Randy Renick (S.B.N. 179652)
rrr@hadsellstormer.com
Cornelia Dai (S.B.N. 207435)
cdai@hadsellstormer.com
HADSELL STORMER RENICK & DAI LLP
128 North Fair Oaks Avenue, Suite 204
Pasadena, California 91103-3645
Telephone: (626) 585-9600
Facsimile: (626) 577-7079

Richard G. McCracken (S.B.N. 62058)
rmccracken@msh.law
Sarah Grossman-Swenson (S.B.N. 259792)
sgs@msh.law
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
475 14th Street, Suite 1200
Oakland, CA 94612
Telephone: (415) 597-7200
Facsimile: (415) 597-7201

Attorneys for Plaintiffs & Plaintiff Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

KATHLEEN GRACE, REGINA DELGADO, ALICIA GRIJALVA, JAVIER TERRAZAS, and all others similarly situated,

Plaintiffs,

v.

THE WALT DISNEY COMPANY, WALT DISNEY PARKS AND RESORTS US, INC., SODEXO, INC., and SODEXOMAGIC, LLC,

Defendants.

Case No. 30-2019-01116850-CU-OE-CXC

DECLARATION OF PROFESSOR CHARLES SILVER IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS

Judge: Hon. William D. Claster
Dept.: CX101
Action Filed: December 6, 2019
Hearing Date: September 12, 2025
Hearing Time: 9:00 a.m.

DECLARATION OF PROFESSOR CHARLES SILVER IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

I, Charles Silver, hereby declare:

I. SUMMARY OF OPINIONS

This is an easy settlement to support.

- The procedural steps that occurred prior to settlement enabled Class Counsel to bargain from a position of strength. The plaintiff class was certified for litigation, then expanded and recertified, and Class Counsel were formally appointed. Absent class members were notified. Success on a motion for summary judgment established the merits of class members' claims. The combination of certification, notice, appointment, and victory on the merits put Class Counsel in an excellent position to negotiate a settlement.
- The proposed settlement is a terrific result for the class. It requires the Disney Defendants to pay $233 million, an amount that will compensate class members fully, cover mandatory payments to the State of California Labor and Workforce Development Agency, and fund service awards for the named plaintiffs and administrative expenses. There are no 'red flags' either. The settlement agreement does *not* provide for the reversion of unclaimed funds, does *not* involve the provision of injunctive relief of uncertain value, does *not* require class members to navigate a claims process, and does *not* create a separate fund from which Class Counsel's fees are to be paid.
- Class Counsel's request for a common fund fee award in the amount of 15 percent of the gross recovery is low by comparison to both market rates and established judicial practices. As a percentage of the benefit produced, the fee is actually below 15 percent because the lawsuit caused the Disney Defendants and the Sodexo Defendants to raise the minimum wage for their employees while litigation continued. This change in the Defendants' practices has already put millions of dollars in class members' pockets. This additional benefit makes the fee request especially easy to approve on the basis of results obtained.

II. CREDENTIALS

I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then, I have been a Visiting Professor at the University of Michigan School of Law (twice), the Vanderbilt University Law School, and the Harvard Law School.

The study of aggregate litigation and related issues, especially attorneys' fees, has been a principal focus of my academic career. I published my first article on the subject shortly after I joined the law faculty at the University of Texas at Austin. *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). Since then, I have published many more, including two empirical studies of fee awards in class actions: Lynn A. Baker, Michael A. Perino, and Charles Silver, *Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment*, 66 Vanderbilt L. Rev. 1677 (2013); and Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015).

I have also written extensively about the professional responsibilities of lawyers who handle aggregate proceedings, judicial management techniques, and settlements. See, e.g., Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991); Charles Silver and Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997); Lynn A. Baker and Charles Silver, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998); Charles Silver and Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal*, 63 VAND. L. REV. 107 (2010); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985 (2011); Lynn A. Baker and Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833, 1866–67 (2011); Robert J. Pushaw & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multi-District Litigation*," 48 B.Y.U. L. REV. (2023); and Charles Silver, *The Suspect Restitutionary Basis for Common Fund Fee Awards in Multidistrict Litigations*, 101 TEXAS L. REV. 1653 (2023).

From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court. Following the death of Richard Nagareda, who also served as an Associate Reporter on the PRINCIPLES, I assembled a team of scholars to revise and update his casebook on complex litigation. See Richard Nagareda, Robert Bone, Elizabeth Burch, Charles Silver and Patrick Woolley, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, 2D (West Academic, 2013).

My writings are also cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996), the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT.

I have testified as an expert on aggregate litigation procedures many times. For example, judges cited my opinions when awarding fees in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2019 WL 6888488 (E.D.N.Y. Dec. 16, 2019), *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 586 F. Supp. 2d 732 (S.D. Tex. 2008), and *Allapattah Services, Inc. v. Exxon Corporation*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), all of which settled for amounts exceeding $1 billion. I have also submitted reports on ethics issues and amicus briefs on class action procedures. For example, I was the principal drafter of an amicus brief submitted in support of the objecting class members in *Amchem v. Windsor*, 521 U.S. 591 (1997), one of the leading cases on class action conflicts.

I have attached a copy of my resume as Appendix I to this declaration.

III. DOCUMENTS REVIEWED

When preparing the opinion expressed herein, I reviewed the following materials which, unless indicated otherwise, were prepared in connection with this litigation. I may also have reviewed other sources, including cases, treatises, law review articles, and others.

- Plaintiffs' Notice of Motion and Motion for an Order Granting Preliminary Approval of Class Action Settlement; Memorandum of Points and Authorities in Support Thereof
- Second Amended Class Action Complaint for Damages, Injunctive and Declaratory Relief
- Retainer Agreement (Javier Terrazas)

- Retainer Agreement (Kathy Grace)
- Retainer Agreement (Alicia Grijalva)
- Retainer Agreement (Regina Delgado)
- Notice of Motion and Motion for Attorneys' Fees and Reimbursement of Costs; Memorandum of Points and Authorities in Support Thereof (in draft)

IV. ANALYSIS

The *Plaintiffs' Notice of Motion and Motion for an Order Granting Preliminary Approval of Class Action Settlement; Memorandum of Points and Authorities in Support Thereof* (hereinafter *Preliminary Approval Motion*) describes the procedural history of this litigation in detail. To avoid repetition, I mention below only the litigation events that are especially important for my purposes.

A. Class Counsel Positioned Themselves to Negotiate a Terrific Settlement

The first point to emphasize is that Class Counsel were in an excellent position to bargain when settlement negotiations commenced. They sought to litigate on behalf of a class from the outset, had the class certified for litigation twice, notified class members of the pendency of proceedings, were formally appointed as class counsel, and established the merits of the class members' claims. These steps solidified the lawyers' position as the class members' bargaining agent while also simplifying the negotiations by removing items that would otherwise have been contested.

Request for a Litigation Class: On December 6, 2019, the named plaintiffs filed a wage-and-hour class action against the Disney Defendants and the Sodexo Defendants. The substantive allegation was that the Defendants violated the City of Anaheim's Living Wage Ordinance and other statutes. The complaint asked the Court to certify a class of persons who were employed at Disney theme parks and hotels in Anaheim as of a specified date and who also met other criteria. The complaint thus established from the commencement of litigation that the object was a class-based recovery. This put all parties on notice that the stakes were large, one consequence of which was that Class Counsel knew from the outset that the litigation would require substantial resources.

Certification for Litigation: Following a stipulation by Defendants to certain issues, the Court

certified a class on July 2, 2021. Notice was sent to absent class members on August 13, 2021. On December 1, 2023, the Plaintiffs filed an amended complaint that added new claims to the lawsuit. The parties then stipulated to an amended class definition that encompassed a larger number of individuals. The Court adopted the amended definition, and notice was sent to all additional class members identified by the Defendants who fell within the amended definition and longer class period.

Certification for litigation strengthened class members' bargaining position in two ways, first by establishing that, in principle, a class-wide judgment could be obtained. When classes are certified for settlement only, a concern exists that class counsel could not bargain effectively because no class could have been created without the defendant's help. Lawyers who need the defendant's help with certification may be reluctant to press for every advantage in negotiations, for fear that the defendant will kill the deal, in which event the plaintiffs' attorneys will not receive a fee award. As the U.S. Supreme Court observed in *Amchem v. Windsor*, 521 U.S. 591, 621 (1997), a lawyer who cannot litigate for a class is "disarmed" in settlement negotiations because the lawyer cannot "use the threat of litigation to press for a better offer."

Second, and relatedly, certification for litigation forces a defendant to deal with the possibility that a court will award damages for an entire class. The possibility of securing a class-wide judgment gives class counsel the same leverage that lawyers representing individual plaintiffs possess: the threat to force the defendant to pay an amount determined by a trial court unless the defendant offers reasonable terms in settlement. Here, Class Counsel possessed the leverage needed to obtain adequate compensation from the Defendants because the case was certified for litigation.

Appointment of Class Counsel: The orders that certified and recertified the plaintiff class appointed the Named Plaintiffs' attorneys as counsel for the class. This is important because the Court had to be satisfied that Class Counsel would adequately represent the class and because formal appointment cemented Class Counsel's right to litigate and negotiate on behalf of a class—one that here contained more than 51,000 members. It is one thing to assert that one has authority to speak and act for a group; it is quite another to have a court order to that effect. The existence of an order makes it hard for a defendant to soften one team of attorneys' demands by playing them off against another who purport to represent the same people. This strategy, known in the class action literature as a "reverse auction" because the team that offers

the cheapest settlement wins, can seriously weaken lawyers' bargaining position, to the detriment of the absent plaintiffs whose claims are settled for a relative pittance.

Because the lawyers serving as Class Counsel were appointed formally, it would have been difficult for the Defendants to undermine their position. And because class members were notified before negotiations commenced, the size of the class was not at issue either, meaning that Class Counsel knew how many absent plaintiffs there were and could demand full compensation for the entire group. Formal appointment also facilitated the ability to take the class-wide discovery that was needed to establish aggregate damages. The expert report on damages prepared by Phillip M. Johnson, Ph.D. demonstrates the importance of this information. When calculating the total amount that class members were underpaid, Dr. Johnson relied on payroll data that the Disney Defendants provided for 51,478 hourly employees and the data provided by the Sodexo Defendants for 544 hourly employees. This information obviously had great value in the settlement negotiations. It also provides a basis for evaluating the reasonableness of the proposed settlement by clarifying the amount the class might have won had the case been tried.

Establishing the Merits of Class Members' Claims: On November 1, 2021, the Court granted Defendants' motions for summary judgment on the ground that Disney did not benefit from a "City Subsidy" and therefore was not subject to the Anaheim Living Wage Ordinance. On July 13, 2023, the court of appeal reversed. The Defendants appealed to the California Supreme Court, which declined to review the case, so the lawsuit returned to the Court for further proceedings.

At the time settlement negotiations commenced in mid-2024, the class's right to prevail on the merits had been established. The parties only needed to litigate damages and penalties, discovery concerning which had taken place. When negotiations started, then, the lawsuit was in nearly ideal shape (from the perspective of the class members) for an agreement to be reached. Class Counsel had authority to speak for the class, had prevailed on the central legal claim supporting the plaintiffs' position, and had acquired the information needed to evaluate damages.

Given how well Class Counsel positioned the litigation prior to the start of negotiations, a terrific result was to be expected. The proposal requires the Disney Defendants to pay $233 million, an amount that will compensate class members fully, cover mandatory payments to the State of California Labor and

Workforce Development Agency, fund service awards for the named plaintiffs, and cover administrative expenses.[1] The proposal includes a detailed plan of allocation that indicates the number of class members with wage claims, service charge claims, retirement contribution claims, wage statement claims, waiting time claims, and claims under the Private Attorneys General Act (PAGA).

There are no 'red flags' either. The settlement agreement does *not* provide for the reversion of unclaimed funds, does *not* require class members to navigate a tricky claims process, does *not* use injunctive relief of uncertain value to hide a cash shortfall, and does *not* create a separate fund from which Class Counsel's fees are to be paid. Class Counsel simply bargained for the largest sum they were able to convince the Defendants to pay and succeeded in recovering an enormous fund. This is the textbook approach that ensures adequate representation.

B. The Proposed Settlement is an Excellent Result

The proposed settlement is exceptional in terms of both its absolute size and the fraction of class members' damages recovered. Starting with the former, a report by Duane Morris indicates that, in 2023, the largest recovery in a FLSA/wage & hour class action was $185 million. Duane Morris, CLASS ACTION REVIEW 2024 289 (2024). The largest recovery in a labor class action—a category that includes some actions with claims arising under state and local wage laws—that year was $80 million. *Id*., p. 302-303. If the proposed settlement had occurred in 2023, it would have been the largest recovery that year. In 2025, Duane Morris produced a survey that focuses on FLSA/wage & hour class actions specifically. It reports that the settlement up for approval here was the largest one to occur in 2024, with the runner-up coming in at $175 million. DUANE MORRIS, WAGE & HOUR CLASS AND COLLECTIVE ACTION REVIEW–2025 36 (2025). In terms of absolute magnitude, the proposed settlement is clearly an outstanding result.

The Duane Morris reports do not rank settlements according to the percentage of estimated losses recovered. But studies of other types of class actions consistently find that class members often recoup only a fraction of their losses. Securities class actions have received the most study, and it is easy to find assessments that conclude that class members often recoup pennies on the dollar, with smaller fractions of losses being recovered in larger cases. See, e.g., CORNERSTONE RESEARCH, SECURITIES CLASS ACTION

[1] A separate settlement requires the Sodexo Defendants to pay $1,750,000 million.

SETTLEMENT—2023 REVIEW AND ANALYSIS 6 (2024) (reporting a median settlement recovery equal to 4.8% of simplified tiered damages in Rule 10b-5 securities class action in 2023); and Edward Flores and Svetlana Starykh, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2024 FULL-YEAR REVIEW, NERA 27 (2025) (reporting a median recovery of 1.2% of investors' estimated losses in 2024).

C. Class Counsels' Request for a 15 Percent Common Fund Fee Award is Reasonable

As mentioned, Class Counsel has applied for a fee award in the amount of 15 percent of the gross recovery. The request is low by comparison to both market rates and established judicial practices.

The request is actually below 15 percent too, considering all the benefits the litigation produced. After losing in the court of appeal, the Disney Defendants raised the minimum wage for the relevant employees. The increase has already put millions of dollars in class members' pockets. This additional benefit could be quantified and added to the denominator when calculating the awarded fee percentage. Its inclusion would reduce the request below 15 percent, making it especially easy to approve on the basis of results obtained.

1. Laffitte v. Robert Half International Inc.

It seems appropriate to start the discussion of Class Counsel's fee request by noting that in *Laffitte v. Robert Half International Inc.*, 376 P.3d 672 (2016), the Supreme Court of California endorsed many of the views I will express. For example, the Court

> join[ed] the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation…—convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 376 P.3d at 686. I have been encouraging judges to use the percentage approach *for decades*.

The *Laffitte* Court conditioned its approval of the straight percentage method on the fact that "[t]he settlement agreement" negotiated there "provided for a true common fund …, without any reversion to defendant and with all settlement proceeds, net of specified fees and costs, going to pay claims by class members." *Id*., at 686–87. The settlement proposed to the Court in this litigation has the same features. It is a true common fund with no mandatory claims process and no reversion. All funds will be distributed to class members, used to cover attorneys' fees and litigation costs, or paid to the State of California as required by law. The Defendants will get nothing back.

I conclude this brief discussion of *Laffitte* by noting two things. First, I helped draft an amicus curiae brief that encouraged the Court to uphold the use of the percentage method. The other signatories were elite law professors with fee-related expertise: Christine Bartholomew, Erwin Chemerinsky, John C. Coffee, Jr., Joshua P. Davis, Nora Freeman Engstrom, Brian T. Fitzpatrick, and Arthur R. Miller. Second, in a concurring opinion, Justice Goodwin Liu relied upon several writings that I authored, coauthored, or contributed to in other ways, including *A Restitutionary Theory of Attorneys' Fees in Class Actions*; *Is the Price Right? An Empirical Study of Fee–Setting in Securities Class Actions*; *ABA Tort Trial and Insurance Practice Section, Report on Contingent Fees in Class Action Litigation;*[2] and *Dissent from Recommendation to Set Fees Ex Post.* I'm proud that Justice Liu found value in my work.

I have also contributed amicus briefs in cases other than *Laffitte*. Most recently, Professors Lynn Baker, Brian Fitzpatrick, and I did so in *In re Dell Technologies Inc. Class V Stockholders Litigation*, 326 A.3d 686 (Del. 2024). See *Brief of Amici Professors Baker, Fitzpatrick and Silver in Support of Appellee and Affirmance*, *filed in In re Dell Technologies Inc. Class V Stockholders Litigation*, 2023 WL 9531802. There, the Chancery Court awarded $266.7 million in fees out of a $1 billion cash recovery, almost 27 percent of the mega-fund. After certain class members appealed the award, my colleagues and I submitted an amicus brief in which we explained why the award was reasonable. The Supreme Court of Delaware agreed and affirmed the award.

2. A Real-World Model for Compensating Attorneys in Common Fund Cases

To show how fee awards in class actions are properly handled, I begin this Declaration by describing

[2] I was an invited academic participant on the committee that produced the cited report.

a series of antitrust cases that were brought against drug manufacturers. The matters, which numbered thirty-three in all and generated more than $2 billion in recoveries, were related. In each one the plaintiff class contained the same small group of drug wholesalers, several of which were of Fortune 500 size or larger, who contended that practices engaged in by the makers of brand-name drugs and generics violated the antitrust laws.

In keeping with the customary practice, the class's attorneys worked on contingency even though the wholesalers could have afforded to pay them by the hour. Consequently, when dollars were recovered, the lawyers applied for fee awards from the common funds. I supplied expert declarations in support of several requests and my colleague Professor Brian Fitzpatrick of the Vanderbilt University School of Law gathered information on many more.

Professor Fitzpatrick summarized the manner in which the class members and their lawyers handled attorneys' fees:

> Although the fee requests ranged from a fixed percentage of 27.5 percent to a fixed percentage of one-third, one-third heavily dominated: the average was 32.85 percent. . . . Moreover, although I was able to find retainer agreements in only three of the cases, in all of them, the agreement called for a fixed percentage of one-third. Finally, in the vast majority of cases, one or more of these corporate class members—often the biggest class members—came forward to voice affirmative support for the fee requests, and not a single one of these corporate class members objected to the fee request in any of the thirty-three cases. Although this support among class members for class counsel's fee requests is not formally ex ante market data—the support came at the end of the cases—because it was the same class of corporations in case after case and often the same counsel in case after case, class members could have tried to alter this pattern at any time. But they did not; they have gone along with it for seventeen years. In other words, the corporations in these cases appear perfectly happy with the percentage method and perfectly happy with the same fixed percentage of one-third that most unsophisticated clients also choose.

Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV.

1151, 1161-1162 (March 2021). The cases supporting these findings are presented in a table in Appendix II. As the table shows, 8 of the cases generated mega-fund settlements, meaning that the recoveries exceeded $100 million.

As stated, I believe these antitrust cases provide a model that courts should follow when awarding fees from common funds. My reasoning runs as follows. The claimants were highly sophisticated businesses with ready access to the market for legal services. All had in-house or outside counsel monitoring the lawsuits as well. The plaintiffs had both the incentive and the knowledge needed to support fee awards that were calculated to maximize their net recoveries. Because the litigations played out over many years, the class members also had opportunities to learn about the risks the cases entailed and the rewards they were likely to generate. Consequently, they could have discovered and corrected any mistaken judgments about the manner of handling fees and reimbursing expenses. They could also have shifted from contingent compensation to guaranteed hourly rates once the risks and rewards were known, but their preference for the contingent percentage approach never waned.

The lessons to be drawn from the pharmaceutical antitrust cases are: sophisticated clients with large financial stakes and good access to legal services use the percentage method when participating in class actions; such clients prefer the percentage approach despite having sufficient funds to pay for legal services by the hour and possessing good information about litigation costs and risks; and such clients use flat percentages rather than scales of percentages that rise or fall even when recoveries are large. Although these lessons are not true universally—sophisticated clients sometimes deviate from them—a strong case can be made that a court would set fees reasonably by following their lead.

3. Judges Should Select Fee Percentages that Encourage Lawyers to Maximize Clients' Recoveries

Many people intuitively think that lower fees are always better than higher ones because lower fees leave more money for clients. The intuition is mistaken. To see this, imagine how class members would fare if courts set common fund fee awards at 0 percent. When the fee is zero, the expected recovery is zero too because lawyers will not agree to represent clients on these terms.

When regulating fees, then, the object should ***not*** be to set them as close to zero as possible. ***It***

should be to maximize class members' net expected recoveries—the amounts they expect to take home after paying their attorneys. Because a claimant who nets $1 million after paying a 40 percent fee is better off than one who nets $500,000 after paying a 20 percent fee, it is rational for clients to offer higher percentages when doing so is expected to leave them with more money after fees are paid.

Judges have known this for years. In 2002, a task force on fees commissioned by the Third Circuit stated: "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, *not to obtain the lowest attorney fee.* The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee." *Third Circuit Task Force Report,* 208 F.R.D. 340, 373 (January 15, 2002) (emphasis added). The Seventh Circuit made a similar point when it rejected the so-called "mega-fund rule," according to which fees must be capped at low percentages when recoveries are very large. "Private parties would never contract for such an arrangement," the court correctly observed, because it would encourage cheap settlements. *In re Synthroid Mtg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001).

Real contracts provide the best evidence of fee arrangements that are designed to maximize recoveries. *See* Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541 (2003) (discussing contracts negotiated by sophisticated businesses and observing that such businesses "prefer to write contracts that maximize total benefits."). Real contracts also provide a natural cross-check on the reasonableness of fee requests. When a request falls within the range that sophisticated clients normally pay, there is reason to believe that class members would rationally have agreed to pay the amount sought if they had been able to bargain with class counsel directly. For these reasons, I believe that judges should 'mimic the market' by following the lead of sophisticated clients.

The mimic-the-market approach also cabins judges' discretion by providing an objective basis for fee awards. In this respect, it is far superior to the multi-factor approach that many courts employ. The latter is "not a rule of law or even a principle" because "it would support equally a fee award of 16%, 20%, 25%, 30%, or 33-1/3%." *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 277 (D. Me. 2005). "[S]ome of the factors," such as the time and labor expended, also clash with the logic of the contingent percentage approach, "which is designed to create incentives for the lawyer to get the most recovery . . . by the

most efficient manner (and [to] penalize the lawyer who fails to do so)." *Id*. *See also In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig*., 56 F.3d 295, 307 (1st Cir. 1995) (observing that the percentage-of-fund method eliminates incentive to be inefficient, as inefficiency just reduces the lawyer's own recovery); and *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (the percentage method "directly aligns the interests of the class and its counsel" and provides a powerful incentive for efficiency and early resolution). Real clients would never penalize their agents for serving them efficiently.

4. The Mimic-the-Market Approach Enjoys a Wide Following

Judges increasingly understand that "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 52 (2d Cir. 2000).

Although only the Seventh Circuit mandates the exclusive use of market rates, federal judges across the country recognize the superiority of this approach and use it often. Examples include *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at *21 (S.D.N.Y. Dec. 18, 2019); *In re TRS Recovery Servs., Inc. & Telecheck Servs., Inc., Fair Debt Collection Practices Act (FDCPA) Litig*., No. 2:13-MD-2426-DBH, 2016 WL 543137, at *9 (D. Me. Feb. 10, 2016); *In re Capital One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015); *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424, at *6 (D. Mass. Dec. 9, 2014); *In re New Motor Vehicles Canadian Exp. Antitrust Litig*., 842 F. Supp. 2d 346 (D. Me. 2012); *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), *order modified and remanded*, 629 F.3d 741 (7th Cir. 2011); *In re Cabletron Sys., Inc. Sec. Litig*., 239 F.R.D. 30, 40 (D.N.H. 2006).

When awarding fees from the enormous settlement in *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1203 (S.D. Fla. 2006), which exceeded $1 billion, the federal district court judge "conclude[d] that the most appropriate way to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal." Anchoring the fee to the market rate avoids arbitrariness by providing an objective basis for awarding a particular amount and also creates desirable incentives.

5. Percentage Compensation is the Norm in Contingent Fee Litigation

In *Laffitte*, discussed above, the Supreme Court of California cited the desirability of approximating the market as a reason for permitting judges to grant percentage-based fee awards from common funds. One of the "recognized advantages of the percentage method," it wrote, is "a better approximation of market conditions in a contingency case." *Laffitte*, 376 P.3d at 686. In contingent fee litigation, the market favors percentage-based compensation.

Abundant evidence supports this contention. When two co-authors and I studied hundreds of settled securities fraud class actions specifically looking for terms included in fee agreements between lawyers and investors seeking to serve as lead plaintiffs, all the agreements we found provided for contingent percentage fees. *Is the Price Right*, *supra*. No lead plaintiff agreed to pay its lawyers by the hour; nor did any retain counsel on a lodestar-multiplier basis. Contracting practices are the same in antitrust cases, as discussed below.

The finding that sophisticated businesses use contingent fee arrangements when hiring lawyers to handle securities class actions was expected. Over the course of my academic career, I have studied or participated in hundreds of class actions, many of which were led by sophisticated business clients. To the best of my recollection, I have encountered only one in which a lead plaintiff paid class counsel out of pocket, and that case is more than 100 years old. Even wealthy named plaintiffs like prescription drug wholesalers and public pension funds that can afford to pay lawyers by the hour have used contingent, percentage-based compensation arrangements instead. Because percentage-based compensation arrangements dominate the market, courts should also use them when awarding fees from common funds.

The market also favors fee percentages that are flat or that rise as recoveries increase. Scales with percentages that decline at the margin are rarely employed. Professor John C. Coffee, Jr., the country's leading authority on class actions, made this point in a report filed in the antitrust litigation relating to high fructose corn syrup:

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen such a fee contract used in the antitrust context; nor, in any context, have I seen a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas).

Declaration of John C. Coffee, Jr., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004), ECF No. 1421, ¶ 22. My experience is similar to Professor Coffee's. I know of few instances in which large corporations used scales with declining percentages when hiring attorneys.

When awarding fees in the $1 billion *Dell Technologies* litigation, Vice Chancellor Laster also rejected the objectors' contention that a scale of declining percentages should be applied. He offered a number of grounds for doing so, one being that studies of private fee agreements—including the court's own assessment of fee arrangements used by plaintiffs' counsel in past matters—showed that such scales are rarely employed. See *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 715–18 (Del. Ch. 2023), *as revised* (Aug. 21, 2023), *aff'd*, 326 A.3d 686 (Del. 2024). For example, a study of 42 contingent fee agreements used in patent cases found that ten contained a fixed rate, 32 contained scales of rising percentages, and *none* adopted a declining scale. See David L. Schwartz, *The Rise of Contingent Fee Representation In Patent Litigation*, 64 Ala. L. Rev. 335 (2012). Across the matters, the mean percentage was 38.6%. Agreements with rising scales started at an average percentage of 28% upon filing of the initial complaint and ended with an average of 40.2% for taking the case through appeal.

In view of the rarity with which declining scales are used, the mimic-the-market approach suggests that flat percentages and scales with percentages that rise at the margin create better incentives. There is a sound economic rationale for this. Flat percentages and rising scales reward plaintiffs' attorneys for recovering higher dollars that are harder to obtain because they demand a willingness on the part of counsel to proceed ever closer to trial, thereby increasing their costs and exposing them to greater risk of loss.

6. Sophisticated Clients Normally Pay Fees Of 33 Percent Or More When Hiring Lawyers To Handle Commercial Lawsuits On Straight Contingency

There is broad agreement that in most types of plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery, and that higher fees prevail in litigation areas like medical malpractice and patents where costs and risks are unusually great. *See, e.g.*, *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often

between 30 and 40 percent of any recovery"); and *Leung v. XPO Logistics, Inc*., 326 F.R.D. 185, 201 (N.D. Ill. 2018) ("a typical contingency agreement in this circuit might range from 33% to 40% of recovery"). The same range is known to prevail in high-dollar, non-class, commercial cases. *See, e.g.*, *Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *10 (W.D. Pa. Oct. 22, 2019); and *Cook v. Rockwell Int'l Corp*., No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017).

Having already discussed patent cases, I turn now to business representations more generally. Here, unfortunately, I have only examples to cite, there being no comprehensive studies of business engagements.

A famous case from the 1980's involved the Texas law firm of Vinson & Elkins ("V&E"). ETSI Pipeline Project ("EPP") hired V&E to sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to prevent EPP from constructing a $3 billion coal slurry pipeline. V&E took the case on contingency, "meaning that if it won, it would receive one-third of the settlement and, if it lost, it would get nothing." David Maraniss, *Texas Law firm Passes Out $100 Million in Bonuses*, WASHINGTON POST, Aug. 22, 1990, https://www.washingtonpost.com/archive/politics/1990/08/22/texas-law-firm-passes-out-100-million-in-bonuses/8714563b-10b8-4f85-b74a-1e918d030144/. After many years of litigation, a series of settlements and a $1 billion judgment against a remaining defendant yielded a gross recovery of $635 million, of which the firm received around $212 million in fees. Patricia M. Hynes, *Plaintiffs' Class Action Attorneys Earn What They Get*, 2 JOURNAL OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS, 243, 245 (1991). It bears emphasizing that the clients who made up the plaintiffs' consortium, Panhandle Eastern Corp., the Bechtel Group, Enron Corp., and K N Energy Inc., were sophisticated businesses with access to the best lawyers in the country. No claim of undue influence by V&E can possibly be made.

The National Credit Union Administration's ("NCUA") experience in litigation against securities underwriters provides a more recent example of contingent-fee terms that were used successfully in large, related litigations. After placing 5 corporate credit unions into liquidation in 2010, NCUA filed 26 complaints in federal courts in New York, Kansas, and California against 32 Wall Street securities firms and banks. To prosecute the complaints, which centered on sales of investments in faulty residential

mortgage-backed securities, NCUA retained two outside law firms, Korein Tillery LLP and Kellogg, Hansen, Todd, Figel, & Frederick PLLC, on a straight contingency basis. The original contract entitled the firms to 25 percent of the recovery, net of expenses. As of June 30, 2017, the lawsuits had generated more than $5.1 billion in recoveries on which NCUA had paid $1,214,634,208 in fees.[3]

When it retained outside counsel on contingency, NCUA knew that billions of dollars were at stake. The failed corporate credit unions had sustained $16 billion in losses, and NCUA's objective was to recover as much of that amount as possible. It also knew that dozens of defendants would be sued and that multiple settlements were possible. Even so, NCUA agreed to pay a straight contingent percentage fee in the standard market range on all the recoveries. It neither reduced the fees that were payable in later settlements in light of fees earned in earlier ones, nor bargained for a percentage that declined as additional dollars flowed in, nor tied the lawyers' compensation to the number of hours they expended.

In *In re Merry-Go-Round Enterprises, Inc*., 244 B.R. 327 (D. Md. 2000), the bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees, 21 times its lodestar. The bankruptcy judge granted the request, writing: "[v]iewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." *Id.* at 335.

The pharmaceutical antitrust cases discussed above also show that sophisticated business clients commonly agree to pay fees in the usual range when serving as named plaintiffs in class actions. Other cases also support this assessment.

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[3] The following documents provide information about NCUA's fee arrangement and the recoveries obtained in the litigations: Legal Services Agreement dated Sept. 1, 2009, https://www.ncua.gov/services/Pages/freedom-of-information-act/legal-services-agreement.pdf; National Credit Union Administration, Legal Recoveries from the Corporate Crisis, https://www.ncua.gov/regulation-supervision/Pages/corporate-system-resolution/legal-recoveries.aspx; Letter from the Office of the Inspector General, National Credit Union Administration to the Hon. Darrell E. Issa, Feb. 6, 2013, https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf.

- In *San Allen, Inc. v. Buehrer*, Case No. CV-07-644950 (Ohio – Court of Common Pleas), which settled for $420 million, seven businesses serving as named plaintiffs signed retainer contracts in which they agreed to pay 33.3 percent of the gross recovery obtained by settlement as fees, with a bump to 35 percent in the event of an appeal. Expenses were to be reimbursed separately.
- In *In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT) (D. Ct.), a RICO class action that produced a $297 million settlement, both of the businesses that served as named plaintiffs were represented by counsel in their fee negotiations and both agreed that the fee award might be as high as 40 percent.
- In *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville County, South Carolina), which settled in 2013 for relief valued at about $81 million, five sophisticated investors serving as named plaintiffs agreed to pay 35 percent of the gross class-wide recovery as fees, with expenses to be separately reimbursed. (The fee was initially set at over 40 percent but was later bargained down to 35 percent.)

In sum, when sophisticated business clients seek to recover money in risky commercial lawsuits involving large stakes, they typically pay contingent fees ranging from 30 percent to 40 percent, with fees of 33 percent or more promised in most cases. As well, there is little variation in fee percentages across cases of different sizes.

V. FEE AWARDS IN CASES WITH COMPARABLE MONETARY RECOVERIES

In my experience, judges want to know about other judges' fee-related practices. I therefore provide this information below, even though judges' practices provide at best indirect evidence of market rates. Because some circuits with many class actions adhere to benchmarks from which judges may be reluctant to depart, the data may say as much about benchmarks as anything else. That said, being familiar with empirical studies of fee awards, I can confidently report that Plaintiffs' Counsel's request for a fee equal to 15 percent of the monetary recovery falls well below the range that courts typically award.

A peer-reviewed study by Theodore Eisenberg, Geoffrey P. Miller and Roy Germano contains the

table below, which breaks out fee awards by federal circuit. The means and medians for all circuits are well above 15 percent. In the 9th Circuit, which includes California, the median is 25 percent, reflecting that circuit's use of 25 percent as a baseline from which departures are discouraged.

TABLE 3. FEE AND CLASS RECOVERIES, BY FEDERAL CIRCUIT, 2009–2013

		Recoveries		Fees		Fee Percentages	
Circuit	N	Mean (millions of dollars)	Median (millions of dollars)	Mean (millions of dollars)	Median (millions of dollars)	Mean (%)	Median (%)
1st	11	45.77	8.2	9.62	1.85	26	23
2nd	116	113.14	3.38	14.31	0.99	28	30
3rd	46	24.48	6.45	5.84	1.71	29	32
4th	22	25	3.66	5.9	0.91	26	25
5th	12	27.72	13.75	6.61	2.66	23	24
6th	23	23.2	5.2	6.38	1.5	26	30
7th	14	30.76	7.38	9.17	2.17	28	30
8th	21	50.74	4.2	5.04	1.11	29	32
9th	144	23.86	3	5.96	0.78	26	25
10th	18	30.07	6.21	7.5	1.36	27	25
11th	11	2.2	2.02	0.65	0.65	30	33
D.C.	6	34.72	11.64	6.57	2.21	19	19
Fed.	6	14.25	1.79	4.26	0.57	29	30
Total	450	48.8	3.83	8.2	1	27	29

Source: Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N. Y.U. L. REV. 937 (2017).

Because this is a mega-fund case with a settlement exceeding $100 million, I compared Class Counsel's request for a 15 percent fee to the amounts actually awarded in other such cases. My research, which is not comprehensive, turned up *dozens* of mega-fund cases with fee awards of 20 percent or more. The following table presents my results:

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MEGA-FUND CASES WITH FEE AWARDS OF 20 PERCENT OR MORE

#	Case Reference	Settlement Amount (in Millions)	Fee
1	Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., et al., No. 02 C-5893, Dkt. No. 2265 (N.D. Ill. Nov. 10, 2016)	$1,575.00	24.68%
2	In re TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SI, 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013)	$1,080.00	28.60%
3	Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006)	$1,075.00	31.33%
4	In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.,MDL No. 1658 (SRC) (D.N.J. Jun. 28, 2016)	$1,062.00	20.00%
5	In re Urethane Antitrust Litig., 2016 WL 4060156, at *8 (D. Kan. July 29, 2016)	$835.00	33.33%
6	Dahl v. Bain Capital Partners, LLC, No. 07-CV-12388, ECF No. 1095 (D.Mass. Feb 2, 2015).	$590.50	33.00%
7	In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467 (S.D.N.Y. 2009)	$586.00	33.33%
8	In re: Cathode Ray Tube (CRT) Antitrust Litig., 2016 WL 4126533, at *1 (N.D. Cal. Aug. 3, 2016)	$576.75	27.50%
9	King Drug Co. of Florence v. Cephalon, Inc., Civil Action No. 06-cv-01797-MSP, Dkt. 870 at 8 (E.D. Pa. Oct. 15, 2015)	$512.00	27.50%
10	Spartanburg Regional Health Servs. District, Inc. v. Hillenbrand Indus., Inc., No. 03-DV-2141, ECF No. 377 (D.S.C. Aug. 15, 2006)	$489.80	25.00%
11	In re Pfizer, Inc. Securities Litig., No. 04-cv-09866, ECF No. 727 (S.D.N.Y. 2016)	$486.00	28.00%
12	Hefler v. Wells Fargo & Company et al., No.16-cv-05479, ECF No 254 (N.D.Cal. 2018)	$480.00	20.00%
13	In re Adelphia Commc'ns Corp. Sec. & Derivative Litig., No. 03 CIV.5755, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006), aff'd, 272 F. App'x 9 (2d Cir. 2008)	$455.00	21.40%
14	In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011)	$410.00	30.00%
15	Ohio Public Emps. Ret. Sys. v. Freddie Mac, No. 03 Civ. 4261, 2006 U.S. Dist. LEXIS 98380 (S.D.N.Y. Oct. 26, 2006)	$410.00	20.00%
16	In re Vitamins Antitrust Litig., No. MDL 1285, 2001 WL 34312839 (D.D.C. July 16, 2001)	$359.00	34.00%
17	New England Carpenters Health Benefits Fund v. First Databank, Inc., No. 05 Civ. 11148, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)	$350.00	24.00%
18	New Jersey Carpenters Health Fund v. Residential Capital LLC, No. 08-cv-8781-HB, ECF No. 353 (S.D.N.Y. July 31, 2015)	$335.00	20.75%
19	In re Rite Aid Corp. Sec. Litig., 269 F. Supp. 2d 603 (E.D.Pa. 2003) and 146 F. Supp. 2d 706 (E.D.Pa. 2001).	$320.00	25.00%
20	In re Williams Sec. Litig., No. 02-cv-72-SPF, ECF No. 1638 (N.D. Okla. Feb. 12, 2007)	$311.00	25.00%
21	In re Oxford Health Plans, Inc. Sec. Litig., MDL No. 1222 (CLB), 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003)	$300.00	28.00%
22	In re DaimlerChrysler AG Sec. Litig., No. 00-0993 (KAJ), ECF No. 971 (D. Del. Feb. 5, 2004)	$300.00	22.50%
23	Sullivan v. DB Investments, Inc., 667 F.3d 273 (3d Cir. 2011)	$295.00	25.00%
24	In re Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR, ECF No. 543 (D. Del. 2009)	$250.00	33.33%
25	In re Allergan, Inc. Proxy Violation Securities Litig, No.14-cv-02004, ECF No. 500 (C.D.Cal. 2019)	$250.00	21.00%
26	In re Comverse Tech., Inc., Sec. Litig., No. 06-1825, 2010 WL 2653354 (E.D.N.Y. June 24, 2010)	$225.00	25.00%
27	In re Buspirone Antitrust Litig., MDL No. 1413 (JGK), 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003)	$220.00	33.33%

#	Case Reference	Settlement Amount (in Millions)	Fee
28	In re Genworth Fin. Inc. Sec. Litig., No. 3:14-cv-00682-JRS, 2016 WL 7187290, at *1-*2 (E.D. Va. Sept. 26, 2016)	$219.00	28.00%
29	Schuh v. HCA Holdings Inc., No. 3:11-cv-01033, ECF No. 563 at 1 (M.D. Tenn. Apr. 14, 2016)	$215.00	30.00%
30	In re: Merck & Co Inc Vytorin/Zetia Securities Litigation, No. 08-CV-02177, ECF No. 352 (D.N.J. Oct. 1, 2013)	$215.00	28.00%
31	In re Wilmington Trust Corporation Securities Litig, No.10-cv-00990, ECF No. 842 (D.Del. 2018)	$210.00	28.00%
32	In re Salix Pharmaceuticals, Ltd., No. 14-cv-08925, ECF No. 236 (S.D.N.Y. 2017)	$210.00	21.24%
33	In re Linerboard Antitrust Litig., No. CIV.A. 98-5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004), amended, No. CIV.A.98-5055, 2004 WL 1240775 (E.D. Pa. June 4, 2004)	$203.00	30.00%
34	Silverman v. Motorola, Inc., No. 07 C 4507, 2012 WL 1597388 (N.D. Ill. May 7, 2012), aff'd sub nom. Silverman v. Motorola Sols., Inc., 739 F.3d 956 (7th Cir. 2013)	$200.00	27.50%
35	In re CMS Energy Sec. Litig., No. 02-cv-72004, ECF No. 476 (E.D. Mich. Sept. 6, 2007)	$200.00	22.50%
36	In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109 (D.N.J. 2002)	$194.00	28.00%
37	In re Lease Oil Antitrust Litig. (No. II), 186 F.R.D. 403 (S.D. Tex. 1999)	$190.00	25.00%
38	In re Bank of New York Mellon Corp. Forex Trans. Litig., 12 MD 2335 (LAK), ECF No. 663 (S.D.N.Y. Dec. 4, 2015)	$180.00	25.00%
39	In re Relafen Antitrust Litig., No. 01-12239, ECF No. 297 (D. Mass. Apr. 9, 2004)	$175.00	33.00%
40	In re Cobalt International Energy, Inc. Securities Litig, No. 14-cv-03428, ECF No. 366 (S.D.Tex. 2019)	$173.80	25.00%
41	In re Schering-Plough Corp. Sec. Litig., No. 01-CV-0829 (KSH/MF), 2009 WL 5218066 (D.N.J. Dec. 31, 2009)	$165.00	23.00%
42	Alaska Elec. Pension Fund v. Pharmacia Corp., No. 03-1519 (AET), ECF No. 405 (D.N.J. Jan. 30, 2013)	$164.00	27.50%
43	Standard Iron Works v. Arcelormittal, et al., No. 08-cv-5214, ECF. No. 539 (N.D. Ill. 2014)	$163.90	33.00%
44	In re Titanium Dioxide Antitrust Litig., No. 10-CV-00318 RDB, 2013 WL 6577029 (D. Md. Dec. 13, 2013)	$163.50	33.33%
45	In re Dollar General Corp. Sec. Litig., No. 3:01-0388, ECF No. 209 (M.D. Tenn. May 24, 2002)	$162.00	20.90%
46	City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc. et al., No. 12-cv-05162, ECF No. 458 (W.D.Ark. 2019)	$160.00	30.00%
47	In re Se. Milk Antitrust Litig., No. 2:07-CV 208, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013)	$158.60	33.33%
48	In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)	$150.00	33.33%
49	In re Broadcom Corp. Sec. Litig., No. 01-CV-00275, ECF No.686 (C.D. Cal. Sept. 12, 2005)	$150.00	25.00%
50	Bd. of Trustees of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A., 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (Scheindlin, J.)	$150.00	25.00%
51	In re JPMorgan Chase & Co. Securities Litigation, No. 12-cv-03852-GBD, ECF No. 211 (S.D.N.Y. May 10, 2016)	$150.00	21.00%
52	In re Polyurethane Foam Antitrust Litig., No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015), appeal dismissed (Dec. 4, 2015)	$147.80	30.00%
53	In re Apollo Grp. Inc. Sec. Litig., No. CV 04-2147-PHX-JAT, 2012 WL 1378677 (D. Ariz. Apr. 20, 2012)	$145.00	33.33%
54	In re: Informix Corp. Sec. Litig. No 97-CV-1289-CRB, ECF No. 471 (N.D.Cal., Nov 23, 1999)	$142.00	30.00%

#	Case Reference	Settlement Amount (in Millions)	Fee
55	Kaplan v. S.A.C. Capital Advisors, L.P. et al., No. 12-cv-09350, ECF No. 388 (S.D.N.Y. 2017)	$135.00	20.00%
56	In re Computer Assocs. Class Action Sec. Litig., No. 02-CV-1226 (TCP), 2003 WL 25770761 (E.D.N.Y. Dec. 8, 2003)	$133.50	25.30%
57	In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 246 F.R.D. 156 (S.D.N.Y. 2007)	$133.00	24.00%
58	In re Plasma-Derivative Protein Therapies Antitrust Litig., No. 09-cv-07666, ECF Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014)	$128.00	33.33%
59	In re Rite Aid Corp. Sec. Litig., MDL No. 1360, 2005 WL 697461 at *2-3 (E.D. Pa. Mar. 24, 2005)	$126.64	25.00%
60	Anwar et al v. Fairfield Greenwich Limited et al, No. 09-cv-0118, ECF No. 1457 (S.D.N.Y. Nov. 20, 2015)	$125.00	30.00%
61	In re Optical Disk Drive Prod. Antitrust Litig., No. 3:10-MD-2143 RS, 2016 WL 7364803, at *6 (N.D. Cal. Dec. 19, 2016)	$124.50	25.00%
62	Kurzweil v. Philip Morris Cos., 1999 U.S. Dist. LEXIS 18378, (S.D.N.Y. Nov 24, 1999)	$123.80	30.00%
63	Norma J Thurber, et al v. Mattel Inc, et al, , No. 99-cv-10368, ECF No. 193 (C.D.Cal., Sep. 29, 2003)	$122.00	27.00%
64	In re Deutsche Telekom AG Sec. Litig., 2005 U.S. Dist. LEXIS 45798, *12, 14	$120.00	28.00%
69	In re Ikon Office Sols., Inc., Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	$111.00	30.00%
70	In re Morgan Keegan Open-End Mutual Fund Litigation, No. 07-cv-02784, ECF No. 435 (W.D.Tenn. Aug 2, 2016)	$110.00	30.00%
71	New Jersey Carpenters Health Fund v. DLJ Mortgage Capital, Inc., et al., No. 08-cv-05653, ECF No. 277 (S.D.N.Y. May 10, 2016)	$110.00	28.00%
72	In re Prudential Sec. Inc. Ltd. Partnerships Litig., 912 F. Supp. 97, 104 (S.D.N.Y. 1996)	$110.00	27.00%
73	In re CVS Corporation Securities Litigation, No. 01-cv-11464, ECF No. 191 (D.Mass, Sep 7, 2005)	$110.00	25.00%
75	Knurr v. Orbital ATK, Inc. et al., No. 16-cv-01031, ECF No. 462 (E.D.Va 2019)	$108.00	28.00%
76	In re Auto. Refinishing Paint Antitrust Litig., No. MDL NO 1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008)	$105.75	32.60%
77	In re Prison Realty Sec. Litig., No. 3:99--0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001).	$104.00	30.00%
78	Erica P. John Fund, Inc. v. Halliburton Co., No. 02-xc-01152, ECF No. 844 (N.D.Tex. Apr. 25, 2018)	$100.00	33.33%
79	8. In re Am. Express Fin. Advisors Sec. Litig., No. 04 Civ. 1773 (DAB), ECF No. 170 at 8 (S.D.N.Y. July 18, 2007) (Batts, J.)	$100.00	27.00%

Before preparing this report, I had not updated the preceding table for several years. I therefore used the 2024 Duane Morris report to see if any recent cases should be added. This brief bit of research turned up three more.

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Case Reference	Settlement Amount (millions)	Fee Award (millions)	Fee Award %
In re Dell Technologies Inc. Class V Stockholders Litigation, Case No. 2018-0816 (Del. Chan. Apr. 25, 2023)	$1,000	$266.70	26.7
In re Facebook Inc. Consumer Privacy User Profile Litigation, Case No. 18-MD-2843 (N.D. Cal. Oct. 10, 2023)	$725	$181.25	25.0
In re Flint Water Crisis, Case No. 16-CV-10444 (E.D. Mich. Mar. 20, 2023)	$626	$180.00	28.8

I also found a passage in the 2023 Antitrust Annual Report that is on point. The authors of that survey found that "[t]he median award of attorneys' fees remained largely around 30% for recoveries up to $249 million. Between $250-$999 million, attorneys fees were 25-26%." Only when settlements exceeded $1 billion did fee percentages decline significantly. Joshua Davis and Rose Clark, 2023 ANTITRUST ANNUAL REPORT: CLASS ACTIONS IN FEDERAL COURT 31 (2024). The following table summarizes their findings.

Figure 14: **Class Recovery by Settlement Size - Median**
2009 - 2023

Settlement Amount	Class Recovery	Attys Fees	Expenses	Total
>$1B	86%	13%	1%	100%
$500-$999M	71%	28%	2%	100%
$250-$499M	74%	25%	1%	100%
$100-$249M	68%	30%	2%	100%
$50-$99M	67%	30%	3%	100%
$10-$49M	64%	32%	4%	100%
<$10M	65%	30%	5%	100%
All Settlements	67%	30%	3%	100%

Source: JOSHUA DAVIS AND ROSE CLARK, 2023 ANTITRUST ANNUAL REPORT: CLASS ACTIONS IN FEDERAL COURT 32 (2024).

I could discuss more cases, but I believe the point has been made. When judges who preside over mega-fund cases are convinced that lawyers' efforts warrant substantial fee percentages, they award them—

even when awards run into the hundreds of millions of dollars. This case could justify such an award, but the lawyers are asking for only 15 percent of the recovery as fees. The reasonableness of the request is patent.

VI. LODESTAR CROSS-CHECK

When awarding fees as a percentage of the settlement, courts often gauge their reasonableness by performing lodestar cross-checks. These cross-checks employ two components: the lodestar calculation, which multiplies hourly rates by time expended; and an imputed multiplier, which is a factor that brings the lodestar calculation into line with the fee request. I discuss both quantities here.

Before doing so, I wish to note two things. First, I oppose the use of lodestar cross-checks and have argued against them repeatedly. By assigning significant weight to hours worked, courts inadvertently encourage lawyers to expend time rather than to conserve it. In other words, courts unintentionally penalize efficiency and reward delay. Lodestar cross-checks also weaken the connection between fees and recoveries, the connection that lashes class counsel's interests fast to class members' wellbeing. To the best of my knowledge, claimants never use the lodestar approach when hiring lawyers directly. I therefore see no reason for courts to rely on it when assessing the reasonableness of class counsel's fees.

Second, the market-based approach that I endorse *is* a cross-check on the reasonableness of Plaintiffs' Counsel's fee request. It provides an objective and independent standard on the basis of which an assessment can be made. Unless a cross-check can only be made in lodestar terms, a question of law on which I take no position, I see no obvious reason for a second cross-check to be made.

Turning to the lodestar cross-check itself, Class Counsel report having spent 5696.2 hours on this litigation, with another 720 hours expected to be needed in the future. At the lawyers' regular hourly rates, the lodestar basis is $6,059,605. The requested fee, $35,212,500, generates a lodestar multiplier of 5.8. *Notice of Motion and Motion for Attorneys' Fees and Reimbursement of Costs; Memorandum of Points and Authorities in Support Thereof*, p. 10.

Mr. Richard M. Pearl, an authority on fee-related practices in California who knows more about local rates than I do, believes that Class Counsel's requested rates are reasonable. I agree, but my opinion is based on my knowledge of the rates charged by lawyers working in metropolitan areas nationwide. At

law firms located in large cities, senior partners regularly charge between $1,500 and $2,000 an hour. With the senior partners in this case requesting rates of $1,150 per hour or less, the rates requested by Class Counsel are reasonable.

Consider a few examples of hourly rates charged in bankruptcy proceedings in 2019. Lawyers who submit bills in these cases must swear under oath that their filings are truthful. Bankruptcy judges review the reasonableness of their charges too.

- In the Sears bankruptcy proceeding, the fee application submitted by Weil, Gotshal & Manges LLP, the debtors' attorneys, included dozens of lawyers whose hourly charges exceed $1,000, with nine lawyers charging $1,500 per hour or more. *See Summ. Sheet for Second Appl., In re Sears Holdings Corp.*, No. 18-23538-rdd (Bankr. S.D.N.Y Aug. 15, 2019), ECF No. 4860.
- Even higher hourly rates were sought in the Toys R' Us bankruptcy, where Kirkland & Ellis LLP served as debtors' counsel. There, the highest hourly rate was $1,795, the blended rate for all partners, of which there were dozens, was $1,227, and the blended rate for all timekeepers, including paralegals and support staff, was $901. *See Summ. Cover Sheet to the Final Fee Appl. of Kirkland & Ellis, In re Toys "R" Us, Inc.*, No. 17-34665 (Bankr. E.D. Va. Mar. 18, 2019), ECF No. 6729.
- The rates sought by the law firm of Davis Polk & Wardwell LLP in the Purdue Pharma bankruptcy proceeding provide another anecdotal example. In late November of 2019, the firm sought rates that included $1,645 per hour for seven partners, $1,445-$1,585 for four more partners, and $1,225 for six lawyers described as being "of counsel." Davis Polk also sought rates exceeding $1,000 per hour for fifteen associates and rates exceeding $900 per hour for many more. . *See Decl. of Marshall S. Huebner in Support of the Appl. of Debtors for Entry of an Order Authorizing the Debtors to Employ and Retain Davis Polk & Wardwell LLP as Att'ys for the Debtors* at 10, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Nov. 5, 2019), ECF No. 419-1.
- As a last example, in the PG&E Bankruptcy proceedings, PG&E was charged $1,640 per hour for litigation attorneys with over 30 years of experience, $1,535–1,640 for some 20–29 year

attorneys, $1,190 for a 16-year attorney, $915 for a 3-year litigation associate, and up to $455 per hour for paralegal work. *See Summ. Sheet to Third Interim Appl. of Simpson Thacher & Bartlett LLP for Allowance and Payment of Compensation and Reimbursement of Expenses for the Period of Sept. 1, 2019 through Dec. 31, 2019, In re PG&E Corp.*, No. 19-30088 (N.D. Cal. Bankr. Mar. 16, 2020), ECF No. 6331.

Today, bankruptcy lawyers' rates are considerably higher. Here are two examples of fees charged in more recent proceedings.

- In the bankruptcy proceedings involving Rite Aid, WeWork, and Yellow Corp., the hourly rates for bankruptcy partners at Kirkland & Ellis run from $1,195 to $2,465 per hour, those for of counsel lawyers run from $820 to $2,245, and those for associates run from $745 to $1,495. David Thomas, *Top Bankruptcy Firm Kirkland Boosts Billing Rates, Nearing $2,500 an Hour*, Reuters, Dec. 15, 2023.
- In the Johnson & Johnson bankruptcy, Jones Day lists hourly rates ranging from $1,275 to $2,000 for partners, from $625 to $1,175 for associates, and from $275 to $525 for paralegals. Mark Curriden, *Legal Fees Hitting $2K an Hour in J&J's Talc Powder Bankruptcy*, The Texas Lawbook, Oct. 21, 2024.

By comparison to these charges, the rates requested by Class Counsel are reasonable.

I turn now to the multiplier portion of the lodestar. As explained, Class Counsel's fee request entails a multiplier of 5.8. The best-known feature of multipliers is that they increase sharply as settlements become larger. The policy of connecting multipliers to settlement size has solid grounding in the economics of litigation, because the multiplier is the component of the lodestar method that ties the fee award to the recovery. Neither lawyers' hourly rates nor the time they expend does this more than weakly. Unless the multiplier increases as settlements grow larger, lawyers will be incentivized to settle cheaply because, by doing so, they will protect their fees instead of putting them at risk—which they do whenever they pass up

opportunities to settle. Unless the upside potential of securing a larger recovery justifies incurring the downside risk of losing fees, the pressure on lawyers to settle will be strong. Awarding larger multipliers when class actions settle for larger sums provides the upside potential that is needed to encourage lawyers to take significant risks.

Because multipliers increase as settlements grow, judges presiding over cases with mega-fund settlements exceeding $100 million have awarded multipliers larger than the one sought here.

- In *In re Buspirone*, 01-md-1410 (S.D.N.Y. Apr. 11, 2003), which settled for $220 million, the court awarded a lodestar multiplier of 8.46.
- In *In re Credit Default Swaps Antitrust Litig*., No. 13MD2476 DLC, ECF No. 554 (S.D.N.Y. April 18, 2016), which settled for $1.86 billion, the multiplier was 6.36.

There are also cases with recoveries below the mega-fund threshold with multipliers larger than the one Class Counsel requests.

- *La. Municipal Police Employees' Ret. Syst. v. Crawford*, C.A. No. 2635-CC (Del. Ch. June 8, 2007) (ORDER) (approving $20 million attorneys' fee award, equating to lodestar multiplier of approximately 6.5 and implied hourly rate of approximately $2,783.22).
- *In re Digex, Inc. S'holder Litig*., C.A. No. 18336 (Del. Ch. Apr. 6, 2001) Tr. at 141-47 (lodestar of $1.4 million awarded fee of $12.3 million, representing lodestar multiplier of 9).[4]
- Farrell v. Bank of America Corp., N.A., 827 Fed.Appx. 628 (9th Cir. 2020) ($14.5 million award on recovery of $21.9 million, with lodestar multiplier of 11).
- Skochin v. Genworth Fin., Inc., No. 3:19-CV-49, 2020 WL 6536140, at *1 (E.D. Va. Nov. 5, 2020) (fee award of $26.5 million reflecting a lodestar multiplier of 9.05.

There are undoubtedly more cases than the ones I have listed.

[4] I was unable to obtain the order for this award. The description is taken from *Plaintiffs' Memorandum in Support of Approval of Settlement, Certification of the Class for Settlement Purposes and an Award of Attorneys' Fees and Costs*, filed in *La. Municipal Police Employees' Ret. Syst. v. Crawford*, C.A. No. 2635-CC (Del. Ch. June 1, 2007).

It also bears repeating here that, separate and apart from the settlement recovery, the lawsuit benefited class members by increasing their wages. This is a real cash benefit for the production of which Class Counsel should be paid. Had the Defendants not raised class members' wages immediately upon losing in the courts on the merits, the damages and the settlement would both have been larger, and Class Counsel would be entitled a contingent fee on the entire amount. The fee request, in dollar terms, is therefore smaller than it could have been and would have been had the Defendants not changed their practices when they did. This benefit warrants a sizeable fee enhancement.

When performing cross-checks, judges do not adhere to simple-minded rules. They award fees that, in their informed judgment, are justified in light of the effort lawyers expended, the risks they incurred, and the results they obtained. In this case, the lawyers have worked long and hard, incurred great expenses, and borne substantial risks. They have also set the class on a course that may lead to additional recoveries in the future. In view of all this, the reasonableness of the requested multiplier is clear.

VII. COMPENSATION

I received financial compensation for the time I spent preparing this report.

VIII. CONCLUSION

For the reasons set out above, I believe that Class Counsel's request for a fee award of 15 percent of the gross recovery is reasonable.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 17th day of July, 2025, at Empire, Michigan.

Charles Silver

APPENDIX I: RESUME OF PROFESSOR CHARLES SILVER

CHARLES SILVER

School of Law
University of Texas
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1337 (voice)
csilver@mail.law.utexas.edu (preferred contact method)
Papers on SSRN at: http://ssrn.com/author=164490

ACADEMIC EMPLOYMENTS

School of Law, University of Texas at Austin, 1987-2015
- Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure
- W. James Kronzer Chair in Trial & Appellate Advocacy
- Cecil D. Redford Professor
- Robert W. Calvert Faculty Fellow
- Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow
- Assistant Professor

University of Michigan Law School, Fall 2018
- Visiting Professor

Harvard Law School, Fall 2011
- Visiting Professor

Vanderbilt University Law School, Fall 2003
- Visiting Professor

University of Michigan Law School, Fall 2018 & Fall 1994
- Visiting Professor

University of Chicago, 1983-1984
- Managing Editor, *Ethics: A Journal of Social, Political and Legal Philosophy*

EDUCATION

Yale Law School, JD (1987)
University of Chicago, MA (Political Science) (1981)
University of Florida BA (Political Science) 1979

PUBLICATIONS

SPECIAL PROJECTS

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters) (American Law Institute 2010).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Class Action Litigation," 25 Rev. Litig. 459 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Mass Tort Litigation," 42 Tort Trial & Insurance Practice Law Journal 105 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Medical Malpractice Litigation," 25 Rev. Litig. 459 (2006).

PRACTICAL GUIDE FOR INSURANCE DEFENSE LAWYERS (2002) (with Ellen S. Pryor and Kent D. Syverud, Co-Reporters); published on the IADC website (2003); revised and distributed to all IADC members as a supplement to the Defense Counsel J. (2004).

BOOKS

MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage) (Cato Institute, 2021).

OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE (with David A. Hyman) (Cato Institute, 2018).

HEALTH LAW AND ECONOMICS, Vols. I and II (coedited with Ronen Avraham and David A. Hyman) (Edward Elgar 2016).

LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, (coedited with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley) (Foundation Press, 2nd Ed. 2012) (updated annually through 2018).

PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (with William T. Barker) (LexisNexis 2012) (updated annually through 2017).

ARTICLES AND BOOK CHAPTERS BY SUBJECT AREA
(* INDICATES PEER REVIEWED)

Health Care Law & Policy

1. "Paying Beneficiaries, Not Providers," Regulation 34 (2020) (with David A. Hyman).

2. "Pharmaceutical Pricing When Success Has Many Parents," 37 Yale J. Reg. 101 (2020) (with David A. Hyman).

3. "Pricing and Paying for Cancer Drugs: Policy Options for Fixing A Broken System," 26:4 The Cancer Journal 298-303 (2020) (with David A. Hyman).*

4. "Medicare For All: Four Inconvenient Truths," 20 Hous. J. of Health L. & Policy 133 (2020) (with David A. Hyman).

5. "Health Care's Government Bureaucracy: A Comment on *Health Care's Market Bureaucracy*, by Allison K. Hoffman," (unpublished) (with David A. Hyman).

6. "Surprise Medical Bills: How To Protect Patients and Make Care More Affordable," 108 Georgetown L. J. 1655 (2020) (with David A. Hyman and Ben Ippolito).

7. "There is a Better Way: Make Medicaid and Medicare More Like Social Security," 18 Georgetown J. of L. & Pub. Pol'y 149 (2020) (with David A. Hyman).

8. "Why Are We Being Overcharged for Pharmaceuticals? What Should We Do About It?" 39 J. Legal Med. 137 (2019) (with David A. Hyman).

9. "Regulating Pharmaceutical Companies' Financial Largesse," 7:25 Israeli J. Health Policy Res. (2018), https://doi.org/10.1186/s13584-018-0220-5 (with Ronen Avraham).*

10. "Medical Malpractice Litigation," (with David A. Hyman) OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (2019), DOI: 10.1093/acrefore/9780190625979.013.365.*

11. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," (with David A. Hyman) OXFORD HANDBOOK OF AMERICAN HEALTH LAW, I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds. (2017).*

12. "Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for Future Medical Expenses Under the Affordable Care Act," (with Maxwell J. Mehlman, Jay Angoff, Patrick A. Malone, and Peter H. Weinberger)25 Annals of Health Law 35 (2016).

13. **"**Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," (with David A. Hyman) 63 DePaul L. Rev. 574 (2014) (invited symposium).

14. "Five Myths of Medical Malpractice," (with David A. Hyman) 143:1 Chest 222-227 (2013).*

15. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (with David A. Hyman), 46 New England L. Rev. 101 (2012) (invited symposium).

16. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?" (coauthored with David A. Hyman) MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE (Ken Oliphant & Richard W. Wright, eds. 2013)*; originally published in 87 Chicago-Kent L. Rev. 163 (2012).

17. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman).*

18. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

19. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

20. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

21. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?" 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

22. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

23. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

24. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).*

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25. "Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After HB 4," 51 Tex. Tech L. Rev. 627 (2019). (with David A. Hyman and Bernard Black) (invited symposium on the 15th anniversary of the enactment of HB4).

26. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010**,"** 13 J. Empirical Legal Stud. 183 (2016) (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati).

27. "Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance," 5 U.C. Irvine L. Rev. 559 (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik) (invited symposium).

28. "Does Tort Reform Affect Physician Supply? Evidence from Texas," Int'l Rev. of L. & Econ. (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik), available at http://dx.doi.org/10.1016/j.irle.2015.02.002.*

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31. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. Empirical Legal Stud. 379 (2010) (with Bernard S. Black and David A. Hyman).*

32. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. Empirical Legal Stud. 723 (2009) (with David A. Hyman and Bernard S. Black).*

33. **"**Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. Legal Analysis 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue).*****

34. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate (Texas) 25 (2008) (with Bernard S. Black and David A. Hyman) (invited symposium).

35. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 3 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with Bernard S. Black, David A. Hyman, William M. Sage and Kathryn Zeiler).*****

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40. "Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois," 13 J. Empirical Legal Stud. 603-636 (2016) (with David A. Hyman, Mohammad Rahmati, Bernard S. Black).*****

41. "The Economics of Plaintiff-Side Personal Injury Practice," U. Ill. L. Rev. 1563 (2015) (with Bernard S. Black and David A. Hyman).

42. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

43. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard S. Black, David A. Hyman, and William M. Sage).*****

Attorneys' Fees—Empirical Studies and Policy Analyses

44. "The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions," RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, Sean Griffith, Jessica Erickson, David H. Webber, and Verity Winship, Eds. (2018).

45. "Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions," 115 Columbia L. Rev. 1371 (2015) (with Lynn A. Baker and Michael A. Perino).

46. "Regulation of Fee Awards in the Fifth Circuit," 67 The Advocate (Texas) 36 (2014) (invited submission).

47. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 Vanderbilt L. Rev. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

48. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 Vanderbilt L. Rev. 107 (2010) (with Geoffrey P. Miller).

49. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul L. Rev. 471 (2008) (with Sam Dinkin) (invited symposium), reprinted in L. Padmavathi, Ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).

50. "Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider," 20 The NAPPA Report 7 (Aug. 2006).

51. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006).

52. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

53. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

54. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

55. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

Liability Insurance and Insurance Defense Ethics

56. "Liability Insurance and Patient Safety," 68 DePaul L. Rev. 209 (2019) (with Tom Baker) (symposium issue).

57. "The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique," 68 Rutgers U. L. Rev. 83 (2015) (with William T. Barker) (symposium issue).

58. "The Basic Economics of the Duty to Defend," in D. Schwarcz and P. Siegelman, eds., RESEARCH HANDBOOK IN THE LAW & ECONOMICS OF INSURANCE 438-460 (2015).*

59. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter 1 (Aug. 2014) (with William T. Barker).

60. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DePaul L. Rev. 617 (2014) (invited symposium).

61. "Ethical Obligations of Independent Defense Counsel," 22:4 Insurance Coverage (July-August 2012) (with William T. Barker), available at

http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

62. "Settlement at Policy Limits and The Duty to Settle: Evidence from Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard S. Black and David A. Hyman).*

63. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

64. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

65. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

66. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

67. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

68. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

69. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6 Coverage 47 (1996) (with Michael Sean Quinn).

70. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6 Coverage 21 (1996) (with Michael Sean Quinn).

71. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 Def. L. J. 1 (Spring 1997).

72. "Wrong Turns on the Three Way Street: Dispelling Nonsense about Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

73. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

74. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994); reprinted in Practicing Law Institute, INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW (1998).

75. "A Missed Misalignment of Interests: A Comment on *Syverud, The Duty to Settle*," 77 Va. L. Rev. 1585 (1991); reprinted in VI INS. L. ANTHOL. 857 (1992).

Class Actions, Mass Actions, and Multi-District Litigations

76. "In Defense of Private Claim Resolution Facilities," J. of L. and Contemporary Problems (forthcoming 2021) (with Lynn A. Baker)*

77. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*," 5 J. of Tort L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

78. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. 1985 (2011) (invited symposium).

79. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda).*

80. "A Rejoinder to *Lester Brickman, On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepperdine L. Rev. 765 (2005).

81. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

82. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

83. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

84. "Representative Lawsuits & Class Actions," in B. Bouckaert & G. De Geest, eds., INT'L ENCY. OF L. & ECON. (1999).*

85. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

86. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

87. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

88. "Justice in Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman).*

General Legal Ethics and Civil Litigation

89. "A Private Law Defense of Zealous Representation" (in progress), available at http://ssrn.com/abstract=2728326.

90. "The DOMA Sideshow" (in progress), available at http://ssrn.com/abstract=2584709.

91. "The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations," 79 Fordham L. Rev. 1985 (2011).

92. "Fiduciaries and Fees," 79 Fordham L. Rev. 1833 (2011) (with Lynn A. Baker) (invited symposium).

93. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

94. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

95. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

96. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

97. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

98. "What's Not To Like About Being A Lawyer?" 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

99. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

100. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

101. "Bargaining Impediments and Settlement Behavior," in D.A. Anderson, ed., DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (1996) (with Samuel Issacharoff and Kent D. Syverud).

102. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

103. "Do We Know Enough about Legal Norms?" in D. Braybrooke, ed., SOCIAL RULES: ORIGIN; CHARACTER; LOGIC: CHANGE (1996) (invited contribution).

104. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 Law and Contemporary Problems 213 (1995) (with Amon Burton, John S. Dzienkowski, and Sanford Levinson,).

105. "Thoughts on Procedural Issues in Insurance Litigation," VII INS. L. ANTHOL. (1994).

Legal and Moral Philosophy

106. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987).*

107. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985).*

108. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984).*

Practice-Oriented Publications

109. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996).

110. "Getting and Keeping Clients," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

111. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

112. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

113. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

Miscellaneous

114. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro).*****

PERSONAL

Married to Cynthia Eppolito, PA; Daughter, Katherine; Step-son, Mabon.

Consults with attorneys and serves as an expert witness on subjects in his areas of expertise.

First generation of family to attend college.

APPENDIX II: TABLE OF FEE AWARDS IN DIRECT PURCHASER PHARMACEUTICAL ANTITRUST CLASS ACTIONS

Direct-Purchaser Pharmaceutical Antitrust Settlements, April 2003-April 2020

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
11/09/18	*Hartig Drug Company Inc. v. Senju Pharmaceutical Co. Ltd. et al*, No. 14-00719 (D. Del.)	$9,000,000	33.33%	N/A	None	No
10/24/18	*In Re: Blood Reagents Antitrust Litigation*, No. 09-md-02081 (E.D. Pa.)	$41,500,000	33.33%	N/A	None	No
09/20/18	*In re Lidoderm Antitrust Litigation,* No. 14-md-02521 (N.D. Cal.)	$166,000,000	27.11%	33.33%	None	Yes
07/18/18	*In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, No. 14-md-02503 (D. Mass.)	$72,500,000	31.45%	N/A	None	No

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
04/18/18	*American Sales Company, LLC v. Pfizer, Inc.*, No. 4-cv-00361 (E.D. Va.)	$94,000,000	32.69%	33.33%	None	Yes
12/19/17	*In re Aggrenox Antitrust Litigation,* No. 14-md-02516 (D. Conn.)	$146,000,000	33.33%	33.33%	None	Yes
12/07/17	*In re Asacol Antitrust Litigation,* No. 15-cv-12730 (D. Mass.)	$15,000,000	33.33%	N/A	None	Yes
10/23/17	*Castro v. Sanofi Pasteur, Inc.*, No. 11-cv-7178 (D.N.J.)	$61,500,000	33.33%	N/A	None	Yes
10/05/17	*In re K-Dur Antitrust Litigation*, No. 01-cv-01652 (D.N.J.)	$60,200,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
10/15/15	*King Drug Company of Florence, Inc. v. Cephalon, Inc., et al*, No. 06-cv-01797 (E.D. Pa.)	$512,000,000	27.50%	N/A	None	Yes
05/20/15	*In re Prograf Antitrust Litig.*, No. 11-md-2242 (D. Mass.)	$98,000,000	33.33%	N/A	None	Yes
01/20/15	*In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141 (E.D. Mich.)	$19,000,000	33.33%	N/A	None	Yes
09/16/14	*Mylan Pharmaceuticals, Inc. v. Warner Chilcott PLC*, No. 12-cv-3824 (E.D. Pa.)	$15,000,000	33.33%	N/A	None	No
08/06/14	*Louisiana Wholesale v. Pfizer, Inc., et al*, No. 02-cv-01830 (D.N.J.)	$190,416,438	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
06/30/14	*In re Skelaxin (Metaxalone) Antitrust Litigation*, No. 12-md-2343 (E.D. Tenn.)	$73,000,000	33.33%	N/A	None	Yes
4/16/14	*In Re: Plasma-Derivative Protein Therapies Antitrust Litigation*, No. 09-07666 (N.D. Ill.)	$64,000,000	33.33%	N/A	None	No
06/14/13	*American Sales Company, Inc. v. Smithkline Beecham Corporation*, No. 08-cv-03149 (E.D. Pa.)	$150,000,000	33.33%	N/A	None	Yes
04/10/13	*Louisiana Wholesale Drug Company, Inc. v. Becton Dickinson & Company, Inc.*, No. 05-cv-01602 (D.N.J.)	$45,000,000	33.33%	N/A	None.	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
11/07/12	*In re Wellbutrin XL Antitrust Litigation*, No. 08-cv-2431 (E.D. Pa.)	$37,500,000	33.33%	N/A	None	Yes
05/31/12	*Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.*, No. 07-cv-142 (D. Del.)	$17,250,000	33.33%	N/A	None	Yes
01/12/12	*In re Metoprolol Succinate Antitrust Litigation*, No. 06-cv-52 (D. Del.)	$20,000,000	33.33%	N/A	None	Yes
11/28/11	*In re DDAVP Direct Purchaser Antitrust Litigation*, No. 05-cv-2237 (S.D.N.Y.)	$20,250,000	33.33%	N/A	None	Yes
11/21/11	*In re Wellbutrin SR Antitrust Litigation*, No. 04-cv-5525 (E.D. Pa.)	$49,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
08/11/11	*Meijer, Inc. v. Abbott Laboratories*, No. 07-cv-05985 (N.D. Cal.)	$52,000,000	33.33%	N/A	None	Yes
01/31/11	*In re Nifedipine Antitrust Litigation*, No. 03-mc-223 (D.D.C.)	$35,000,000	33.33%	N/A	None	Yes
01/25/11	*In re Oxycontin Antitrust Litigation*, No. 04-md-1603 (S.D.N.Y.)	$16,000,000	33.33%	N/A	None	Yes
04/23/09	*In re Tricor Direct Purchaser Litigation*, No. 05-340 (D. Del.)	$250,000,000	33.33%	N/A	None	Yes
04/20/09	*Meijer, Inc. v. Barr Pharmaceuticals, Inc.*, No. 05-cv-2195 (D.D.C.)	$22,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
11/09/05	*In re Remeron Direct Purchaser Antitrust Litigation*, No. 03-cv-00085 (D.N.J.)	$75,000,000	33.33%	N/A	None	Yes
04/19/05	*In re Terazosin Hydrochloride Antitrust Litigation*, No. 99-md-1317 (S.D. Fla.)	$74,572,327	32.41%	N/A	None	Yes
11/30/04	*North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.*, No. 04-cv-248 (D.D.C.)	$50,000,000	33.33%	N/A	None	No
04/09/04	*In re Relafen Antitrust Litigation*, No. 01-cv-12239 (D. Mass.)	$175,000,000	33.33%	N/A	None	No

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
04/11/03	*Louisiana Wholesale Drug Co. v. Bristol-Myers Squibb Co.*, No. 01-cv-7951 (S.D.N.Y.)	$220,000,000	32.96%	N/A	None	Yes
			N=33 **Median= 33.33%** **Mean= 32.85%**	**3/33**	**0/33**	**26/33**