

Attorney Reports on the Impact of *Amchem* and *Ortiz* on Choice of a Federal or State Forum in Class Action Litigation

*A Report to the Advisory Committee on Civil Rules
Regarding a Case-based Survey of Attorneys*

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April 2004

Federal Judicial Center

This study was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Advisory Committee or of the Federal Judicial Center.

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Includes May 2004 update

Update

Add the following to p.39, after the first full paragraph and before subsection (d):

Nor was the proportion of monetary recoveries devoted to attorney fees different in a statistically significant way in state and federal court in removed and remanded cases. In the remanded cases, the typical state court awarded 30% of the total monetary recovery as attorney fees; the typical federal court awarded 25%. The average award was 27% in cases remanded to state courts and 29% in cases removed to and retained in federal courts.

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Background

In 2001, the Advisory Committee on Civil Rules (“the Committee”) asked the Federal Judicial Center to conduct empirical research in an attempt to gain information that might assist the Committee’s examination of whether Federal Rule of Civil Procedure 23 should be amended to provide a different certification standard for classes certified for settlement rather than for trial and litigation. After researching class action filing rates,¹ the Center designed and conducted a survey of attorneys who had represented clients in recently terminated class action litigation.

In both state and federal courts, many class actions have been resolved by certification for settlement. In class action litigation that is characterized by multiple filings in state and federal forums, such as mass tort cases, the ability to certify cases for multistate or nationwide settlement is viewed as important to achieving a broad resolution of the litigation. In 1996, the Committee published for public comment a proposed amendment to Rule 23 that would have permitted certification of a settlement class action “even though the requirements of subdivision (b)(3) might not be met for purposes of trial.”² The Committee deferred consideration of the proposed amendment after the Supreme Court granted certiorari in *Amchem Products, Inc. v. Windsor*³ and later in *Ortiz v. Fibreboard Corp.*⁴ In those cases, the Court held that under Rule 23 a court could not certify a class for settlement unless the class met all of the Rule 23(a) criteria and one of the Rule 23(b) criteria, with the exception of trial

1. In September 2002, the Center presented to the Committee the results of a related study, also requested by the Committee, of the effect of the *Amchem* and *Ortiz* decisions on the filing of class actions in federal courts. See Bob Niemic & Tom Willging, Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules (2002) (available at <http://www.fjc.gov>). That study reported that the rate of filing of class actions in federal court had increased after *Amchem* and *Ortiz*. That study does not—and could not—directly answer the question whether those two decisions have had an impact on the settlement of class actions in federal court or whether there is any relationship between the Court decisions and attorney–client decisions on where to file cases. For example, those two cases may have influenced attorneys’ decisions in a limited number of specific types of cases; also, the number of federal class action filings might have increased at a slower rate than state class action filings.

2. Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559 (1996); see also *id.* at 563–64 (Proposed Committee Note).

3. 521 U.S. 591 (1997). In *Amchem*, the Supreme Court affirmed a Third Circuit decision that vacated the order of the district court certifying a class of individuals with asbestos injury claims against a number of defendants and approving a Rule 23(b)(3) opt-out settlement. The district court had combined in one class action claimants with present asbestos injuries and future claimants (absent and unknown) who had been exposed to an asbestos product but who had not to date discovered an asbestos-related injury. The Court held that the district court’s ruling had allowed settlement of a “sprawling” class action that failed to provide future claimants the adequate representation required by Rule 23(a)(4).

4. 527 U.S. 815 (1999). In *Ortiz*, the Court reversed a Fifth Circuit decision that had affirmed an asbestos settlement with similar features to those the Court criticized in *Amchem*. The settlement in *Ortiz*, however, focused on a single manufacturer of products containing asbestos and used a mandatory “limited fund” settlement class certified under Rule 23(b)(1)(B).

manageability for a (b)(3) class. The rulings restricted the ability of federal courts to certify settlement class actions.

In *Amchem*, the Court noted the Committee's pending "settlement class" proposal and stated that, although parts of the Court's ruling were rooted in due process concerns about notice, the holding on certification standards was limited to Rule 23 "as it is currently framed."⁵ Since the Supreme Court decisions, the Committee has continued to receive proposals to amend Rule 23 to relax the certification standard for settlement classes—proposals that emphasize the importance of such class actions to achieving the broad resolution of repetitive litigation.⁶ The Committee has also continued to receive advice that the problems of such a rule amendment would outweigh any benefits that facilitating settlements might provide.⁷

As part of its examination of proposals to amend Rule 23 to provide a separate settlement class certification standard, the Committee asked the Center to assist by providing empirical information, if possible, as to the effect of *Amchem* and *Ortiz* on class action litigation in federal courts. The Center, in consultation with the Committee, designed a survey of attorneys in class actions recently terminated in federal courts. Questionnaires were designed to provide data on whether the Supreme Court decisions restricting certification of settlement classes in federal courts under existing Rule 23 influenced attorneys to file and litigate such actions in state courts. The survey also sought information on the extent to which limits on certification of settlement classes affected the number of overlapping or duplicative class actions pending simultaneously in state and federal courts.

This report is based on analyses of responses to questionnaires (copies of which can be found in the Questionnaire Appendix accompanying the full report) returned by 728 attorneys, 312 (43%) representing plaintiffs and 416 (57%) representing defendants in 621 class actions (see the Methods Appendix accompanying the full report). These class actions were either filed in federal court or removed to federal court between 1994 and 2001 and terminated between July 1, 1999, and December 31, 2002. In 107 of the 621 cases, we received responses from attorneys for both sides.⁸ The response rate was 39% of 1,851 attorneys. Attorneys were asked to report information about a specific case in which they had represented a party (the "named

5. *Amchem*, 521 U.S. at 619.

6. See, e.g., Francis McGovern, *Settlement of Mass Torts in a Federal System*, 36 Wake Forest L. Rev. 871, 878 (2001) (stating that "*Amchem* and *Ortiz* have changed the practical landscape for the global resolution of personal injury mass tort litigation by making class action settlements more expensive and, in certain circumstances, improbable"). According to Professor McGovern, a change in Rule 23 to facilitate settlement class actions for all types of cases is one way to address the problem. *Id.* at 882 (asserting that "[t]here will be efforts to facilitate class action settlements by relaxing the 23(a) prerequisites and, at the same time, strengthening 23(e) scrutiny").

7. For discussion of some of the arguments against global class action settlements and settlement class rules in the pre-*Amchem* legal environment, see generally, *Symposium, Mass Torts: Serving Up Just Desserts*, 80 Cornell L. Rev. 811 (1995).

8. All responses were used for analyses based on attorney reports (Parts 1 and 3). For analyses done at the case level (Parts 2, 4, and 5), if two responses referred to the same case, each response was given a weight of 0.5.

case”). We selected the named cases from the database used for the Center’s earlier report to the Committee on class action filing activity.

The report identifies factors that attorneys reported—with the benefit of hindsight—as related to their decisions about where to file or whether to remove a class action, and it presents data concerning attorney perceptions of the relative importance of those factors. Questions called for numerous attorney judgments about whether individual factors might have influenced that attorney’s total assessment of differences between state and federal courts in handling class action litigation.

Unless specified as not statistically significant, all differences discussed in this report were statistically significant. By statistically significant we mean significant at the .05 level or better (i.e., the probability that the differences occurred by chance is at most 5%).

Executive Summary

Overall conclusions regarding Amchem and Ortiz factors

The Committee's primary question was whether existing Rule 23, as interpreted and applied in the *Amchem* and *Ortiz* line of cases to restrict class certification for settlement class actions, induced attorneys to file and litigate class actions in state rather than federal court. This study supports the following empirical conclusions based on attorney reports regarding specified cases:

- neither *Amchem* and *Ortiz* nor federal class certification rules were reported to have directly affected the vast majority of plaintiff attorneys' choice of forum;
- defendant attorneys reported their perceptions that federal courts' strict application of class certification rules was one factor that affected their decision to *remove* cases to federal courts, which would not be likely to avoid any effects of *Amchem* and *Ortiz*;
- in less than 10% of the cases, *Amchem* and *Ortiz* factors may have been related to attorneys' choice of forum and to how courts managed class actions;
- despite attorneys' perceptions that federal judges were less receptive than state judges to motions to certify class actions, federal and state judges were almost equally likely to certify class actions and to certify those cases for litigation and trial or for settlement;
- federal and state judges were equally likely to approve class settlements;
- federal judges were more likely than state judges to deny class certification, while state judges were more likely than federal judges to not rule on certification;
- the reported size of certified classes tended to be larger in state courts, but no direct link to *Amchem* and *Ortiz* was found and we could not directly test speculation that *Amchem* and *Ortiz* may have driven the larger classes into state court where they could be settled more easily;
- the rate at which proposed class actions were reported to have been certified appears to have declined when compared to a Federal Judicial Center pre-*Amchem* and *Ortiz* study of class actions in four federal districts;
- based on the same study, the percentage of certified class actions that were reported to have been certified for settlement appears to have increased after *Amchem* and *Ortiz*; and
- the percentage of class recoveries reported to have been allocated to attorney fees appears to have been about the same as in the previous Center study.

Summary of findings

1. Attorney reports of the effects of Amchem and Ortiz on choice of forum

(a) Plaintiff attorney reports of reasons for filing the named case in federal or state court

We presented plaintiff attorneys a range of questions and statements to find out why they filed the named case in state or federal court. Three factors were strongly related to their decisions about where to file: widely shared attorney perceptions that state or federal judges were predisposed to rule on certain claims in line with the interests of the attorney's client; attorney reports of the source of law (state or federal) for the claims; and attorney reports of "state facts," a composite measure we created, using the average of the percent of class members who resided in the state and the percent of claims-related transactions or events that attorneys reported having occurred within the state.⁹

Attorneys' decisions regarding where to file were associated with other factors, but not as strongly as with those above. The strongest group of additional factors encompassed the substantive law and the discovery rules governing the case. Those factors were also related to attorney perceptions of judicial predisposition. Plaintiff attorneys did not report that either class certification rules in general or the *Amchem* and *Ortiz* holdings in particular had any direct impact on their choice of a state or federal forum.

We also found that the filing of a class action in state or federal court was strongly associated with the location of a competing or overlapping class action.

(b) Comparison of plaintiff and defendant attorney reports of reasons for choosing to file the named case in, or remove it to, federal court

We presented a similar set of statements to defendant attorneys so they could indicate why they removed the named case, and we compared their responses to those of plaintiff attorneys who also chose a federal forum. Defendant attorneys more often than plaintiff attorneys cited their expectations that federal courts would apply class certification rules strictly and that substantive law, discovery rules, and expert evidence rules would favor their side. Aside from the importance defendant attorneys attributed to stringent class certification rules in general, *Amchem* and *Ortiz* factors

9. The portion of the "state facts" variable that deals with the location of claims-related transactions or events depends on the ability of a responding attorney to distinguish between events (such as the purchase of a product) that may have occurred both within the state of filing and in a number of other states. For further discussion of the "state facts" variable see the full text of this report at *infra* notes 19–20.

limiting federal courts' ability to certify a class for settlement did not appear to have played a role in either side's decision to select a federal forum. In general, a defendant attorney was far more likely than a plaintiff attorney to refer to the attorney's personal preferences or to client preferences as a basis for a decision to select a federal forum.

(c) Attorney reports of the effects of *Amchem* and *Ortiz* on the named case and in general

We also posed direct questions to attorneys about any effects *Amchem* and *Ortiz* may have had on their decisions about where to file or litigate the named cases and on class action litigation in general, including case management. Attorneys' responses suggest that, at most, the two decisions may have had a relationship to the attorneys' choice of forum and to case management in a small percentage of the named cases. Overall, as discussed in Parts 1(a) and (b), attorneys' statements as to why they filed cases in state or federal courts did not independently generate a conclusion that the *Amchem* and *Ortiz* decisions played an important role. Viewed in the aggregate—that is, in the context of the many factors that might have been associated with choice of forum—attorneys reported perceptions that *Amchem* and *Ortiz* factors had an impact on a small proportion of cases.

Nonetheless, attorney responses to the direct *Amchem* and *Ortiz* questions provide some support for the conclusion that the cases have had some relationship with class action certification and settlement. Our findings in that regard appear to be limited to a small proportion of the cases covered in the survey, less than 10% of which generated reports of some link with the two decisions.

Attorneys' opinions about the impact of *Amchem* and *Ortiz* indicate that they expected the two cases to have had more of an impact than their collective reports show they had in the named cases. Forty-three percent (43%) said that *Amchem* and *Ortiz* had made it more difficult in general to certify, settle, and/or maintain class actions in federal and state courts; another 5% thought the two cases had such an impact, but only in mass tort cases.

(d) Plaintiff and defendant attorney reports about any relationship between client characteristics and filing and removal decisions

We also asked plaintiff and defendant attorneys about characteristics that might have described their clients (such as place of residence, type of business, gender, race, and ethnicity) and whether, at the time of filing or removing an action, they perceived any litigation advantage or disadvantage arising out of any of those characteristics. None of the differences appeared to be related to choice of a federal or state forum. We found few important differences in reports of advantages or disadvantages based on party characteristics. The majority of attorneys reported that they perceived no advantage or disadvantage in most of their clients' characteristics.

Comparing perceptions of plaintiff attorneys who filed in state courts with those who filed in federal courts, the only salient client characteristics were connected to the defendant's type of business and the proposed class representative's local residence and reputation. The class representative's local residence appeared to be the factor with the strongest association with a plaintiff's decision to file a class action in a state court.

Comparing perceptions of plaintiff attorneys with those of defendant attorneys (regardless of the choice of forum), the only client characteristic that elicited a majority response was that plaintiff attorneys tended to see the proposed class representative's local residence as an advantage. Other client characteristics (e.g., defendant's corporate status or type of business) produced different responses from plaintiff and defendant attorneys.

2. Competing or overlapping class actions filed in other courts

A clear majority of attorneys reported the existence of other lawsuits dealing with the same subject matter as the named case in other state or federal courts. Those attorneys also indicated that about three-fourths of the other lawsuits were resolved in the same manner as the named case. Among the remaining cases, we found that when the named case was dismissed on the merits, voluntarily dismissed, or terminated by summary judgment (and not resolved as a class action), the related cases were more likely to have had a different outcome. Those data suggest that rulings on the merits of individual claims did not prevent further litigation in other courts in related cases.

3. Plaintiff and defendant attorney perceptions of state and federal judges' predispositions toward plaintiff and defendant interests

(a) Attorney perceptions of judicial predispositions

Attorneys on both sides of the litigation reported their expectations about judicial predispositions at the time they filed or removed the named case. Those impressions were often related to lawyers' judgments about the favorability of that court's rules and the substantive law applicable to their clients' claims and defenses, and to attorneys' impressions of judicial receptivity to claims like those of their clients.

About half of the plaintiff attorneys who filed cases in state courts expressed an impression that state judges were more likely than federal judges to rule in favor of interests like those of their clients. About one in four plaintiff attorneys who filed in federal court, though, expressed an expectation that federal judges were more likely than state judges to rule in favor of their clients' interests, and about 40% of plaintiff attorneys filing in federal court reported that they perceived no difference between state and federal judges in that regard.

Three out of four defendant attorneys who removed cases to federal courts reported the impression that federal judges were more likely than state judges to rule

in favor of interests like those of their clients. About 20% of attorneys perceived no difference between the two sets of judges.

(b) Substantive law, procedural rules, and judicial receptivity as sources of perceived judicial predispositions

Plaintiff attorneys were more likely to perceive judicial predispositions in favor of their clients' interests when they also reported that state substantive law and state discovery, evidence, and class action certification rules favored their clients' interests. Those plaintiff attorneys were also more likely than other plaintiff attorneys to report that state court judges were more receptive than federal judges to motions to certify a class and more receptive to their clients' claims on the merits.

In reporting their impressions of judicial predispositions, defendant attorneys presented almost, but not exactly, a mirror image of plaintiff attorneys. Defendant attorneys who removed cases to federal courts were more likely to perceive federal predispositions in favor of their clients' interests when they also reported that federal discovery, expert evidence, and general evidentiary rules favored their clients' interests. Those defendant attorneys were also more likely than other defendant attorneys to report that federal judges were less receptive than state judges to motions to certify a class and more receptive to their clients' positions on the merits. Defendant attorneys who perceived federal judicial predispositions, however, were no more likely than other defendant attorneys to report that federal substantive law was favorable to their clients' interests.

In the next two sections we explore how those perceptions in individual named cases matched up with the aggregate of judicial rulings, procedural outcomes, and monetary recoveries and settlements in two groups of named cases: first, those removed from federal courts and, in the final section, all of the named cases.

4. Comparison of rulings by state and federal courts in removed cases

In Part 1(a) we reported that attorney perceptions of judicial predispositions toward interests like those of the attorneys' clients represented one of the strongest factors affecting choice of forum. Do these attorney perceptions about judicial predispositions have any basis in the reality of judicial rulings in the named cases viewed as a whole?

We found little relationship between the attorneys' perceptions and federal and state judicial rulings in the named cases. Federal district judges remanded to state court almost half of the cases that defendants removed to federal court, providing an opportunity to compare rulings in the two sets of courts.¹⁰ We found federal and state

10. Note that our comparison of the two sets of cases proceeds on the assumption (untestable in the context of this survey) that district judges' decisions to remand were based on the presence or absence of federal subject-matter jurisdiction and were not affected one way or the other by the certifiability of the case as a class action or by the underlying merits of the claims presented.

judges about equally likely to certify cases as class actions (which happened in 22% of the remanded cases and 20% of the cases retained in federal courts). Moreover, federal and state judges were about equally likely to certify classes for trial and litigation or for settlement: Half of the certifications in each set of courts were for trial and litigation and half were for settlement.

In the attorney reports about the named cases, federal judges were more likely than state judges to issue rulings denying class certification, while state judges were more likely than federal judges to take no action regarding class certification. Neither the action or inaction of courts regarding class certification was associated with whether a case produced a monetary recovery or settlement. A ruling denying class certification usually was accompanied by explicit resolution of the individual claims of the proposed class representatives, whether the resolution was by settlement, summary judgment, or trial. The absence of a ruling on class certification was more often accompanied by voluntary dismissal of the claims.

In the named cases, we found no statistically significant differences in rulings on dispositive procedural motions in cases remanded to state courts and in cases retained in the federal courts. In certified class actions, state and federal courts were equally likely to approve a classwide settlement. In one or two instances in federal or state court the settlement had been revised before court approval; no class settlement was rejected in total.

We also found, in removed cases, a relationship (again, not necessarily a causal relationship) between attorneys' perceptions of judicial predispositions and whether the parties' class settlements included a money recovery—and, if so, how much. Attorney fees also varied in the same direction as the predisposition perceived by attorneys; that is, fees were higher when plaintiffs perceived a predisposition in their favor than when they did not perceive such a predisposition.

Despite the similarities in rulings, monetary recoveries—almost always in the form of settlements fashioned by the parties—differed in the two court systems. In removed cases that were remanded to state courts, the amount of classwide monetary recoveries and settlements was substantially larger than monetary recoveries and settlements in cases retained in federal court. The median recovery in state court was \$850,000 and in federal court was \$300,000. Those differences, however, appeared to be a product of the larger size of classes resolved in state courts (typically, 5,000 class members compared to 1,000 in federal courts). The typical recovery per class member turned out to be higher in federal court: \$517 in federal court compared to \$350 in cases remanded to state courts.

We also found a relationship between class size and attorney perception of predispositions. Attorneys were somewhat more likely to perceive federal court predispositions to favor client interests in cases with a smaller class size and to perceive favorable state court predispositions toward such interests in cases with a larger class size. These differences seem marginal, however, and applicable to a small number of cases.

5. Procedural outcomes and monetary recoveries and settlements in named cases (removed and not removed)

Looking at the total sample of all closed cases (including cases filed as original federal class actions, not just the removed cases discussed in Part 4), we found that in the majority of cases (57%) the court took no action on class certification. Courts certified 24% of the cases as class actions and denied certification in 19% of them. Of the certified cases, 58% were certified for settlement and 42% were certified for trial or litigation.

The Center's 1996 research for the Committee, focusing on class actions terminated in 1992–1994 in four federal district courts, and based on examination of court files, not attorney recollections, reported a class certification rate of 37%. The percentage of those cases certified for settlement was 39%. While the study methods were different, comparing data from the current study and the 1992–1994 study indicates that the rate of class certification as a whole most likely has not increased and appears to have declined (from 37% to 24%) in the period after *Amchem* and *Ortiz*. These two studies also indicate that the percentage of class actions certified for settlement appears to have increased (from 39% to 58%).

In the study at hand, in both state and federal courts, certified class actions generally terminated with settlements and monetary recoveries. Almost all certified class actions settled. In contrast, most cases that were never certified terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' claims.

In state and federal courts combined, about one in four of the named cases included a monetary recovery or settlement for the class. The typical (i.e., median) recovery was \$800,000. Twenty-five percent (25%) of the recoveries and settlements exceeded \$5.2 million, and 25% were \$50,000 or less.

Various commentators and judges have criticized the use of coupons—especially nontransferable coupons without any market value—to settle class actions. In the study, 29 of 315 cases (9%) with a recovery included some type of coupon in the recovery; 3 of those cases (1%) involved nontransferable coupons.

Attorney fees typically were about 29% of the class recovery, which was about the same percentage as in the prior FJC study of class actions. Twenty-five percent (25%) of the cases involved fees of 36% or more, which was also similar to what we found previously.

Results from the Class Action Survey

1. Attorney reports of the effects of Amchem and Ortiz on choice of forum

To examine whether the *Amchem* and *Ortiz* decisions have had any relationship with attorney–client decisions on where to file class actions, we had to ask a more fundamental question: What factors influence attorneys’ decisions to file class actions in state versus federal courts? A literature review reinforced our understanding that a host of factors are likely to influence such decisions. One researcher found, for example, that attorneys give “quite diverse” reasons for forum selection, citing “as many as fifteen or twenty different factors” when responding to surveys of forum selection choices.¹¹ Attorneys cited “geographic convenience, fear of local bias, superior rules of procedure, case delay, judicial competence, litigation costs, favorable or unfavorable precedent, higher damages awards, jury pool differences, better rules of evidence, greater judicial pretrial involvement, and selection choice made by client or referring attorney.”¹² In addition, in diversity cases attorneys indicated that “attorney habit, convenience, and case delay” were the primary factors affecting their choice of forum.¹³

(a) Plaintiff attorney reports on reasons for filing the named cases in federal or state courts¹⁴

We investigated why plaintiff attorneys file class actions in state or federal court by conducting multivariate analyses of a wide range of variables covered in our questionnaire. These analyses allow us to look at the relationships between pairs of variables while controlling for the effects of other variables.

We concentrated on factors we expected to be correlated with attorneys’ choice of forum and analyzed responses from plaintiff attorneys who filed proposed class action lawsuits in state court and plaintiff attorneys who filed such suits in federal court.¹⁵ The Regression Methods and Results Appendix presents a more complete description of these analyses. Note that we used a very restrictive approach on the data in the

11. Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 382 (1992).

12. *Id.*

13. *Id.* at 383.

14. The analyses in this subsection, but not in other parts of this report, excluded 72 cases that had been removed to federal court but remanded to state court or dismissed for lack of federal jurisdiction. The reason for excluding these cases was that the lack of federal jurisdiction suggested that the plaintiff attorney did not have a meaningful choice of forum.

15. We were unable to examine defendant attorneys’ reasons for removing cases to federal court or choosing to litigate such cases in state courts because we were unable to identify a source of information about cases in which defendants chose to remain in state court.

multivariate analyses and therefore some of the reported frequencies in this section are different from those reported in sections using other analyses.¹⁶

Various factors might play a role in an attorney's choice of forum. Factors include case characteristics (e.g., number of class members, amount in controversy, nature of suit), perceived advantages in a particular forum (e.g., applicable law, convenience, rules, judicial receptiveness, costs and fees, and strategy), and attorney experience (e.g., type of practice, type of clients, years of experience). Table 1 describes the factors our analyses found to be associated with attorneys' choice of forum, beginning with the three factors that turned out to be the most strongly associated.

Table 1: Factors reported to have influenced plaintiff attorneys' choice of forum

Factor	Description of Factor in Questionnaire*
Judicial predisposition (toward client interests)**	Attorneys' impression of any predisposition of state or federal judges toward interests like their clients (Question 23)
Source of law**	Attorneys' estimate of proportion of claims based on state or federal law (Question 1)
State facts**	The average of the percent of class members residing in the state (Question 4) and the percent of claims-related events that occurred in the state where the class action was filed (Question 5)
Substantive law	Substantive law was more favorable to our case (Question 21)
Discovery rules	Discovery rules were more favorable to our case (Question 21)
Judicial receptiveness (to merits of claims)	Judges in state or federal court are generally more receptive to the claims on the merits (Question 21)
Location of court	The location of the court was more convenient for us, our clients, or witnesses (Question 21)
Cost of litigation	The cost of litigation would be lower (Question 21)
Jury award	A jury award would be higher (Question 21)
Other cases	Similar cases were filed in state or federal court (Question 19)
Percent of federal civil litigation	Percent of attorney's workload devoted to civil litigation in federal court during the past five years (Question 33)
Number of state class actions	Number of class actions attorney filed in state court in the past three years (Question 31)

*Question numbers refer to the questionnaires addressed to plaintiff attorneys, which are in the Questionnaire Appendix. Note that Question 21 asked attorneys directly about their reasons for choosing a state or federal forum. Other questions asked attorneys to describe particular aspects of the named case.

**These three factors were by far the strongest reported influences. See discussion below.

16. In the multivariate analyses we chose to limit our analyses to cases where there were no missing values for any of the variables in question. This reduced the total number of responses in the analyses. See the "Regression Methods and Results" section of the Methods Appendix for a more detailed description of how we eliminated missing data.

Primary factors reportedly influencing plaintiff attorneys' choice of forum

There are three factors that appear to have the greatest connection with where attorneys filed their cases: (1) perceptions of judicial predispositions to rule for one side or the other; (2) attorney reports of the source (state or federal) of the law supporting the claims; and (3) attorney reports of the percentage of class members residing in, and claims-related events originating in, the state in which the case was filed (which we call "state facts"). These three factors proved to be closely related to attorneys' choice of forum.

Perception of judicial predispositions. Attorneys indicated whether they perceived that state or federal judges had any predisposition toward ruling in favor of interests like those of their clients.¹⁷ Attorneys tended to file in the jurisdiction they thought would be predisposed to their clients' interests. Forty percent (40%) of attorneys filing in state and federal court reported that they perceived a state judicial predisposition. Thirty-two percent (32%) of attorneys filing in federal court and 4% of attorneys filing in state court reported that they perceived a federal judicial predisposition. A number of attorneys (28% filing in federal court and 56% filing in state court) reported that they perceived no differences between state and federal judges. See Part 3(b) for further discussion of the sources of these perceptions.

Source of law. We asked attorneys to estimate the proportion of claims in the named case that were based on federal or state law. Most attorneys reported that their cases had a majority of state claims: 83% of attorneys filing in state court and 59% of attorneys filing in federal court reported a majority of state claims. Twenty-five percent (25%) of attorneys filing in federal court and 5% of attorneys filing in state court reported a majority of federal claims. Sixteen percent (16%) of attorneys filing in federal court and 13% of attorneys filing in state court reported an equal number of both state and federal claims. It is interesting to note that 13% of plaintiffs who filed cases originally in federal court reported that the named case involved the laws of many states.¹⁸ Comments from attorneys in a few instances indicated that they sometimes filed a case in federal court because they wanted to pursue a federal claim and knew that a single federal claim would allow a defendant to remove the case to federal court.

State facts. We also asked attorneys to estimate the percentage of class members residing in the state and the percentage of claims-related events that occurred in the state where the class action was filed.¹⁹ Attorneys filing in federal court reported a

17. In another analysis, reported in Part 3(b), Tables 8 and 9, we report that such predispositions are related to attorneys' judgments or intuitions about factors such as the relative strictness of applicable class certification rules, judicial receptivity to motions to certify a class or to the merits of claims or defenses, and the impact of other system-wide court rules, such as those relating to discovery or evidence. Attorney judgments about the favorability of substantive law are also related, but to a lesser degree, to their impressions about judicial predispositions.

18. We did not ask that exact form of Question 21 of plaintiff attorneys who filed named cases originally in state court.

19. Questions 4 and 5 provide the underlying support for the "state facts" variable (see Questionnaire Appendix). Question 4 asks for "the percentage of claims-related transactions/events [that]

greater percentage of class members residing outside the state of filing than attorneys filing in state court (51% v. 28%) as well as a higher percentage of claims-related events occurring in multiple states (34% v. 26%). These data suggest that attorneys tend to file in federal courts cases with factual and legal issues implicating a larger number of states and tend to file in state courts cases with factual and legal issues implicating a smaller number of states.

Similarly, federal courts appear to have received more proposed class actions with multistate class membership than state courts. About 71% of attorneys filing in federal court reported class members resided in more than two states, compared with 41% of attorneys filing in state courts. Similarly, 34% of attorneys filing in federal court reported having class members from all 50 states, compared with 19% of attorneys filing in state court who so reported.

We computed a composite variable, called “state facts,” by taking the average of the percentage of class members who resided in the state where the class action was filed and the percentage of claims-related events that occurred in the state where the class action was filed.²⁰ Attorneys who filed in state court had a higher average of state facts (73%) than attorneys who filed in federal court (57%).

Perception of judicial predispositions, source of law, and state facts. We found that the probability of filing in state court is at its highest level when attorneys perceive a state judicial predisposition toward their clients’ interests, there was a majority of state claims, and there was a high average²¹ of class members residing in, and claims-related events originated in, the state where the class action was filed. Likewise, the probability of filing in state court was at its lowest level when the opposite was true. The multivariate model predicts that very few cases would be filed in state courts if attorneys perceive a federal judicial predisposition toward their clients’ interests, there is a majority of federal claims, and there is a low average²² of claimants residing in, and claims-related events occurring in, the state where plaintiffs filed the class action.

Secondary factors reportedly influencing attorneys’ choice of forum

Reasons for choosing to file in state or federal court. We found other factors were associated with attorneys’ choice of forum. In the questionnaire (Questionnaire Appendix, question 21), attorneys reviewed a list of statements about factors that might have influenced their decisions about where to file the case. These statements

occurred in the state where the class action was filed.” That question depends on the ability of a responding attorney to distinguish between events (such as the purchase or use of a product allegedly causing injury) that may have occurred both within the state of filing and in a number of other states.

20. We examined the influence of the number of states represented by the class, the percentage of class members residing in the state, and the number of claims-related events that occurred in the state but found that these factors individually were not associated with attorneys’ choice of forum.

21. We examined the distribution for this variable and found that 25% of the respondents reported that all of the class members resided in, and all of the claims-related events occurred in, the state in which the plaintiff filed the class action (which we call “high state facts”).

22. We examined the distribution for this variable and found that 25% of respondents reported 20% or less state facts (which we call “low state facts”).

compared differences in state and federal practices, including applicable law, convenience, rules, judicial receptiveness, costs and fees, and strategy. Attorneys indicated which reason(s) influenced their decisions on where to file their case.

Attorneys who filed in state court were more likely than attorneys who filed in federal court to choose the following reasons for their decision: favorableness of substantive law and discovery rules; general judicial receptiveness to such claims on the merits; lower costs of litigation; higher jury awards; and convenience of the court location.²³ We found that the above factors were associated with where the named case was filed. The probability of filing in state court increased if an attorney chose any of those factors as a reason for selecting a particular court.

Table 2 shows the percentage of attorneys who chose any of these factors.

Table 2: Factors selected by plaintiff attorneys as reasons for choice of forum

Reason	Filed in State Court	Filed in Federal Court
Source of claims (state or federal)	78%	28%
Favorableness of substantive law	33%	4%
Favorableness of discovery rules	28%	16%
Judicial receptiveness to claims on merits	38%	19%
Lower costs of litigation	31%	12%
Higher jury awards	18%	4%
Location of court	32%	18%

Note: Differences in this table are statistically significant at the .05 level.

Competing or overlapping cases. Attorneys were asked whether other lawsuits were filed in state or federal courts dealing with the same subject matter around the same time as the named case.²⁴ Attorneys filing in state court reported that, of the similar cases filed at the time of the named case, 61% were filed in a state court, 26% were filed in both state and federal court, and 13% were filed in federal court. Attorneys filing in federal court reported that 40% of similar cases were filed in state court, 12% were filed in both state and federal court, and 48% were filed in a federal court.

We found that the locations of the other cases are associated with the location where the named case was filed. The probability of filing in state court increases when a similar case has been filed in a state court and decreases when a similar case has

23. These factors were found to be independently predictive of attorneys' choice of forum. We controlled for the three factors in the basic model. There may be other factors (not included in the questionnaire) that we could not control that may have influenced the relationship.

24. Note that we created the database for this study in a way that was designed to eliminate duplicate cases consolidated in the same federal court or in the same MDL proceeding. See Methods Appendix at A-2 ("Population of Class Action Terminations"). Attorneys in the survey may, of course, have referred to cases that we treated as a single consolidated case.

been filed in a federal court. For further discussion of competing and overlapping cases, including discussion of settlements and other outcomes, see Part 2.

Attorney experience. Attorneys were asked about the percentage of their civil cases that they filed in federal court in the past five years. Responses indicated that the probability of filing in state court increases when the percentage of civil litigation filed in federal court in the past five years is low and decreases when the percentage of civil litigation filed in federal court is high. Attorneys filing in state court reported filing 30% of civil litigation in federal court in the past five years. Attorneys filing in federal court reported filing 46% of civil litigation in federal court.

Attorneys also were asked about the number of class actions they filed over the past three years and the percentage filed in state court. Of all of the factors discussed in this section, attorney reports indicated that prior class action filings had the least amount of influence on attorneys' choice of forum. The probability of filing in state court increases when the number of class actions filed in state court is high and decreases when the number of class actions filed in state court is low. Attorneys filing in state court reported filing 77% of all of their class actions in the past three years in state court. Attorneys filing in federal court reported filing 36% of all of their class actions in the past three years in state court.

Factors not associated with filing choices

We also examined other factors that could bear on the impact of the *Amchem* and *Ortiz* decisions on plaintiffs' choice of a federal or state forum. Table 3 describes these factors, none of which seemed to have played a role in attorneys' decisions.

Table 3: Factors not associated with plaintiff attorneys' choice of forum

Factor	Description of Factor in Questionnaire
Stringency of class certification rules	[Federal/State] class action rules in general imposed [more/less] stringent requirements for certifying a class action.
Availability of interlocutory appeal	Interlocutory appeal was [more/less] likely to be available in [federal/state] court.
Stringency of class notification rules	[Federal/State] class action rules in general imposed [more/less] stringent requirements for class notification.
Judicial receptiveness to approve settlement	[Federal/State] court was generally more receptive to motions to approve a class settlement.
Judicial receptiveness to certification	[Federal/State] court was generally [less/more] receptive to motions to certify a class.
Appoint firm as class counsel	[Federal/State] court would be more likely to appoint my client and our law firm to represent the class.
<i>Amchem</i> main reason	<i>Amchem/Ortiz</i> : One or both cases provided the main reason we [filed/removed] the named case [in/to] [state/federal] court.
<i>Amchem</i> one reason	<i>Amchem/Ortiz</i> : One or both cases were among a number of factors that led us to [file/remove] the named case [in/to] [state/federal] court.
<i>Amchem</i> specific case impact	What effect, if any, do you think the <i>Amchem</i> and <i>Ortiz</i> cases had on the management of the named case?
<i>Amchem</i> general impact	How do you think the <i>Amchem</i> and <i>Ortiz</i> cases have affected class action litigation generally in federal and state courts?

Summary

Linking these findings with the Advisory Committee's interest in information to assist its decision on whether to revisit the settlement class area, we found no support in the multivariate analysis for the proposition that the *Amchem* and *Ortiz* opinions had any impact on plaintiff attorney decisions about choice of forum. As we discuss in Part 1(c), attorney responses to direct and open-ended questions suggest a perceived impact from the two cases and perhaps some impact on defendant attorneys' decisions to remove cases to federal court. The multivariate analysis discussed above, however, indicates that plaintiff attorneys did not consider those two cases as influencing their selection of a federal or state forum in the named cases. The only rule-related factor that was associated with attorneys' choice of forum related to discovery rules. None of the *Amchem*-related rules and propositions were associated with plaintiff attorneys' choice of forum.

(b) Comparison of plaintiff and defendant attorney reports of reasons for choosing to file the named case in, or remove it to, federal court

We could not conduct a multivariate analysis of factors affecting defendant attorneys' removal of cases to federal court because we could not readily obtain a sample of defendant attorneys who chose to remain in state courts. We did examine defendant attorneys' responses, however, and in this section compare responses of plaintiff²⁵ and defendant attorneys who chose federal court.

The types of cases that were removed to federal court seemed to differ from those filed originally in federal court in regard to the proportion of claims based on state or federal law. Defendant attorneys who removed named cases to federal court (58%) were more likely than plaintiff attorneys who filed named cases originally in federal court (39%) to report that all claims in their case were based on state law. Eighty-eight percent (88%) of defendant attorneys, as opposed to 66% of plaintiff attorneys, reported that at least half of their claims were based on state law. On the other hand, 24% of plaintiff attorneys who filed cases originally in federal court reported that all claims were based on federal law; only 3% of defendant attorneys who removed cases reported this. About one-third of plaintiff attorneys who filed cases in federal court and 12% of defendant attorneys who removed cases to federal court reported that their case involved a majority of federal claims.

Cases that defendant attorneys removed to federal court included more state facts (71%) than cases plaintiff attorneys filed in federal court (55%). Defendant attorneys reported that, on average, 73% of class members resided in, and 73% of claims-related events occurred in, the state where the class action was filed. Plaintiff attorneys who filed in federal court reported that on average 47% of class members resided in, and 62% of claims-related events occurred in, the state of filing. Over 60% of attorneys removing to federal court reported that members of the proposed class resided in two or fewer states; 16% reported class members from all 50 states. Twenty-nine percent (29%) of plaintiff attorneys who filed in federal court reported that the class members resided in two or fewer states and 34% reported class members from all 50 states.

Attorneys appear to have considered any overlapping or competing cases before choosing federal court. Earlier we reported that plaintiff attorneys were more likely to file in state court if a similar case had been filed in state court. Plaintiff attorneys who filed in federal court reported that 50% of similar cases were filed in federal court, 22% were filed in both state and federal court, and 28% were filed in state court. On the other hand, defendant attorneys were likely to remove the named case to federal court even if a similar case had been filed in state court: Defendant attorneys reported 11% of other similar cases had been filed in federal court, 29% were filed in both state and federal court, and 60% were filed in state court.

25. The frequencies for plaintiff attorneys filing in federal court differ from the percentages presented in Table 2 because we did not need to eliminate any responses based on a failure to respond to other questions.

Table 4 shows the percentage of attorneys who reported relying on certain factors as a reason for filing or removing a case to federal court.

Table 4: Factors cited by attorneys as reasons for choice of federal court*

Reason	Defendant Removed Case to Federal Court	Plaintiff Filed Case in Federal Court
Client prefers federal court	65%	Not available**
Attorney prefers federal court [†]	57%	26%
Class certification more/less stringent [†]	47% more stringent	8% less stringent
Class notification more/less stringent [†]	9% more stringent	1% less stringent
Court more receptive to motions to approve class settlement [†]	2%	6%
Court likely to appoint firm as class counsel [†]	Not available**	3%
Discovery rules favorable [†]	26%	10%
Expert evidence rules favorable [†]	22%	2%
Substantive law favorable [†]	18%	3%
Costs of litigation lower ^{††}	14%	9%
Jury awards favorable [†]	21% lower awards	3% higher jury awards
Court has more resources [†]	30%	14%
Court is more expeditious [†]	27%	17%
Court location favorable ^{††}	9%	17%

*Table 4 differs from previous tables in that it includes responses from defendant attorneys who removed cases from state to federal courts.

**These respondents were not presented with this factor as a potential reason for choosing a federal forum.

[†]Differences are statistically significant at the .05 level.

^{††}Differences are statistically significant at the .10 level.

The reason most often cited by defendant attorneys for removing cases to federal court was the general preference of both the client and the attorney to litigate in federal court. Defendant attorneys were more than twice as likely as plaintiff attorneys to cite their preference to litigate in federal court as a reason for filing in that court.

Amchem and *Ortiz* factors reportedly did not play much of a role in either plaintiff or defendant attorneys' choice of a federal forum. Almost half of defendant attorneys cited the general stringency of class certification as a reason for removing a case to federal court. Many plaintiff attorneys choosing federal court agreed; few indicated a belief that they would have an easier time with class certification. A small minority of plaintiff attorneys chose to file in federal court because the attorneys expected the court to appoint their firm as class counsel.

Expected effects of *Amchem* and *Ortiz* would more likely appear when a defendant attorney decides to remain in state court, but we did not have the opportunity to study cases that were filed in state court and not removed to federal court. To the extent that attorneys viewed certification of a settlement class as an integral part of the settlement approval process,²⁶ most attorneys did not report judicial receptiveness to motions to approve class settlement as an important factor in their decisions on choice of forum.

In choosing a forum, attorneys reported considering the perceived favorableness of substantive law and court rules, and the judicial receptiveness to their claims or defenses. Defendant attorneys were more likely than plaintiff attorneys to report choosing federal court because they expected the substantive law, and class certification, discovery, and expert evidence rules to be more favorable.

A number of respondents reported that they chose to file in federal court after considering the court resources and how fast their case would move through the court. Defendant attorneys were more likely than plaintiff attorneys to report choosing federal court because they believed that federal court had more resources available to handle the class action, that the court would be able to resolve the class action more expeditiously, and that litigation costs would be lower. Plaintiff attorneys were more likely than defendant attorneys to report choosing federal court because the location of the court was convenient to them, their clients, and witnesses. A few plaintiff attorneys reported that they chose federal court because they believed they would receive a higher jury award, but defendant attorneys were seven times more likely to report choosing federal court because they envisioned a lower jury award.

Summary

Defendant attorneys' reported reasons for choosing a federal forum differed somewhat from plaintiff attorneys' reported reasons. Defendant attorneys were far more likely to view federal courts as preferable because of restrictive application of class certification rules. *Amchem* and *Ortiz* considerations may have played a role in defendant attorneys' perceptions of restrictive application of class certification rules in federal courts, but this study does not provide evidence that *Amchem* and *Ortiz* led plaintiff attorneys to file class actions in state court or led defendant attorneys to refrain from removing state class actions to federal court.

(c) Attorney reports of the effects of *Amchem* and *Ortiz* on the named case and in general

We also analyzed a set of direct questions concerning the impact of the *Amchem* and *Ortiz* cases on filing and removal decisions. A closed-ended question asked about "any effect one or both of those cases may have had on your decisions" about where to file or whether to remove. A large majority (85%) of plaintiff and defendant attorneys

26. A common scenario in which class certification becomes an integral part of settlement approval occurs when both sides negotiate a class settlement and then seek certification of a settlement class as a part of seeking court approval of the settlement.

indicated that neither the *Amchem* nor the *Ortiz* decision was among a number of factors that influenced their decisions about where to file or whether to remove the named case. Defendant attorneys (11%) were more likely than plaintiff attorneys (7%) to indicate that *Amchem* and *Ortiz* were among a number of factors that led to their choice of a federal forum (by removal or original filing). A larger percentage (15%) of attorneys involved in personal injury cases than in all other types of cases (9%) reported some effect of the cases on the choice of forum, but that difference is not statistically significant.

Four attorneys indicated that either or both the *Amchem* and *Ortiz* decisions were the main reason for their forum selection. These responses came from both plaintiff and defendant attorneys in four different types of cases from four different districts. They appear to have no common threads.

We also asked an open-ended question about “the effect, if any . . . the *Amchem* and *Ortiz* cases had on the management of the named case.”²⁷ Attorney responses were similar to those reported above for the closed-ended question dealing with filing and removal decisions. First, those factors proved not to be important in plaintiff attorneys’ choice of forum (see Part 1(a), above). Second, 88% of the attorneys reported *Amchem* and *Ortiz* had little or no effect on the management of the named case. About 7% of plaintiff and 5% of defendant attorneys said the two decisions made it more difficult to certify, settle, or maintain the named cases as a class action, with 2% of plaintiff attorneys and 3% of defendant attorneys pointing solely to an increased difficulty in settling the case as a class action.²⁸ Note that the above data represent ex post facto assessments of the effects of *Amchem* and *Ortiz* in general, not just on the choice of forum. As such, these data represent the main opportunity attorneys had to report the effects of *Amchem* and *Ortiz* on certification of a class for settlement.

In responding to an open-ended question about the general effects of the two cases, a contrast between the general perceptions and opinions of attorneys and their reported experiences in the named case emerged. We asked “How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?” Attorneys perceived the two Supreme Court cases to have had far more impact than attorneys’ collective responses to specific questions about the named case revealed: 43% expressed their opinion that the two cases have generally made it more difficult to certify, settle, or maintain class actions in federal and state courts. Another 5% expressed their opinion that the impact of the two cases was limited to making it more difficult to certify, settle, or maintain mass tort class actions in federal or state court. About 27% indicated that the effect had been “none” or “little.”

In our estimation, attorney reports about the named cases deserve far greater weight because those reports amount to a representative national sample of attorneys’ *experiences* in recent cases. In contrast, responses to the general question amount to a representative national sample of attorneys’ *opinions*—perhaps based on their own

27. Both authors coded the open-ended responses. The percent of agreement was 96% for this question and the question discussed in the next paragraph of the report.

28. Differences between plaintiff and defendant responses were not statistically significant.

experiences, perhaps not—untethered to a specific identified case. Data from our sample are anchored to identified cases and our design allows us to draw inferences about the representativeness of those cases. Data based on the attorneys' opinions are not anchored to known cases and cannot be said to reflect actual circumstances. One can speculate, of course, that attorneys' opinions might influence future cases.

Summary

The data derived from the named cases suggest that, at most, the two Supreme Court decisions affected attorneys' choice of forum and class certification or settlement in a modest percentage of the named cases. As discussed in Part 1(a), plaintiff attorneys' reports of why they filed cases in state or federal courts—when examined in the aggregate and in the context of the multiple factors that might be expected to affect their choice of forum—did not reveal any impact based on the *Amchem* and *Ortiz* decisions.

Nonetheless, attorney responses to the direct *Amchem* and *Ortiz* questions provide some support for the conclusion that the cases may have had some relationship with class action certification and settlement apart from the attorneys' choice of forum. About 5% to 8% of the attorneys reported an effect from *Amchem* and *Ortiz* on certification, maintenance, or settlement of the named case as a class action. Those data both confirm the existence of *Amchem* and *Ortiz* relationships asserted by Professor McGovern and suggest their relative infrequency.²⁹

(d) Plaintiff and defendant attorney reports about any relationship between client characteristics and filing and removing decisions

Attorneys might believe they would have an advantage, or a disadvantage, in state or federal court based on particular characteristics of the parties they represent. The questionnaire called for attorneys to review a list of party characteristics and report if they had, at the time of filing, expected any of those characteristics to yield an advantage or disadvantage. The party characteristics included residence, gender, race, ethnicity, religion, socioeconomic status, foreign national status, corporate status, and type of business, and reputation of the class representatives and defendants.

Most respondents reported expecting no advantage or disadvantage arising from most of these party characteristics. When a majority of attorneys perceived effects, they tended to be modest—but all were statistically significant. None of the characteristics elicited responses indicating attorneys' widespread perceptions of a strong advantage or disadvantage.

Using multivariate analyses we found that party characteristics were not associated with plaintiff attorneys' choice of forum. We included those characteristics in the analysis (see Part 1(a)) of the many factors that might have affected attorney decisions about where to file a class action. Here we discuss the differences regarding the

29. See *supra* note 6 and accompanying text.

importance of these party characteristics among plaintiff attorneys who filed in state or federal court as well as between plaintiff and defendant attorneys.

Differences between plaintiff attorneys who filed in state and federal court

We examined whether there were differences between ratings of party characteristics for plaintiff attorneys who filed proposed class actions in state court and plaintiff attorneys who filed such suits in federal court. Attorneys who filed in state and federal court differed in their reports of any perceived advantage or disadvantage of defendant’s type of business and class representative’s local residence and reputation.

In these analyses, what we did not find may be as important as what we found. No significant differences emerged from ratings of the perceived advantage or disadvantage of class representative’s type of business; defendant’s out-of-state residence; defendant’s reputation; or either party’s gender, race, ethnicity, religion, socioeconomic status, corporate status, and foreign national status.

Table 5 shows the percentage of plaintiff attorneys who filed in state and federal court who rated the party characteristic as an advantage, a disadvantage, or neither.

Table 5: Plaintiff attorney ratings of party characteristics by choice of forum

Variable	Court of Filing	Advantage	No Advantage/ No Disadvantage	Disadvantage
Defendant’s type of business (N=147)	State	52%	45%	3%
	Federal	29%	65%	6%
Class representative’s local residence (N=163)	State	71%	28%	1%
	Federal	1%	52%	47%
Class representative’s reputation (N=131)	State	28%	70%	2%
	Federal	0%	87%	13%

Note: Differences in this table are statistically significant at the .05 level.

The majority of plaintiff attorneys who filed in state court reported expecting the type of business conducted by the defendant to be an advantage to the plaintiff’s case, but nonetheless multivariate analyses did not show that defendant’s type of business influenced plaintiffs’ filing decisions. To a lesser degree, some plaintiff attorneys reported expecting the defendant’s type of business to make filing in federal court more advantageous. A limited number of attorneys identified the type of business.³⁰ They mentioned insurance or financial services (e.g., banking, mortgages, and accounting) most frequently as presenting an advantage to the plaintiff side. Attorneys who filed in state court most often reported viewing a manufacturing business as an

30. Because the number of attorneys who provided this information was small, we were unable to conduct any sophisticated statistical analysis.

advantage, whereas attorneys who filed in federal court reported seeing this type of business as neither an advantage nor a disadvantage.

A majority of attorneys filing in state court reported that the local residence³¹ of the class representative made state filing more advantageous to their side. Of the party characteristics, this one had the strongest association with a plaintiff's decision about where to file a class action; nonetheless, it did not surface in the multivariate analysis as a factor in the model predicting choice of forum (see Part 1(a)). Almost one-half of attorneys filing in federal court reported the class representative's local residence to be disadvantageous to their side.

Likewise, more than a quarter of attorneys filing in state court reported that the reputation of the class representative was an advantage to their side. No attorneys who filed in federal court reported the class representative's reputation to be an advantage, but a number did report this party characteristic put their case at a disadvantage in federal court.

Differences between plaintiff and defendant attorneys

We also examined whether there were differences in ratings of the above party characteristics between plaintiff attorneys who filed proposed class actions in state or federal court and defendant attorneys who removed proposed class actions to state court. We found that there were statistically significant differences between plaintiff and defendant attorneys on the perceived advantage of the defendant's and the class representative's residence and type of business, the defendant's corporate status, and the class representative's gender, race, ethnicity, religion or socioeconomic status.

No statistically significant differences were found in ratings of the perceived advantage or disadvantage of the defendant's gender, race, ethnicity, religion, or socioeconomic status; the defendant's out-of-state residence; the class representative's corporate status; or the reputation or foreign national status of both the class representative and the defendant.

Table 6 shows the percentage of plaintiff and defendant attorneys who rated the party characteristic as an advantage, a disadvantage, or neither.

31. Note that the term "local residence" may take on different meaning in the state and federal courts. A local resident, in reference to a state court, probably resided in the same city in which the court was located. A local resident, in reference to a federal court, may well have resided in a different city but in the same state as the court.

Table 6: Ratings of party characteristics by plaintiff and defendant attorneys

Variable	Attorney	Advantage	No Advantage/ No Disadvantage	Disadvantage
Class representative's local residence (N=395)	Plaintiff	63%	36%	1%
	Defendant	24%	52%	23%
Defendant's type of business (N=360)	Plaintiff	22%	77%	1%
	Defendant	12%	78%	10%
Class representative's type of business (N=223)	Plaintiff	43%	52%	4%
	Defendant	39%	40%	22%
Defendant's corporate status (N=319)	Plaintiff	24%	72%	4%
	Defendant	25%	59%	15%
Class representative's gender, race, ethnicity, religion, or socioeconomic status (N=294)	Plaintiff	17%	82%	1%
	Defendant	9%	80%	11%

Note: Differences in this table are statistically significant at the .05 level.

The parties differed on the perceived advantage of the local residence of the class representative. Plaintiff attorneys were more likely than defendant attorneys to report the local residence of the class representative as an advantage to their side. About a quarter of defendants reported expecting the local residence of the class representative to be advantageous to their side, but an equal number expected it to be a disadvantage.

Plaintiff and defendant attorneys' opinions were mixed regarding any advantage related to defendant's type of business. For example, each set of attorneys reported viewing a defendant's financial services business as an advantage to their side. Regarding an insurance business, however, both sides agreed in effect: Plaintiff attorneys reported viewing an insurance business as an advantage to their side, while defendant attorneys reported viewing an insurance business as a disadvantage to their side.

Overall, the majority on both sides expected no advantage or disadvantage based on the defendant's type of business. Of those who saw advantages or disadvantages, plaintiff attorneys believed the defendant's type of business was more advantageous to their cases than did defendant attorneys. A number of defendant attorneys expected the type of business conducted by the defendant to be advantageous to their side, but an equal number expected it to be a disadvantage.

Although plaintiff attorneys were more likely to report viewing the class representative's type of business as an advantage for the plaintiff, a number of defendant attorneys also viewed this party characteristic as an advantage for their side. However, defendant attorneys were more likely than plaintiff attorneys to view this

party characteristic as a disadvantage. On the whole, both sets of attorneys saw a class of consumer or insured claimants as an advantage to their side. Defendant attorneys viewed a class involving brokers or sales representatives as an advantage to their side, while plaintiff attorneys saw this type of class as a disadvantage to the plaintiffs' success.

A clear majority on both sides reported no advantage or disadvantage associated with a defendant's corporate status. About a quarter of both plaintiff and defendant attorneys expected the defendant's corporate status to be an advantage to their side. However, defendant attorneys were more likely than plaintiff attorneys to expect that the defendant's corporate status would be a disadvantage to their side.

Plaintiff attorneys reported that the gender, race, ethnicity, religion, or socioeconomic status of the class representative was more of an advantage to their case than did defendant attorneys. Again, the majority on each side thought these characteristics were of no consequence.

Summary

In the debates about choice of forum in class action litigation, the legal interests of the parties often become intertwined with party characteristics on both sides of the cases. Defendants' corporate status and type of business receive emphasis, as do plaintiffs' local residence, reputation, gender, ethnicity, and so forth. The above analyses help to separate out the relationship of these variables to the decisions about where to file cases. We detected differences in reported expectations of advantages based on party characteristics, but the absence of such characteristics in the predictor models identified through the multivariate analysis indicates that these party characteristics are not critical in the plaintiff's choice of whether to file a class action in state or federal court (see Part 1(a)).

2. Competing or overlapping class actions filed in other courts

The Advisory Committee has expressed concern about the use of competing or overlapping class actions to create unfair advantages in class action litigation by shopping proposed classes among various courts in search of a favorable outcome. Pinning down the motivations for and effects of competing class actions was beyond the reach of this study. We were able, however, to obtain information from attorneys about the frequency with which other cases dealt with the same subject matter and about the outcomes of those other cases in comparison to the named case.

A clear majority (64%) of the named cases were reported to be similar to one or more other lawsuits dealing with the same subject matter and filed in state or federal court within a year or so before or after the named case. Of those named cases, 48% related to other cases filed only in state court; 25% to other cases filed only in federal court; and 27% to other cases filed in both state and federal courts.³² Cases that had

32. In creating the database for the current study and the September 2002 study of class action filing rates, we made efforts to avoid multiple counting of similar class action cases by identifying a single lead

been removed from state to federal court were significantly more likely than cases filed originally in federal court to be related to another case that had been filed in a state court (61% v. 27%). Conversely, cases that were originally filed in federal court were significantly more likely than cases removed to federal court to be related to another case filed in federal court (46% v. 12%).

One indication of competition among the class actions is the extent to which different settlements are proposed in different courts. Settlement of similar class claims was proposed in another case 30% of the time. In about one third of the named cases in which attorneys reported that a settlement had been proposed in another case, the court had certified a class for trial and litigation or settlement—which suggests a potential conflict between the cases. As discussed in Parts 4 and 5, almost all of the certified named cases resulted in a class settlements approved by the court. In one case that was not certified, an attorney reported that a settlement had been proposed in another case and that the court rejected a proposed class settlement in the named case.³³

Overall, about two-thirds (68%) of the other cases either had the same outcome as the named case or had been settled or dismissed as part of the named case; another 7% were related to a national MDL settlement or judgment; and 4% had been removed to federal court before being resolved. The cases removed to federal court may have been resolved in accordance with the other federal action(s). Combining the above cases leads to the likelihood that about three-quarters (75%–79%) of the other cases were resolved in accordance with the outcome of the named case. Another 15% were settled or dismissed on an individual or statewide basis, and 5% of the cases defied categorization.³⁴

When the named case had been dismissed on the merits, voluntarily dismissed, or terminated by summary judgment, the other case was more likely to have had a different outcome than when the named case had been terminated by a class settlement. These data suggest that, in the minority of cases in which the outcomes were not the same, a ruling on the merits in a class action filed in one court did not prevent litigation of similar cases in other courts.

case for groups of cases that had been consolidated within a federal district or across districts by the Judicial Panel on Multidistrict Litigation. See Bob Niemic & Tom Willging, *Effects of Amchem/Ortiz on the Filing of Federal Class Actions 29–32* (Sept. 2, 2002) (available at www.fjc.gov under “Publications”). The final database included more than 15,000 class actions and excluded more than 12,000 related cases that had been consolidated within the federal system. *Id.* at 32.

33. In that case, the district court refused to certify a statewide class or to grant preliminary approval of a proposed settlement of an action that had been the subject of a nationwide class settlement (that excluded residents of the state in which the district was located) in the courts of another state. Instead, the court dismissed plaintiffs’ federal statutory claim for failure to state a claim upon which relief could be granted.

34. There were no significant differences in outcomes based on whether the case had been removed or remanded, or whether an attorney for the plaintiffs or for a defendant was responding to the survey.

3. Plaintiff and defendant attorneys' perceptions of state and federal judges' predispositions toward plaintiff and defendant interests

As shown in Part 1(a), a key question inquired into attorneys' impressions of any predispositions federal or state judges might have to rule in favor of interests like those of the attorneys' clients. Many attorneys perceived that federal and state judges would rule differently on matters of interest, including rulings on class certification, the merits of their cases, and jurisdictional issues. Our analyses showed that plaintiff attorneys reported that their perceptions of such predispositions strongly influenced their decisions about where to file class actions. We asked the same question of defendant attorneys who had removed cases from state to federal court. We focus in this section on both plaintiff and defendant attorneys' reported perceptions of the predispositions of judges in federal and state courts to rule on a particular class action in favor of interests like those of the attorneys' clients. In Part 3(a) we report attorney perceptions of judicial predispositions, and in Part 3(b) we report the extent to which such predispositions are related to differences in federal and state substantive law and procedural and evidentiary rules. Parts 4 and 5 compare those perceptions with the aggregated rulings and monetary recoveries and settlements or other outcomes in the sampled cases. Part 4 does so for removed and remanded cases, and Part 5 does so for all cases combined.

(a) Attorneys' perception of judicial predispositions

In both the filing and removal settings, the survey question pointed to the time the attorney decided where to file or whether to remove and asked the attorney to identify "which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients?" (see Questionnaire Appendix, Question 23).

Table 7 presents the exact language of the response categories as well as the number and percentage of each response from plaintiff attorneys who filed class action cases in state courts, plaintiff attorneys who filed class actions in federal courts, and defendant attorneys who removed class actions from state to federal courts.

Table 7: Attorney impressions of judicial predispositions to rule in favor of client interests

Impressions About Judicial Predispositions	Plaintiff Attorneys – State Filing	Plaintiff Attorneys – Federal Filing	Defendant Attorneys – Removed to Federal Court
Federal judges were more likely than state judges to rule in favor of interests like those of my clients	9 (5%)	24 (23%)	182 (74%)
State judges were more likely than federal judges to rule in favor of interests like those of my clients	95 (52%)	27 (26%)	1 (<1%)
We perceived no differences between state and federal judges in this regard	67 (37%)	44 (42%)	44 (18%)
I don't know/Not applicable	12 (7%)	10 (10%)	19 (8%)
Total	183	105	246

Note the context and framework of the question. Each responding plaintiff attorney had decided where to file the action and each defendant attorney had decided to remove the case to federal court. The question calls for the attorney's hindsight judgment about one factor that might have influenced the attorney's assessment of whether there is a meaningful difference between state and federal courts in managing and ruling on class action litigation. If an attorney believed that there was a difference in regard to that single factor, the available options were to indicate a predisposition of one court or the other. An attorney who did not see those response categories as adequate to describe his or her view could, of course, opt for "I don't know/Not applicable." Note also that this question followed lengthy questions about reasons for filing in or removing cases to federal court and about party characteristics that might have affected an attorney's choice of forum.

Most of the attorneys reported that at the time they filed or removed the named case, they had clear expectations that judges in state or federal courts were predisposed to rule in favor of interests like those of their clients. About three out of four defendant attorneys who removed cases perceived federal judges to be more likely than state judges to rule in favor of interests like those of their clients. These perceptions did not vary significantly based on the type of case.

A plurality of plaintiff attorneys who had filed in federal court reported perceiving no material difference between federal and state judges. Fewer than one out of four plaintiff attorneys who filed original actions in federal court perceived federal judges to be likely to rule in favor of interests like those of their clients. An approximately equal percentage of such plaintiff attorneys perceived state judges to be more receptive to their clients' interests, but nonetheless filed their cases in federal court. Perhaps the

latter attorneys chose not to file in state court because they were pursuing federal causes of action that would render the case removable to federal court.

When filing in state court, about half of the plaintiff attorneys perceived state judges as more likely than federal judges to rule in favor of their clients' interests. Plaintiff attorneys who filed class actions in state court were twice as likely as plaintiff attorneys who filed class actions in federal court to express the opinion that state judges were more likely to rule in their clients' interests. Conversely, attorneys who filed actions in federal courts were almost five times more likely than attorneys who filed originally in state court to report their impressions that federal judges were predisposed to rule in favor of interests like those of their clients.

Overall, 29% of all attorneys responded that they perceived no difference between state and federal judges regarding any predisposition toward interests like their clients' interests. A majority (63%) of all attorneys perceived predispositions on the part of judges in one set of courts or the other.

(b) Substantive law, procedural rules, and judicial receptivity as sources of attorney impressions of perceived judicial predispositions

In this section we attempt to identify sources of the predispositions that attorneys perceived. Are they a surrogate for differences between federal and state substantive law? Procedural rules? Evidentiary rules? Or do they represent a perceived judicial receptivity to claims like those of the attorneys' clients? To a great extent, the answer to all of those questions is "Yes." Perceived judicial predispositions appear to represent attorneys' combined perceptions of substantive legal and procedural rules favorable to their clients and of judicial receptivity to enforcing those rules.

Table 8 shows the relationships, in removed cases only, between defendant attorneys' perceived judicial predispositions and those attorneys' assessments of the favorability of law-related factors and of judicial receptivity toward their clients' interests.

Table 8: Defendant attorneys' assessment of favorability of legal rules and of judicial receptivity to such rules in relation to their impressions of judicial predispositions toward their clients' interests (removed cases only)

Attorneys' Assessments of Favorability or Receptivity	Attorneys Reporting <i>Judicial Predisposition</i> Toward Their Clients' Interests	Attorneys Reporting <i>No Judicial Predisposition</i> Toward Clients' Interests
Federal substantive law was more favorable to our defense than state substantive law.	71%	72%
Federal discovery rules were more favorable to our case.*	84%	67%
Federal expert evidence rules (<i>Daubert/Frye</i>) were more favorable to our case.*	85%	67%
Federal evidentiary rules were more favorable to our case.*	85%	69%
Federal class action rules in general imposed more stringent requirements for certifying a class action.	77%	66%
The federal court was generally less receptive to motions to certify a class.*	84%	64%
The federal court was generally more receptive to the claims on the merits.*	83%	70%

*These differences are statistically significant at the .05 level.

As we saw in Part 3(a), about three out of four attorneys who removed proposed class actions to federal court reported their impression that federal judges were predisposed to rule in favor of interests like those of their clients (Table 7). Table 8 shows that several bases for the attorneys' expectations of favorable rulings lie in the substantive law and procedural rules underlying such rulings. Defendant attorneys who removed cases perceived that federal discovery, expert evidence, and general evidentiary rules favored their clients' interests. They also reported their impressions that federal judges were less receptive than state judges to motions to certify a class and more receptive to defendants' positions on the merits. We did not find statistically significant differences in attorney perceptions of the stringency of the class action rules in federal and state courts.

Table 9 examines similar phenomena from the perspective of plaintiff attorneys who filed actions in state court.

Table 9: Plaintiff attorneys' assessment of favorability of legal rules and of judicial receptivity to such rules in relation to their impressions of judicial predispositions toward their clients' interests (removed cases only)

Attorneys' Assessments of Favorability or Receptivity	Attorneys Reporting <i>Judicial Predisposition</i> Toward Interests Like Those of Their Clients	Attorneys Reporting <i>No Judicial Predisposition</i> Toward Interests Like Those of Their Clients
State substantive law was more favorable to our claims than federal substantive law.*	61%	43%
State discovery rules were more favorable to our case.*	66%	43%
State expert evidence rules (<i>Daubert/Frye</i>) were more favorable to our case.	55%	48%
State evidentiary rules were more favorable to our case.*	80%	44%
State class action rules in general imposed less stringent requirements for certifying a class action.*	77%	40%
The state court was generally more receptive to motions to certify a class.*	76%	36%
The state court was generally more receptive to the claims on the merits.*	78%	32%

*These differences are statistically significant at least at the .05 level.

About half of plaintiff attorneys who filed cases in state courts reported their impression that state judges were predisposed to rule in favor of interests like their clients' interests (Table 7). Table 9 reveals some of the apparent bases for those impressions. Those plaintiff attorneys who perceived a judicial predisposition toward their clients' interests were more likely to perceive that state law as well as state discovery, evidentiary, and class action rules favored their clients' interests. They were also more likely (than plaintiff attorneys who reported no judicial predisposition) to report that state court judges were more receptive than federal judges to motions to certify a class and to their clients' claims on the merits.

In analyzing other aspects of the survey, we found evidence that attorneys' perceptions of judicial predispositions were not accurate in relation to judicial rulings on class certification and other procedural motions. Attorney perceptions, however, showed some consistency with regard to the size of monetary recoveries and settlements and attorney fee awards—matters that largely arose out of party settlements. In Part 4 we present data based on attorney reports about removed cases

indicating that attorneys' perceptions regarding rulings in the named case turned out for the most part to differ from our analysis of those rulings.

Attorney perceptions of judicial predispositions, however, showed an association (but not necessarily a causal relationship) with the amount of class monetary recoveries and settlements in state and federal courts—in all but one instance in the form of settlements negotiated by the parties. These results, however, do not appear to be the direct results of federal or state judicial predispositions because the only judicial rulings in such cases would have been to certify a class—as likely as not an unopposed settlement class—and to approve the proposed settlement—which was always the result in either court system.

4. Comparison of rulings by state and federal courts in removed cases

Overall, 221 of 438 cases (50%) that had been removed from state to federal court were remanded to the state court in which they were originally filed. Of the closed cases in the subset of removed cases,³⁵ 123 of 292 (42%) had been remanded to state court. In this part, all analyses that discuss the outcomes of removed cases use the subset of closed cases.

Having information about a group of closed remanded cases creates an opportunity to compare state courts' and federal courts' rulings, procedural outcomes, and monetary recoveries and settlements. The only apparent systematic difference among the two sets of cases was that a federal district judge had ruled that there was no federal jurisdiction to hear the remanded cases. We proceed on the assumption that such jurisdictional rulings do not ordinarily turn on the merits of the claims presented or on the certifiability of the case as a class action. We will examine whether federal and state court rulings on class certification (see Table 10), motions to dismiss or for summary judgment (see Table 12), or reviews of class settlements (see Table 13) reveal any systematic differences in the ways federal and state courts resolved the two sets of proposed class actions. We will also examine the class recoveries (see Table 14), generally settlements, in cases that produced any type of recovery for the class.

Assuming that there are no inherent or likely differences in the merits of the two sets of cases, one would expect the outcomes either to be similar or to reflect differences in state and federal rules or in judicial approaches to the same types of cases. Each set of cases was similar in that it was initially filed in state court and removed to federal court. We found no statistically significant differences in the likelihood of a court remanding various types of cases, such as contract, personal injury, property damage, or other types of cases. The following discussion does not and cannot address similarities and differences between removed cases and cases filed in state court and not removed.

35. A substantial number of the remanded cases had been closed in federal court because of the remand, but were still pending in state courts at the time of the survey.

As we saw in Parts 1 and 3, attorneys for class action litigants generally anticipate that federal and state judges will rule differently on matters of interest to the attorneys’ clients. A large majority (74%) of defendant attorneys who removed cases to federal court indicated they had an impression that “federal judges were more likely than state judges to rule in favor of interests like those of my clients” (Table 7). A smaller but substantial percentage (52%) of plaintiff attorneys who filed a case originally in state court perceived state judges to be “more likely than federal judges to rule in favor of interests like those of my clients” (Table 7). Taking such statements as hindsight-based observations—or, perhaps more realistically, as general expectations about federal and state judicial rulings on class certification and on the merits—how well do those statements stand up when we compare them to the aggregate outcomes of a sample of cases in federal and state courts?

(a) Rulings on class certification

Table 10 compares federal and state judicial rulings on class certification.

Table 10: Comparison of outcomes regarding class certification for closed cases removed to federal court, by remand

Outcome Regarding Class Certification	Remanded to State Court (N=118)	Removed to Federal Court and Not Remanded (N=165)
Class certified for trial and litigation or settlement	24 (20%)	37 (22%)
– Certified for trial and litigation	12 (50%)	18 (51%)
– Certified for settlement	12 (50%)	18 (49%)
Certification denied*	15 (12%)	44 (27%)
No action taken on certification (before case resolved)*	79 (67%)	84 (51%)

*Differences are statistically significant at the .05 level.

In both federal and state courts, cases were almost equally likely to be certified as class actions. The slightly lower certification rate in state courts is not statistically significant. The likelihood of certification for trial and litigation or for settlement is also approximately the same in federal and state courts. These data indicate that in the aggregate *Amchem* and *Ortiz* have not resulted in a likelihood that proposed class actions would be more likely certified for settlement purposes in state courts than in federal courts.³⁶

36. Note however the limits of these data. All of the cases in this study were terminated within approximately two to five years after the Supreme Court’s *Amchem* decision (three to six years after the

In both federal and state forums a majority of cases filed as class actions received no ruling on class certification. In the named cases, federal judges were more likely than state judges to rule on class certification and federal judges were more than twice as likely to deny class certification.³⁷ Federal judges' higher rate of denying class certification appears to be a counterpart of state judges' higher rate of not ruling on class certification.

Differences between a ruling denying class certification and the absence of such a ruling

Table 10 shows that cases removed to federal court were more likely than cases remanded to state court to include a ruling on class certification. What, if any, difference in case outcome did having a ruling denying class certification, compared with no action, make?

Looking at all cases in the study we found no statistically significant difference in the likelihood that the two types of uncertified cases would produce a monetary recovery for the proposed class. Overall, neither type of case was very likely to lead to a monetary recovery. Nor was there any statistically significant difference in the likelihood either type of case would produce a nonmonetary recovery (such as a coupon settlement or injunctive relief) or a recovery that included no nonmonetary relief.

Table 11 presents data on the procedural outcomes of cases in which no class action was certified, broken out by whether the trial court denied a motion to certify a class or took no action on class certification.

Third Circuit's decision rejecting certification of a settlement class). Within this database we have no basis for comparing pre-*Amchem* and post-*Amchem* activity.

37. In an empirical study of class action cases terminated in four federal district courts during 1992–1994, Federal Judicial Center researchers reported that federal judges certified as class actions 152 (37%) of the 407 proposed class actions in the study; 59 (39%) of the 152 certified class actions were settlement classes. Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts 9* (Federal Judicial Center 1996) (“FJC Empirical Study”). At that time in those courts the certification rate for both litigation and settlement classes was notably higher than the rate in either federal or state court in the current study.

Table 11: Comparison of rulings and procedural outcomes for cases filed but not certified as class actions (all cases)

Rulings and Procedural Outcomes	Court Denied Class Certification (N=92)	Court Took No Action on Class Certification (N=275)
Dismissed on merits	23 (24%)	67 (24%)
Dismissed for lack of jurisdiction	4 (4%)	22 (8%)
Summary judgment entered	12 (13%)	18 (6%)
Settled on individual basis*	38 (41%)	70 (25%)
Settled as part of another case	3 (3%)	13 (5%)
Voluntarily dismissed*	18 (19%)	85 (31%)
Tried on an individual basis	5 (5%)	3 (1%)

Note: The categories do not add up to 100% because respondents could select more than one category and because “other” responses have been omitted.

*Differences are statistically significant at the .05 level.

Cases in which the court denied class certification were more likely than cases with no action on class certification to end with individual settlements for named plaintiffs and less likely to be voluntarily dismissed by the parties. None of the other differences in outcomes proved to be statistically significant.

Support for defendants’ expectations that federal court rulings were more likely than state court rulings (or the absence of rulings) to end up favoring their clients’ interests boils down to a greater likelihood that federal courts will expressly deny class certification while state courts are more likely not to act on the matter. Overall, the data suggest that there was little practical difference between federal court rulings denying class certification and state court inaction regarding class certification.

(b) Rulings in cases not certified as class actions

Turning back to removed cases, Table 12 shows variations in rulings and procedural outcomes for noncertified cases (including cases in which there was no ruling on class certification), based on whether those cases were remanded to state court or resolved in federal court.

Table 12: Comparison of rulings and procedural outcomes for cases filed, but not certified, as class actions and removed to federal court, by remand

Rulings and Procedural Outcomes	Remanded to State Court (N=90)	Removed to Federal Court and Not Remanded (N=126)
Dismissed on merits	20 (22%)	28 (22%)
Summary judgment entered	8 (8%)	11 (8%)
Settled on individual basis*	20 (22%)	48 (38%)
Settled as part of another case*	9 (9%)	4 (3%)
Voluntarily dismissed	22 (24%)	36 (29%)
Judgment after individual trial	2 (2%)	4 (3%)

Note: Total percentages may exceed 100% because respondents could select more than one category.

*Differences are statistically significant at the .05 level.

Table 12 shows, in cases filed as class actions but not certified, state and federal judges were equally likely to dismiss individual claims on their merits or to enter summary judgment on those claims. These data regarding rulings on the merits do not support attorneys' perceptions of the predispositions of state judges to rule in favor of plaintiffs' interests or of federal judges to rule in favor of defendants' interests. The only statistically significant differences we found in the outcomes of the two sets of cases was that cases removed to federal court and not remanded to state court were more likely to be settled on an individual basis and less likely to be settled as part of another case. That tendency may in turn be linked with our earlier finding regarding the denial or absence of class certification. Rulings that expressly denied certification were correlated with individual settlements. The fact of a ruling, and not the absence of class certification, seems to be the key factor.

(c) Procedural outcomes of certified class actions

We also looked for differences in procedural outcomes of certified class actions according to whether they were remanded to state court or retained in federal court. Table 13 shows little variation in results. Federal courts were somewhat more likely than state courts to approve a proposed classwide settlement or to approve a revised settlement, but, again, the differences were not statistically significant. These data do not show any indication that *Amchem* and *Ortiz* have led to an increased reluctance on the part of federal courts to approve class settlements or that there is any difference between federal and state courts in that regard.

Table 13: Comparison of procedural outcomes for certified closed class actions removed to federal court, by remand

Outcomes of Certified Cases*	Remanded to State Court (N=28)	Removed to Federal Court and Not Remanded (N=37)
Classwide settlement approved	23 (82%)	33 (88%)
Classwide settlement revised and approved	1 (4%)	2 (5%)
Class representatives settled on individual basis	0	1 (3%)
Classwide trial resulting in defendant judgment	0	1 (3%)
Case dismissed on merits	1 (4%)	1 (3%)
Case dismissed on grounds other than merits	1 (4%)	0
Case stayed after defendant filed bankruptcy	1 (4%)	1 (3%)

Note: The categories may not add up to 100% because respondents could select more than one category and because “other” responses have been omitted.

*None of the differences in this table are statistically significant at the .05 level.

Table 14 presents data showing substantial differences in financial recoveries when comparing certified class actions remanded to state courts and certified class actions retained in federal courts. A monetary recovery or settlement was more likely to occur when a federal court retained a case after removal (44%) than after a federal court remanded a case to state court (33%).

Table 14: Comparison of monetary recoveries and settlements and class size in certified closed class actions, by remand

Monetary Recovery/Class Size	Remanded to State Court (N=74)	Removed to Federal Court and Not Remanded (N=118)
Cases with a monetary recovery or settlement*	25 (33%)	52 (44%)
Median amount of monetary recovery or settlement**	\$850,000	\$300,000
Median size of class**	5,000	1,000
Median recovery per class member	\$350	\$517

*Differences are statistically significant at the .05 level, based on a chi-square test.

**Differences in the medians are statistically significant at the .05 level, based on a Mann-Whitney test of medians.

Both the size of the class and the amount of any monetary recovery or settlement were substantially larger in cases remanded to state courts than in cases retained in federal courts. Most of these recoveries were based on settlements approved by judges (see Table 13). The total recovery for the class, of course, represents the benefit to the class that typically serves as the primary basis for the court to calculate attorney fees for class counsel.

In the remanded cases, the median class recovery was \$850,000; in the removed cases retained in federal courts, \$300,000. From the individual class member's perspective, differences in the amount of recovery, however, were more than compensated by differences in the sizes of the classes. By dividing the reported class size in each case into the total monetary recovery we calculated the recovery per class member. In the retained cases, the typical (i.e., median) recovery per class member was \$517, almost 50% higher than the \$350 typical recovery in remanded cases. Thus, smaller class recoveries in federal versus state court appear to be a product of the smaller class sizes.

(d) Perceptions, class size, and monetary recoveries and settlements

Our data also show a relationship between the size of the class and attorney perceptions of judicial predispositions. When the class contained fewer than 40,000 members, attorneys on the whole were somewhat more likely to report a perceived predisposition on the part of federal courts than state courts (86% v. 76%) and, as we have seen in Part 1, would have been somewhat more likely to file in federal court because of that perceived predisposition. Conversely, for classes with more than 40,000 members, attorneys were more likely to report a state court predisposition (24% vs. 14%). Although statistically significant, these differences are small and cannot support a generalization that attorneys tended to look to state courts to handle the larger cases.

Generally, plaintiff attorneys comprised the group that indicated a predisposition on the part of state courts, but the single case in which a defendant attorney indicated a state court predisposition involved a class of more than 40,000 members. Those data suggest that cases involving larger proposed classes tend to be filed in or removed to state courts and that the filing/removal pattern varies with the size of the class and moves in the same direction as attorneys' perceptions of judicial predispositions. There is a possibility that attorneys, particularly plaintiff attorneys, perceive a judicial predisposition in federal courts against large "sprawling" class actions, as in *Amchem*,³⁸ and select state courts for such cases. Our data cannot directly confirm or reject that possibility, but the small differences suggest that any effect would be limited to a small number of cases.

We also analyzed the data on class recoveries from a different angle by looking for case-specific relationships between an attorney's impression of the predisposition of

38. *Amchem*, 521 U.S. 591, 624 (1997) ("No settlement class called to our attention is as sprawling as this one.").

federal and state judges and the recovery or settlement in the named case in which the attorney was counsel. One cannot overemphasize that attorneys reported both their impressions about judicial predispositions and the data on the amount of monetary recoveries and fees after the cases had been concluded. Accordingly, we cannot say that the perceived predisposition led to higher settlements and fees or whether the higher recoveries led to perceptions of judicial predispositions. Substantial differences in the amount of monetary recoveries were related, in the direction of the attorneys' perceptions.

When plaintiff attorneys indicated that state judges were more likely to favor interests like those of their clients, the typical monetary recovery or settlement for the class was \$1,000,000. When defendant attorneys indicated that federal courts had a predisposition to favor interests like their clients' interests, the typical monetary recovery or settlement for the class was \$20,000.

We found similar results when we looked at the relationship between attorneys' perceptions of predispositions and the amount of attorney fees and expenses awarded in cases with a monetary recovery or settlement. When plaintiff attorneys indicated that state judges were more likely to favor interests like those of their clients, the typical award for attorney fees and expenses was \$200,000 (in cases with a typical monetary recovery or settlement of \$1,000,000). When defendant attorneys indicated that federal courts had a predisposition to favor interests like their clients' interests, the typical award for attorney fees and expenses was \$7,000 (in cases with a typical monetary recovery or settlement of \$20,000).

(e) Summary

In Part 3, we reported relationships between attorneys' perceptions of judicial predispositions and their perceptions of the favorability of substantive, procedural, and evidentiary law and rules, and of the perceived judicial receptivity to attorneys' clients' positions on class certification and on the merits. In this part, we extended our inquiry into the relationships among attorney perceptions of judicial predispositions and federal and state judicial rulings in removed cases on class certification and other procedural matters, including approval of class settlements. We also examined whether such attorney perceptions had any relationship with the monetary recoveries and settlements in removed named cases.

We found few differences in legal rulings on procedural motions in state or federal courts. Federal and state judges were about equally likely to certify a class, whether for trial and litigation or settlement. One salient difference, however, was that federal judges were more likely to deny a motion to certify a class while state judges were more likely to take no action regarding such a motion. That difference, though, turns out to have little practical significance for a proposed class; it appears primarily to be related to the procedural outcome of individual claims, whether by voluntary dismissal or adjudication.

5. Procedural outcomes and monetary recoveries and settlements in named cases (removed and not removed)

(a) Certification for settlement or trial and litigation

Looking now at the total sample of all closed cases in the study (including the cases filed as original actions in federal court, not just the removed cases discussed in Part 4), in the majority of cases (57%) the court took no action regarding class certification. Judges certified 24% as class actions and denied certification to the other 19%. Considering only cases in which a court ruled on certification, 56% of those rulings were to certify a class.

In a pre-*Amchem* study, Center researchers found that 152 of 407 proposed class actions (37%) had been certified as class actions, either for settlement or for trial.³⁹ That study was based on an examination of court files, not attorney recollections, and was limited to proposed class actions that had been terminated between 1992 and 1994 in four federal districts. Despite these differences, it seems reasonable to infer that the class certification rate has decreased after, but not necessarily because of, *Amchem*.

Of the cases reported as certified, 42% were certified for trial and litigation and 58% were certified for settlement (see Table 15). Relatively few (10%) of the cases certified for settlement were certified before the parties presented a settlement to the trial court. In the FJC study of official court files and records for class actions terminated in 1992–1994—before either *Amchem* or *Ortiz* was decided—59 of 152 (39%) certified class actions were certified for settlement purposes only.⁴⁰ While the methods of study and the populations of cases for the two studies were different, together they suggest that the percentage of class actions certified for settlement has increased and, correspondingly, the percentage certified for trial and litigation has decreased. Given that the data fail to show any reduction in the percentage of classes certified for settlement—and in fact show an increase in the proportion of classes certified for settlement compared to those certified for trial and litigation—there is no basis for concluding that *Amchem* and *Ortiz* reduced the frequency of class certification for settlement purposes.

In the current study, all cases certified for settlement in fact settled. A small percentage (5%) settled only after the parties revised a proposed settlement. Cases certified for trial and litigation usually settled, but not always. Table 15 shows the outcomes for class actions certified for trial and litigation compared with class actions certified for settlement only.

39. FJC Empirical Study, *supra* note 37 at 9.

40. *Id.*

Table 15: Comparison of case outcomes for class actions certified for trial and litigation and class actions certified for settlement (N=125)

Outcomes of Certified Class Actions	Certified for Trial and Litigation (N=52) (42%)	Certified for Settlement (N=73) (58%)
Classwide settlement approved*	38 (72%)	69 (95%)
Classwide settlement revised and approved	2 (3%)	4 (5%)
Classwide settlement proposed and not approved by court	1 (2%)	0
Class representative settled individually	1 (2%)	0
Classwide trial resulting in plaintiff judgment	3 (6%)	0
Classwide trial resulting in defendant judgment	3 (6%)	0
Case dismissed on merits	5 (10%)	0
Case dismissed on other grounds	2 (4%)	0

Note: Categories may exceed 100% because respondents could select more than one category.

*Differences are statistically significant at the .05 level.

It is often said that most or even all class actions settle. Data from the current study as well as the FJC study of 1992–1994 class actions reveal an important qualification for that statement: Almost all *certified* class actions settle. This is not to say that certification causes settlement. In the earlier study, settlement often preceded certification⁴¹ or followed certification by a considerable time.⁴² In the current study, we asked how often certification for settlement purposes preceded settlement and found that three cases (10%) were certified as settlement classes before certification.

Most cases (77%) certified for trial and litigation also ended up as settlements; in one case a court rejected a settlement. Note, however, the claim that “all class actions settle” does not even hold for certified class actions. Almost a quarter of cases certified for trial and litigation did not result in an approved classwide settlement: 14% were dismissed altogether, primarily on the merits, and certified class action lawsuits went to trial at a rate (12%) that exceeds the overall rate (2–4%) for federal civil cases.⁴³

41. *Id.* at 61–62 (reporting data indicating that class settlements in four federal district courts preceded certification 15%, 23%, 37%, and 54% of the time).

42. *Id.*

43. *Id.* at 66 and Table 16 (showing trial rates “not notably different from the 3% to 6% trial rates for nonprisoner nonclass civil actions” in the four districts studied). The trial rate has diminished in the last decade from 4.3% in 1990 to 2.2% in 2000. Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 Ohio St. J. on Disp. Resol. 93 (2002), citing Administrative Office of the United States Courts, Annual Report of the Director of the Administrative Office of the United States Courts, 153 app. tbl. C-4 (1990); Administrative Office of the United States Courts, *Judicial Business of the United States Courts*; 2000 Annual Report of the Director, 159 app. tbl. C-4 (2000).

One might expect, of course, that cases that have survived pretrial motions would have a higher trial rate. When we include all closed cases, combining data from two columns of Table 16, below, we find that 13 of 486 cases (3%) went to trial on an individual (2%) or classwide (4%) basis.

Table 15 shows six cases being tried to verdicts, three for plaintiffs and three for defendants. In the only case in which an attorney reported a monetary amount recovered by a plaintiff class as a result of a jury trial, the amount was \$1,600,000; \$400,000 of that amount was allocated for attorney fees.

(b) Outcomes of certified and noncertified cases compared

Courts and commentators often point to a certification decision as the key decision in setting the course of class actions.⁴⁴ Our data support the proposition that class certification is at least one of the key decisions in class action litigation. One should not assume, however, that certified cases had not earlier faced and survived motions to dismiss and motions for summary judgment. The study of 1992-1994 class actions reported that rulings on such motions often preceded any action on class certification.⁴⁵

Table 16 compares survey data for certified and noncertified cases filed as proposed class actions. Cases certified for settlement are included in the certified column.

44. For empirical data on this point, see Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 *Law & Soc'y Rev.* 237 (1992) (finding "it is clear that certified class actions in general have more settlement clout and a greater staying power"). See also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (1995) (indicating that "orders certifying suits as class actions . . . often, perhaps typically, inflict irreparable injury on the defendants (just as orders denying class certification often, perhaps typically, inflict irreparable injury on the members of the class)").

45. The Center's 1996 study reported that rulings on motions to dismiss and motions for summary judgment often preceded court action on class certification. In those instances, rulings on dispositive motions would be the key determinants of whether the case would proceed to the class certification stage. See FJC Empirical Study, *supra* note 37 at 29-35 (Federal Judicial Center 1996). A 2003 amendment to Rule 23(c) was designed to ratify this practice by allowing sufficient time for the court to rule on dispositive motions before ruling on class certification, permitting class certification decisions to be made "at an early practicable time" rather than "as soon as practicable." The committee note suggests that the new rule "reflects prevailing practice" and "captures the many valid reasons that may justify deferring the initial certification decision," citing the FJC empirical study.

Table 16: Comparison of case outcomes for closed cases filed as class actions (certified vs. not certified)

Outcomes of Cases	Certified (N=119)	Not Certified (N=367)
Proposed class settlement approved	101 (85%)	Not applicable
Revised class settlement approved	5 (4%)	Not applicable
Class settlement proposed and rejected	1 (1%)	3 (1%)
Case dismissed for lack of jurisdiction	Not applicable	26 (7%)
Case dismissed on merits	5 (4%)	90 (24%)
Case dismissed on other grounds	2 (2%)	Not applicable
Summary judgment granted	None	29 (8%)
Class representatives settle individually	1 (1%)	107 (29%)
Case dismissed voluntarily	Not applicable	103 (28%)
Individual trials held	Not applicable	8 (2%)
Class trial held	5 (4%)	Not applicable

Note: The categories do not add up to 100% because respondents could select more than one category and because “other” responses have been omitted.

In three-quarters of the not-certified cases that were dismissed on the merits, the ruling on the merits preceded any court action on certification. This follows the pattern observed in the earlier Center study.

The dichotomy between certified and non-certified cases could hardly be clearer. A certification decision appears to mark a turning point, separating cases and pointing them toward divergent outcomes. A profile of certified cases suggests that they have shown classwide merit, at least in the sense of surviving or avoiding motions to dismiss or motions for summary judgment. Certified cases concluded with a court-approved classwide settlement 89% of the time; a few were tried and a few were dismissed involuntarily. Non-certified cases did not show evidence of having classwide merit; they were dismissed by a court, settled on an individual basis, or voluntarily dismissed 97% of the time; a few had individual trials.

(c) Monetary and nonmonetary recoveries and settlements

Survey data suggest that attorney perceptions of favorable or unfavorable treatment in federal courts may have a relationship with the total monetary amount of classwide recoveries and settlements. Class recoveries were almost always the result of negotiated class settlements, not directly the result of court judgments or jury verdicts, but reported class settlements almost always occurred in cases that a court

certified as a class action for settlement or trial and litigation. In fact, *Amchem* and *Ortiz* made it clear that a class settlement cannot be approved unless a class can be certified under Rule 23 standards.

Monetary recovery or settlement. Overall, 142 (23%) of the named cases led to a classwide monetary recovery or settlement; attorneys estimated the amount of recovery in 120 of those cases. The typical recovery or settlement was \$800,000; 25% of the attorneys reported recoveries and settlements of \$5.2 million or more; and 25% reported \$50,000 or less.

Nonmonetary recovery. Table 16 shows the frequency of providing four types of nonmonetary relief in a class recovery: transferable and nontransferable coupons, injunctive relief, and cy pres—public interest remedies. Altogether these nonmonetary remedies were the sole remedies provided to the class in 15 cases. The total numbers in Table 17 include cases in which there was no class recovery, monetary or otherwise.

Table 17: Form of nonmonetary relief in closed class action cases

Form of Relief	Total of All Reports, Including Monetary Recovery (N=318)	No Monetary Recovery (N=166)	No Monetary Recovery and No Other Nonmonetary Recovery (N=152–156)
Transferable coupons	19 (6%)	8 (5%)	6 (4%)
Nontransferable coupons	10 (3%)	3 (2%)	2 (1%)
Injunction	29 (9%)	6 (3%)	5 (3%)
Cy pres class/public interest award	4 (1%)	3 (2%)	2 (1%)

Courts and commentators have criticized the use of coupons, particularly nontransferable coupons with no market value, to settle class action lawsuits.⁴⁶ As Table 17 shows, attorneys reported that transferable coupons were part or all of the recovery in 19 cases (6% of all cases). Of those cases, 8 (5% of cases without a monetary recovery) had no monetary recovery, and in 6 cases (4% of cases with no other recovery) transferable coupons represented the only remedy provided to the class.⁴⁷ Nontransferable coupons were reported in 10 cases (3% of all cases), all but 3 of which (2% of cases with no monetary recovery) were accompanied by a monetary recovery for the class. In 2 cases (1% of cases with no other recovery), nontransferable coupons were the sole remedy for the class.

46. See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 808–09 (3d Cir. 1995); see also Deborah Hensler et al., *Class Action Dilemmas* 488–89 (2000).

47. We did not obtain information about whether the transferable coupons were in fact marketable.

(d) Attorney fees and expenses

Attorney fees have been characterized as “the lightning rod in the controversy over damages class actions.”⁴⁸ Attorney fees and expenses were reported for 103 of 142 cases in which there was a monetary recovery or settlement for a class. The typical case included fees and expenses that amounted to 29% of the total recovery.⁴⁹ At the high end, in 25% of cases at least 36% of the total recovery was allocated to attorney fees and expenses. At the low end, in 25% of the cases 9% or less of the recovery went to attorney fees and expenses.

(e) Summary

Reviewing the outcomes of the named cases in our survey of counsel largely confirms previous Center research on class actions litigation in federal courts.⁵⁰ In both Center studies, a minority of cases filed as class actions survived the litigation process to the point of having a class certified. Other cases tended to be dismissed, granted summary judgment, or resolved by settling the claims of the named plaintiffs.

Certified class actions generally produced settlements and monetary recoveries. The typical recovery or settlement was \$800,000.

We uncovered evidence of transferable and nontransferable coupon recoveries in 29 cases, representing 9% of cases with a class recovery. Three of those cases involved nontransferable coupons and no monetary remedy.

We found that attorney fees typically represented about 29% of the monetary recovery or settlement and that one case in four involved fees of 36% or more, findings that were also very close to those reported in the 1996 FJC study.

(f) Conclusions

For a summary of the empirical conclusions discussed in this report, see “Overall conclusions regarding *Amchem* and *Ortiz* factors” at the beginning of the Executive Summary, *supra* page 4.

48. Hensler, *supra* note 46 at 434.

49. These data dovetail with the results of the 1996 FJC study in which researchers reported that the “fee-recovery rate infrequently exceeded the traditional 33.3% contingency fee rate. Median rates ranged from 27% to 30%.” FJC Empirical Study, *supra* note 37 at 69.

50. See generally, *id.*

Appendix

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Methods Appendix

A case-based survey

After consultation with the Class Action Subcommittee and the Advisory Committee, we decided to conduct a survey of counsel in a select set of closed class action cases and to explore the full panoply of considerations that might have affected attorneys' decisions when choosing forums in particular cases. We determined that such an approach would enable us to get a contextual picture of the role that prior class certification and settlement approval decisions played in attorneys' calculations about where to file or whether to remove a case.

We designed a questionnaire, again in conjunction with the Subcommittee and the Advisory Committee, to uncover and measure—in class actions recently terminated in federal courts⁵¹—the relative importance of multiple factors that might influence the decision about whether to file in federal or state court. By asking about multiple factors, we can avoid the assumption that class action or settlement rules represent determinative factors. Also, a case-based approach links the attorneys' views to a concrete decision made in a case, helping avoid the distortions that hypothetical or general questions might elicit. Using a case-based approach also provides the benefit of allowing us to test aggregate relationships between views expressed in the questionnaire and the court rulings and outcomes in a large sample of recent cases. We were able to compare the perceived predispositions of federal and state judges, as identified by the attorneys, with the judicial rulings, procedural outcomes, and monetary recoveries and settlements in the cases in which such predispositions were thought to exist.

We also asked attorneys directly whether the U.S. Supreme Court's rationales affected their decisions about where to file or whether to remove class action cases being studied. We then supplemented that case-based approach with a general question designed to elicit the attorneys' opinions about how *Amchem* and *Ortiz* have affected class action litigation in federal and state courts. That approach poses the relevant question clearly and directly. There is a risk that, by isolating and focusing attention on the *Amchem-Ortiz* factors, the question posed might have led attorneys to overstate the importance of those cases. As discussed in Part 1(c) of the report, the study shows a wide disparity between the opinions of attorneys and their collective experiences in the named cases.

51. Note that for statistical purposes, termination of the case in federal court occurs when a federal district court remands to a state court a case originally filed in that court. The case may, of course, continue to be litigated in the state court. We asked attorneys to include the outcome of the case in state court in their responses to relevant survey questions.

Structuring the data set

Typically, plaintiff attorneys have a choice of filing class actions in state or federal court. For example, they may be able to choose whether to include federal claims in their actions or whether to include at least one defendant with the same state citizenship as at least one named plaintiff. Defendants and their attorneys often have the opportunity to remove a class action from state to federal court, on the grounds that a federal question is at issue; that there is complete diversity of citizenship among the litigants; or that plaintiffs' efforts to destroy diversity jurisdiction by adding a local defendant amounted to a fraudulent joinder. Defendants who act in a timely manner have an opportunity to choose between exercising their removal rights or remaining in state court.

In our survey, by including cases that had been removed from state court, we have been able to compare plaintiff counsels' perceptions and motivations for filing originally in state court with those of counsel who filed original actions in federal courts. We have also been able, to a limited extent, to compare defendant counsel who removed cases to federal courts with defendant counsel in cases filed originally in federal court. Unfortunately to keep the study manageable we did not have the option of including defendants who had chosen to remain in state court: To do so would have required identifying or creating a database of state court class action filings, a task beyond our time and resources.

The unit of analysis in Parts 1 and 3 is the report of an attorney; the unit of analysis in Parts 2, 4, and 5 is the named case. For the case-level analyses, when we received responses from both sides of a case we assigned each response a weight of 0.5 and included both responses in the analysis. In total, we received 728 responses from attorneys in 621 cases. The multivariate analyses focused on the filing decisions of plaintiff attorneys and accordingly gave full weight to all of the attorney responses, as did the analyses in Part 3 relating to judicial predispositions, which also included responses from all plaintiff attorneys and defendant attorneys who removed cases to federal court.

Population of class action terminations

We used the database of class action cases that we created for the Federal Judicial Center's "Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules" (Sept. 9, 2002, available at www.fjc.gov) which included class action filings for the period January 1, 1994, through June 30, 2001. For this research we broadly defined class action filings to be cases where a class allegation was either considered or made at some point in the life of the case but not necessarily certified by the court. To avoid multiple counting of cases dealing with the same legal claims, we identified which cases had been consolidated, either within a district or across districts by consolidation orders or by orders of the Judicial Panel on Multidistrict Litigation (JPML). We then included only the lead case in the database.

We searched for class action cases using the on-line services of LexisNexis CourtLink.⁵² This service maintains a database of docket sheets for nearly all the federal district courts.⁵³ CourtLink's service allows full text searching capabilities of the electronic docket files maintained in its "CaseStream Historical" database. We supplemented this approach with data from the Integrated Database (IDB), an historical database of all federal cases. We also obtained data from the JPML to crosscheck our listing of multidistrict litigation (MDL) cases.

In our database there were 15,037 class action cases (excluding all prisoner cases and cases with a pro se litigant) from 82 districts.⁵⁴ The cases were either "unique" class actions not directly related to any other class action, lead class actions in intradistrict consolidations, or lead class actions in interdistrict consolidations.

For the current study, we were mainly interested in cases that were filed as original proceedings or removed from state court.⁵⁵ Additionally, to provide a basis for examining choice of forum, we wanted to study class actions with a jurisdiction of federal question or diversity of citizenship.⁵⁶ We determined that 6,386 (42%) of the cases in the original database included class actions that terminated between July 1, 1999 and December 31, 2002 (regardless of when they were originally filed).

We excluded from consideration certain types of cases that were categorically unlikely to be affected by *Amchem/Ortiz*. The cases excluded from consideration were (1) all labor cases; (2) all securities cases⁵⁷; (3) civil rights cases originally filed in federal court based on federal question jurisdiction; and (4) cases described as "other (federal) statutes" that had been originally filed in federal court and were based on federal question jurisdiction. In most or all of the above cases, the predominance of

52. Previous Center research on class actions revealed that the Integrated Database (IDB) seriously undercounted the number of class actions in federal courts. Examples include data gathering for the Center's 1996 empirical study of class actions and more recent research for interlocutory appeals. See Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996) at Appendix D.

53. The exceptions are Alaska, Guam, Northern Mariana Islands, Nevada, Virgin Islands, and Wisconsin-Western. These courts were not linked to the Public Access to Court Electronic Records (PACER) system at the time of our search.

54. For practical reasons we excluded twelve districts in which we could not electronically access docket data. These districts are Alabama-Middle, Alaska, Arkansas-Western, Guam, Indiana-Southern, Northern Mariana Islands, North Carolina-Eastern, Nevada, New Mexico, Oklahoma-Eastern, Virgin Islands, and Wisconsin-Western.

55. Focusing on original proceedings and removed cases excludes cases that originated on remand from an appellate court, that were reopened or reinstated, that were transferred from another district, or that were transferred by the MDL panel.

56. Focusing on federal question and diversity-of-citizenship jurisdiction excludes cases involving the United States as a plaintiff or defendant.

57. In our earlier report, we found that *Amchem/Ortiz* had no significant impact on class action filing rates for securities cases. We excluded securities cases from the current study because the Securities Litigation Uniform Standards Act of 1998 steers those actions into federal court, leaving little room for plaintiffs to choose to file in state court. We also excluded other cases because of their predominantly federal orientation.

federal statutory claims seems likely to render their filing in federal court as more of a routine decision that would not reveal any of the state-federal dynamics that are the core of our inquiry.

After this exclusion, we selected cases and identified lead plaintiff and defendant counsel in those cases based on Integrated Database (IDB) origin codes for “original proceedings” and “removed from state court” and based on IDB jurisdiction codes for “federal question” and “diversity of citizenship.” Our final sample included 1,418 class action cases.

In summary, the database included cases that involved (1) personal injury and property damage claims based on diversity or a federal question filed as an original action in federal court or removed from state court; (2) contract claims based on diversity or a federal question filed as an original action in federal court or removed from state court; (3) other statutes claims based on diversity filed as an original action in federal court or removed from state court or a federal question removed from state court; and (4) civil rights claims based on diversity and removed from state court.

Content of the questionnaire

Each questionnaire consisted of four sections. See Questionnaire Appendix for copies of the four versions of the questionnaire, one for each type of attorney (plaintiff, defendant) in each type of case (removed, not removed). The first section of each questionnaire sought general information on case characteristics, for example, about the nature of the claims, the make-up of the class (e.g., number, residence), the outcome of the class allegations, monetary and nonmonetary recovery, costs of litigation, and an overview of competing or overlapping class actions filed with a similar subject matter that were filed in another court.

The second section of each questionnaire involved selecting a state or federal forum. Attorneys were asked to select reasons that were important in their decision to file in state or federal court; rate possible sources of favoritism that may have affected their decision to file in state or federal court; and their impression of any predisposition a state or federal judge may have towards the interests of their clients.

The third section of each questionnaire dealt with the impact of *Amchem/Ortiz*. Attorneys were asked about the impact of *Amchem/Ortiz* on their decision to file the named case in state or federal court or to remove that case from state court. Attorneys were also asked to report any general impact *Amchem/Ortiz* may have had on class action litigation generally.

The fourth section of each questionnaire sought information on the attorneys’ law practices and experience. Attorneys were asked the size of their law practice; the length of time they have practiced; the percentage of time spent on civil litigation in the past five years; and the percentage of time spent on class action litigation in the past five years.

Pilot test of questionnaire

Before collecting data, we wanted class action attorneys to give us feedback about our attorney questionnaire. We asked the ABA Section of Litigation (and its Committee on Class Actions and Derivative Suits) for names of attorneys who could pilot test our questionnaire.⁵⁸ We were given the names of ten attorneys who primarily represent plaintiffs and ten attorneys who primarily represent defendants.

We mailed twenty questionnaires and asked these attorneys to review and complete the questionnaires and provide us with comments and suggestions. Attorneys were asked to think about a recent, but closed, class action that their firm had litigated. We asked attorneys to note any instruction or question that was unclear and to give us feedback on whether we had included all reasonable response options for each question. We received responses from ten attorneys (seven plaintiff attorneys and three defendant attorneys) and were able to address their comments and, we believe, make the questionnaire more comprehensible and complete.

Determining attorney sample

We downloaded the docket sheets for the 1,418 class action cases in our sample. From these docket sheets we developed a database of the names and addresses of the lead attorneys for both the plaintiff and defendant parties in the case. Our plan was to mail questionnaires to the plaintiff attorney and defense attorney for each case in the sample. In many instances we had attorneys appearing in more than one case in our sample. We attempted to survey the second or third named attorney (if there was one) in lieu of the lead attorney for those cases in which the lead attorney was already chosen for another case. There were 183 cases that were eliminated from the database when we could not find an attorney because all listed attorneys were already chosen for another case or because no attorney information was provided on the docket sheet.

Collecting data

We mailed questionnaires to 2,132 attorneys (1,048 plaintiff attorneys and 1,084 defense attorneys⁵⁹) who represented 1,235 cases. Variations of the questionnaire were keyed to the four different types of cases and attorneys: plaintiff and defendant attorneys in removed cases and plaintiff and defendant attorneys in cases filed originally in federal court. A cover letter signed by the Honorable Lee H. Rosenthal, chair of the Class Action Subcommittee of the Advisory Committee on Civil Rules, urged the attorneys to assist the committee by responding to the questionnaire. The letter referred to a specific class action case along with the case's docket number. We included a postage-paid return envelope.

58. We would like to thank Dinita L. James, co-chair of that committee, and the attorneys who assisted us with our pilot test.

59. Docket sheets did not always list attorneys representing both sides.

Approximately two weeks after the initial mailing we sent a follow-up postcard to each attorney that thanked those attorneys who completed the questionnaire and prompted those who had not to return their questionnaire. Approximately one week after we sent the postcards, we mailed out a second questionnaire to any attorney who had failed to respond.

Response rate

We received a completed questionnaire from 728⁶⁰ attorneys in the sample representing 621 different cases. The response rate was 39%.⁶¹

Representativeness of the responses

In the entire sample of attorneys, 49% represented plaintiffs and 51% represented defendants; among those who responded, 43% represented plaintiffs and 57% represented defendants. We also asked respondents what types of clients they generally represented, and we found that 35% represented primarily plaintiffs, 49% represented primarily defendants, and 14% represented plaintiffs and defendants equally.

On average, responding attorneys devoted 49% (median = 50%) of their work time during the past five years to civil litigation in state court, 41% (median = 40%) to civil litigation in federal court, and 34% (median = 20%) to class action litigation (in state and federal court). On average, responding attorneys had been involved in 13 (median = 5) class action cases in the past three years.

A plurality (39%) of responding attorneys practiced in firms of fifty or more attorneys; 26% practiced in firms of two to ten; 24% practiced in firms of eleven to forty-nine; and 2% were government attorneys. On average, these attorneys had practiced law for 22 years; 91% had practiced law for at least ten years.

We compared the cases underlying the responses with cases in the original sample and found the responses to be representative of the sample as a whole. We found some differences between the original set of cases and the subset of cases in which responding attorneys were counsel. In both sets, the durations (from filing to disposition) showed no substantial differences. We did find differences on certain methods of disposition, the original set of cases were more likely to have the disposition of “other” types of dismissal and dismissed as “settled” than the subset of responding cases. We also found that the original subset of cases were more likely to have no action taken by the court than the subset of responding cases. Most types of cases were equally represented among both groups; however, there were significantly

60. There were 730 questionnaires returned but because of an incorrect nature-of-suit code in our initial database, we determined that one involved a securities case and another a labor case, and we excluded these cases from the study.

61. The total number of valid questionnaires was 1,851. Of the 2,132 questionnaires mailed we had 32 attorneys tell us the case was not a class action, 98 questionnaires were returned because of a bad address, and 151 questionnaires were returned by attorneys who told us they did not have enough information to answer the questionnaire.

more contract cases in the original set of cases. Responding cases were more likely to be removed and remanded than the original set of cases.

Data analysis

We have used logistic regression to examine relationships among variables as discussed in Part 1(a). Other data analysis is generally based on cross-tabulations of the data, comparison of chi-square tests of differences between pairs of variables, and tests of differences between medians.

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Regression Methods and Results

Below we present the techniques used to analyze attorneys' choice of forum as presented in Part 1(a). We provide additional statistical results and also an alternative way to explain the findings.

*Multivariate analyses*⁶²

Multivariate regression is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable).⁶³ Logistic regression, a type of multivariate analysis, is the preferred statistical approach for analysis of dichotomous dependent variables. Because the dependent variable is dichotomous (filing in federal or state court), we used logistic regression. Logistic regression models estimate the effect of each independent variable (predictor) on the odds that a case would be filed in state court while controlling for other variables in the equation. An odds ratio is simply the ratio of the probability of filing in state court to the probability of filing in federal court.

The analysis first examines the unique ability of each of the independent variables to explain attorneys' choice of forum. Results for the logistic model are reported as odds ratios. When interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to file in state court as in federal court. An odds ratio of greater than one indicate a higher likelihood of filing in state court.

Forward logistic regression⁶⁴ was conducted to determine which independent variables were predictors of choice of forum. Ten models are presented, the dependent variable in each is whether the case was filed in federal or state court (federal court = 0, state court = 1). Each model includes different blocks of independent variables.

Table A-1 shows the descriptive statistics for each of the independent variables. Logistic regression results are presented in Table A-2 at the end of this appendix.

62. The multivariate analyses excluded 72 cases that were removed to federal court but remanded to state court or dismissed for lack of jurisdiction because the absence of federal jurisdiction indicated that the plaintiff did not have a meaningful choice of forum.

63. *See generally* David W. Hosmer & Stanley Lemeshow, *Applied Logistic Regression* 31–90 (2d ed. 2000) (describing and applying logistic regression models).

64. We used both SPSS 10.0 and SAS version 8.2 to model the data.

Table A-1: Descriptive statistics for logistic regression models

Variable	N	Minimum	Maximum	Mean	Standard Deviation
Judicial predisposition	211	-1	1	-.26	.68
Source of law	211	-1	1	-.64	.68
State facts	211	0	100	68.00	38.59
Substantive law	211	0	1	.24	.43
Discovery rules	211	0	1	.25	.40
Judicial receptiveness	211	0	1	.32	.47
Cost of litigation	211	0	1	.25	.43
Jury award	211	0	1	.13	.34
Location of court	211	0	1	.27	.45
Other cases	92	-1	1	-.33	.83
Percent of civil litigation	210	0	100	36.00	26.86
Number of class actions	203	0	200	12.57	23.22

Note that the number of respondents in the regression analyses is smaller than the total number of plaintiffs in the study. We chose to eliminate from the regression analyses attorney reports with any missing responses for the relevant variables. For a response to be included in the analyses we needed data on all of the factors in the model. We thought we would get a more accurate model of attorney choice of forum if we only looked at complete responses. Since we were asking attorneys to answer questions on a case that may have terminated over three years ago, we were unsure what the missing responses really meant. Before eliminating any data we examined whether there were any differences between the data we wanted to eliminate and the data with complete responses. The data with complete responses were representative of the sample of plaintiffs as a whole.

Model 1: Basic model

Regression results indicate that an overall model of three predictors was statistically reliable between state and federal courts. This model has three predictors—perceived judicial predisposition,⁶⁵ source of law,⁶⁶ and state facts⁶⁷—that are associated with

65. The variable was coded -1 for a perceived federal judicial predisposition, 0 for no perceived state or federal judicial predisposition, and 1 for a perceived state judicial predisposition.

66. The variable was coded -1 for a majority of federal claims (which included responses that the case had all federal claims or a majority of federal claims), 0 for an equal number of state and federal claims, and 1 for a majority of state claims (which included responses that the case had all state claims or a majority of state claims).

attorneys' choice of forum. Each predictor and the overall model are significant at the .01 level. The overall model predicted 79.15% of the responses correctly. The goodness-of-fit was adequate at .08.⁶⁸

The odds ratio is a common way of interpreting this type of data. With the other significant predictors in the model being held constant, an attorney who perceives a state judicial predisposition is 6.72 times more likely than an attorney who perceives a federal judicial predisposition to file the case in federal court. Similarly, a case with a majority of state claims was 4.88 times more likely than a case with a majority of federal claims to be filed in state court. Finally, a case with high state facts is 90% more likely than a case with low state facts to be filed in state court.

Perceived judicial predisposition, source of law, and state facts

Chart 1 shows the percentage of cases expected to be filed in state court based on three factors and data we actually observed. The basic model is a projection derived from our data, but note that the projection is not identical to our data.⁶⁹ An example will clarify this point. According to the basic model (which attempts to predict what might occur with future cases) we would expect that 92% of cases with high state facts, a perceived state predisposition, and a majority of state law will be filed in state court. In our data, we found that 86% of our respondents who reported those specific factors filed their case in state court. The predictive model will never correctly predict all possible outcomes, but the difference between our actual data and the predicted outcome is small, which tells us the basic model is a good model.

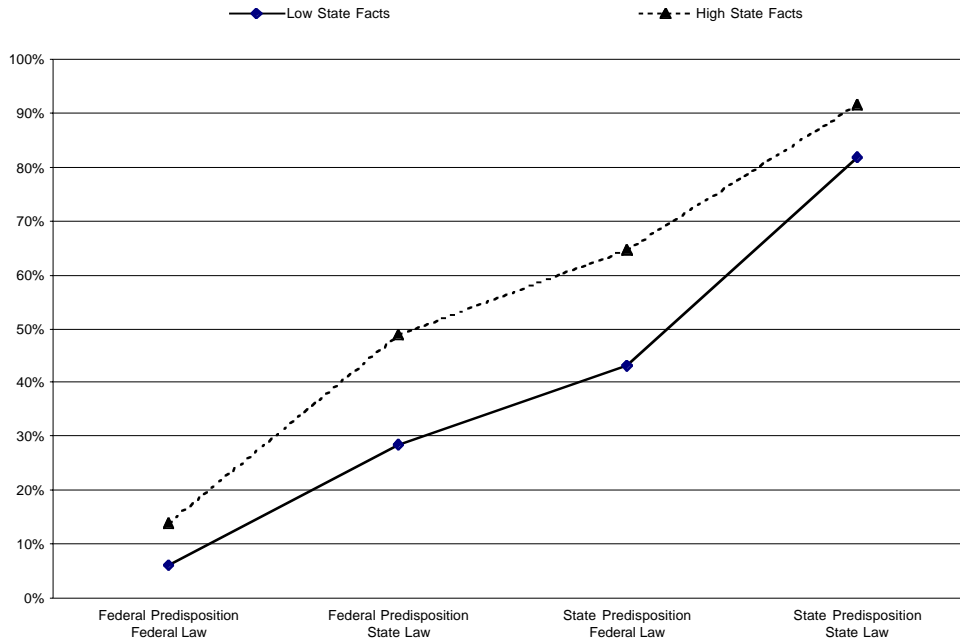
Chart 1 shows that the probability of filing in state court is at its highest level when all factors point towards the state court (fourth category along the bottom). When the case has a mix of both state and federal factors the probability of filing in state court is higher when attorneys perceive a state judicial predisposition toward their clients' interests (third category) than if there is a majority of state claims but attorneys perceive a federal judicial predisposition (second category). The probability of filing in state court is at its lowest level when all factors point toward federal court (first category). We also found that the probability of filing in state court is higher if the average of the percent of class members and events occurring in the state is high (dashed line) versus low (solid line).

67. "State facts" is a composite variable we created. It represents the average of the percentage of class members residing in the state where the class action was filed and the percentage of claims-related events that occurred in that state.

68. The deviance goodness-of-fit statistic is reported. The goodness-of-fit statistic can range from 0 to 1 and measures how well the model is predicting the actual data. A model is appropriate if the goodness-of-fit index is greater than .05.

69. The logic behind the model assumes that what we actually observed are random departures from the predicted outcome and we are charting only predicted outcomes or the probability of filing in state court.

Chart 1: Base model – probability of filing in state court



In the final stage of analysis, we assessed the potential impact of other factors on attorneys' choice of forum while statistically controlling for factors in the basic model. We present nine other models below that include additional factors that are associated with attorneys' choice of forum.

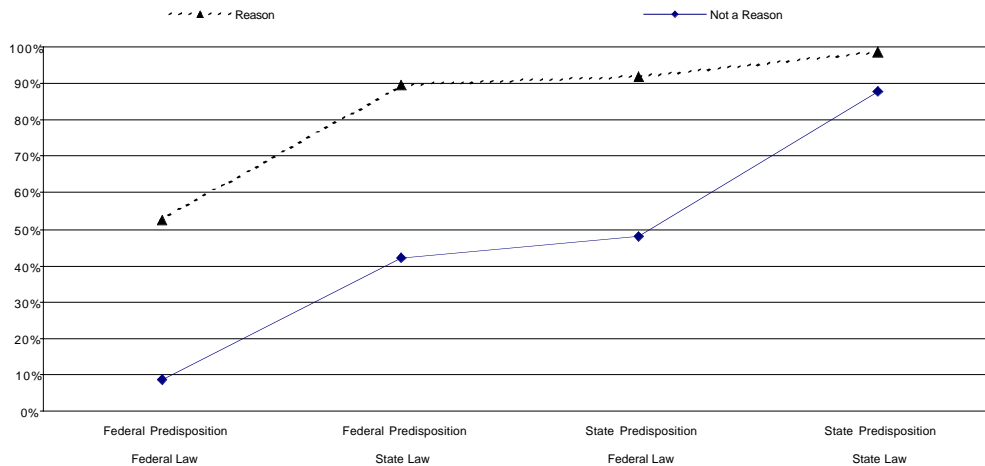
Model 2: Substantive law

This model has four predictors (perceived judicial predisposition, source of law, state facts, and favorableness of substantive law) that are associated with attorneys' choice of forum. Each predictor and the overall model are significant at the .05 level. The overall model predicted 78.20% of the responses correctly. The goodness-of-fit was adequate at .50.

With the other significant predictors in the model being held constant, an attorney who chose the favorableness of substantive law as the reason for filing in a particular forum was 11.95 times more likely to file the case in state court than an attorney who did not choose this as a reason.

Chart 2 shows the probability of filing in state court when the attorney cites the favorableness of the substantive law as a reason for choosing a forum or does not choose this factor as a reason. The probability of filing in state court is much higher when the attorney expects the substantive law to be more favorable to his or her case.

Chart 2: Impact of favorability of substantive law on probability of filing in state court

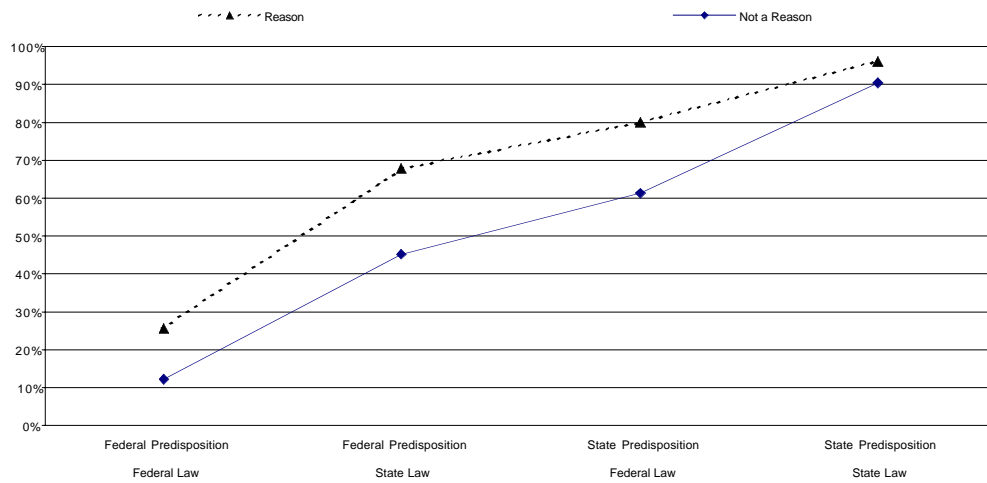


Model 3: Discovery rules

This model has four predictors (perceived judicial predisposition, source of law, state facts, and favorableness of discovery rules) that are associated with attorneys' choice of forum. Each predictor and the overall model are significant at the .01 level. The overall model predicted 77.73% of the responses correctly. The goodness-of-fit was adequate at .37.

Chart 3 shows that the other significant predictors in the model being held constant, an attorney who chose the favorableness of discovery rules as the reason for filing in a particular forum was 2.54 times more likely to file the case in state court than an attorney who did not choose this as a reason.

Chart 3: Impact of favorability of discovery rules on probability of filing in state court

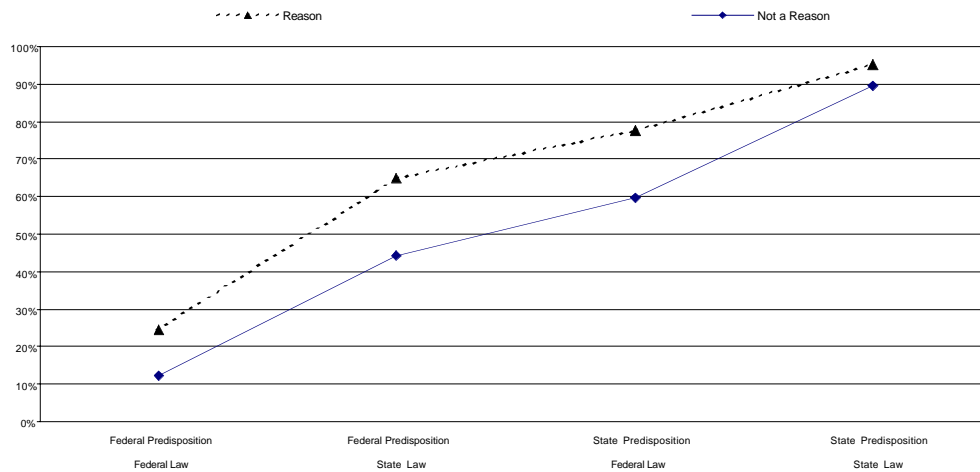


Model 4: Judicial receptiveness

This model has four predictors (perceived judicial predisposition, source of law, state facts, and judicial receptiveness to claims on the merits) that are associated with attorneys' choice of forum. Each predictor and the overall model are significant at the .05 level. The overall model predicted 77.25% of the responses correctly. The goodness-of-fit was adequate at .17.

Chart 4 shows that with the other significant predictors in the model being held constant, an attorney who chose the judicial receptiveness to claims on the merits as the reason for filing in a particular forum was 2.34 times more likely to file the case in state court than an attorney who did not choose this as a reason.

Chart 4: Impact of judicial receptiveness on probability of filing in state court

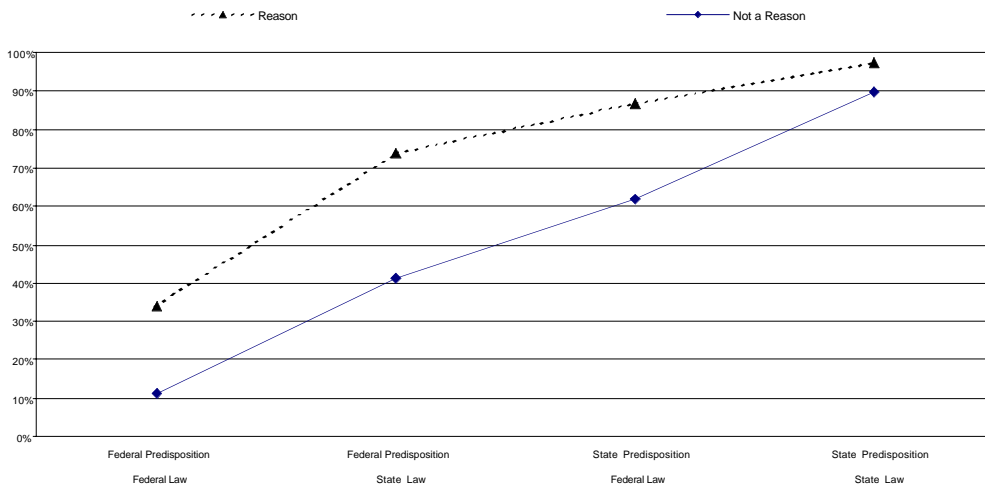


Model 5: Lower cost of litigation

This model has four predictors (perceived judicial predisposition, source of law, state facts, and lower cost of litigation) that are associated with attorneys' choice of forum. Each predictor and the overall model are significant at the .01 level. The overall model predicted 77.25% of the responses correctly. The goodness-of-fit was adequate at .42.

Chart 5 shows that with the other significant predictors in the model being held constant, an attorney who chose the lower cost of litigation as a reason for filing in a particular forum was 4.00 times more likely to file the case in state court than an attorney who did not choose this as a reason.

Chart 5: Impact of cost of litigation on probability of filing in state court

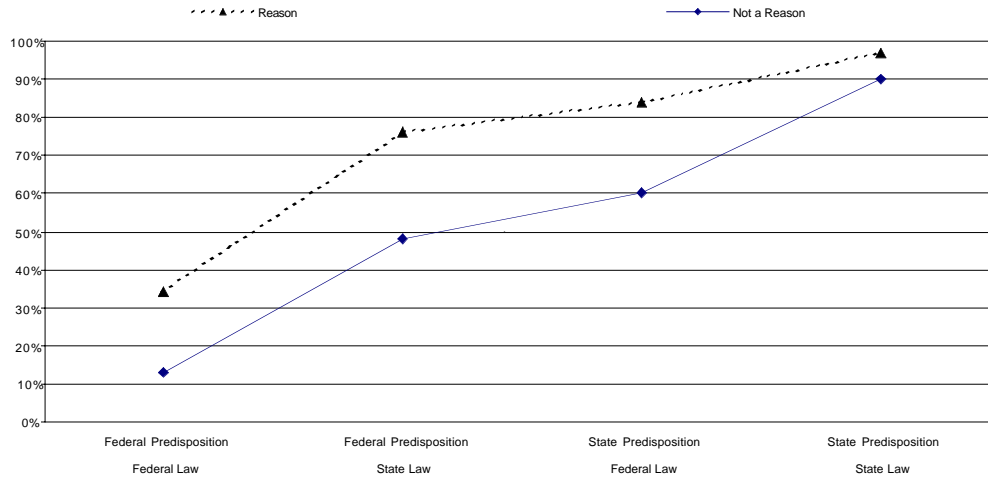


Model 6: Higher jury award

This model has four predictors (perceived judicial predisposition, source of law, state facts, and higher jury award) that are associated with attorneys' choice of forum. Each predictor and the overall model are significant at the .10 level. The overall model predicted 80.57% of the responses correctly. The goodness-of-fit was adequate at .24.

Chart 6 shows that with the other significant predictors in the model being held constant, an attorney who chose the higher jury award as the reason for filing in a particular forum was 3.46 times more likely to file the case in state court than an attorney who did not choose this as a reason.

Chart 6: Impact of jury award on probability of filing in state court

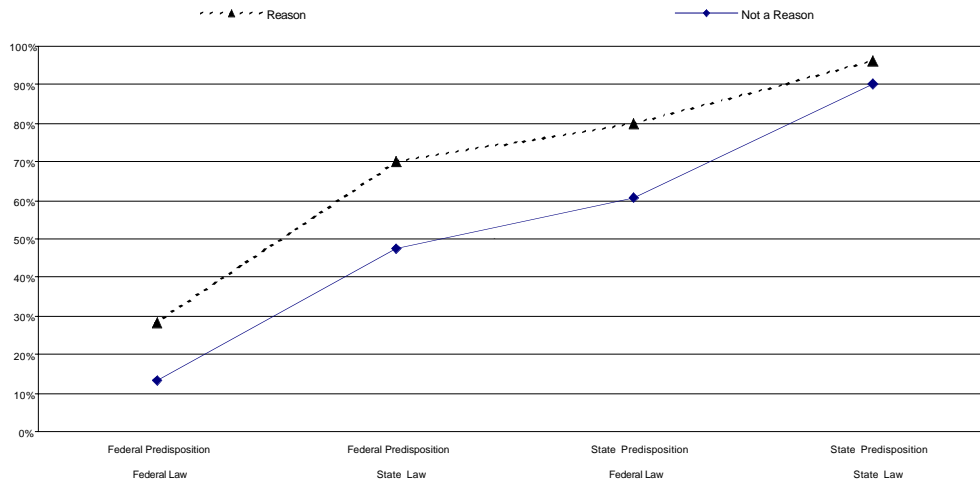


Model 7: Convenience of court location

This model has four predictors (perceived judicial predisposition, source of law, state facts, and convenience of court location) that are associated with attorneys' choice of forum. Each predictor and the overall model are significant at the .05 level. The overall model predicted 77.73% of the responses correctly. The goodness-of-fit was adequate at .34.

Chart 7 shows that with the other significant predictors in the model being held constant, an attorney who chose the convenience of the court location as the reason for filing in a particular forum was 2.60 times more likely to file the case in state court than an attorney who did not choose this as a reason.

Chart 7: Impact of court location on probability of filing in state court

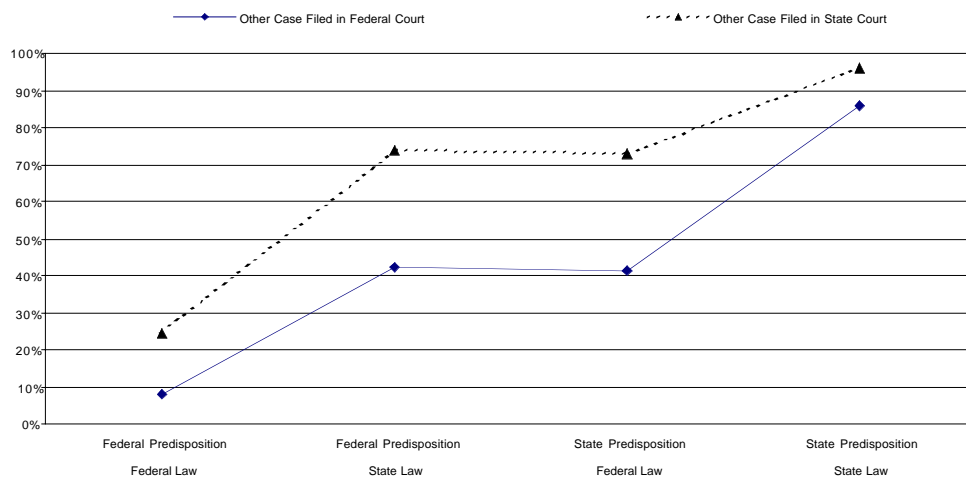


Model 8: Competing or overlapping actions

This model has four predictors (perceived judicial predisposition, source of law, state facts, and where other cases⁷⁰ were filed) that are associated with attorneys' choice of forum. Each predictor and the overall model are significant at the .05 level. The overall model predicted 79.35% of the responses correctly. The goodness-of-fit was adequate at .20.

Chart 8 shows that with the other significant predictors in the model being held constant, a case was 1.96 times more likely to be filed in state court if a competing or overlapping action was filed in state court.

Chart 8: Impact of competing or overlapping cases on probability of filing in state court



70. The variable was coded -1 for other cases filed in federal court, 0 for other cases filed in both state and federal court, and 1 for other cases filed in state court.

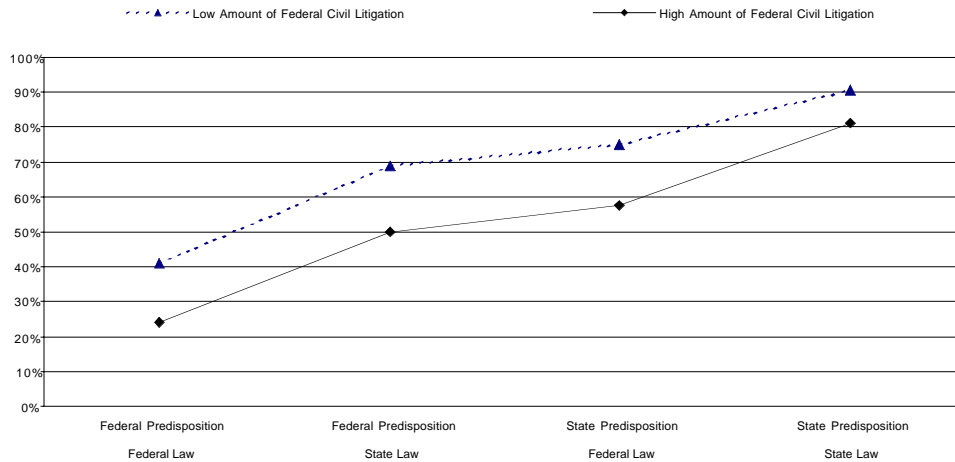
Model 9: Federal civil litigation

This model has four predictors (perceived judicial predisposition, source of law, state facts, and percent of civil litigation in the past five years filed in federal court) that are associated with attorneys’ choice of forum. Each predictor and the overall model are significant at the .05 level. The overall model predicted 77.14% of the responses correctly. The goodness-of-fit was adequate at .20.

With the other significant predictors in the model being held constant, an attorney who has filed a high level of his or her civil litigation cases in federal court in the past five years is more likely to file the class action in federal court than an attorney who filed a low level of their civil litigation cases in federal court.

Chart 9 shows that an attorney with a high level (60%) of federal civil litigation is 92% more likely to file in federal court than an attorney with a low level (10%) of such litigation.

Chart 9: Impact of percentage of civil cases filed in federal court in the past five years on the probability of filing in state court



Model 10: Number of class actions filed in state court

This model has four predictors (perceived judicial predisposition, source of law, state facts, and number of class actions filed in state court in the past three years) that are associated with attorneys’ choice of forum. Each predictor and the overall model are significant at the .05 level. The overall model predicted 78.82% of the responses correctly. The goodness-of-fit was adequate at .20.

With the other significant predictors in the model being held constant, an attorney who had filed seven class actions in state court in the past three years is 27.5% more likely to file the named case in state court than an attorney who has filed two class actions in state court.

Chart 10 shows the probability of filing in state court with a high number of class actions filed in state court in the past three years (seven class actions) or a low number of class actions filed in state court (two class actions).

Chart 10: Impact of number of class actions filed in state court in the past three years on the probability of filing in state court

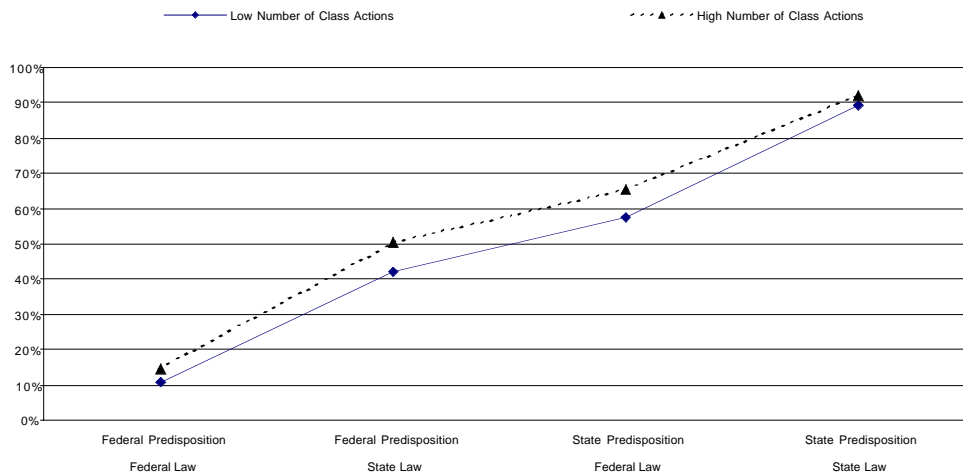


Table A-2: Results of logistic regression

Variable	Model 1		Model 2		Model 3	
	Coefficient	Wald	Coefficient	Wald	Coefficient	Wald
Constant	0.81	4.82*	1.12	7.97*	1.10	7.55*
Legal source	0.89	13.36*	1.03	15.07*	0.90	13.68*
State facts	-0.01	6.44*	-0.01	4.2*	-0.01	7.72*
Predisposition	1.21	23.52*	1.15	18.7*	1.23	23.08*
Substantive law			-2.48	12.73*		
Discovery rules					-0.93	4.28*
Model chi-square [df]	51.45* [3]		71.72* [4]		56.10* [4]	
Block chi-square [df]			20.28* [1]		4.66* [1]	
McFadden's R ²	0.19		0.27		0.21	

Variable	Model 4		Model 5		Model 6	
	Coefficient	Wald	Coefficient	Wald	Coefficient	Wald
Constant	1.00	6.78*	1.18	8.58*	0.87	5.42*
Legal source	0.88	12.83*	0.85	11.6*	0.90	13.37*
State facts	-0.01	6.1*	-0.01	7.64*	-0.01	5.62*
Predisposition	1.18	21.65*	1.27	23.8*	1.15	20.79*
Judicial receptiveness	-0.85	4.29*				
Costs of litigation			-1.39	8.39*		
Jury awards					-1.24	2.92*
Model chi-square [df]	56.03* [4]		61.30* [4]		55.06* [4]	
Block chi-square [df]	4.59* [1]		9.86* [1]		3.62* [1]	
McFadden's R ²	0.21		0.23		0.21	

Table A-2: Results of logistic regression (cont'd)

Variable	Model 7		Model 8	
	Coefficient	Wald	Coefficient	Wald
Constant	1.23	8.16*	1.19	3.37*
Legal source	0.90	12.87*	1.07	5.53*
State facts	-0.01	8.88*	-0.02	4.77*
Predisposition	1.16	21.23*	1.05	6.11*
Location of court	-0.95	4.73*		
Other cases			0.67	3.96*
Model chi-square [df]	56.51* [4]		25.70* [4]	
Block chi-square [df]	5.08* [1]		4.03* [1]	
McFadden's R ²	0.21		0.24	

Variable	Model 9		Model 10	
	Coefficient	Wald	Coefficient	Wald
Constant	-0.03	0.01	1.05	6.19*
Legal source	0.74	8.65*	0.90	12.95*
State facts	-0.01	4.62*	-0.01	4.76*
Predisposition	1.25	23.31*	1.21	22.36*
Civil cases in federal court	0.02	7.24*		
Class actions filed state court			-0.06	3.06*
Model chi-square [df]	58.69* [4]		56.10* [4]	
Block chi-square [df]	7.47* [1]		4.16* [1]	
McFadden's R ²	0.22		0.22	

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Questionnaire Appendix

- Questionnaire 1: Plaintiff in Case Filed Originally in State Court and Removed to Federal Court
- Questionnaire 2: Plaintiff in Case Filed Originally in Federal Court
- Questionnaire 3: Defendant in Case Filed Originally in State Court and Removed to Federal Court
- Questionnaire 4: Defendant in Case Filed Originally in Federal Court

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**Questionnaire 1:
Plaintiff in Case Filed Originally in State Court and
Removed to Federal Court**

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**National Survey of Class Action Counsel in Federal Class Actions
Regarding Federal and State Class Action Practices**

Designed and administered by the Federal Judicial Center

**For the Advisory Committee on Civil Rules of the
Judicial Conference of the United States**



Origin and Purpose

The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. This questionnaire was designed by the Federal Judicial Center at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial branch agency whose duties include conducting research on the operation of the courts. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Who Should Complete the Questionnaire?

Court records show that you represented the plaintiff(s) in the case identified in the cover letter (the "named case"). Plaintiff(s) filed that case in state court as a class action or raised the issue of class certification at a later stage of the litigation. A defendant removed the action to federal court where it was either litigated or remanded to state court. **If the named case was not filed in state court and removed to federal court**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope.

We ask that an attorney who represented the plaintiff(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box if you would like a summary of the survey results.

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

- All claims were based on state law.
 The majority of claims were based on state law.
 Claims were based on state and federal law about equally.
 The majority of claims were based on federal law.
 All claims were based on federal law.
 I don't know/Not applicable

2. How many members were in the class?-----> approximately _____ members

3. Members of the proposed class resided in how many state(s)?----->approximately _____ states

4. What percentage of claimants resided in the state where the class action was filed?----->approximately _____%

5. What percentage of claims-related transactions/events occurred in the state where class action was filed?-----> approximately _____%

6. Did the federal district court remand the named case to state court?

Please check one:

- Yes----->Answer questions 7-20 with respect to case events in the **state court** after remand.
 No----->Answer questions 7-20 with respect to case events in **federal court**.
 I don't know/Not applicable.----->Answer questions 7-20 with respect to case events in **federal court**.

- 7a. The outcome on class certification in the named case was:

Please check one:

- The trial court decided not to certify a class for trial or settlement.----->Proceed to question 8.
 The trial court took no action on class certification.----->Proceed to question 8.
 The trial court certified a class for trial or settlement.----->Proceed to question 7b.

- 7b. The court certified a class:

Please check all that apply:

- For trial----->Proceed to question 9.
 For settlement purposes only, *before* the parties presented a settlement to the trial court. ----->Proceed to question 9.
 For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.----->Proceed to question 9.

8. If no class was certified, what happened?

Please check all that apply:

- Parties proposed a classwide settlement, but the court did not approve any settlement.
 The court dismissed the case for lack of jurisdiction.
 The court dismissed the case on the merits.
 Class representative(s) settled on an individual basis.
 Parties voluntarily dismissed the case.
 The court granted summary judgment motion.
 Cases were tried on an individual basis.
 Other (specify) _____
 I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check *all that apply*:

- Parties proposed a classwide settlement, and the court approved that settlement.
- Parties proposed a classwide settlement, and the court approved a revised settlement.
- Parties proposed a classwide settlement, but the court did not approve any settlement.
- Class representative(s) settled their own claims on an individual basis.
- Trial on class claims resulted in a judgment for the class.
- Trial on class claims resulted in a judgment for the defendant(s).
- The court dismissed all claims on the merits.
- Other (specify) _____
- I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check *all that apply*:

- Certification for trial as a class action.
- Certification for settlement as a class action.
- Amount of attorney fees.
- Terms of the proposed class settlement.
- Class representatives' settlement of their individual claims.
- No opposition filed to certification for settlement or to settlement terms.----->Proceed to question 12.
- I don't know/Not applicable.----->Proceed to question 12.

11. Indicate the outcome in the trial court of each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for *all that apply*:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a court ruling in the named case?

Please check *one*:

- Yes
- No----->Proceed to question 14.
- I don't know/Not applicable----->Proceed to question 14.

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for *all that apply*:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal. Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

- There was a monetary recovery.
 How much was the total monetary recovery?----->approximately \$ _____
 How much of this amount was distributed to class members, if you know?---->approximately \$ _____
- There was no monetary recovery.
- I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?----->approximately \$ _____

How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?----->approximately \$ _____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

- There was no recovery.
- Transferable coupons, securities, or other instruments
- Nontransferable coupons or other instruments
- Injunctive or declaratory relief
- Medical monitoring of potential injuries to class members
- Other (specify) _____
- There was only a monetary recovery
- I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

- Federal court
- State court
- Both Federal and State court
- I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

- Same as the outcome in the named case
- The outcome in the other case(s) differed from the named case in the following ways (specify):

- _____
- I don't know/Not applicable

Part II. Reasons for selecting a state forum

21. Please check **each box** that indicates a reason you filed the named case in state court:

Applicable Law

- All or most claims were based on state law.
- All or most claims were based on the law of the state in which we filed the case.
- State substantive law was more favorable to our claims than federal substantive law.

Convenience

- A majority of claims-related transactions or events took place within the state of filing.
- A majority of claims-related witnesses lived or worked in the state of filing.
- A majority of members of the proposed class lived or engaged in relevant activity in the state of filing.
- My co-counsel and I were more familiar with the procedures in state court.
- The location of the state court was more convenient for us, our clients, or witnesses in the named case.

Rules

- State discovery rules were more favorable to our case.
- State expert evidence (*Daubert/Frye*) rules were more favorable to our case.
- State evidentiary rules were more favorable to our case.
- State class action rules in general imposed less stringent requirements for certifying a class action.
- State class action rules imposed less stringent requirements for notifying class members.
- Interlocutory appeal was less likely to be available in state court.

Judicial Receptiveness

- The state court was generally more receptive to motions to certify a class.
- The state court was generally more receptive to motions to approve a class settlement.
- The state court was generally more receptive to the claims on the merits.
- The state court was able to more expeditiously resolve this class action.
- The state court had more resources available to handle this class action.

Costs and Fees

- The cost of litigation for my client would be lower in state court.
- The state court would be more likely to act favorably on our request for attorney fees.

Strategy

- We wanted to avoid being included in a federal multidistrict litigation transfer.
- The state court would be more likely to appoint my client and our law firm to represent the class.
- We wanted to present similar claims in a number of state courts.

Other

- I generally prefer to litigate in state court.
 - A jury award in state court would likely be higher.
 - Please specify any other reasons why you filed this action in state court.
-
-

22. To achieve the most favorable outcome for your client, you may have weighed certain party characteristics in your decision to file the named case in state court rather than in federal court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you **expected** at the time you chose to file the named case in state court.*

Source of advantage/disadvantage	By filing in state court, we expected:					Not Applicable/ I Don't Know
	Strong advantage for our client	Advantage for our client	No advantage or disadvantage for our client	Disadvantage for our client	Strong disadvantage for our client	
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

23. When you filed the named case, which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'? *Please answer the question with respect to the state court judges and federal court judges most likely to hear the named case at the trial level.*

Please check one:

- Federal judges were more likely than state judges to rule in favor of interests like those of my clients.
 State judges were more likely than federal judges to rule in favor of interests like those of my clients.
 We perceived no differences between state and federal judges in this regard.
 I don't know/Not applicable

Part III. Impact of *Amchem*¹ and *Ortiz*²

24. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about where to file the named case?

Please check all that apply:

- One or both cases provided the main reason we filed the named case in state court.
- One or both cases were among a number of factors that led us to file the named case in state court.
- Neither case had an effect on our decisions about where to file the named case.
- I don't know/Not applicable

25. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

26. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

27. Which of the following best describes your law practice?

Please check one:

- Sole practitioner
- Private firm of 2-10 lawyers
- Private firm of 11-49 lawyers
- Private firm of 50 or more lawyers
- Legal staff of a for-profit corporation or entity
- Legal staff of a nonprofit corporation or entity
- Government
- Other (specify) _____

28. How many years have you practiced law?-----> _____ years

29. What type of clients do you generally represent?

Please check one:

- Primarily plaintiffs
- Primarily defendants
- Plaintiffs and defendants about equally
- Primarily class action objectors
- Other (specify): _____

30. In the past three years or so, how many class actions have you filed (including those filed as part of a team of plaintiffs' attorneys)?----->approximately _____ class actions

¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

31. Of these class action lawsuits, what percentage did you file in state court(s)?----->approximately _____ %
32. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately _____ %
33. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately _____ %
34. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?----->approximately _____ %
35. Comments. Please add any additional comments you may have about your experiences with filing or removal of class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

Questionnaire 2:
Plaintiff in Case Filed Originally in Federal Court

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when printing double-sided copies.

**National Survey of Class Action Counsel in Federal Class Actions
Regarding Federal and State Class Action Practices**

Designed and administered by the Federal Judicial Center

**For the Advisory Committee on Civil Rules of the
Judicial Conference of the United States**



Origin and Purpose

The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. This questionnaire was designed by the Federal Judicial Center at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial branch agency whose duties include conducting research on the operation of the courts. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Who Should Complete the Questionnaire?

Court records show that you represented plaintiff(s) in the case identified in the cover letter (the "named case"). Plaintiff(s) filed that case in federal court as a class action or raised the issue of class certification at a later stage of the litigation. **If the named case was not filed originally in federal court**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope.

We ask that an attorney who represented the plaintiff(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box if you would like a summary of the survey results.

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

- All claims were based on state law.
 The majority of claims were based on state law.
 Claims were based on state and federal law about equally.
 The majority of claims were based on federal law.
 All claims were based on federal law.
 I don't know/Not applicable

2. How many members were in the class?-----> approximately _____ members

3. Members of the proposed class resided in how many state(s)?----->approximately _____ states

4. What percentage of claimants resided in the state where the class action was filed?----->approximately _____%

5. What percentage of claims-related transactions/events occurred in the state where class action was filed?-----> approximately _____%

6. Did the federal district court transfer the named case to another federal district?

Please check one:

- Yes
 No
 I don't know/Not applicable

- 7a. The outcome on class certification in the named case was:

Please check one:

- The trial court decided not to certify a class for trial or settlement.----->Proceed to question 8.
 The trial court took no action on class certification.----->Proceed to question 8.
 The trial court certified a class for trial or settlement----->Proceed to question 7b.

- 7b. The court certified a class:

Please check all that apply:

- For trial----->Proceed to question 9.
 For settlement purposes only, *before* the parties presented a settlement to the trial court.----->Proceed to question 9.
 For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.----->Proceed to question 9.

8. If no class was certified, what happened?

Please check all that apply:

- Parties proposed a classwide settlement, but the court did not approve any settlement.
 The court dismissed the case for lack of jurisdiction.
 The court dismissed the case on the merits.
 Class representative(s) settled on an individual basis.
 Parties voluntarily dismissed the case.
 The court granted summary judgment motion.
 Cases were tried on an individual basis.
 Other (specify) _____
 I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check *all that apply*:

- Parties proposed a classwide settlement, and the court approved that settlement.
- Parties proposed a classwide settlement, and the court approved a revised settlement.
- Parties proposed a classwide settlement, but the court did not approve any settlement.
- Class representative(s) settled their own claims on an individual basis.
- Trial on class claims resulted in a judgment for the class.
- Trial on class claims resulted in a judgment for the defendant(s).
- The court dismissed all claims on the merits.
- Other (specify) _____
- I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check *all that apply*:

- Certification for trial as a class action.
- Certification for settlement as a class action.
- Amount of attorney fees.
- Terms of the proposed class settlement.
- Class representatives' settlement of their individual claims.
- No opposition filed to any of the above.----->Proceed to question 12.
- I don't know/Not applicable.----->Proceed to question 12.

11. Indicate the outcome in the trial court to each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for *all that apply*:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a trial court ruling in the named case?

Please check *one*:

- Yes
- No----->Proceed to question 14.
- I don't know/Not applicable----->Proceed to question 14.

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for *all that apply*:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal. Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

- There was a monetary recovery.
 How much was the total monetary recovery?----->approximately \$ _____
 How much of this amount was distributed to class members, if you know?---->approximately \$ _____
- There was no monetary recovery.
- I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?----->approximately \$ _____

How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?----->approximately \$ _____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

- There was no recovery.
- Transferable coupons, securities, or other instruments
- Nontransferable coupons or other instruments
- Injunctive or declaratory relief
- Medical monitoring of potential injuries to class members
- Other (specify) _____
- There was only a monetary recovery
- I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

- Federal court
- State court
- Both Federal and State court
- I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

- Same as the outcome in the named case
- The outcome in the other case(s) differed from the named case in the following ways (specify):

- _____
- I don't know/Not applicable

Part II. Reasons for selecting a federal forum

21. Please check **each box** that indicates a reason you filed the named case in the federal district that you chose instead of filing the action in state court:

Applicable Law

- All or most claims were based on federal law.
- At least one claim was based on federal law.
- At least one claim could only be brought in federal court.
- At least one claim was based on the laws of many states.
- Federal substantive law was more favorable to our claims than state substantive law.

Convenience

- My co-counsel and I were more familiar with the procedures in federal court.
- The location of the federal court was more convenient for us, our clients, or witnesses in the named case.

Rules

- Federal discovery rules were more favorable to our case.
- Federal expert evidence (*Daubert/Frye*) rules were more favorable to our case.
- Federal evidentiary rules were more favorable to our case.
- Federal class action rules in general imposed less stringent requirements for certifying a class action.
- Federal class action rules imposed less stringent requirements for notifying class members.
- Interlocutory appeal was less likely to be available in federal court.

Judicial Receptiveness

- The federal court in the district you chose was generally more receptive to motions to certify a class.
- The federal court in the district you chose was generally more receptive to motions to approve a class settlement.
- The federal court in the district you chose was generally more receptive to the claims on the merits.
- The federal court in the district you chose was able to more expeditiously resolve this class action.
- The federal court in the district you chose had more resources available to handle this class action.

Costs and Fees

- The cost of litigation for my client would be lower in federal court.
- The federal court would be more likely to act favorably on our request for attorney fees.

Strategy

- We wanted to be included in a federal multidistrict litigation transfer.
- The federal court would be more likely to appoint my client and our law firm to represent the class.
- We wanted to avoid having similar claims in a number of state courts.

Other

- I generally prefer to litigate in federal court.
 - The defendant was likely to remove the action to federal court.
 - A jury award in federal court would likely be higher.
 - Please specify any other reasons why you filed this action in federal court.
-
-

22. To achieve the most favorable outcome for your client, you may have weighed certain party characteristics in your decision to file the named case in the federal court you chose rather than in state court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you expected at the time you chose to file the named case in federal court.*

Source of advantage/disadvantage	By filing in this federal district, we expected:					Not Applicable/ I Don't Know
	Strong advantage for our client	Advantage for our client	No advantage or disadvantage for our client	Disadvantage for our client	Strong disadvantage for our client	
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

23. When you filed the named case, which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'? *Please answer the question with respect to the state court judges and federal court judges most likely to hear the named case at the trial level.*

Please check one:

- Federal judges were more likely than state judges to rule in favor of interests like those of my clients.
 State judges were more likely than federal judges to rule in favor of interests like those of my clients.
 We perceived no differences between state and federal judges in this regard.
 I don't know/Not applicable

Part III. Impact of *Amchem*¹ and *Ortiz*²

24. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about where to file the named case?

Please check all that apply:

- One or both cases provided the main reason we filed the named case in federal court.
- One or both cases were among a number of factors that led us to file the named case in federal court.
- Neither case had an effect on our decisions about where to file the named case.
- I don't know/Not applicable

25. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

26. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

27. Which of the following best describes your law practice?

Please check one:

- Sole practitioner
- Private firm of 2-10 lawyers
- Private firm of 11-49 lawyers
- Private firm of 50 or more lawyers
- Legal staff of a for-profit corporation or entity
- Legal staff of a nonprofit corporation or entity
- Government
- Other (specify) _____

28. How many years have you practiced law?-----> _____ years

29. What type of clients do you generally represent?

Please check one:

- Primarily plaintiffs
- Primarily defendants
- Plaintiffs and defendants about equally
- Primarily class action objectors

¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

Other (specify): _____

- 30. In the past three years or so, how many class actions have you filed (including those filed as part of a team of plaintiffs' attorneys)?----->approximately _____ class actions
- 31. Of these class action lawsuits, what percentage did you file in state court(s)?----->approximately _____ %
- 32. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately _____ %
- 33. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately _____ %
- 34. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?----->approximately _____ %
- 35. Comments. Please add any additional comments you may have about your experiences with filing or removal of class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

Questionnaire 3:
Defendant in Case Originally Filed
in State Court and Removed to Federal Court

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when printing double-sided copies.

National Survey of Class Action Counsel in Federal Class Actions Regarding Federal and State Class Action Practices

Designed and administered by the Federal Judicial Center

**For the Advisory Committee on Civil Rules of the
Judicial Conference of the United States**



Origin and Purpose

The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. This questionnaire was designed by the Federal Judicial Center at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial-branch agency whose duties include conducting research on the operation of the courts. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Who Should Complete the Questionnaire?

Court records show that you represented defendant(s) in the case identified in the cover letter (the "named case"). Plaintiff(s) filed that case in state court as a class action or raised the issue of class certification at a later stage of the litigation. Defendant(s) removed the action to federal court where it was either litigated or remanded to state court. **If the named case was not filed in state court and removed to federal court**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope.

We ask that an attorney who represented the defendant(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box if you would like a summary of the survey results.

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

- All claims were based on state law.
 The majority of claims were based on state law.
 Claims were based on state and federal law about equally.
 The majority of claims were based on federal law.
 All claims were based on federal law.
 I don't know/Not applicable

2. How many members were in the class?-----> approximately _____ members
 3. Members of the proposed class resided in how many state(s)?----->approximately _____ states
 4. What percentage of claimants resided in the state where the class action was filed?----->approximately _____%
 5. What percentage of claims-related transactions/events occurred in the state where class action was filed? -----> approximately _____%
 6. Did the federal district court remand the named case to state court?

Please check one:

- Yes----->Answer questions 7-20 with respect to case events in the **state court** after remand.
 No----->Answer questions 7-20 with respect to case events in **federal court**.
 I don't know/Not applicable.----->Answer questions 7-20 with respect to case events in **federal court**.

- 7a. The outcome on class certification in the named case was:

Please check one:

- The trial court decided not to certify a class for trial or settlement.----->Proceed to question 8.
 The trial court took no action on class certification.----->Proceed to question 8.
 The trial court certified a class for trial or settlement----->Proceed to question 7b.

- 7b. The court certified a class:

Please check all that apply:

- For trial----->Proceed to question 9.
 For settlement purposes only, *before* the parties presented a settlement to the trial court.----->Proceed to question 9.
 For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.----->Proceed to question 9.

8. If no class was certified, what happened?

Please check all that apply:

- Parties proposed a classwide settlement, but the court did not approve any settlement.
 The court dismissed the case for lack of jurisdiction.
 The court dismissed the case on the merits.
 Class representative(s) settled on an individual basis.
 Parties voluntarily dismissed the case.
 The court granted summary judgment motion.
 Cases were tried on an individual basis.
 Other (specify) _____
 I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check *all that apply*:

- Parties proposed a classwide settlement, and the court approved that settlement.
- Parties proposed a classwide settlement, and the court approved a revised settlement.
- Parties proposed a classwide settlement, but the court did not approve any settlement.
- Class representative(s) settled their own claims on an individual basis.
- Trial on class claims resulted in a judgment for the class.
- Trial on class claims resulted in a judgment for the defendant(s).
- The court dismissed all claims on the merits.
- Other (specify) _____
- I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check *all that apply*:

- Certification for trial as a class action.
- Certification for settlement as a class action.
- Amount of attorney fees.
- Terms of the proposed class settlement.
- Class representatives' settlement of their individual claims.
- No opposition filed to certification for settlement or to settlement terms.----->Proceed to question 12.
- I don't know/Not applicable.----->Proceed to question 12.

11. Indicate the outcome in the trial court to each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for *all that apply*:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a court ruling in the named case?

Please check *one*:

- Yes
- No----->Proceed to question 14.
- I don't know/Not applicable----->Proceed to question 14.

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for *all that apply*:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal. Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

- There was a monetary recovery.
 How much was the total monetary recovery?----->approximately \$ _____
 How much of this amount was distributed to class members, if you know?--->approximately \$ _____
- There was no monetary recovery.
- I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?----->approximately \$ _____
- How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?----->approximately \$ _____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

- There was no recovery.
- Transferable coupons, securities, or other instruments
- Nontransferable coupons or other instruments
- Injunctive or declaratory relief
- Medical monitoring of potential injuries to class members
- Other (specify) _____
- There was only a monetary recovery
- I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

- Federal court
- State court
- Both Federal and State court
- I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

- Same as the outcome in the named case
- The outcome in the other case(s) differed from the named case in the following ways (specify):

- I don't know/Not applicable

Part II. Reasons for selecting a federal forum

21. Please check **each box** that indicates a reason you removed the named case from state to federal court:

Applicable Law

- At least one claim was based on federal law.
- At least one claim called for defenses based on federal law.
- At least one claim was based on the laws of many states.
- Federal substantive law was more favorable to our defense than state substantive law.

Convenience

- My client prefers to litigate cases in federal court.
- My co-counsel and I were more familiar with the procedures in federal court.
- The location of the federal court is more convenient for us, our clients, or witnesses in the named case.

Rules

- Federal discovery rules were more favorable to our case.
- Federal expert evidence (*Daubert/Frye*) rules were more favorable to our case.
- Federal evidentiary rules were more favorable to our case.
- Federal class action rules in general imposed more stringent requirements for certifying a class action.
- Federal class action rules imposed more stringent requirements for notifying class members.
- Interlocutory appeal of a certification order was more likely to be available in federal court.

Judicial Receptiveness

- The federal court was generally less receptive to motions to certify a class.
- The federal court was generally more receptive to motions to approve a class settlement.
- The federal court was generally more receptive to the claims on the merits.
- The federal court was able to more expeditiously resolve this class action.
- The federal court had more resources available to handle this class action.

Costs and Fees

- The cost of litigation for my client would be lower in federal court.

Strategy

- We wanted to centralize cases into a federal multidistrict litigation proceeding.
- We wanted to avoid having similar claims in a number of state courts.

Other

- I generally prefer to litigate in federal court.
 - A jury award in federal court would likely be lower.
 - Please specify any other reasons why you removed this case to federal court.
-
-

22. To achieve the most favorable outcome for your client, you may have weighed certain party characteristics in your decision to remove the named case to federal court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you **expected** at the time you chose to remove the named case to federal court.*

Source of advantage/disadvantage	By removing to federal court, we expected:					Not Applicable/ I Don't Know
	Strong advantage for our client	Advantage for our client	No advantage or disadvantage for our client	Disadvantage for our client	Strong disadvantage for our client	
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

23. When you removed the named case, which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'? *Please answer the question with respect to the state court judges and federal court judges most likely to hear the named case at the trial level.*

Please check one:

- Federal judges were more likely than state judges to rule in favor of interests like those of my clients.
 State judges were more likely than federal judges to rule in favor of interests like those of my clients.
 We perceived no differences between state and federal judges in this regard.
 I don't know/Not applicable

Part III. Impact of *Amchem*¹ and *Ortiz*²

24. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about whether to remove the named case?

Please check all that apply:

- One or both cases provided the main reason we removed the named case to federal court.
- One or both cases were among a number of factors that led us to remove the named case to federal court
- Neither case had an effect on our decisions about whether to remove the named case.
- I don't know/Not applicable

25. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

26. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

27. Which of the following best describes your law practice?

Please check one:

- Sole practitioner
- Private firm of 2-10 lawyers
- Private firm of 11-49 lawyers
- Private firm of 50 or more lawyers
- Legal staff of a for-profit corporation or entity
- Legal staff of a nonprofit corporation or entity
- Government
- Other (specify) _____

28. How many years have you practiced law?-----> _____ years

29. What type of clients do you generally represent?

Please check one:

- Primarily plaintiffs
- Primarily defendants
- Plaintiffs and defendants about equally
- Primarily class action objectors
- Other (specify): _____

30. In the past three years or so, how many class actions have you filed or defended (including those filed as part of a team of plaintiffs' attorneys)?----->approximately _____ class actions

¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

31. Of these class action lawsuits, what percentage did you file or defend in state court(s)?----->approximately ____ %
32. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately ____ %
33. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately ____ %
34. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?----->approximately ____ %
35. Comments. Please add any additional comments you may have about your experiences with filing, defending or removing class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

**Questionnaire 4:
Defendant in Case Filed Originally
in Federal Court**

Blank page inserted for correct pagination
when printing double-sided copies.

**National Survey of Class Action Counsel in Federal Class Actions Regarding
Federal and State Class Action Practices**

Designed and administered by the Federal Judicial Center

**For the Advisory Committee on Civil Rules of the
Judicial Conference of the United States**



Origin and Purpose

The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. This questionnaire was designed by the Federal Judicial Center at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial branch agency whose duties include conducting research on the operation of the courts. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Who Should Complete the Questionnaire?

Court records show that you represented defendant(s) in the case identified in the cover letter (the "named case"). Plaintiff(s) filed that case in federal court as a class action or raised the issue of class certification at a later stage of the litigation. **If the named case was not filed originally in federal court**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope.

We ask that an attorney who represented the defendant(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available**, please check this box and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box if you would like a summary of the survey results.

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willing at 202-502-4049 or Bob Niemic at 202-502-4074.

Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

- All claims were based on state law.
 The majority of claims were based on state law.
 Claims were based on state and federal law about equally.
 The majority of claims were based on federal law.
 All claims were based on federal law.
 I don't know/Not applicable

2. How many members were in the class?-----> approximately _____ members

3. Members of the proposed class resided in how many state(s)?----->approximately _____ states

4. What percentage of claimants resided in the state where the class action was filed?----->approximately _____%

5. What percentage of claims-related transactions/events occurred in the state where class action was filed? -----> approximately _____%

6. Did the federal district court transfer the named case to another federal court?

Please check one:

- Yes
 No
 I don't know/Not applicable

- 7a. The outcome on class certification in the named case was:

Please check one:

- The trial court decided not to certify a class for trial or settlement.----->Proceed to question 8.
 The trial court took no action on class certification.----->Proceed to question 8.
 The trial court certified a class for trial or settlement----->Proceed to question 7b.

- 7b. The court certified a class:

Please check all that apply:

- For trial----->Proceed to question 9.
 For settlement purposes only, *before* the parties presented a settlement to the trial court.----->Proceed to question 9.
 For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.----->Proceed to question 9.

8. If no class was certified, what happened?

Please check all that apply:

- Parties proposed a classwide settlement, but the court did not approve any settlement.
 The court dismissed the case for lack of jurisdiction.
 The court dismissed the case on the merits.
 Class representative(s) settled on an individual basis.
 Parties voluntarily dismissed the case.
 The court granted summary judgment motion.
 Cases were tried on an individual basis.
 Other (specify) _____
 I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check *all that apply*:

- Parties proposed a classwide settlement, and the court approved that settlement.
- Parties proposed a classwide settlement, and the court approved a revised settlement.
- Parties proposed a classwide settlement, but the court did not approve any settlement.
- Class representative(s) settled their own claims on an individual basis.
- Trial on class claims resulted in a judgment for the class.
- Trial on class claims resulted in a judgment for the defendant(s).
- The court dismissed all claims on the merits.
- Other (specify) _____
- I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check *all that apply*:

- Certification for trial as a class action.
- Certification for settlement as a class action.
- Amount of attorney fees.
- Terms of the proposed class settlement.
- Class representatives' settlement of their individual claims.
- No opposition filed to certification for settlement or to settlement terms.----->Proceed to question 12.
- I don't know/Not applicable.----->Proceed to question 12.

11. Indicate the outcome in the trial court to each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for *all that apply*:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a court ruling in the named case?

Please check *one*:

- Yes
- No----->Proceed to question 14.
- I don't know/Not applicable----->Proceed to question 14.

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for *all that apply*:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal. Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

- There was a monetary recovery.
 How much was the total monetary recovery?----->approximately \$ _____
 How much of this amount was distributed to class members, if you know?--->approximately \$ _____
- There was no monetary recovery.
- I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?----->approximately \$ _____
- How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?----->approximately \$ _____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

- There was no recovery.
- Transferable coupons, securities, or other instruments
- Nontransferable coupons or other instruments
- Injunctive or declaratory relief
- Medical monitoring of potential injuries to class members
- Other (specify) _____
- There was only a monetary recovery
- I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

- Yes
- No----->Proceed to question 21.
- I don't know/Not applicable----->Proceed to question 21.

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

- Federal court
- State court
- Both Federal and State court
- I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

- Same as the outcome in the named case
- The outcome in the other case(s) differed from the named case in the following ways (specify):

- I don't know/Not applicable

Part II. Reasons for preferring a federal forum

21. This question is hypothetical: assume – contrary to fact – that plaintiff(s) had filed the named case in state court.

Would you have removed this action to federal court?

Please check one:

- Yes
- No
- I don't know/Not applicable

Please check **each box** that indicates a reason that **would have influenced** your decision to remove the case to federal court.

Applicable Law

- At least one claim was based on federal law.
- At least one claim called for defenses based on federal law.
- At least one claim was based on the laws of many states.
- Federal substantive law was more favorable to our defense than state substantive law.

Convenience

- My client prefers to litigate cases in federal court.
- My co-counsel and I were more familiar with the procedures in federal court.
- The location of the federal court is more convenient for us, our clients, or witnesses in the named case.

Rules

- Federal discovery rules were more favorable to our case.
- Federal expert evidence (*Daubert/Frye*) rules were more favorable to our case.
- Federal evidentiary rules were more favorable to our case.
- Federal class action rules in general imposed more stringent requirements for certifying a class action.
- Federal class action rules imposed more stringent requirements for notifying class members.
- Interlocutory appeal of a certification order was more likely to be available in federal court.

Judicial Receptiveness

- The federal court was generally less receptive to motions to certify a class.
- The federal court was generally more receptive to motions to approve a class settlement.
- The federal court was generally more receptive to the claims on the merits.
- The federal court was able to more expeditiously resolve this class action.
- The federal court had more resources available to handle this class action.

Costs and Fees

- The cost of litigation for my client would be lower in federal court.

Strategy

- We wanted to centralize cases into a federal multidistrict litigation proceeding.
- We wanted to avoid having similar claims in a number of state courts.

Other

- I generally prefer to litigate in federal court.
- A jury award in federal court would likely be lower.
- Please specify any other reasons why you might have removed this case to federal court.

22. Continuing the hypothetical, assume that plaintiff(s) had filed the named case in state court and that you were considering whether to remove the named case to federal court. You may have had to weigh certain party characteristics in considering whether to remove to federal court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you would have expected.*

Source of advantage/disadvantage	In considering a motion to remove to federal court, we would have expected:					Not Applicable/ I Don't Know
	Strong advantage for our client	Advantage for our client	No advantage or disadvantage for our client	Disadvantage for our client	Strong disadvantage for our client	
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

Part III. Impact of *Amchem*¹ and *Ortiz*²

23. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about whether to remove class actions during the past three years?

Please check all that apply:

- We did not consider removing any class actions during the past three years.
- One or both cases provided the main reason we removed one or more class actions to federal court.
- One or both cases were among a number of factors that led us to remove one or more class actions to federal court
- Neither case had an effect on our decisions about whether to remove class actions.
- I don't know/Not applicable

24. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

25. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

26. Which of the following best describes your law practice?

Please check one:

- Sole practitioner
- Private firm of 2-10 lawyers
- Private firm of 11-49 lawyers
- Private firm of 50 or more lawyers
- Legal staff of a for-profit corporation or entity
- Legal staff of a nonprofit corporation or entity
- Government
- Other (specify) _____

27. How many years have you practiced law?-----> _____ years

28. What type of clients do you generally represent?

Please check one:

- Primarily plaintiffs
- Primarily defendants
- Plaintiffs and defendants about equally
- Primarily class action objectors
- Other (specify): _____

¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

29. In the past three years or so, how many class actions have you filed or defended (including those filed as part of a team of plaintiffs' attorneys)?----->approximately _____ class actions
30. Of these class action lawsuits, what percentage did you file or defend in state court(s)?----->approximately _____ %
31. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately _____ %
32. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately _____ %
33. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?----->approximately _____ %
34. Comments. Please add any additional comments you may have about your experiences with filing, defending or removing class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

The Federal Judicial Center

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About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special-focus workshops.

The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

The Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

The Interjudicial Affairs Office provides information about judicial improvement to judges and others from foreign countries and identifies international legal developments of importance to personnel of the federal courts.