

An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation

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I. Introduction and Overview

Attorneys' choice of whether to file or litigate a class action in a state or federal forum has been of great concern to policymakers who are considering how to regulate class action litigation.¹ If an attorney for a plaintiff class can plead a valid claim against a local defendant as well as an out-of-state defendant, that attorney can generally choose between a state or federal forum and sometimes from among multiple state or federal forums.² Federal jurisdiction in such a case is typically based on diversity of citizenship between the plaintiff and the out-of-state defendant. According to the removal statute, if the plaintiff pleaded a valid claim against a local defendant then the case is not removable from state to federal court.³ In practice, the defendant has the power to remove a case to federal court and to force the plaintiff to seek remand of the case by the federal court back to state court.⁴

1. The proposed Class Action Fairness Act of 2005 would create a new category of federal jurisdiction for class actions in which there is minimal diversity of citizenship between a class member and a defendant, the amount in controversy exceeds the sum or value of \$5 million, and the class membership meets defined terms of the legislation. S. 5, 109th Cong. 1st Sess., § 4 (2005). Class actions meeting those criteria would be removable from state to federal court by any defendant without regard to whether a defendant is a citizen of the state in which the action was brought. *Id.*, § 5.

See also Deborah Hensler et al., *Class Action Dilemmas* 410–16, 481–83 (2000) (“RAND Study”) (noting that a recurrent complaint is that plaintiff attorneys file lawsuits in courts, generally state courts, where they believe the judges are more likely to certify a class action); JoEllen Lind, “*Procedural Swift*”: Complex Litigation Reform, State Tort Law, and Democratic Values, 37 Akron L. Rev. 717, 751 (2004) (observing that “[w]hether forum choice ought to be constrained in damage class actions poses another dilemma for public policymakers”).

2. See generally Charles Alan Wright et al., *Federal Practice and Procedure* § 3723 (1998 & 2004 Supp.) (for a discussion of the traditional requirements for federal jurisdiction based on diversity of citizenship).

3. 28 U.S.C. § 1441(b) provides that any action not based on a federal question “shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”

4. 28 U.S.C. § 1441(a) provides that “[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court . . . may be removed by the defendant or defendants.” See also 28 U.S.C. § 1446(d), which provides that filing a notice of removal with the clerk of the state court “shall effect the removal and the State court shall proceed no further unless or until the case is remanded”; and 28 U.S.C. § 1447(c), establishing procedures for filing a motion to remand and providing that if “at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”

A defendant can successfully remove a case from state to federal court if there is federal jurisdiction based on complete diversity of citizenship⁵ or on a federal question pleaded in the complaint. As noted above, removal is not authorized if one of the defendants is a citizen of the state in which the action was brought.⁶

Proponents of changing federal jurisdictional statutes assert that a major and undesirable consequence of allowing plaintiff attorneys the option of selecting a favorable forum has been a large number of class action filings in a small number of state courts that are, the proponents contend, predictably predisposed to favor plaintiffs' interests.⁷ Proponents of change recommend expanding the circumstances under which a defendant may remove a class action from state to federal court.⁸ Proposed legislation would permit removal of class actions to federal courts based on minimal diversity of citizenship, that is, where at least one class member and one defendant are citizens of different states.⁹

The call for legislative change reflects fundamental assumptions about plaintiff and defendant attorneys' analyses and motivations and about the effects of their decisions to choose a state or federal forum in which to litigate a class action. Many assume that the driving force in choice-of-forum decisions is the expected difference in class certification and case outcome based on how state and federal judges apply substantive laws and procedural rules. For example, one set of critics asserted "federal judges scrutinize class action allegations more strictly than state judges and deny certification in situations where a state judge might grant it improperly."¹⁰ An academic commentator summarized the state of the debate in these words:

Plaintiffs view the federal courts as increasingly dominated by judges sympathetic to business interests and defendants. Defendants view state courts, particularly where judges are elected, as pro-plaintiff, and, in certain venues, as beholden to plaintiffs' attorneys. No matter that these

5. For a discussion of the requirement of complete diversity of citizenship to establish federal jurisdiction, see generally Wright et al., *supra* note 2, § 3605 (1998).

6. 28 U.S.C. § 1441(b) (West 2004).

7. See, e.g., John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case of It ... in State Court*, 23 Harv. J.L. & Pub. Pol'y 143 (2001) (focusing on three county courts that had high volumes of class action filings relative to their populations).

8. *Id.* at 150–51. For a discussion of the circumstances under which class actions filed in state court can be removed to federal court, see generally Wright et al., *supra* note 2, § 3723 (1998). For a brief summary of recent legislative actions designed to alter those rules, see Wright et al., *supra* note 2, at 564 (Supp. 2004).

9. See, e.g., S. 5, 109th Cong. 1st Sess., § 4(a)(2)(A) (2005).

10. See, e.g., Beisner & Miller, *supra* note 7, at 154 (quoting a 1999 version of the RAND study, *supra* note 1).

stereotypes often fail to predict judicial behavior; they are given credence by attorneys on both sides, and they influence the agendas of interest groups and lobbyists concerning legislative and judicial initiatives.¹¹

In passing the Class Action Fairness Act of 2003, the House of Representatives adopted a finding that “[t]hrough the use of artful pleading, plaintiffs are able to avoid litigating class actions in Federal court, forcing businesses and other organizations to defend interstate class action lawsuits in county and State courts where . . . less scrutiny may be given to the merits of the case . . .”¹²

The above assumptions seem to be based on anecdotes of lawyers and lobbyists.¹³ These often-extreme scenarios are presented as typical in class action litigation. Such claims divert policymakers' attention away from typical cases and interfere with a careful examination of the range of factors that might affect choice of forum, such as the locus of the alleged harms, the residence of class members, the applicable law, and the convenience of the parties and lawyers—factors that might be rendered irrelevant by the proposed legislation. Prior to this study, we had little empirical information on how such factors affect choice of forum in class action litigation.

As to the assumptions that state courts favor plaintiffs and federal courts favor defendants, despite the force with which conclusions have been asserted there has been no quantitative empirical examination of the differences in the treatment of class actions in state and federal courts. Nor has there been any quantitative empirical examination of the factors affecting attorneys' choices to litigate in a state or federal forum.¹⁴ The dearth of data has forced policymakers and proponents of change to rely on anecdotes and assumptions.¹⁵ Many as-

11. Edward F. Sherman, *Introduction to the Symposium: Complex Litigation: Plagued by Concerns Over Federalism, Jurisdiction and Fairness*, 37 Akron L. Rev. 589, 598 (2004).

12. H.R. 1115, 108th Cong. 1st Sess, § 2(a)(4) (2003).

13. One quantitative study presented in support of the legislation is Beisner & Miller, *supra* note 7. That study focuses on three “outlier” courts, known to be atypical of state courts generally. As such, the study amounts to a collection of anecdotes and does not attempt to sample the universe of state or federal class actions.

14. One very useful empirical study of attorney choice of forum examined civil litigation in general and did not focus on class action litigation. 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).

15. RAND's in-depth analysis of ten cases litigated in federal and state courts represents a careful and systematic examination of choice-of-forum issues. See Hensler et al., *supra* note 1. That study, however, was not quantitative and, as the authors stress, was not designed to examine typical cases or to reach conclusions that might be applied generally to class action litigation. *Id.* at 138 (“with only enough resources to conduct ten case studies, we could not select a statistically representative sample”). Beisner & Miller limited their study to three selected

sume that the outcomes of class action litigation mirror the predictions of those who succeed in choosing the forum, that is, plaintiffs who file and retain a class action in state courts or defendants who successfully remove such an action to the federal courts.

Rather than rely on assumptions, we sought to answer some of the following empirical questions about the class action litigation process:

- What factors influence plaintiff attorneys' choice of forum for filing a class action?
- What factors influence defendant attorneys' choice of forum for defending a class action?
- How different are judicial rulings on class certification and other procedural matters in state and federal forums?
- How different are the case outcomes—mostly in the form of dismissals or settlements—in state and federal forums?
- To the extent that both sides to the litigation base their forum-selection decisions on expectations of favorable legal rules or judicial predispositions, how accurate do their perceptions prove to be?

A. Overview

This report presents empirical data and analysis relevant to the above questions. Overall, our data lend support to the conventional wisdom that attorney choice of forum is influenced by attorneys' perceptions of how the state and federal forums are likely to treat their cases, both as to class certification and settlement review, but our data also show that attorneys considered more than the perceived attitudes of judges. Attorneys also considered the underlying substantive and procedural law to be applied in state and federal court as well as local factors, such as the number of class members residing in the forum state and the local origin of the facts underlying the complaint. Our data, however, lend little support to the view that state and federal courts differ greatly in how they resolve class actions. For example, state and federal courts were equally unlikely to certify cases filed as class actions. Both state and federal courts certified classes in fewer than one in four cases filed as class actions. Although state courts approved settlements awarding more money to the class than did federal courts, that difference was a product of the size of the class; individual class members

state courts, one of which the authors characterized as an “outlier among outliers.” Beisner & Miller, *supra* note 7, at 168.

on average were awarded more from settlements in federal courts than in state courts.

The balance of Part I of this report consists of a brief overview of the survey methods used to gather empirical data from attorneys who litigated the terminated class actions in the sample. Part II summarizes the findings as a whole. Part III describes and discusses the factors that plaintiff and defendant attorneys identified as having affected their choice of a state or federal forum. The data reveal that one of the strongest factors in an attorney's choice of forum is the attorney's perception of a judicial predisposition to rule in favor of interests like those of the attorney's client. Local residence of the class members, location of events underlying the claims, and local law were the other major factors.

Part IV examines factors associated with attorneys' perceptions of judicial predispositions. This part explores the differences in such perceptions in relation to reports by the same attorneys on known or perceived differences between state and federal substantive law, procedural rules, and judicial receptivity to class actions.

Part V compares judicial rulings and case outcomes in cases that were remanded to state courts with those retained in the federal courts. Data come from attorney reports of state and federal judicial rulings in a subset of removed class actions. Part V also compares state and federal rulings on class certification, procedural rulings on dispositive motions, and settlement approval. It also covers monetary recoveries—generally in the form of class-wide settlements—and attorney fees, class size, and recoveries per class member.

Part VI examines attorney perceptions of judicial predispositions in relation to the specific cases in which plaintiff and defendant attorneys reported such perceptions. This approach allows us to compare and contrast those perceptions with the rulings that would be expected in those cases if such judicial predispositions were a significant factor.

Part VII adds to the database of removed cases by including surveyed cases filed originally in federal court. This part examines judicial rulings, settlement amounts, nonmonetary relief, and attorney fees for all cases in the sample, not just the removed cases. This section also compares class certification rates, dismissals, recoveries, and attorney fees in this study with available empirical data from prior studies.

The Methods Appendix discusses the design and content of the questionnaire, the population from which the sample of cases and attorneys was drawn, the data collection, the representativeness of the data, and the mode of analysis. The Methods Appendix also presents a detailed discussion of the regression methods and results, including charts of the ten predictor models that emerged from the analysis.

The Questionnaire Appendix contains a copy of each of the four questionnaires: one for plaintiff attorneys in cases filed originally in state court; one for plaintiff attorneys in cases filed originally in federal court; and one each for defendant attorneys in cases filed in state or federal court.

B. Overview of methods

In the course of conducting empirical research for another purpose relating to choice of forum in class action litigation,¹⁶ we examined plaintiff and defendant choice-of-forum motivations and decisions by means of a survey of attorneys in a representative national sample of recently terminated cases that had been filed as class actions in state and federal courts. Our data from state court filings derive exclusively from attorney reports about cases plaintiffs filed in state courts, cases that defendants subsequently removed to federal courts. About half of those cases were remanded to state courts for final resolution.

We sent questionnaires¹⁷ to 2,132 attorneys in 1,235 class action cases that had been either filed in federal court or removed to federal court between 1994 and 2001 and terminated between July 1, 1999, and December 31, 2002. Out of 1,851 valid mailings we received responses from 728 attorneys, an overall response rate of 39%. The number of responses was sufficient to test the statistical significance of differences among the responses. In 107 of the 621 cases, we received responses from attorneys for both sides.¹⁸ Of the responding attorneys, 312 (43%) represented plaintiffs and 416 (57%) represented defendants. 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.¹⁹ Attor-

16. At the request of the Judicial Conference of the United States Advisory Committee on Civil Rules, FJC researchers studied the effects of two recent Supreme Court decisions on attorneys' choice of a federal or state forum. See Thomas E. Willging & Shannon R. Wheatman, Attorney Reports on the Impact of *Amchem* and *Ortiz* on Choice of a Federal or State Forum in Class Action Litigation (Federal Judicial Center 2004), available at <http://www.fjc.gov> (under "Publications," "Class Action Litigation")

17. Each questionnaire was eight pages long. The questionnaires are in the Questionnaire Appendix, *infra*. Some of the original sets of questionnaires were returned uncompleted because the attorney was not at the address; some attorneys returned uncompleted forms, stating that they did not have sufficient information to answer the questionnaire.

18. All responses were used for analyses based on attorney reports (Parts I and III). For analyses done at the case level (Parts II, IV, and V), if two responses referred to the same case, each response was given a weight of 0.5.

19. The most important feature of a response rate is whether the respondents "are essentially a random sample of the initial population and thus a somewhat smaller sample of the total population." Earl Babie, Survey Research Methods 182 (1990). For further discussion of the representativeness of the sample of cases and of the responses from attorneys, see *infra* Methods Appendix, at pages 62–63.

neys were asked to report information about a specific case in which they had represented a party (the “named case”). We selected the named cases from the database used for an earlier FJC report on class action filing activity.²⁰

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 in their filing and removal decisions. Questions called for numerous attorney judgments about whether individual factors might have influenced the 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 at the .05 level or better, which means the probability that the differences occurred by chance is at most one in twenty.²¹

20. See Bob Niemic & Tom Willging, Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules (Federal Judicial Center 2002), available at <http://www.fjc.gov> (under “Publications,” “Class Action Litigation”).

21. Further discussion of methods can be found in the Methods Appendix, *infra*.

II. Summary of Findings

A. Plaintiff attorneys

The questionnaire gave plaintiff attorneys a host of reasons why they might have filed the named case in state or federal court (the named case is the case about which the attorneys were surveyed). Multiple regression analysis revealed three factors that were strongly related to attorneys' decisions about where to file:

- attorney perceptions that state or federal judges were predisposed to rule on certain claims in line with the interests of the attorney's client;
- the source of law (state or federal) applicable to the claims; and
- "state connections," 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.

The substantive law and the discovery rules governing the case also had an impact on the attorneys' decisions. Those two factors were directly related to attorney perceptions of judicial predispositions. Attorney decisions to file a class action in state or federal court were also related to the location of a competing or overlapping class action.

Personal and social characteristics of clients had little effect on the attorneys' decisions. A class representative's local residence was the client characteristic most strongly associated with a plaintiff's decision to file a class action in a state court—a factor captured as part of the "state connections" variable. The defendant's type of business was also associated with a plaintiff's choice of forum.

B. Defendant and plaintiff attorneys' choice of a federal forum compared

Defendant attorneys in removed cases and plaintiff attorneys in cases filed in federal courts each chose to litigate in a federal forum. Defendant attorneys in removed cases, however, more often reported 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. A defendant attorney was also far more likely than a plaintiff attorney to refer to the attorney's personal preferences or to client preferences as a basis for selecting a federal forum.

Responses from both plaintiff and defendant attorneys who sought a federal forum indicated that client characteristics, such as defendant's place of residence, gender, race, and ethnicity, were not related to choice of a federal or state forum. Attorneys infrequently perceived a litigation advantage or disadvantage arising out of any of those characteristics. Plaintiff attorneys, however, tended to see a proposed class representative's local residence as an advantage even when they filed the class action in federal court.

C. Attorney perceptions of judicial predispositions

Attorneys on both sides of the litigation reported that they had expectations about judicial predispositions when they filed or removed the named case. About half of the plaintiff attorneys who filed cases in state courts said they thought that state judges were more likely than federal judges to rule in favor of interests like those of their clients. About 25% of plaintiff attorneys who filed in federal court reported that they expected federal judges to be more likely than state judges to rule in favor of interests like those of their clients, and about 40% of plaintiff attorneys filing in federal court reported that they perceived no difference between state and federal judges in that regard. About 75% of defendant attorneys who removed cases to federal court said that they had an impression at the time that federal judges were more likely than state judges to rule in favor of interests like those of their clients. About 20% of defendant attorneys said they perceived no difference between the two sets of judges.

Often, attorneys' impressions of judicial predispositions were related to the attorneys' judgments about the relative favorability of the substantive law applicable to their clients' claims and defenses; to the relative favorability of a court's rules; and to the perceived judicial receptivity to the type of claims their clients presented. Plaintiff attorneys who filed in state court and perceived state judicial predispositions in favor of their clients' interests were more likely to report that state substantive law and state discovery, evidence, and class action certification rules favored their clients' interests. Plaintiff attorneys who perceived a state judicial predisposition 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 who removed cases to federal court presented almost, but not exactly, a mirror image of plaintiff attorneys. Defendant attorneys who reported perceiving federal court predispositions in favor of their clients' interests were more likely to report that federal discovery, expert evidence, and general evidentiary rules favored their clients' interests. Defendant attorneys who perceived a federal judicial predisposition 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 three sections (Parts II.D-II.F) we summarize findings about how those perceptions matched up with judicial rulings, procedural outcomes, and monetary recoveries and settlements in two groups of named cases: (1) those removed from federal courts (below) and (2) all of the named cases (see Part VII).

D. Attorney perceptions and judicial rulings in removed cases

When we examined the removed cases, we found little relationship between the attorneys' perceptions of what the federal or state court was likely to do and courts' actual rulings. 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 types of courts.²² Federal and state judges were about equally likely to certify cases as class actions (which occurred 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. Federal judges were, however, more likely than state judges to issue rulings denying class certification; state judges, on the other hand, were more likely than federal judges to take no action regarding class certification.

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. Moreover, in certified class actions, state and federal courts were equally likely to approve a class-wide settlement. In one or two instances in federal or state court the settlement had been revised before court approval. No judge rejected a class settlement.

22. 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.

E. Attorney perceptions and monetary recoveries and settlements in removed cases

Despite the similarities in rulings, monetary recoveries differed in the two court systems, although they almost always took the form of settlements fashioned by the parties. In removed cases that had been remanded to state courts, the amount of class-wide monetary recoveries and settlements was substantially larger than monetary recoveries and settlements in cases retained in federal court. The typical (median) recovery was \$850,000 in state court and \$300,000 in federal court. Those differences, however, appeared to be a product of the larger size of class actions 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 court.

F. Attorney perceptions and judicial rulings in removed cases, arranged by perceived judicial predisposition

When we analyzed the removed cases according to plaintiff and defendant attorney perceptions of judicial predispositions, the results were similar to those regarding all removed cases as described in the previous paragraphs. Attorneys' perceptions of state or federal judicial predispositions toward their clients' interests showed little or no relationship to the state or federal judicial rulings in the surveyed cases. Judges certified or dismissed class actions with equal frequency in state and federal courts. As found in the examination of all removed cases, judges in federal courts tend to deny certification more frequently while state courts more frequently take no action on class certification. Judicial rulings on dispositive motions were just about equally likely to lead to a dismissal in the two sets of courts. In short, the predispositions anticipated by the attorneys failed to materialize in the form of judicial rulings.

G. Judicial rulings and settlements in all cases

Looking at all closed cases in our sample (including cases filed originally in federal court), 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.²³ Of the certified cases, 58% were certified for settlement and 42% were certified for trial or litigation.²⁴

23. See Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts* (Federal Judicial Center 1996) (hereinafter "FJC 1996 Study"). A somewhat shorter version of that study can be found at Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking*

In both state and federal courts, all certified class actions settled on a class-wide basis. The typical (i.e., median) recovery in the class-wide settlements was \$800,000. Twenty-five percent of the recoveries and settlements exceeded \$5.2 million, and 25% were \$50,000 or less. In contrast, most cases that were never certified were terminated by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' claims.

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.

H. Attorney fees

Attorney fees typically were 27% of the class recovery in remanded cases and 29% of the class recovery in cases retained in the federal courts, about the same percentage as in the prior FJC study of class actions.²⁵ Twenty-five percent of the cases involved fees of 36% or more.

ing Challenges, 71 N.Y.U. L. Rev. 74 (1996). The FJC's 1996 research, 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%. FJC 1996 Study, at 7. The percentage of those cases certified for settlement was 39%. *Id.* While the study methods were different, comparing data from the current study and the 1992–1994 study suggests that the rate of class certification as a whole most likely has declined in the past decade.

24. *Id.* The FJC 1996 Study and the current study suggest that the percentage of class actions certified for settlement has increased from the 37% rate found in 1996.

25. Median rates in the four federal districts studied in 1996 ranged from 27% to 30%. *Id.* at 68–69.

III. Factors Affecting Choice of Forum

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.²⁶ 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, higher likelihood of attorney fee award, jury pool differences, better rules of evidence, greater judicial pretrial involvement, and selection choice made by client or referring attorney."²⁷ In addition, in diversity cases attorneys indicated that "attorney habit, convenience, and case delay" were the primary factors affecting their choice of forum.²⁸

The questionnaires we sent to attorneys inquired about all of the above factors. In addition, we asked about matters peculiar to class actions, such as the rules governing certification of a class, class notification requirements, and the availability of interlocutory appeal. We also asked about judicial predisposition to rule in favor of client interests, about judicial receptivity to class actions, about judicial resources available to manage the litigation, and about the effect of federal multidistrict litigation procedures.²⁹ Finally, we asked about whether the decision of where to file or defend might have been influenced by various party characteristics, such as residence, gender, ethnicity, race, religion, nationality, reputation, type of business, corporate status, and the like.

We analyzed the attorneys' questionnaire responses regarding these and similar factors. If this report does not mention a specific factor from the above list, that means attorneys did not report any meaningful influence of that factor on their decisions.

26. Miller, *supra* note 14, at 382.

27. *Id.*

28. *Id.* at 383.

29. For copies of the four questionnaires used, see *infra* Questionnaire Appendix.

A. Plaintiff attorney reports on reasons for filing the named cases in federal or state courts³⁰

First, by conducting multivariate analyses of the wide range of variables described above, we analyzed why plaintiff attorneys file class actions in state or federal court. Multivariate analyses, as the name implies, allow us to look at the relationships between pairs of variables while controlling for the effects of other variables.³¹

We concentrated on factors we expected to be associated 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.³²

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.

30. 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.

31. See *infra* Methods Appendix, pages 64–78, for a more complete description of these analyses. Note that we used a very restrictive approach on the data in the multivariate analyses and therefore some of the reported frequencies in this section are different from those reported in sections using other analyses. 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.

32. We were unable to examine defendant attorneys' reasons for removing cases to federal court or for 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.

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

Factor	Description of Factor in Questionnaire ³³
Judicial predisposition	Attorneys' impression of any predisposition of state or federal judges toward interests like those of their clients (Question 23)
Source of law	Attorneys' estimate of proportion of claims based on state or federal law (Question 1)
State connections	The average of the percentage of class members residing in the state (Question 4) and the percentage 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	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)
Attorney's federal civil litigation	Percentage of attorney's workload devoted to civil litigation in federal court during the past five years (Question 33)
Attorney's state class actions	Number of class actions attorney filed in state court in the past three years (Question 31)

1. Primary factors reportedly influencing plaintiff attorneys' choice of forum

Three factors appear to have the greatest connection with where attorneys filed their class action cases: (1) attorneys' perception of judicial predispositions to rule for one side or the other; (2) the source (state or federal) of the law supporting the claims; and (3) 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 connections"). How attorneys perceived these three factors proved to be closely related to their choice of forum.

Perception of judicial predispositions. The questionnaire asked attorneys to indicate whether they perceived, at the time of filing, that state or federal judges

33. Question numbers refer to the questionnaires addressed to plaintiff attorneys, which can be found in the Questionnaire Appendix, *infra*. 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.

had any predisposition toward ruling in favor of interests like those of their clients.³⁴ Attorneys tended to file in the jurisdiction they thought would be predisposed to their clients' interests. Forty percent of attorneys filing in state court reported that they perceived a state judicial predisposition. Thirty-two percent of attorneys filing in federal court—as compared to 4% of attorneys filing in state court—reported that they perceived a federal judicial predisposition. A number of attorneys (28% of those filing in federal court and 56% of those filing in state court) reported that they perceived no differences between state and federal judges.

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 of attorneys filing in federal court and 5% of attorneys filing in state court reported a majority of federal claims. Sixteen percent 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 plaintiff attorneys who filed cases originally in federal court reported that the named case involved the laws of many states.³⁵ Comments from attorneys in a few instances indicated that they sometimes filed a case in federal court because they wanted to pursue at least one federal claim and knew that a single federal claim would allow a defendant to remove the case to federal court.

State connections. We also asked attorneys to estimate the percentage of class members residing in, and the percentage of claims-related events that occurred in, the state where the class action was filed.³⁶ Attorneys filing in federal court reported a greater percentage of class members residing outside the state of filing

34. In another analysis, reported in Part IV.B, Tables 7 and 8, 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. Attorneys' judgments about the favorability of substantive law are also related, but to a lesser degree, to their impressions about judicial predispositions.

35. We did not use the same form of Question 21 for plaintiff attorneys who filed named cases originally in state court.

36. Questions 4 and 5 provide the underlying support for the "state connections" variable (see *infra* Questionnaire Appendix). Question 4 asked for the percentage of claimants residing in the state where the class action was filed. Question 5 asked for "the percentage of claims-related transactions/events [that] occurred in the state where 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.

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 when the case has factual and legal issues involving a larger number of states and tend to file in state courts when the case has factual and legal issues involving 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 connections,” by taking the average of the percentage of class members who resided in the state where the case was filed and the percentage of claims-related events that occurred in the state where the case was filed.³⁷ Attorneys who filed in state court had a higher average of state connections (73%) than attorneys who filed in federal court (57%).

Perception of judicial predispositions, source of law, and state connections. 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 in a case with a majority of state claims and with a high average³⁸ of class members residing in, and claims-related events originating 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 in a case with federal claims and with a low average³⁹ of claimants residing in, and claims-related events occurring in, the state where plaintiffs filed the class action.

37. 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.

38. 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 connections”).

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

2. Secondary factors reportedly influencing attorneys' choice of forum

Other reasons for filing in state or federal court. We found other factors were associated with attorneys' choice of forum. In the questionnaire,⁴⁰ attorneys reviewed a list of reasons that might have influenced their decisions about where to file the case. This list 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 include the following as reasons for their decision: favorability of substantive law and discovery rules; judicial receptiveness to such claims on the merits; lower costs of litigation; higher jury awards; and convenience of the court location.⁴¹ We found that those reasons were associated with where the named case was filed. The probability of filing in state court increased if an attorney chose any of those reasons for selecting a particular court.

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

Table 2: Reasons selected by plaintiff attorneys for choice of forum

Reason	Filed in State Court	Filed in Federal Court
Source of claims (state or federal)	78%	28%
Favorability of substantive law	33%	4%
Favorability 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 between state and federal courts in this table are all 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.⁴² Attorneys filing in state court re-

40. See *infra* Questionnaire Appendix, Question 21.

41. 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 that we did not measure that may have influenced the relationship.

42. 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 *infra* Methods Appendix, at pages 58–60 (“Population of class action terminations”). Attorneys

ported 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 been filed in a federal court.

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 generally varies in the same direction as the attorneys' recent filing activity. Attorneys filing class actions in state court reported filing 30% of all their civil litigation in federal court in the past five years. Attorneys filing class actions in federal court reported filing 46% of their 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. This factor had little 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.

3. Summary

The multivariate analysis indicates that plaintiff attorneys' choices between state and federal forums followed their expectations about where their clients' interests would best be served. Those attorneys' choices also followed their assessment of whether a state or federal forum had more of a nexus with the underlying litigation. When plaintiff attorneys perceived that state judges were receptive to, and predisposed to rule in favor of, claims like those of their clients; that state substantive law and discovery rules were more favorable to their clients; and that the facts, legal claims, and class members were linked to the state, then they were far more likely to file in state rather than federal court. The absence of any

in the survey may, of course, have referred to cases that we treated as a single consolidated case.

or all of those factors favorable to plaintiffs and to a state filing increased the likelihood of a federal filing.⁴³

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 plaintiff⁴⁴ 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. Claims based on state law were considerably more frequent in cases originally filed in state courts. Defendant attorneys who removed named cases to federal court were more likely to report that all claims in their cases were based on state law than were plaintiff attorneys who filed named cases originally in federal court: 58% of defendant attorneys reported that all claims were based on state law, but 39% of plaintiff attorneys so reported. Eighty-eight percent 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 had more state connections (i.e., percentage of in-state class membership and case-relevant factual links to the forum state) (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

43. For a detailed presentation of ten models that predict the probability of filing in state or federal court according to the most important factors identified in the regression analysis, see *infra* Methods Appendix, at pages 64–78.

44. 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.

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 a single state, whereas 16% reported class members from all 50 states. Twenty-nine percent of plaintiff attorneys who filed in federal court reported that the class members resided in two or a single state, 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.

Table 3 shows the percentage of attorneys who reported that they relied on specific reasons for filing in or removing a case to federal court.

Table 3: Reasons cited by attorneys for choice of federal court*

Reason	Defendant Removed to Federal Court	Plaintiff Filed in Federal Court
Client prefers federal court	65%	Not available**
Attorney prefers federal court [†]	57%	26%
Class certification [†]	47% (more stringent)	8% (less stringent)
Class notification [†]	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 awards)
Court has more resources [†]	30%	14%
Court is more expeditious [†]	27%	17%
Court location favorable ^{††}	9%	17%

* Table 3 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.

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 that a federal court would scrutinize a motion for class certification more closely than a state court; few indicated a belief that they would have an easier time with class certification in federal court. 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.

As was true regarding plaintiff attorneys' choice of a state forum (see Part III.A and Table 2), defendant attorneys' choice of a federal forum included consideration of 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 court resources and how fast their cases 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.

1. 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. As one might expect, both sets of attorneys sought substantive law and procedural rules that would favor their clients.

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

1. 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 the defendant's type of business and the 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 a 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 4 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 4: 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 between federal and state court in this table are statistically significant at the .05 level.

The majority of plaintiff attorneys who filed in state court said they had expected the type of business conducted by the defendant to be an advantage to the plaintiff's case; 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.⁴⁵ 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 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 residence⁴⁶ 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 III.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 at-

45. Because the number of attorneys who provided this information was small, we were unable to conduct a meaningful statistical analysis.

46. 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.

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.

2. 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 federal 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 5 shows the percentage of plaintiff and defendant attorneys who rated the party characteristic as an advantage, a disadvantage, or neither.

Table 5: Ratings of party characteristics by all plaintiff attorneys and by defendant attorneys who removed the named case to federal court

Variable	Attorney	Advantage	No Advantage/ 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 between plaintiff and defendant attorneys 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 attor-

neys to say that they thought the local residence of the class representative would be 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 a 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, more than three-quarters of the attorneys 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 socio-economic 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.

3. Summary

Debates about why attorneys choose to file class actions in state or federal court point to the legal interests of the parties and party characteristics on both sides of the cases, and those two types of factors often become intertwined. 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. In our analyses, attorneys' expectations of advantages differed somewhat based on party characteristics, but the failure of such characteristics to surface in the multivariate analysis shows that these party characteristics are not critical factors in plaintiff attorneys' choice of whether to file a class action in state or federal court (see Part III.A).

IV. Plaintiff and Defendant Attorneys' Perceptions of State and Federal Judges' Predispositions Toward Plaintiff and Defendant Interests

As shown in Part III.A, a key factor in a plaintiff attorney's choice of forum is the attorney's impression of any predispositions federal or state judges might have to rule in favor of interests like those of the attorney's 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 and found even stronger perceptions on that side as well.

In this section we analyze in more detail 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 IV.A we report attorney perceptions of judicial predispositions, and in Part IV.B we report the extent to which such predispositions are related to differences in federal and state substantive law and procedural and evidentiary rules. Part V compares those perceptions with the rulings and monetary recoveries and settlements or other outcomes in the removed and remanded cases as a whole. Part VI separates out cases in which attorneys reported a perceived judicial disposition and examines the rulings in the underlying cases to determine whether they confirmed the predisposition or not.

A. Attorneys' perception of judicial predispositions

For both the filing and removal settings, our questionnaire 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?"⁴⁷

Table 6 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 to federal courts.

47. See *infra* Questionnaire Appendix, Question 23.

Table 6: 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 a case in state or federal court or removing a case 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, including claims within the exclusive jurisdiction of the federal courts, 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 type of court or the other.

B. Substantive law, procedural rules, and judicial receptivity in relation to attorney perceptions of judicial predispositions

In this section we attempt to identify relationships that may shed light on the nature of the perceived predispositions. Are attorneys' perceptions of judicial predispositions a surrogate for differences between federal and state substantive law, procedural rules, and/or evidence rules? Or do attorneys actually perceive judicial receptivity to claims like those of their clients? Perceived judicial predispositions appear to represent attorneys' perceptions of substantive legal, procedural, and evidence rules favorable to their clients combined with perceptions of judicial receptivity to enforcing those rules.

Table 7 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. Note that the two numerical columns represent different sets of attorneys and the figures represent the percentage of each set.

Table 7: 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 Toward Their Clients' Interests</i>	Attorneys Reporting <i>No Judicial Predisposition Toward Their Clients' Interests</i>
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 IV.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 (see Table 6). Table 7 shows that several reasons 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 rules on discovery and evidence (expert and nonexpert) favored their clients' interests. Defendant attorneys 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. Note that the attorneys' perceptions of judicial receptivity were notably more frequent (83%) than their perceptions of substantive law differences (71%). That discrepancy indicates that a small percentage of these attorneys perceived a judicial receptivity to their clients' claims that existed independently of the applicable substantive law.

Table 8 examines similar phenomena from the perspective of plaintiff attorneys who filed actions in state court. As with Table 7, the two numerical columns in Table 8 represent different sets of attorneys and the figures represent the percentage of each set.

Table 8: 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 (see Table 6). Table 8 reveals some of the apparent reasons 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. As was the case with defendant attorneys, plaintiff attorneys' perceptions of judicial receptivity to their clients' claims (78%) was considerably higher than those attorneys' perceptions of the favorability of substantive law (61%), indicating that a small percentage of attorneys perceived a judicial receptivity to their clients' claims, a receptivity that existed independently of the applicable substantive law.

In analyzing other aspects of the survey, we found evidence that attorneys' perceptions of judicial predispositions were not accurate when compared with judicial rulings on class certification and other procedural motions. In Part V we present data based on attorney reports about removed cases, data indicating that the rulings in those cases as a whole did not support the attorneys' perceptions of judicial predispositions.

Attorney perceptions of judicial predispositions, however, were associated with, but not necessarily caused by, the amount of class monetary recoveries and settlements in state and federal courts. In all but one instance the outcome was in the form of a settlement negotiated by the parties. Such outcomes do not appear to be the direct consequence of federal or state judicial predispositions because the only judicial rulings in such cases would have been the decision to certify a class and to approve the proposed settlement. About half of the class certifications were based on settlement classes (see Tables 9 & 13) that are generally agreed to by the parties. In only one instance did a federal judge reject a proposed class settlement for a certified class (see Tables 12 & 19). Thus, the case outcomes were not the direct product of judicial rulings.

V. Comparison of Rulings by State and Federal Courts in Removed Cases

Our sample of cases includes 438 that were removed from state to federal court; 221 of those 438 cases (50%) were remanded by the federal court to the state court in which they were originally filed. Of the 438 cases, 292 had been closed by the time of our survey. Of the 292 closed cases, 169 (58%) were retained in federal court, and federal judges had remanded 123 (42%) to the state court in which they were originally filed. The remanded cases were less likely to be closed ($123/221=56\%$) than the cases retained in federal courts ($169/217=78\%$).⁴⁸ All analyses in this section, except Table 10, use the subset of closed cases.

Information about a group of closed remanded cases provided an opportunity to compare state courts' and federal courts' rulings, procedural outcomes, and monetary recoveries and settlements. The only apparent systematic difference among the remanded and removed 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 9), motions to dismiss or for summary judgment (see Table 11), or reviews of class settlements (see Table 12) reveal any systematic differences in the ways federal and state courts resolved the two sets of proposed class actions. We will also examine cases that produced any type of recovery, generally in the form of settlements, for the class (see Table 13).

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.

As we saw in Parts III and IV, 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 re-

48. 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.

moved 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” (see Table 6). 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” (see Table 6). 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 outcomes of a sample of cases in federal and state courts?

A. Rulings on class certification

Table 9 compares federal and state judicial rulings on class certification.

Table 9: Comparison of outcomes regarding class certification for closed removed cases with closed remanded cases

Outcome Regarding Class Certification	Removed to Federal Court and 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 between remanded and removed cases 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.⁴⁹

In both federal and state forums a majority of cases filed as class actions received no ruling on class certification. Federal judges, however, were more likely

49. The overall class certification rate for all removed cases was 21%. Note that the class certification rate for all the named cases in the survey was 24% (see Part VII.A), indicating that cases filed originally in federal court had a higher class certification rate than cases removed from state court.

than state judges to rule on class certification and federal judges were more than twice as likely to deny class certification.⁵⁰ Federal judges' higher rate of denying class certification appears to be a counterpart of state judges' higher rate of not ruling on class certification.

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

Table 9 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 a case's outcome did a ruling denying class certification have?

Looking at all cases in the study we found no statistically significant difference in the likelihood that a case that was denied certification or a case that had no action taken on certification would produce a monetary recovery for the proposed class. 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 even a recovery that included no nonmonetary relief.

Table 10 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.

50. In the FJC 1996 Study, researchers found 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. FJC 1996 Study, *supra* note 23, at 9. 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 10: 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 defendant attorneys' 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 11 compares 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 11: Comparison of rulings and procedural outcomes for removed and remanded cases filed, but not certified, as class actions

Rulings and Procedural Outcomes	Removed to Federal Court and 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%)
Judgment after class trial	0	0

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

* Differences between remanded and removed cases are statistically significant at the .05 level.

Table 11 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 related to our earlier finding regarding the denial or absence of class certification. Rulings that expressly denied certification were related to the likelihood of 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 12 shows little variation in results. Federal courts were somewhat more likely than state courts to approve a proposed class-wide settlement or to approve a revised settlement, but, again, the differences were not statistically significant.

Table 12: Comparison of procedural outcomes for removed and remanded certified closed class actions

Outcomes of Certified Cases*	Removed to Federal Court and Remanded to State Court (N=28)	Removed to Federal Court and Not Remanded (N=37)
Class-wide settlement approved	23 (82%)	33 (88%)
Class-wide settlement revised and approved	1 (4%)	2 (5%)
Class representatives settled on individual basis	0	1 (3%)
Class-wide 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.

* The differences between remanded and removed cases in this table are not statistically significant at the .05 level.

Table 13 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%). That outcome, however, might be an artifact of the timing of the survey.⁵¹

51. We used the date of termination in federal court as the cutoff date for our sample. For remanded cases, a number remained pending at the time of the survey. One might infer that those cases had survived early dismissal and thus may have been more likely than the closed cases to produce a monetary recovery when they came to a conclusion in the state court.

Table 13: Comparison of monetary recoveries and settlements and class size in remanded and removed certified class actions

Monetary Recovery/Class Size	Removed to Federal Court and 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 12). The total recovery for the class, of course, represents the common 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 monetary recoveries in federal versus state court appear to be a product of the smaller class sizes.

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.

D. Summary

In comparing remanded and removed 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 notable 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.

Thus, data based on state and federal judges' rulings do not support attorneys' perceptions that state courts are likely to favor plaintiffs in class action litigation and that federal courts are likely to favor defendants. In the next section we examine those rulings in direct relationship to specific perceptions and expectations of plaintiff and defendant attorneys.

VI. Relationships Among Attorney Perceptions of Judicial Predispositions in Individual Cases and Outcomes of Judicial Rulings on Motions

In this section we focus specifically on attorneys' statements about perceived judicial predispositions toward the attorneys' clients and the rulings in those cases. We look at federal and state court rulings on class certification and on procedural matters in certified and noncertified cases. The small number of cases with monetary recoveries does not allow us to look closely at the outcome of the litigation, attorney fee awards, and class recoveries.

Table 14 compares federal and state judicial rulings on class certification in relation to plaintiff attorneys' perceptions that judicial predispositions existed in the state courts that would favor their clients' interests.

Table 14: Comparison of attorney reports of class certification rulings in remanded and removed cases where plaintiff attorneys perceived a judicial predisposition in state court in favor of plaintiff

Outcome Regarding Class Certification	Removed to Federal Court and Remanded to State Court (N=20)	Removed to Federal Court and Not Remanded (N=35)
Class certified for trial and litigation or settlement	5 (25%)	11 (31%)
Certified for trial and litigation	2 (30%)	6 (60%)
Certified for settlement	4 (70%)	4 (40%)
Certification denied	5 (25%)	7 (20%)
No action taken on certification (before case resolved)	10 (50%)	17 (49%)

Note: The differences in this table are not statistically significant. Apparent differences between totals and subtotals are the result of rounding of weighted responses by two attorneys in the same case.

The most noteworthy aspect of the data in Table 14 is that there are no statistically significant differences in the rulings on whether or not to certify a class in state and federal courts. Despite plaintiff attorneys' expectations—reported with the benefit of hindsight after these cases had closed—that a state court would rule more favorably toward interests like the plaintiffs' interests, these plaintiffs in fact received comparable rulings from state and federal courts on the central issue of whether or not to certify a class. In other words, the attorneys' perceptions of judicial predispositions proved to be no more accurate than a prediction based on flipping a coin. The fact that these predispositions

diction based on flipping a coin. The fact that these predispositions were asserted in response to a survey conducted after the cases had closed suggests that attorney assertions about judicial predispositions reflect general suppositions about the two sets of courts more than specific predictions about the case at hand.

Table 15 presents the defendant–federal court counterpart of Table 14.

Table 15: Comparison of attorney reports of class certification rulings in remanded and removed cases where defendant attorneys perceived a judicial predisposition in state court in favor of defendant

Outcome Regarding Class Certification	Removed to Federal Court and Remanded to State Court (N=55)	Removed to Federal Court and Not Remanded (N=61)
Class certified for trial and litigation or settlement	6 (11%)	8 (13%)
Certified for trial and litigation	4 (67%)	4 (50%)
Certified for settlement	2 (33%)	4 (50%)
Certification denied*	9 (16%)	19 (31%)
No action taken on certification (before case resolved)**	40 (73%)	34 (56%)

* Difference is statistically significant at the .05 level.

** Difference is statistically significant at the .10 level.

As with plaintiff attorneys (see Table 14), defendant attorneys' statements about judicial predispositions yielded no significant differences in the likelihood that a federal or state court would certify a class. Federal judges certified classes slightly more often than state judges, but the differences are not statistically significant. Fewer than 15% of the judges in either type of court certified classes. Like the perceptions of plaintiff attorneys discussed above, defendant attorneys' perceptions of judicial predispositions regarding affirmatively certifying a class proved to be no more accurate than a prediction based on a coin toss. Judges in federal court, however, denied class certification statistically significantly more often than state court judges. As was the case with remanded cases as a whole (see Part V.A), state judges were more likely to have taken no action on class certification.

Table 16 presents data comparing rulings and procedural outcomes for removed noncertified cases (including cases in which there was no ruling on class certification) in which a plaintiff attorney perceived a judicial predisposition in state court.

Table 16: Comparison of attorney reports of rulings and procedural outcomes in remanded and removed noncertified class actions where a plaintiff attorney perceived a judicial predisposition in state court in favor of plaintiffs

Rulings and Procedural Outcomes	Removed to Federal Court and Remanded to State Court (N=27)	Removed to Federal Court and Not Remanded (N=29)
Dismissed on merits	2 (7%)	3 (10%)
Dismissed for lack of jurisdiction	1 (4%)	1 (3%)
Summary judgment entered	1 (4%)	1 (3%)
Settled on individual basis*	4 (15%)	12 (41%)
Settled as part of another case	1 (4%)	1 (3%)
Voluntarily dismissed*	18 (67%)	10 (34%)
Tried on an individual basis	0 (0%)	1 (3%)

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.

As with the rulings on class certification, judicial rulings on the merits of the case in the form of motions to dismiss or for summary judgment fail to reveal any relationship with plaintiff attorneys’ perceptions that state courts will favor their clients’ interests. The relatively small number of cases dismissed, or resolved by summary judgment, in federal and state courts are not different in any statistically significant way. Cases remanded to state court were more likely to be voluntarily dismissed and less likely to be settled on an individual basis. Neither of those outcomes is the direct result of a judicial ruling. Moreover, assuming that voluntary dismissal is a less beneficial outcome for the plaintiff than an individual settlement, those data do not support plaintiff attorneys’ perceptions that state courts would favor their clients’ interests.

Table 17 presents the defendant–federal court counterpart of Table 16.

Table 17: Comparison of attorney reports of rulings and procedural outcomes in remanded and removed noncertified class actions where a defendant attorney perceived a judicial predisposition in federal court in favor of defendants

Rulings and Procedural Outcomes*	Removed to Federal Court and Remanded to State Court (N=50)	Removed to Federal Court and Not Remanded (N=56)
Dismissed on merits	12 (24%)	13 (23%)
Dismissed for lack of jurisdiction	3 (6%)	1 (2%)
Summary judgment entered	5 (10%)	8 (14%)
Settled on individual basis	12 (24%)	19 (34%)
Settled as part of another case	3 (6%)	1 (2%)
Voluntarily dismissed	14 (28%)	14 (25%)
Judgment after individual trial	1 (2%)	0 (0%)

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

* The differences between remanded and removed cases in this table are not statistically significant.

Whether a federal or state court resolved the case appears to have made no difference. In the cases remanded to state courts, 40% were dismissed or had summary judgments entered, and in the cases retained in the federal courts, 39% were dismissed or had summary judgments. Of course, the slight difference is not statistically significant. Again, we find no support for defendant attorneys' perceptions that federal courts were more likely to rule in favor of their clients' interests.

We also examined the attorneys' perception of judicial predispositions from another angle—the procedural outcomes in state and federal courts, including the outcome of reviewing class settlements, for cases certified as class actions. As with our analysis of those outcomes in Part V.C (see Table 12), we found that the results were substantially the same in state and federal courts: Class-wide settlements were approved in both sets of courts. The small number of cases, however, does not support a reliable test of statistical significance.

We also asked whether there was any relationship between attorney perceptions and the amount recovered by the class, the size of the class, and the amount and percentage of attorney fees awarded to the attorney for the class. We were unable to come to any firm conclusions because relatively few cases met the preconditions of having both a class-wide monetary recovery and a perceived judicial predisposition in one direction or the other. For those few cases in which data were available, the results paralleled those presented in Table 13. Total monetary recoveries for the class were higher in state court and consequently

attorney fee recoveries in state court were higher. Class sizes were smaller in federal courts and the recovery per class member somewhat higher in federal court.

A. Summary

Attorney perceptions of judicial predispositions toward their clients' interests show little or no relationship to the judicial rulings in the surveyed cases, even when we grouped the cases according to the direction of the perceived predispositions. Judges certified or dismissed class actions with equivalent frequency in state and federal courts. The sole difference was that judges in federal courts more frequently denied certification while state courts more frequently took no action on class certification.

VII. Procedural Outcomes, Monetary Recoveries, and Settlements in All Named Cases (Removed and Not Removed)

A. Certification for settlement or trial and litigation

This part shifts focus to examine the larger number of attorney responses in 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 Parts V and VI). In the majority of cases (57%) the court took no action regarding class certification. Judges certified 24% of the cases 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.⁵²

In their 1996 study, FJC researchers found that 152 of 407 (37%) proposed class actions had been certified as class actions, either for settlement or for trial.⁵³ 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 the differences in research methods, given the objectivity of class certification it seems reasonable to infer that the class certification rate has decreased considerably in recent years.

Of the cases reported as certified, 42% were certified for trial and litigation and 58% were certified for settlement (see Table 18, columns 2 & 3). Relatively few (10%) of the cases certified for settlement were certified before the parties presented a settlement to the trial court. In the 1996 FJC study, 59 of 152 (39%) certified class actions were certified for settlement purposes only.⁵⁴ 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 considerably and, correspondingly, the percentage certified for trial and litigation has decreased equivalently.

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 18

52. The 24% class certification rate suggest that federal question cases are more likely to be certified than diversity cases, which were certified at a 21% rate. See *supra* Part V.A. Detailed comparison of federal question and diversity cases is beyond the scope of this report.

53. FJC 1996 Study, *supra* note 23, at 9.

54. *Id.*

shows the outcomes for class actions certified for trial and litigation compared with class actions certified for settlement only.

Table 18: Comparison of case outcomes for class actions certified for trial and litigation and class actions certified for settlement

Outcomes of Certified Class Actions	Certified for Trial and Litigation (N=52)	Certified for Settlement (N=73)
Class-wide settlement approved*	38 (72%)	69 (95%)
Class-wide settlement revised and approved	2 (3%)	4 (5%)
Class-wide settlement proposed and not approved by court	1 (2%)	0
Class representative settled individually	1 (2%)	0
Class-wide trial resulting in plaintiff judgment	3 (6%)	0
Class-wide 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 earlier FJC study 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 certification or followed certification by a considerable time.⁵⁵ In the current study, we asked how often certification for settlement purposes preceded settlement and found that only three cases (10%) were certified as settlement classes before settlement.

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 class-wide 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.⁵⁶ One might expect, of course, that

55. *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).

56. *Id.* at 66 & 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

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 19, below, we find that 13 of 486 cases (3%) went to trial on an individual (2%) or class-wide (4%) basis.

Table 18 shows that six cases were 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 \$1.6 million; \$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.⁵⁷ 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 earlier FJC study reported that rulings on such motions often preceded any action on class certification.⁵⁸

Table 19 compares survey data for certified and noncertified cases filed as proposed class actions. Cases certified for settlement are included in the certified column.

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 U.S. Courts, Annual Report of the Director of the Administrative Office of the U.S. Courts 153, Table C-4 (1990); Administrative Office of the U.S. Courts, Judicial Business of the United States Courts; 2000 Annual Report of the Director 159, Table C-4 (2000).

57. 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)").

58. See FJC 1996 Study, *supra* note 23, at 29–35. That 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. *Id.* 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 1996 FJC empirical study.

Table 19: Comparison of case outcomes for certified and noncertified cases filed as class actions

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 noncertified 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 1996 FJC study.

The dichotomy between certified and noncertified 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 class-wide 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, class-wide settlement 89% of the time; a few were tried and a few were dismissed involuntarily. Noncertified cases did not show evidence of having class-wide 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 class-wide 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.⁵⁹

1. Monetary recovery or settlement

Overall, 142 (23%) of the named cases led to a class-wide 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.

2. Nonmonetary recovery

Table 20 shows the frequency of providing four types of nonmonetary relief in a class recovery: transferable and nontransferable coupons; injunctive relief; and cy pres class/public interest remedies. Altogether these nonmonetary remedies were the sole remedies provided to the class in fifteen cases. The total numbers in Table 20 include cases in which there was no class recovery, monetary or otherwise. Note that in Table 20 the third column is a subset of the second column, and the fourth column is a subset of the third.

Table 20: 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.⁶⁰

59. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), made it clear that a class settlement cannot be approved unless a class can be certified under Rule 23 standards, with the sole exception that the manageability of a class need not be established when the certification is for settlement. *Amchem*, at 613–14.

As Table 20 shows, attorneys reported that transferable coupons were part or all of the recovery in nineteen cases (6% of all cases). Of those cases, eight (5% of cases without a monetary recovery) had no monetary recovery, and in six cases (4% of cases with no other recovery) transferable coupons represented the only remedy provided to the class.⁶¹ Nontransferable coupons were reported in ten cases (3% of all cases), all but three of which (2% of cases with no monetary recovery) were accompanied by a monetary recovery for the class. In two cases (1% of cases with no other recovery), nontransferable coupons were the sole remedy for the class.

D. Attorney fees and expenses

Attorney fees have been characterized as “the lightning rod in the controversy over damage class actions.”⁶² 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.⁶³ At the high end, in 25% of the 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 FJC research on class action litigation in federal courts.⁶⁴ As found in the two studies, a diminishing minority of cases filed as class actions survived the litigation process to the point of having a class certified. Noncertified 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 (2%) involved nontransferable coupons and no monetary remedy.

60. 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 Hensler et al., *supra* note 1, at 488–89.

61. We have no further information about whether the transferable coupons were in fact marketable.

62. Hensler et al., *supra* note 1, at 434.

63. These data dovetail with the results of the earlier 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 1996 Study, *supra* note 23, at 69.

64. See generally, *id.*

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 very close to those reported in the 1996 FJC study.

F. Conclusions

We based our analyses on responses to questionnaires completed by 728 attorneys in 621 recently terminated class action cases that had been filed in federal court or removed to federal court. The returned questionnaires represented a random, national sample sufficiently large to test the statistical significance of differences among the response categories of interest. The questionnaire asked attorneys about the reasons they either filed in federal court or removed the case to federal court, and about the judicial rulings and outcomes of the cases.

We began by asking what factors affected plaintiff and defendant choice of forum. For plaintiff and defendant attorneys we found that expectations of favorable treatment, based on perceived judicial predispositions to favor interests like those of their clients, were a major force in attorneys' respective decisions about where to litigate. Those expectations, though, were not necessarily the product of attorney perceptions of judicial bias. We found for plaintiff attorneys that expectations about judicial predispositions were related to attorney perceptions of favorable substantive law and favorable discovery rules in the state forum they selected. Similarly, for defendant attorneys, expectations about judicial predispositions were also related to perceptions of favorable substantive law and discovery rules as well as to favorable class action and expert evidence rules in the federal forum they selected. In their responses to our survey, defendant attorneys described an almost totally favorable legal environment for their clients in the federal courts—a convergence of judicial receptivity, predispositions, and favorable substantive and procedural rules.

We found plaintiff attorneys' preferences for state forums to be associated with local (that is, state) factors, such as the source of plaintiffs' legal claims in state law, the factual origins of plaintiffs' claims in the forum state, and the number of class members residing in the forum state. A class representative's local residence also played a role. Indeed, the defendant's type of business was the only factor strongly associated with a plaintiff's choice of forum that did not necessarily have a local nexus. These empirical findings are not consistent with some of the assumptions underlying proposed class action legislation.⁶⁵

We also analyzed differences between state and federal courts' rulings in the closed cases in our sample. The general expectation—from attorney responses to our questionnaire and conventional wisdom—was that state courts are more

65. See *supra* Part I, text accompanying notes 10–15.

permissive toward class actions. However, we found little difference in the rulings issued by the two sets of courts. Class actions were equally unlikely to be certified in both state and federal courts—fewer than one in four cases filed as class actions were certified as such. Federal courts were more likely to deny class certification explicitly; state courts were more likely to take no action regarding class certification. Rulings on dispositive procedural motions were not significantly different in the two sets of courts.

The outcomes of settlements differed in the aggregate in state and federal courts, but not on an individual class member basis. In the aggregate, the typical (median) monetary class settlement in state court was more than twice the amount of the typical settlement in federal court. On an individual level, however, class members in our sample were awarded amounts that were about 50% higher in federal court than in state court. The percentage of attorney fees did not vary much between state and federal courts, but the larger class awards (resulting from larger class membership in state cases) yielded larger attorney fee awards. While attorneys did not identify fee awards as a major factor affecting their choice of forum in a given class action, the results of our study indicate that the prospect of greater attorney fees in state courts might serve as an incentive to file class actions in state courts. Our data suggest, however, that the size of the class, not the type of forum, is the predominant factor in determining award sizes. A larger class in a federal court would be expected to generate as large a fee award as the same size class in a state court.

Even when we matched attorney perceptions of judicial predispositions with judicial rulings in the cases for which those predispositions were reported, we did not find evidence that the attorneys' perceptions were accurate. To the contrary, the percentage of class actions certified, the percentage dismissed, and the percentage of settlements approved were indistinguishable in state and federal courts without regard to whether an attorney predicted a predisposition in that court or not.

In the end, the data from this study document the conventional expectations of lawyers in choosing a forum. At the same time, the case-based findings reveal that those expectations did not prove to be accurate predictors of judicial rulings in a random sample of cases. State forums were not typically more favorable for plaintiffs, and federal forums were not typically more favorable for defendants. Plaintiff and defendant expectations proved to be true in about half of the cases, which suggests that those outcomes were highly likely to have occurred by chance. Attorney choice of forum may have been influenced by routine acceptance of a general set of preconceptions about the differences between state and federal courts.

Appendices

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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 courts⁶⁶—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.

66. 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 III and IV is the report of an attorney; the unit of analysis in Parts V, VI, and VII 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 IV 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 as 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.⁶⁷ This service maintains a database of docket sheets for nearly all the federal district courts.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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

67. 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), available at <http://www.fjc.gov> ("Publications," "Class Action Litigation").

68. 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.

69. 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.

70. 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.

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

were (1) all labor cases; (2) all securities cases;⁷² (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 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 filed as original actions in federal court or 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 non-monetary 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

72. 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.

of any predisposition a state or federal judge may have toward 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 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.⁷³ 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 cases. 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

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

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 attorneys⁷⁴) 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.

Approximately two weeks after the initial mailing we sent a follow-up postcard to each attorney, thanking those attorneys who had completed the questionnaire and prompting 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 728⁷⁵ attorneys in the sample representing 621 different cases. The response rate was 39%.⁷⁶

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 plain-

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

75. 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.

76. 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 bad addresses, and 151 questionnaires were returned by attorneys who told us they did not have enough information to answer the questionnaire.

tiffs, 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 50 or more attorneys; 26% practiced in firms of 2 to 10; 24% practiced in firms of 11 to 49; and 2% were government attorneys. On average, these attorneys had practiced law for 22 years; 91% had practiced law for at least 10 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 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 III.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.

Regression Methods and Results

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

Multivariate analyses⁷⁷

Multivariate regression is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable).⁷⁸ 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 indicates a higher likelihood of filing in state court.

Forward logistic regression⁷⁹ 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.

77. 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.

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

79. 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,⁸⁰ source of law,⁸¹ and state facts⁸²—that are as-

80. 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.

81. 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

sociated with 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 .08.⁸³

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 to file in state court than an attorney who perceives a federal judicial predisposition. 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.⁸⁴ 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

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).

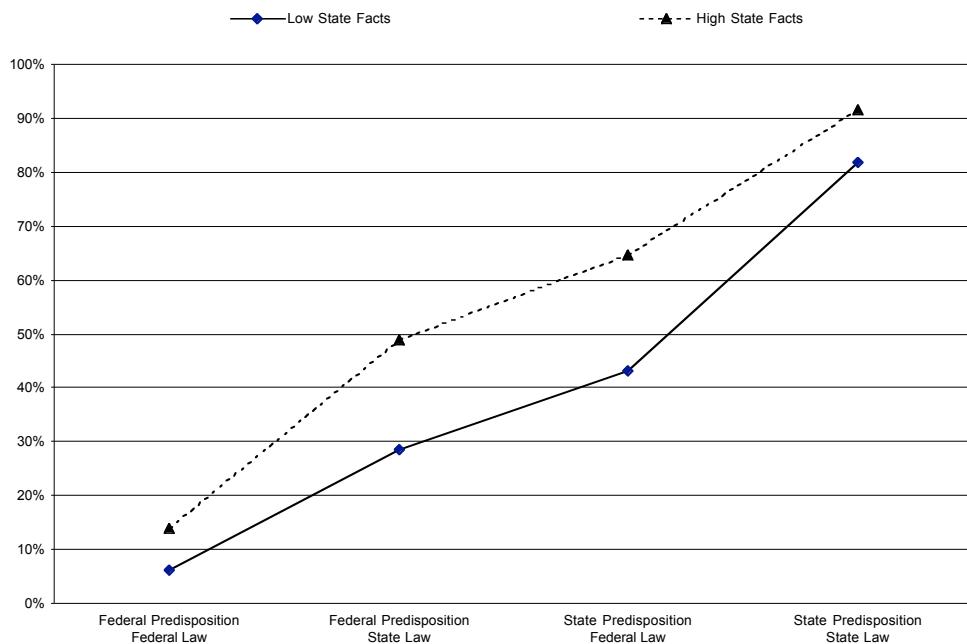
82. "State facts" (also referred to in the report as "state connections") is a composite variable we created. It represents the average of the percentage of class members residing in the state where the class action was filed and the percentage of claims-related events that occurred in that state.

83. 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.

84. 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.

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).

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.

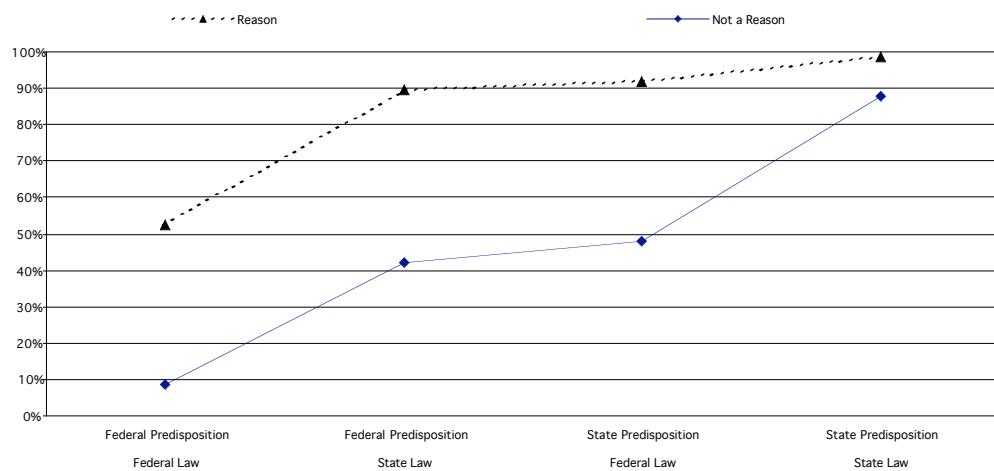
Model 2: Substantive law

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

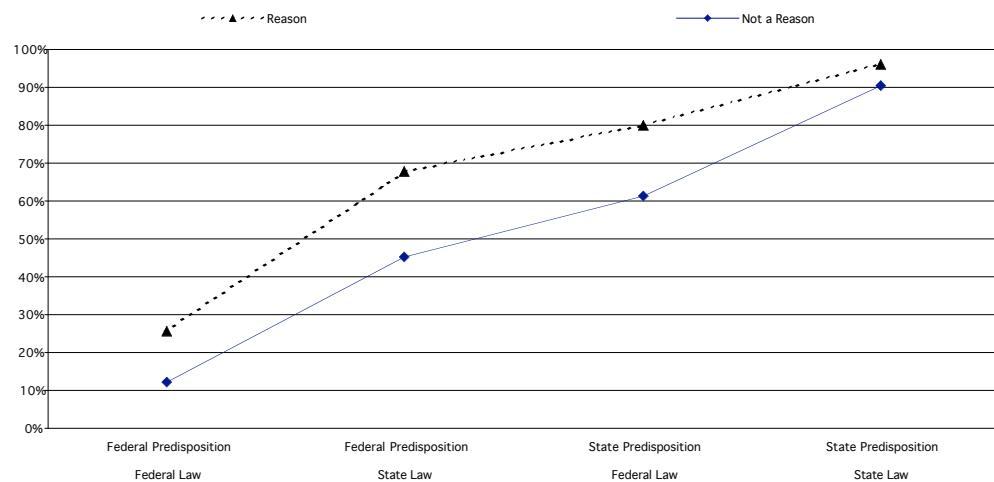


Model 3: Discovery rules

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

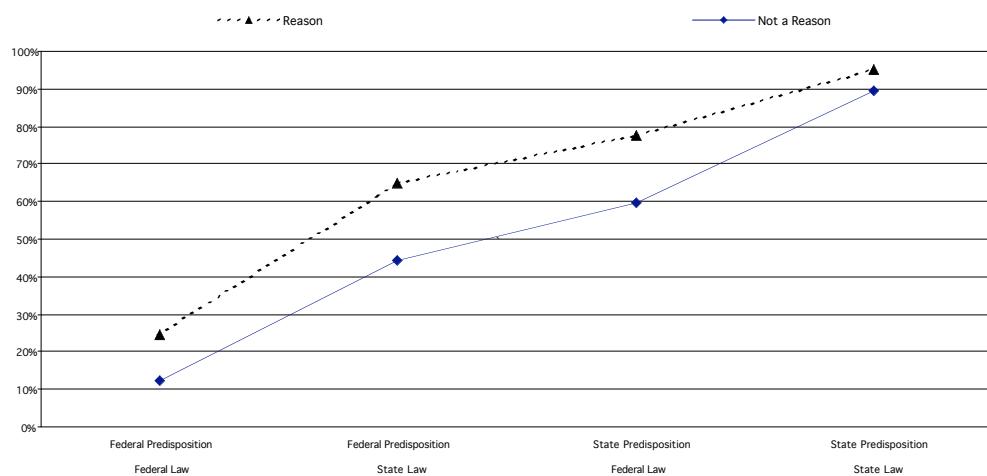


Model 4: Judicial receptiveness

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

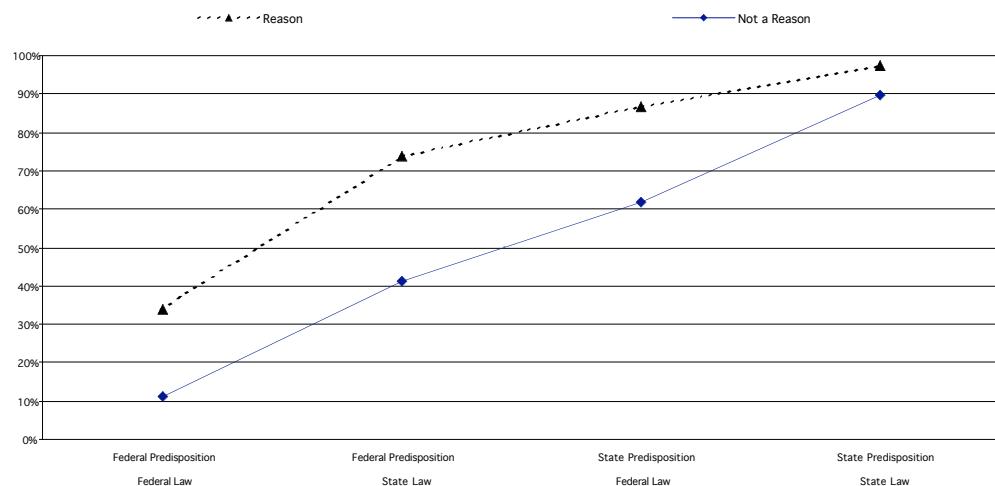


Model 5: Lower cost of litigation

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

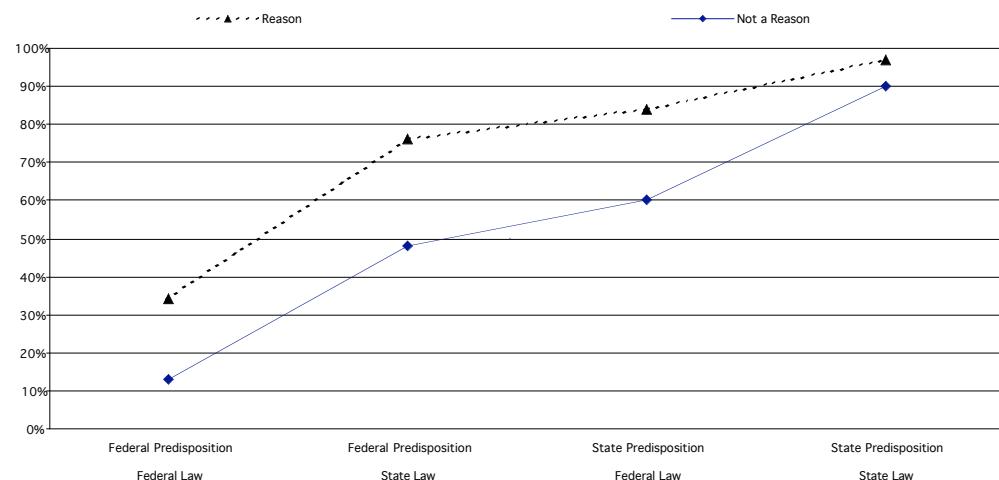


Model 6: Higher jury award

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

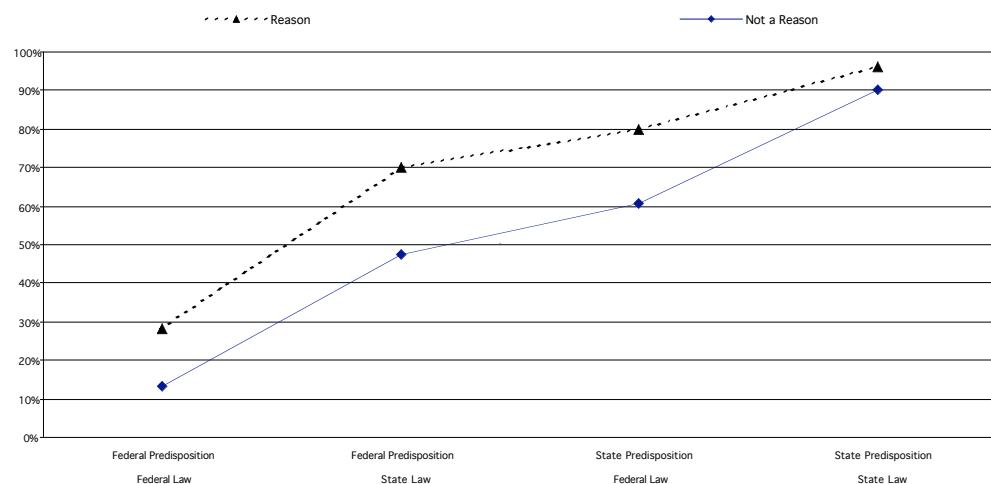


Model 7: Convenience of court location

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

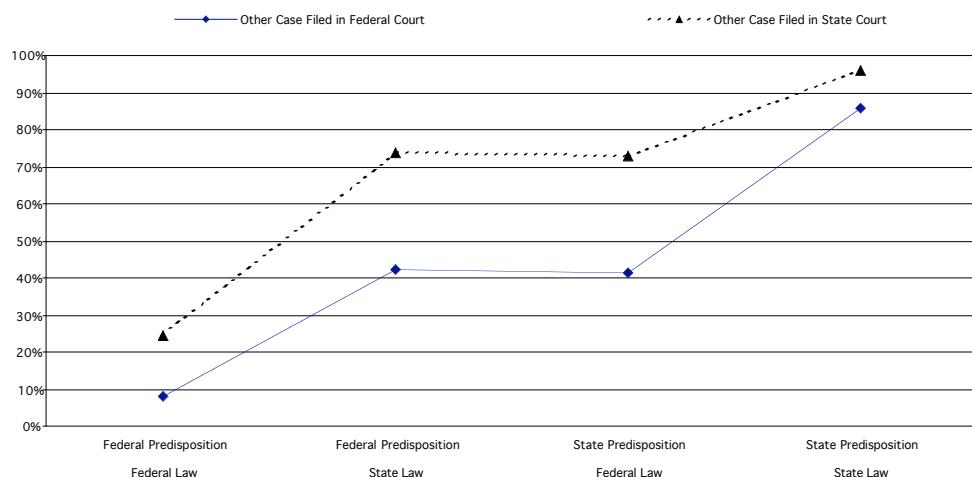


Model 8: Competing or overlapping actions

This model has four predictors (perceived judicial predisposition, source of law, state facts, and where other cases⁸⁵ 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



85. 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.

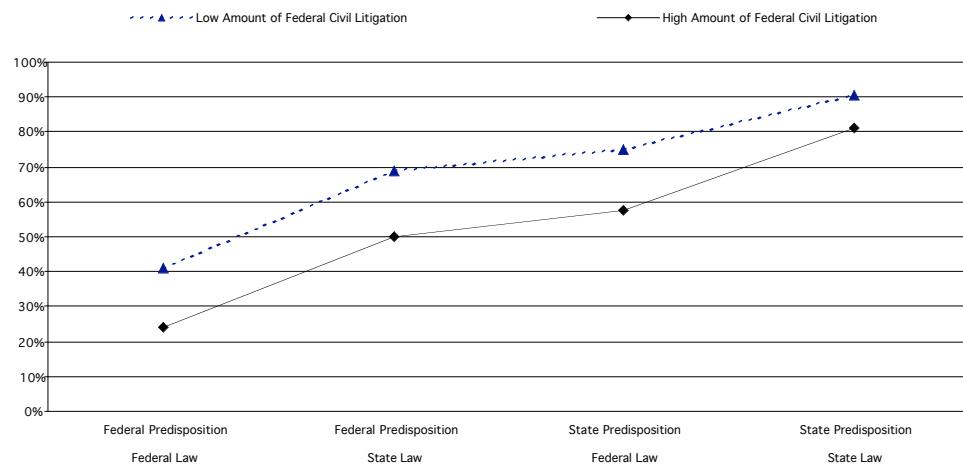
Model 9: Federal civil litigation

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

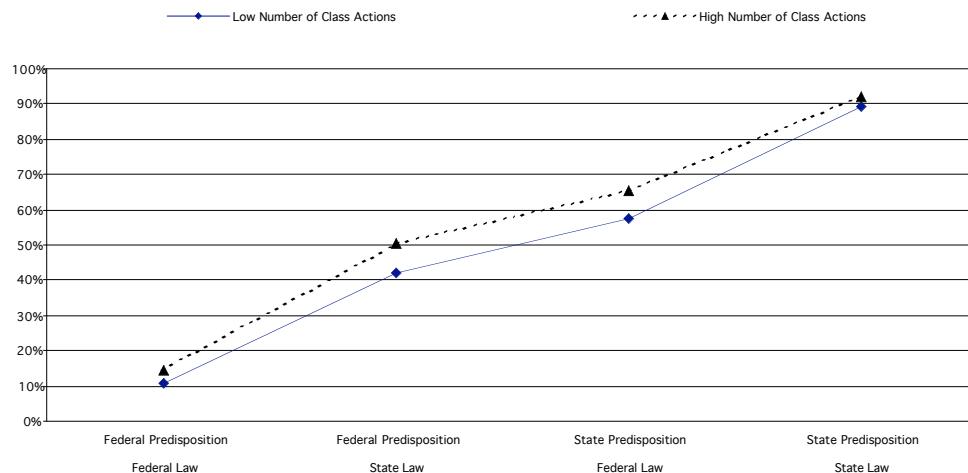


Table A-2: Results of logistic regression

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	

continued next page

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	

Questionnaire Appendix

- Questionnaire 1: Plaintiff in Case Filed Originally in State Court and Removed to Federal Court, 81
Questionnaire 2: Plaintiff in Case Filed Originally in Federal Court, 91
Questionnaire 3: Defendant in Case Filed Originally in State Court and Removed to Federal Court, 101
Questionnaire 4: Defendant in Case Filed Originally in Federal Court, 111

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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

Blank pages inserted to preserve 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 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 Filed Originally
in State Court and Removed to Federal Court

Blank pages inserted to preserve 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 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.*

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.*

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 pages inserted to preserve 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 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 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.*

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.*

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 organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.