Plaza Hotel Fire Litigation,*** MDL 721 (D.P.R.).

Strother v. John Wieland Homes and Neighborhoods of the Carolinas, et al., No. 09-CO-29-1783 (Ct. of Common Pleas, Sixth Jud. Cir.), an individual catastrophic personal injury/premise liability case involving life-altering brain injury.

Plaintiffs' Steering Committee and Discovery Committee in ***In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation,*** MDL 1373 (S.D. Ind.).

In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II), MDL 1687

Class counsel in ***Carol Lee Whitfield, et al., v. Sangamo Weston,*** No. 6:84-3184 (D.S.C.), a PCB personal injury and property damage class action settled while pending before U.S. District Court for the District of South Carolina, Greenville Division.

In re Graniteville Train Derailment, *No. 2006-CP-02-1032 (Ct. of Common Pleas, Second Jud. Cir.).* served in a leadership role for both individual and class action cases in connection with the January 2005 railroad derailment and chemical spill in Graniteville, S.C.

SECURITIES FRAUD AND ERISA CLASS ACTIONS

Lead counsel in ***Shenwick et al. v. Twitter Inc. et al.,*** No. 3:16-cv-05314 (N.D. Cal.).

Co-lead counsel in ***Hatamian v. Advanced Micro Devices, Inc.,*** No. 14-cv-00226-JD (N.D. Cal.)

Lead counsel in ***Bernacchi v. Investment Technology Group, Inc.,*** No. 1:15-cv-06369-JFK (S.D.N.Y.).

Co-lead counsel in ***Berry v. Wells Fargo & Co.***, No. 3:17-cv-00304 (D.S.C.)

Co-lead counsel ***In re Intel Corp. Securities Litigation,*** No. 5:20-cv-05194-EJD (N.D. Cal.)

Co-lead counsel in ***In re 3M Co. Securities Litigation***, No. 2:19-cv-15982 (D.N.J.)

Lead counsel in ***Takata v. Riot Blockchain, Inc., et al.,*** No. 3:18-cv-02293 (D.N.J.)

Co-lead counsel in ***Parchmann v. MetLife, Inc. et al,*** No. 1:18-cv-00780-SJ-RLM (E.D.N.Y.)

Co-lead counsel in class action ***Bennett v. Sprint Nextel Corporation,*** No. 2:09-cv-02122-EFM-KMH (D. Kan.), representing the PACE Industry Union-Management Pension Fund (PIUMPF) and several other institutional investors.

Co-class counsel in ***Alaska Electrical Pension Fund v. Pharmacia Corp.,*** No. 03-1519 (D.N.J.). federal securities fraud litigation alleging that the defendants misrepresented clinical trial results of Celebrex® to make its safety profile appear better than rival drugs.

Lead counsel in ***In re Barrick Gold Securities Litigation,*** No. 1:13-cv-03851 (RPP) (S.D.N.Y.)

Lead counsel in ***Hefler v. Wells Fargo & Co.***, No. 16-cv-05479-JST (N.D. Cal.)

Co-lead counsel in ***Ross v. Career Education Corp.*** No. 1:12-cv-00276 (N.D. Ill.).

Co-lead counsel representing a group of institutional shareholders ***In re Allion Healthcare, Inc. Shareholders Litigation,*** No. 5022-cc (Del. Ch.).

Co-lead counsel representing investors in ***Robert Freedman v. St. Jude Medical, Inc.,*** No. 0:2012cv03070 (D. Minn.).

Co-lead counsel representing investors in ***In re Hewlett-Packard Co. Securities Litigation,*** No. SACV 11-1404 AG (RNBx) (C.D. Cal.).

Co-lead counsel in ***In re UBS AG Securities Litigation,*** No.07 Cov. 11225 (RJS) (S.D.N.Y.).

Co-lead counsel representing institutional investors in ***Hill v. State Street Corporation,*** No. 09-cv-12146-NG (D. Mass.).

Sole lead counsel representing lead plaintiffs in ***City of Brockton Retirement System v. Avon Products, Inc.,*** No. 11 Civ. 4665 (PGG) (S.D.N.Y.).

Co-lead counsel on behalf of stockholders in ***Marsden v. Select Medical Corporation,*** No. 04-cv-4020 (E.D. Pa.).

Co-lead counsel on behalf of a class of investors in ***South Ferry LP #2 v. Killinger,*** No. C04-1599C-(W.D. Wash.) (regarding Washington Mutual).

Sole lead counsel representing the lead plaintiff in class action, ***In re NPS Pharmaceuticals, Inc. Securities Litigation,*** No. 2:06-cv-00570-PGC-PMW (D. Utah***)***, concerning the drug PREOS.

Co-lead counsel for co-lead plaintiffs Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Metzler Investment GmbH in ***In re Molson Coors Brewing Co. Securities Litigation,*** No. 1:05-cv-00294 (D. Del.).

Co-lead plaintiffs' counsel in shareholder class action ***In re The DirecTV Group, Inc. Shareholder Litigation****,* No. 4581-VCP (Del. Ch.).

Sole lead counsel in ***Manville Personal Injury Settlement Trust v. Gemunder,*** No. 10-CI-01212 (Ky. Cir. Ct.) (regarding Omnicare, Inc.), a shareholder derivative complaint stemming from federal investigations into three kickback schemes.

Co-lead plaintiffs' counsel in ***City of Sterling Heights General Employees' Retirement System v. Hospira, Inc.,*** *No. 11 C 8332 (N.D. Ill.),* a securities fraud class action.

Co-lead counsel in ***In re Rehabcare Group, Inc. Shareholders Litigation,*** No. 6197-VCL (Del. Ch.), merger litigation involving the acquisition of healthcare provider RehabCare Group, Inc., by Kindred Healthcare, Inc.

Class counsel in ***Brown v. Charles Schwab & Co.,*** No. 2:07-cv-03852-DCN (D.S.C.), one of the first cases to interpret the civil liabilities provision of the Uniform Securities Act of 2002.

Co-lead counsel in securities class action settlement ***In re MBNA Corporation Securities Litigation****,* No. 05-CV-00272-GMS (D.Del.).

Lead counsel for lead plaintiffs in a securities class action involving a group of shareholders who purchased publicly-traded Dell securities in ***In re Dell, Inc. Securities Litigation,*** No. A-06-CA-726-SS (W.D. Tex.).

Co-lead counsel in ***Minneapolis Firefighters' Relief Association v. Medtronic, Inc.,*** No. 08-6324 (PAM/AJB) (D. Minn.), representing a class of investors who purchased Medtronic common stock.

Co-lead counsel in ***In re Synovus Financial Corporation,*** No. 1:09-cv-01811 (N.D. Ga.), for co-lead plaintiff Sheet Metal Workers' National Pension Fund, investors in Georgia bank Synovus Financial Corp.

Plaintiffs' Steering Committee and plaintiffs' liaison counsel, ***In re Policy Management Systems Corporation,*** No. 3:93-0807-JFA (D.S.C.).

Sole lead counsel, ***In re Coventry Health Care, Inc. Securities Litigation,*** No. 7905-CS (Del. Ch.), a shareholder class action challenging the $7.2 billion acquisition of Coventry Health Care, Inc., by Aetna, Inc.

Co-lead counsel in Louisiana class action ***In re The Shaw Group, Inc. Shareholders Litigation,*** No. 614399 (19th Jud. Dist. La.).

Co-lead counsel, ***In re Atheros Communications Inc. Shareholder Litigation,*** No. 6124-VCN (Del. Ch.), merger litigation involving Qualcomm Incorporated's proposed acquisition of Atheros Communications, Inc.

ANTITRUST/COMPETITION LAW

Plaintiffs' Steering Committee ***In re Juul Labs, Inc. Antitrust Litigation***, Case No. 20-cv-02345-WHO (N.D. Cal.)

Plaintiffs' Steering Committee ***In re Chicago Board Options Exchange Volatility Index Manipulation Antitrust Litigation*** No. 18 CV 4171 MDL No. 2842 (N.D. Ill. Eastern Division).

Co-Lead Counsel ***In re Zetia (Ezetimibe) Antitrust Litigation***, MDL No. 2:18md2836 (E.D. Va Norfolk Division).

Plaintiffs' Steering Committee of ***In re Digoxin & Doxycycline Antitrust Litigation,*** 16 md 2724 (E.D. Pa.)

Interim Co-Lead Counsel of ***In re Solodyn Antitrust Litigation***, 14 cv 2503 (D. Mass.)

Interim Co-Lead Counsel in antitrust class action ***In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation,*** MDL No. 2542 (S.D.N.Y.).

Appointed to the Executive Committee in antitrust class action ***In re Lidoderm Antitrust Litigation***, MDL No. 2521 (N.D.Cal.).

Interim Liaison Counsel ***In Re Aggrenox Antitrust Litigation****,* MDL No. 2516 (D.Conn.).

Co-lead counsel in antitrust class action ***In re Loestrin 24 Fe Antitrust Litigation****,* MDL 2472 (D.R.I.).

Co-lead counsel in antitrust class action ***In re Suboxone (Bupreorphine Hydrochloride and Naloxone) Antitrust Litigation****,* MDL 2445 (E.D. Pa.).

Co-lead counsel in antitrust class action ***In re Niaspan Antitrust Litigation****, MDL 2460* (E.D. Pa.).

Co-lead counsel in antitrust class action ***In re Effexor XR Antitrust Litigation****,* No. 11-cv-05590 (D.N.J.).

Co-lead counsel for the end-payor antitrust class action ***In re Actos Antitrust Litigation****,* (S.D.N.Y.).

Co-lead counsel in antitrust class action ***In re Lipitor Antitrust Litigation****,* MDL 2332 (D.N.J.).

TOXIC TORTS AND OCCUPATIONAL DISEASE

Liaison Counsel for ***In re Aqueous Film-Forming Foams Products Liability Litigation*** (MDL 2873 D.S.C.) regarding a fire suppressant that is part of the PFAS chemical group that allegedly contaminated groundwater and harmed people.

Plaintiffs' Executive Committee in the Flint, MI lead contamination class action: ***In re Flint Water Cases,*** No. 5:16-cv-10444 (E.D. Mich.).

Plaintiffs' Steering Committee of ***In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010,*** MDL 2179, (E.D. La.), and lead settlement negotiators of the two class action settlements reached with BP, one of which is the largest civil class action settlement in U.S. history.

Lead trial counsel in ***The People of the State of California v. Atlantic Richfield Company, et al.*** No. 1-00-CV-788657 (Santa Clara Cnty. Super. Ct.) Resulting in 2014 verdict holding Sherwin-Williams Company, ConAgra Grocery Products and NL Industries Inc. liable for creating a public nuisance and ordered abatement of lead paint from homes within 10 California cities and counties.

Bongani Nkala & Others v. Harmony Gold Mining Company Limited & Others, No. 48226/12 (South Gauteng High Court, Johannesburg). Motley Rice has been retained as a consultant by South African human rights lawyer Richard Spoor in his effort to take on leading global gold producers and seek justice for tens of thousands of exploited gold mine workers suffering from silicosis.

Travelers Statutory Direct Action Settlement (Bankr. Court, S.D.N.Y.), an eleven-state asbestos settlement with Travelers Insurance.

Co-lead and Liaison Counsel in ***In re KBR, Inc., Burn Pit Litigation***

Chair, Plaintiffs' Steering Committee and liaison counsel for plaintiffs, ***In re Asbestos Products Liability Litigation,*** MDL 875 (E.D. Pa.).

Plaintiffs' Steering Committee and coordinating counsel, ***Linscomb v. Pittsburgh Corning Corporation,*** No. 1:90cv-05000 (E.D. Tex.), a national class action on behalf of asbestos victims nationwide.

Michelle McMunn, et al. vs. Babcock & Wilcox Power Generation Group, Inc., et al., Civil Action No. 10-143 2:10-cv-00143-DSC-RCM

Lead plaintiffs' counsel in ***Bates v. Tenco Services Inc.,***132 F.R.D. 160 (D.S.C. 1990), a jet fuel pollution case involving the consolidated property damage and personal injury claims of multiple plaintiffs in the Gold Cup Springs subdivision.

Executive committee member in ***In re Asbestos School Litigation,*** No. 94-1494 (E.D. Pa.), a national school asbestos class action.

Lead plaintiffs' counsel in ***Central Wesleyan College v. W.R. Grace & Co.,*** No. 2:87-1860-8 (D.S.C.), a national asbestos property damage class action.

Lead plaintiffs' counsel in ***In re Raymark Asbestos Exposure Cases,*** No. 87-1016-K (D. Kan.), a national asbestos personal injury class action in which 19,684 claims were resolved.

Co-lead plaintiffs' counsel in ***Cimino v. Pittsburgh Corning Corporation,*** No. 1:85-CV-00676 (E.D. Tex.), an asbestos personal injury class action on behalf of approximately 2,300 plaintiffs.

Co-lead plaintiffs' counsel in ***Chatham v. AC&S, et al.,*** a consolidated asbestos personal injury action involving 300 plaintiffs in the Circuit Court of Harris County, Texas.

Co-lead plaintiffs' counsel in ***Abrams v. GAF Corporation,*** No. 88-5422(1) (Jackson Cty., Miss.), a consolidated asbestos personal action involving more than 6,000 plaintiffs.

Co-liaison plaintiffs' counsel in 3,000 asbestos personal injury cases in the Third Judicial Circuit of Illinois, Madison County, Illinois.

Co-lead plaintiffs' counsel in a consolidated asbestos personal injury action involving 540 plaintiffs pending in the Superior Court of Alameda County, California.

Counsel in numerous consolidated asbestos trials including 87 consolidated cases in Danville, Illinois; 300 consolidated cases in U.S. District Court, Western District of New York, Rochester, New York; 42 consolidated cases in State Court in Mississippi; and 315 consolidated cases in the Circuit Court of Kanawha County, West Virginia.

Plaintiffs' lead counsel in ***In re Kansas Asbestos Cases*** in U.S. District Court for the District of Kansas, ***In re Madison County Illinois Asbestos Litigation***

Plaintiffs' lead counsel in ***In re Wayne County Michigan Asbestos Cases***.

John Schumacher v. Amtico, et al., No. 2:10-1627 (E.D.Pa.), the first federal court mesothelioma case to go to trial before Eduardo C. Robreno, the judge who oversees the entire Federal Asbestos MDL, In re Asbestos Products Liability Litigation, MDL 875.

Plaintiffs' Steering Committee of ***In re Welding Fume Products Liability Litigation,*** MDL 1535

ANTI-TERRORISM AND HUMAN RIGHTS

Lead counsel in ***In re Thomas E. Burnett, Sr., et al. v. Al Baraka Investment & Development Corp., et al.,*** Case No. 03-CV-9849 (GBD); ***In re Terrorist Attacks on September 11, 2001,*** MDL 1570 (S.D.N.Y), a landmark lawsuit against the alleged sponsors of al Qaeda and Osama bin Laden in an action filed on behalf of more than 6,500 family members, survivors, and those killed on 9/11.

Linde et al. v. Arab Bank PLC, No. 1:04-cv-02799 (E.D.N.Y.) and ***Almog v. Arab Bank, PLC,*** No. 1:04-cv-05564-NG-VVP (E.D.N.Y.), one of the first lawsuits brought against an international bank for its alleged role in financing terrorism.

Mark McDonald, et al. vs. The Socialist People's Libyan Arab Jamahiriya, et al.; No. 06-CV-0729-JR (DC 04/21/06), a high-profile case involving Libya's longtime alleged sponsorship of IRA acts of terror.

Cummock, et al. v. Socialist People's Libyan Arab Jamahiriya, et al., No. 96-CV-1029 (D.D.C.). Victoria Cummock, Motley Rice's client, sought full accountability and a public trial as the only opt-out of the no-fault Pan Am 103/Lockerbie settlement.

Krishanthi, et al. vs. Rajaratnam, et al.; No. 09-CV-5395(D.N.J.), terrorist financing litigation against alleged financiers of the Tamil Tigers terrorist organization in Sri Lanka.

Plaintiffs' Steering Committee and lead counsel for Verizon plaintiffs in ***In re National Security Agency Telecommunications Records Litigation,*** MDL 1791

Ng v. Central Falls Detention Facility Corporation, et al., No. 09-53 (D. R.I.), a human rights case that alleged the defendants subjected a Chinese immigration detainee to extreme physical and mental abuse and torture while in U.S. custody.

Harris, et al. v. Socialist People's Libyan Arab Jamahiriya, et al., No. 1:06-cv-00732-RWR (D.D.C.), a case filed against Libya involving the 1986 bombing of Berlin's LaBelle Discotheque.

AVIATION DISASTERS AND PASSENGER RIGHTS

Plaintiffs' liaison counsel in ***In re September 11 Litigation,*** No. 21-MC-97-AKH (S.D.N.Y), representing 56 of the 96 families that opted out of the no-fault federal September 11 Victim Compensation Fund in liability and damages cases claims against the airlines and aviation security companies for their alleged failure to implement basic security measures.

Amanda Tuxworth v. Delta Air Lines, Inc., No. 2:10-cv-03212-RMG (D.S.C), an aviation passenger rights case involving a Delta passenger.

Chris Turner, Individually and as Personal Representative of The Estate of Tracy Turner v. Ramo LLC, a Florida Limited Liability Company, No. 11-14066 (Ct. of Appeals, 11th Cir.), an aviation case involving fraudulent transfer allegations in connection with a fatal plane crash.

Counsel for victims of **Asiana Airlines Flight 214**

Counsel for families of victims of **Malaysia Airlines Flight MH370**

BANKRUPTCIES

Coalition of Abused Scouts for Justice in the **Boy Scouts of America and Delaware BSA, LLC Chapter 11 bankruptcy proceedings** (Case No. 20-10343), on behalf of a group of firms representing thousands of survivors

Claimants' committee in ***In re A.H. Robins,*** a Chapter 11 Reorganization involving Dalkon Shield victims nationwide

Claimants committee in the ***Camall Chapter 11***, the first bankruptcy associated with the Fen-Phen litigation

Motley Rice attorneys currently serve as a member of the trust advisory committee for several of the asbestos bankruptcy trusts formed under 524(g) of the federal bankruptcy code:

AC&S , Inc. Bankr., No. 02-12687 (D. Del.)

Armstrong World Industries, Inc., Bankr. No. 00-4471 (D. Del.)

Babcock & Wilcox Co. Bankr., No. 00-10992 (E.D. La.)

Celotex Corp. Bankr., Nos. 90-10016-8B1, 90-10017-8B1 (M.D. Fla.)

Dresser II Bankr., No. 03-35592 (W.D. PA.)

Federal Mogul Bankr., No. 01-10578 (D. Del)

G-I Holdings Bankr., Nos. 01-30135 and 01-38790 (D.N.J.)

Johns-Manville Corp., No.82-B11656 through 82 B 11676 (S.D.N.Y., E.D.N.Y.)

Kaiser Aluminum Corp. Bankr., No.02-10429 (D. Del.)

Keene Bankr., No. 93B 46090,96 CV 3492 (S.D.N.Y.)

MH Detrick Bankr., No. 98 B 01004 (N.D. Ill.)

Owens Corning Corp. Bankr., No. 00-03837 (D. Del.)

Rock Wool Bankr., Nos. CV-99-J-I589-S.BK -96-08295-TBB-11 (N.D. Ala.)

Rutland Fire Clay Bankr., No. 99-11390 (D. Vt.)

Shook & Fletcher Bankr., No. 02-02771-BGc-11 (N.D. Ala.)

United States Gypsum Corp. Bankr., No. 01-2094 (D. Del.)

W.R. Grace Co. Bankr., No.s 01-1139, 01-1140 (D. Del.)

Motley Rice attorneys have served as lead or co-lead trial counsel on behalf of The Asbestos Claims Committee:

Armstrong World Industries, Inc., Bankr. No. 00-4471 (D. Del.) (estimation trial and plan confirmation trial)

Federal Mogul Bankr., No. 01-10578 (D. Del.) (estimation trial and plan confirmation trial)

Owens Corning Corp. Bankr., No. 00-03837 (D. Del.) (estimation trial and substantive consolidation trial)

Pittsburgh Corning Corp. Bankr., No. 00-22876 (W.D. Pa.) (plan confirmation trial)

W.R. Grace Co. Bankr., Nos. 01-1139, 01-1140 (D. Del.) (estimation trial and plan confirmation trial)

Motley Rice attorneys have served on The Asbestos Claims Committee involved in the formation and confirmation of various asbestos bankruptcy trusts.

AC&S Bankr., No. 02-12687 (D. Del)

Babcock & Wilcox Bankr., No. 00-10992 (E.D. La.)

Celotex Bankr., Nos. 90-10016-8B1, 90-10017-8B1 (M.D. Fla.)

Combustion Engineering Bankr., D. Del. No. 03-10495 (D. Del.)

Congoleum Corp. Bankr., No.03-51524 (D.N.J.)

Durabla Corp. Bankr., No. 09-14415 (D. Del)

Federal Mogul Bankr., No. 01-10578 (D. Del.)

G-I Holdings Bankr., Nos. 01-30135 and 01-38790 (D. N.J.)

Johns-Manville Corp., No.82-B11656 through 82 B 11676 (E.D.N.Y.)

Keene Bankr., No. 93B 46090,96 CV 3492 (S.D.N.Y.)

MH Detrick Bankr., No. 98 B 01004 (N.D. Ill.)

North American Refractories Corp. Bankr., No. 02-20198 (W.D. Pa.)

Owens Corning Corp. Bankr., No. 00-03837 (D. Del.)

Pittsburgh Corning Corp. Bankr., No. 00-22876 (W.D. Pa.)

Rock Wool Bankr., Nos. CV-99-J-I589-S.BK-96-08295-TBB-11 (N.D. Ala.)

Rutland Fire Clay Bankr., No. 99-11390 (D. Vt.)

Shook and Fletcher Bankr., No. 02-02771-BGc-11 (N.D. Ala.)

United States Gypsum Corp. Bankr., No. 01-2094 (D. Del.)

W.R. Grace Co. Bankr., No.s 01-1139, 01-1140 (D. Del.)

ACCOLADES FOR THE FIRM

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"Elite Trial Lawyers"

***The National Law Journal* Law Firm of the Year**

2021 Government Representation
2021 Mass Torts
2020 Pharmaceuticals Firm of the Year
2020 Insurance Liability Firm of the Year
2019 Bankruptcy Law *(finalist)*

Practice Group of the Year

Law360

2020 • 2019 • 2015 Product Liability
2018 Consumer Protection
2015 • 2013 "Most Feared Plaintiffs Firm"

Securities Class Action Services Top 50

International Securities Services

2017 • 2016 • 2015 • 2014 • 2011 • 2010 • 2009

For full methodologies and selection criteria, visit www.motleyrice.com/award-methodology

Please remember that every case is different. Although they endorse certain lawyers, *The Legal 500 United States* and *Chambers USA* and other similar organizations listed above are not Motley Rice clients. Any result we achieve for one client in one matter does not necessarily indicate similar results can be obtained for other clients.

Mathew P. Jasinski

LICENSED IN: CT, NY
ADMITTED TO PRACTICE BEFORE:
U.S. Supreme Court; U.S. Court of Appeals for the First, Second, and Third Circuits; U.S. District Court for the District of Connecticut and Southern District of New York
EDUCATION:
J.D. *with high honors*, University of Connecticut School of Law, 2006
B.A. *summa cum laude*, University of Connecticut, 2003

Mathew Jasinski represents consumers, businesses, and governmental entities in class action and complex cases involving consumer protection, unfair trade practices, commercial, environmental and securities litigation. He also represents whistleblowers in *qui tam* cases under the False Claims Act.

Mathew's litigation experience includes all aspects of trial work, from case investigation to appeal. He has represented plaintiffs in class actions involving such claims as breach of contract and unfair trade practices. He has experience in complex commercial cases regarding claims of fraud and breach of fiduciary duty and has represented an institutional investor in its efforts to satisfy a judgment obtained against the operator of a Ponzi scheme. Mathew obtained a seven-figure arbitration award in a case involving secondary liability for an investment advisor's conduct under the Uniform Securities Act. Please remember that every case is different. Any result we achieve for one client in one matter does not necessarily indicate similar results can be obtained for other clients.

Mathew also serves the firm's appellate group, having argued cases in the U.S. Courts of Appeals for the First and Second Circuits, the Connecticut Appellate Court, and the Connecticut Supreme Court. He also has worked on numerous appeals before other state and federal appellate courts across the country.

Prior to joining Motley Rice in 2009, Mathew practiced complex commercial and business litigation at a large defense firm. He began his legal career as a law clerk for Justice David M. Borden (ret.) of the Connecticut Supreme Court. During law school, Mathew served as executive editor of the *Connecticut Law Review* and judging director of the Connecticut Moot Court Board. He placed first in various moot court and mock court competitions, including the Boston region mock trial competition of the American Association for Justice. As an undergraduate, Mathew served on the board of associate directors for the University of Connecticut's honors program and was recognized with the Donald L. McCullough Award for his student leadership.

Mathew continues to demonstrate civic leadership in the local Hartford community. He is vice chairman of the board of directors for the Hartford Symphony Orchestra, a deacon of the Asylum Hill Congregational Church, and a commissioner of the Hartford Parking Authority. Previously, Mathew served on the city's Charter Revision Commission and its Young Professionals Task Force, an organization focused on engaging young professionals and positioning them for future business and community leadership.

PUBLISHED WORKS:

"On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives" (Jasinski and Ladewig, *Perspectives on Politics,* Vol. 6, Issue 1, March 2008)

"Hybrid Class Actions: Bridging the Gap Between the Process Due and the Process that Functions" (Jasinski and Narwold), *The Brief,* Fall 2009

AWARDS AND ACCOLADES:

Lawdragon
2019–2020 Lawdragon 500 Plaintiff Financial Lawyers

Super Lawyers®
2013–2020 *Connecticut Super Lawyers Rising Stars* list
Business litigation; Class action/mass torts; Appellate

Connecticut Law Tribune
2018 "New Leaders in Law"

Hartford Business Journal
2009 "Forty Under 40"

ASSOCIATIONS:

American Association for Justice
American Bar Association
Connecticut Bar Association
Oliver Ellsworth Inn of Court
Phi Beta Kappa

For full Super Lawyers selection methodology visit: www.superlawyers.com/about/selection_process.html
For current year CT data visit: www.superlawyers.com/connecticut/selection_details.html

William H. Narwold

LICENSED IN: CT, DC, NY, SC
ADMITTED TO PRACTICE BEFORE:
U.S. Supreme Court, U.S. Court of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits, U.S. District Court for the District of Connecticut, Eastern District of Michigan, Eastern and Southern Districts of New York, District of South Carolina
EDUCATION:
J.D. cum laude, University of Connecticut School of Law, 1979
B.A., Colby College, 1974

Bill Narwold has advocated for corporate accountability and fiduciary responsibility for nearly 40 years, representing consumers, governmental entities, unions and institutional investors. He litigates complex securities fraud, shareholder rights and consumer fraud lawsuits, as well as matters involving unfair trade practices, antitrust violations and whistleblower/qui tam claims.

Bill leads Motley Rice's securities and consumer fraud litigation teams and False Claim Act practice. He is also active in the firm's appellate practice. His experience includes being involved in more than 200 appeals before the U.S. Supreme Court, U.S. Courts of Appeal and multiple state courts.

Prior to joining Motley Rice in 2004, Bill directed corporate, securities, financial, and other complex litigation on behalf of private and commercial clients for 25 years at Cummings & Lockwood in Hartford, Connecticut, including 10 years as managing partner. Prior to his work in private practice, he served as a law clerk for the Honorable Warren W. Eginton of the U.S. District Court, District of Connecticut from 1979-1981.

Bill often acts as an arbitrator and mediator both privately and through the American Arbitration Association. He is a frequent speaker on legal matters, including class actions. Named one of 11 lawyers "who made a difference" by *The Connecticut Law Tribune*, Bill is recognized as an AV® rated attorney by Martindale-Hubbell®.

Bill has served the Hartford community with past involvements including the Greater Hartford Legal Assistance Foundation, Lawyers for Children America, and as President of the Connecticut Bar Foundation. For more than twenty years, Bill served as a Director and Chairman of Protein Sciences Corporation, a biopharmaceutical company in Meriden, Connecticut.

AWARDS AND ACCOLADES:

Best Lawyers®
2013, 2015, 2017, 2019 Hartford, Conn. "Lawyer of the Year": Litigation–Banking and Finance
2005–2021 Litigation–Banking and finance, mergers and acquisitions, securities

Lawdragon
2019–2020 Lawdragon 500 Plaintiff Financial Lawyers

Super Lawyers®
2009–2020 *Connecticut Super Lawyers and New England Super Lawyers®* lists
Securities litigation; Class action/mass torts

Connecticut Bar Foundation
2008 Legal Services Leadership Award

ASSOCIATIONS:

American Bar Association
Connecticut Bar Foundation, Past President
Taxpayers Against Fraud
University of Connecticut Law School Foundation, past Board of Trustees member

For full Super Lawyers selection methodology visit: www.superlawyers.com/about/selection_process.html
For current year CT data visit: www.superlawyers.com/connecticut/selection_details.html

Jessica C. Colombo

LICENSED IN: CT, NY
ADMITTED TO PRACTICE BEFORE:
U.S. Court of Appeals for the Second Circuit, U.S. District Court for the District of Connecticut
EDUCATION:
J.D. *with high honors*, University of Connecticut School of Law, 2017
B.A. *cum laude*, State University of New York at New Paltz, 2014

Jessica Colombo works to deter misconduct and fraud by representing individuals and institutional investors in complex securities and consumer protection class actions. In addition, Jessica's practice includes representing whistleblowers in cases involving the False Claims Act, and she contributes to the firm's appellate practice. She is also a part of the firm's team that represents dozens of governmental entities, including states, cities, towns, counties and townships in litigation against several pharmaceutical drug manufacturers and distributors for the alleged deceptive marketing and distribution of highly addictive prescription opioids.

Prior to joining Motley Rice, Jessica served as a law clerk to the Honorable Bethany J. Alvord of the Connecticut Appellate Court. She gained additional experience in complex consumer fraud and product liability litigation while serving as a Motley Rice law clerk in 2016. She also interned with the U.S. Attorney's Office for the District of Connecticut.

While completing her legal studies, Jessica served as Executive Editor of the *Connecticut Law Review*, a member of the Public Interest Law Group, and a volunteer with the International Refugee Assistance Project. She also represented criminal defendants in the University of Connecticut School of Law Criminal Trial Clinic. She received multiple CALI awards in Lawyering Process, Torts, Estate Plan/Tax Practice, and Trademark Law.

Jessica previously worked as a toll collector for the New York State Thruway Authority, where she was a member of the International Brotherhood of Teamsters, Local 72.

ASSOCIATIONS:

American Bar Association
Connecticut Bar Association

Erin Casey Williams

LICENSED IN: SC
ADMITTED TO PRACTICE BEFORE:
United States Court of Appeals for the Second Circuit; U.S. District Court for the Eastern District of Michigan, and District of South Carolina
EDUCATION:
J.D., University of Illinois College of Law, 2014
B.S. with honors, University of Illinois at Urbana-Champaign, 2011

Erin Casey Williams protects the interests of institutional investors and consumers through complex securities litigation.

Erin is a member of Motley Rice's litigation teams representing investors in securities fraud class action cases. She supports the firm's efforts in matters involving Qualcomm Incorporated and Investment Technology Group, Inc.

Erin assisted in the development of deposition strategies and completed discovery with the Motley Rice securities team before joining the firm in 2017. Her previous experience includes litigating claims involving medical malpractice, wrongful death, personal injury and complex family law matters at a Charleston, S.C., law firm. She also researched and drafted memoranda regarding construction defects, insurance defense, and tort liability for a national litigation support agency.

While pursuing her law degree, Erin interned for the Federal Defender Program in Chicago in addition to working as a judicial extern for the Honorable Michael T. Mason of the U.S. District Court for the Northern District of Illinois. She served as an associate editor of the *University of Illinois Law Review* and the Community Service Chair of the Women's Law Society.

ASSOCIATIONS:

American Bar Association
South Carolina Bar Association
South Carolina Association for Justice
South Carolina Women Lawyers Association
Charleston County Bar Association

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Joseph F. Rice (DC, SC) is the attorney responsible for this communication. Prior results do not guarantee a similar outcome. Motley Rice LLC, a South Carolina Limited Liability Company, is engaged in the New Jersey practice of law through Motley Rice New Jersey LLC. Esther Berezofsky attorney responsible for New Jersey practice.
PD: 08.16.2021

EXHIBIT B

Motley Rice LLC

(01/24/2019 – 08/12/2021)

Note: Motley Rice did not start on this matter until 01/24/2019 (during Phase 5)

Phase 1	Pre-suit Investigation; Preparing and Filing Complaint	8/13/2012-12/28/2012	Total Hours: 0	
Phase 2	Responding to Motion to Dismiss and Hearing on Motion to Dismiss; Analysis of Decision on Motion to Dismiss	12/29/2012-2/27/2014	Total Hours: 0	
Phase 3	Preparing and Filing Appeal to Federal Circuit and Hearing; Analysis of Appeal Decision	2/28/2014-5/15/2015	Total Hours: 0	
Phase 4	Class Discovery; Preparing and Filing Class Certification Papers; Hearing; Notice Process	5/16/2015-1/15/2019	Total Hours: 0	
Phase 5	Merits Discovery; Trial Preparation; Preparation of Mediation Statement; Mediation	1/16/2019-1/4/2021	Total Hours: 237.8 William Narwold: 89.30 x $1,100.00 Mathew Jasinski: 51.30 x $800.00 Jessica Colombo: 36.20 x $425.00 James Geisler: 32.80 x $300.00 Viola LePine: 28.20 x $325.00 Total	 $ 98,230.00 41,040.00 15,385.00 9,840.00 9,165.00 $173,660.00
Phase 6	Drafting of Settlement Agreement; Preparing Preliminary and Final Approval Papers,	1/5/2021-08/12/21	Total Hours: 173.0 William Narwold: 47.40 x $1,100.00 Mathew Jasinski: 12.6 x $800.00	 $ 52,140.00 10,080.00

	Notices and Fee Motion		Erin Williams: 100.1 x $550.00 Viola LePine: 1.1 x $325.00 Evelyn Richards: 11.8 x $350.00 Total	55,055.00 357.50 4,130.00 $121,762.50

TOTAL HOURS FOR PHASES 5 & 6: 410.80

LODESTAR TOTAL: $295,422.50

William Narwold: $1,100.00 x 136.7 = $150,370.00
Mathew Jasinski: $800.00 x 63.9 = $51,120.00
Jessica Colombo: $425.00 x 36.2 = $15,385
Erin Williams: $550.00 x 100.1 = $55,055.00
James Geisler: $300.00 x 32.8 = $9,840.00
Evelyn Richards: $350.00 x 11.8 = $4,130.00
Viola LePine: $325.00 x 29.3 = $9,522.50

EXHIBIT C
Motley Rice LLC Litigation Expenses

Printing/Copying	$124.15
Online Research	$137.49
Contract Labor	$2,2209.68
Ricoh Services	$268.36
Telephone	$11.30
TOTAL	**$2,750.98**