IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEY'S FEE REQUEST AND CLASS REPRESENTATIVE INCENTIVE AWARD

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I. INTRODUCTION

In February 2016, Quinn Emanuel became the first firm in the nation to file a lawsuit on behalf of a Qualified Health Plan issuer against the federal government alleging that the government improperly failed to make risk corridor payments in violation of Section 1342 of the Affordable Care Act. Four years later, following round after round of fierce litigation and a loss at the Federal Circuit, eight justices of the Supreme Court adopted the exact legal theory Quinn Emanuel set forth in the initial *Health Republic* complaint and which it advocated at every step, including in the parallel cases that eventually made their way to the Supreme Court. The result? An entire industry was able to collect three years' worth of unpaid risk corridors amounts they had previously been forced to write off as a total loss—approximately $12 billion. Nearly $4 billion of that recovery will go to the class members in these class actions.

For its work on behalf of the class members, Quinn Emanuel seeks 5% of the class judgments as its attorneys' fee. This is the amount to which Quinn Emanuel limited itself in the class opt-in notice and, as discussed at length below, respectfully believes is warranted by the work

it has performed in these class actions (and beyond), the results it has achieved for the class members, and the law guiding the Court's analysis. If approved, a 5% fee would represent one of the lowest percentage rates ever awarded to class counsel, even in cases with multi-billion-dollar recoveries, such as this.

As support for this petition, Quinn Emanuel cites extensively to the records in the various cases and appeals, and submits the declarations of Prof. Brian Fitzpatrick (Ex. 2) and Prof. Charles Silver (Ex. 3), noted civil procedure and class action scholars, who provide further empirical and economic support for counsel's fee request.

Finally, given their extensive efforts and doggedness on behalf of the respective classes, Quinn Emanuel also seeks permission to provide both Health Republic and Common Ground $100,000 class representative incentive fees. Quinn Emanuel proposes paying these fees out of its fee award, meaning that the incentive fees will not cost the other class members anything extra.

II. BACKGROUND

A. Quinn Emanuel Identifies and Brings the First Risk Corridors Claims in the Nation

In late 2015, Quinn Emanuel partners Stephen Swedlow, J.D. Horton, and Adam Wolfson learned about the federal government's decision to not fund the risk corridors program in accordance with Section 1342's money-mandating provisions. They read news stories about the widespread chaos the multi-billion shortfall in payments caused and, believing that the decision reflected a serious injustice, researched the legal options available to qualified health plan issuers. Based on this research, they concluded that QHP issuers did, in fact, possess Tucker Act claims against the government for the full amount of outstanding risk corridors payments.

In January 2016, Quinn Emanuel spoke with Dawn Bonder, the CEO of Health Republic Insurance Company, an Oregon-based CO-OP that had suffered heavily due to the government's

failure to make full risk corridor payments for 2014—so much so that it had to wind down its operations following the 2015 benefit year. Declaration of Dawn Bonder ("Bonder Dec.") ¶¶ 8-9 (Ex. 4). Ms. Bonder had previously spoken with news outlets regarding her frustrations with the government's actions and, with the consent of her co-executives and Board of Directors, retained Quinn Emanuel to represent Health Republic as a representative for a putative class of QHP issuers who suffered similarly from the government's failure to pay. *Id*. ¶ 10.

Health Republic and Quinn Emanuel took a substantial risk in suing the government on the risk corridors claims. Shortly before filing the complaint, Ms. Bonder spoke with Robert Gootee, the CEO of Moda Health Plan, another insurer based in Oregon (and one of the QHP issuers that took their later-filed risk corridors claims to the Supreme Court). *Id*. Ms. Bonder explained the nature of Health Republic's upcoming lawsuit and Mr. Gootee responded by telling her she was making a "bold" choice in filing suit, and that he would not even consider doing so on behalf of Moda, as he thought the lawsuit had no chance of success. *Id*.

Nevertheless, in late February, Quinn Emanuel filed a first-of-its-kind lawsuit, asserting Health Republic's and the putative risk corridors class's Tucker Act claims. *Id*. ¶ 12; Declaration of Stephen Swedlow ("Swedlow Dec.") ¶ 8 (Ex. 1). The lawsuit alleged a cause of action for failure to satisfy Section 1342's money-mandating obligation--a liability and damages theory this Court and, more recently, the Supreme Court validated in full. *See Health Republic* Compl. (Dkt. 1); *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020). Quinn Emanuel focused solely on the statutory claim and did not waste class resources on breach of contract or takings claims it believed were superfluous to the core wrong. Quinn Emanuel's complaint then proceeded for several months as the sole complaint in the nation, until other QHP issuers filed suit

using the Health Republic complaint as a template for their claims. Bonder Dec. ¶ 12; Swedlow Dec. ¶¶ 11-12.

B. QHP Issuers Vote With Their Feet By Choosing Quinn Emanuel as the Highest-Quality, Most Cost Effective Counsel Available

In the months following the initial filing, Quinn Emanuel met and conferred with the government, scheduled briefing on the government's intended motion to dismiss, undertook substantial legal and factual research, and then briefed that motion in full. The briefs Quinn Emanuel submitted during this process, as well as this Court's subsequent denial of the government's motion to dismiss, were pathbreaking. The Court's opinion denying the government's motion to dismiss, as well as the arguments Quinn Emanuel raised on Health Republic's and the putative class's behalf, thereafter became a blueprint for subsequent lawsuits and Court of Federal Claims decisions that then went up on appeal to the Federal Circuit and, eventually, the Supreme Court.

After defeating the government's motion to dismiss, Quinn Emanuel convinced the government to agree to class certification and thereafter began the long and arduous process of providing notice to all of the putative class members and, because this is an opt-in class action, meeting with and discussing the case with potential class members and answering their questions about the claims (including, *inter alia*, the reasons to join the class). *See Health Republic* Dkt. 30; Swedlow Dec. ¶ 11. A huge number of these QHP issuers chose to do exactly that, because Quinn Emanuel offered them the best combination of cost-effective, high quality of counsel. Swedlow Dec. ¶ 17.

To the latter point, during the opt-in period, it became clear that some QHP issuers who had not spoken with Quinn Emanuel (along with outside counsel at other firms) had concluded that Quinn Emanuel would seek 33% of any settlement or award. Swedlow Dec. ¶ 13. As a result

of this incorrect assumption, several QHP issuers retained counsel to file individual lawsuits in the Court of Federal Claims at contingency rates in multiples of the 5% Quinn Emanuel is seeking in this fee petition. *Id.* ¶ 14. On the day Quinn Emanuel learned of the misunderstanding related to the anticipated contingency rate, it submitted (and the Court subsequently approved) a supplemental class notice informing potential class members that Quinn Emanuel would seek attorneys' fees of no greater than 5% of any recovery. *Id.* ¶ 15. This supplemental notice was sent to every putative class member before the deadline to opt in, so all eventual class members joined the class with this information in hand. *Id.* Quinn Emanuel subsequently learned from QHP issuers that, after it made the 5% maximum fee disclosure, other law firms willing to represent QHP issuers on a contingent basis were unwilling to agree to rates that low. *Id.* ¶ 16. As a consequence, after the supplemental notice, some QHP issuers chose to opt into the class because Quinn Emanuel's offered fee rate was the lowest they were able to obtain. *Id.*

Eventually, more than 150 QHP issuers representing more than $2.1 billion in unpaid risk corridors amounts for the 2014 and 2015 benefit years opted into the class. *Id.* ¶ 17. During the opt-in process, Quinn Emanuel also moved for summary judgment on the putative class's claims. *See Health Republic* Dkt. 47. The government filed a cross-motion for summary judgment and the parties briefed those issues to the Court in early- and mid-2017. On the putative class's behalf, Quinn Emanuel retained an expert economist, who helped explain the economic incentives underlying the risk corridors program, as well as the problems associated with failure to pay. See Swedlow Dec. ¶ 24; *Health Republic* Dkt. 47-1. Quinn Emanuel presented arguments that the Supreme Court later adopted, using reasoning and citations virtually identical to those that Quinn Emanuel provided in its original summary judgment briefs.

Shortly after briefing on those cross-motions was complete, Quinn Emanuel also filed a putative class action for 2016 benefit year risk corridor amounts. This came about because, during the opt-in process for the *Health Republic* action, Quinn Emanuel spoke with Common Ground Healthcare Cooperative, another CO-OP that faced substantial headwinds due to the government's failure to pay risk corridors amounts. Declaration of Cathy Mahaffey ("Mahaffey Dec.") ¶ 6 (Ex. 5). Because Health Republic wound down its operations following the 2015 benefit year, it could not act as a class representative for QHP issuers who provided QHPs in the 2016 year. Bonder Dec. ¶ 8. Common Ground, however, did provide QHPs that year and expressed interest in picking up where Health Republic left off, acting as a class representative for QHP issuers on 2016 risk corridor amounts. Mahaffey Dec. ¶¶ 4, 6.

C. Quinn Emanuel Provided Substantial Assistance on Appeal to Parallel Risk Corridors Plaintiffs, Even Though the Court Stayed This Case

Well after this case was filed, several other QHP issuers also filed suit. Those cases moved more quickly than this case because they were not class actions and therefore could proceed directly to summary judgment, whereas this case needed to first go through class certification and then the opt-in process before the Court could decide summary judgment. Due to the speed with which those other cases proceeded, they reached the judgment phase—with mixed success for the plaintiffs—before this Court could rule on Health Republic's summary judgment motion. This Court therefore stayed consideration of the summary judgment motion pending the final resolution of those later-filed, but earlier-decided, single actions. *See Health Republic* Dkt. 62. The Court also stayed consideration of the merits of the risk corridor claim in *Common Ground*. *Common Ground* Dkt. 9.

Quinn Emanuel, however, did not remain idle in the years following the stays. In the Federal Circuit, Quinn Emanuel submitted multiple amicus briefs on behalf of different interested

parties, including Health Republic, a trade association named America's Health Insurance Plans, and a group of health economists from across the political spectrum that explained how the government would hamper itself in the future with respect to public-private enterprise if it did not make good on its statutory promises to pay. Swedlow Dec. ¶ 22. The economists' amicus brief had particular impact during the appeal process; Judge Wallach cited it extensively in dissenting from the denial of *en banc* review. *See Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 747-48 (Fed. Cir. 2018) (Wallach, J., dissenting from denial of *en banc* rehearing)

At the Supreme Court level, Quinn Emanuel continued providing critical input, again submitting amicus briefs on behalf of the economist group, including in connection with the plaintiffs' petition for a writ of certiorari, as well as during the merits briefing before the Supreme Court. Swedlow Dec. ¶ 22. The submissions focused on the negative economic and societal impact that would result if the government failed to honor its commitments. The reasoning reflected in Quinn Emanuel's amicus briefs self-evidently made its way into the Supreme Court's subsequent opinion. As Justice Sotomayor's majority opinion noted, the Court's holdings in *Maine Community Health Options* "reflect a principle as old as the Nation itself: The Government should honor its obligations." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020).

Throughout the Supreme Court process, Quinn Emanuel also provided comments, strategic suggestions, and assistance with argument to the firms and attorneys handling the Supreme Court arguments. Swedlow Dec. ¶ 22. All that work paid off for the class in the Supreme Court's eventual decision, and now all class members will be able to collect 100% of their remaining unpaid risk corridors amounts. For the Non-Dispute Subclasses, this amounts to approximately

$1.9 billion *Health Republic* and $1.8 billion in *Common Ground*. *See Health Republic* Dkt. 82; *Common Ground* Dkt. 105.

III. ARGUMENT

Most class actions do not proceed to final judgment; instead, they typically resolve through settlement. Fitzpatrick Dec. ¶ 3. Because settlements do not provide class members full relief, courts are charged with protecting class members' interests by ensuring that such results are "fair, reasonable and adequate." RCFC 23(e)(2); Fitzpatrick Dec. ¶ 9. In assessing the attorneys' fees class counsel requests as part of a settlement, courts are further charged with asking whether there has been "a tradeoff between merits relief and attorney's fees." 5 Newberg on Class Actions § 13:54 (William Rubenstein ed., 5th ed. 2020) (collecting cases).

In contrast, where, as here, class counsel obtains a judgment for the class that affords each class member full relief, the attorney fee inquiry is narrower. The Court must decide only whether proposed fees are "reasonable" under the circumstances. *Compare* RCFC 23(h), *with* RCFC 23(e)(2)(C). Class members must of course receive notice of and be afforded the opportunity to respond to the fee request, but the Court need not hold a hearing on the issue, as it must for a settlement. *Compare* RCFC 23(h)(3), *with* RCFC 23(e)(2)(C).

The recovery in this case takes the form of a "common fund," meaning that "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Kane Cty., Utah v. United States*, 145 Fed. Cl. 15, 18 (2019) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980)). Where such a common fund has been created to benefit an RCFC 23 class, but some or most class members have no bilateral contractual agreement with class counsel regarding fees, "it is appropriate to direct an award of attorney fees and expenses based on the common fund doctrine so that the other plaintiffs pay their fair share of the costs of class counsel's advocacy on their behalf." *Id.*

To "determin[e] the appropriate percentage for recovery of fees from a common fund," judges of this court evaluate a proposed percentage fee award based on seven factors: "(1) the quality of counsel; (2) the complexity and duration of litigation; (3) the risk of non-recovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class member's objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award." *Lambert v. United States*, 124 Fed. Cl. 675, 683 (2015); *see also Kane Cty.*, 145 Fed. Cl at 18; *Raulerson v. United States*, 108 Fed. Cl. 675, 679–80 (2013); *Quimby v. United States*, 107 Fed. Cl. 126, 133 (2012); *Moore v. United States*, 63 Fed. Cl. 781, 787 (2005) (citing Manual for Complex Litig. (4th ed.) § 14.121 (2004)).

These factors, taken individually and in the aggregate, strongly support Quinn Emanuel's request for an award of 5% of the common fund created for the Non-Dispute Subclasses in these cases.

A. Quality of Class Counsel is Exceptional

Among the factors relevant to the quality of counsel are "the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *25 (D.N.J. Oct. 1, 2013). But the quality of counsel's representation is "best measured by results." *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *1 (S.D.N.Y. Nov. 29, 2018). And here, class counsel achieved truly superlative results: a 100% recovery for each and every class member. Indeed, courts regularly find that counsel achieved exceptional results for the class where counsel obtained *less than half* of the class's potential recovery. *See, e.g., Alaska Elec.*, 2018 WL 6250657, at *1

(holding that quality of representation "was exceptional" because counsel recovered "between 35% and 73% of their expected trial demand"); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) (results favored a "substantial award" of attorney's fees although "the recovery here--$730 million—represents only a fraction of the possible recovery estimated by plaintiffs' damages experts--$3 billion); *In re Nigeria Charter Flights Litig.*, No. 04-CV-304, 2011 WL 7945548, at *8 (E.D.N.Y. Aug. 25, 2011) (counsel's representation was "of high quality" where counsel achieved an approximately 48% recovery).

The exceptional result in this case was a direct result of counsel's exceptional skill. Quinn Emanuel is a world-renowned litigation firm, having been described as a "global force in business litigation" by the *Wall Street Journal* and a "litigation powerhouse" by *The American Lawyer*. Swedlow Dec. ¶ 2. Legal Business has three times recognized Quinn Emanuel as a "US Law Firm of the Year," and in 2015 and 2019 The American Lawyer named the firm as a "Litigation Department of the Year" finalist. *Id*. In 2013 and 2016, Quinn Emanuel was named the "Class Action Practice Group of the Year" by Law360 for its work for plaintiffs and defendants in class action litigation. *Id*. ¶ 4. And in 2020, Quinn Emanuel was voted the "most feared" firm in the world after independent BTI Consulting Group surveyed over 350 major companies who identified Quinn Emanuel as the firm they least wanted to face as opposing counsel. *Id*. ¶ 2. In short, Quinn Emanuel's reputation among firms that practice complex litigation is unparalleled. *See also Kane Cty.*, 145 Fed. Cl. at 18–19 (quality of counsel factor weighed in favor of significant attorney's fee award where counsel had "extensive experience" in issues underlying the case).

Likewise, the individual attorneys representing the class have extensive experience in class action and healthcare litigation along with stellar reputations. Lead class counsel Stephen Swedlow, Managing Partner of Quinn Emanuel's Chicago Office, has been lead counsel in over

20 trials, multi-party jury trials and arbitrations. Swedlow Dec. ¶ 5. He has been lead trial counsel for two class action trials to verdict and has obtained, as lead counsel, class action settlements of $63 million and $100 million in cases involving health plans. *Id.* In 2003, he was a finalist for Trial Lawyer of the Year for obtaining the largest civil verdict in Illinois history. *Id.*

J.D. Horton, a partner in Quinn Emanuel's Los Angeles office, has represented health plans in civil and regulatory actions for over 20 years. *Id.* ¶ 6. He has obtained settlements of $40 million and $28 million on behalf of two health plan classes related to prescription drug purchases and represented the Kaiser Foundation Health Plan in multiple enforcement proceedings brought by the Department of Managed Health Care, including in a 40-day trial that ended with the Court rejecting virtually the entirety of the Department's case. *Id.* Among many other health plan providers, he has represented Blue Shield of California in a declaratory relief action against the Department of Managed Health Care, as well as a major health care service plan in an arbitration against a large IPO. *Id.*

Adam Wolfson, also a partner in Quinn Emanuel's Los Angeles office, was one of the principal co-lead counsel for plaintiffs in In re Polyurethane Foam Antitrust Litigation, where he helped obtain more than $430 million in settlements on behalf of a certified class in a case alleging a price-fixing conspiracy in the flexible polyurethane foam industry. *Id.* ¶ 7. He also obtained a $283 million patent infringement and breach of contract trial verdict on behalf of ViaSat, Inc. relating to its competitor's theft of innovative intellectual property and satellite designs. *Id.* He is currently on the plaintiffs' Executive Committee in *In re Combat Arms Earplug Product Liability Litigation*, in which the plaintiffs, service members from all branches of the U.S. Armed Forces, are suing to recover for damages they suffered from the use of defective earplugs 3M sold to the USAF for over a decade, and he is currently representing a putative class of consumers harmed by

supracompetitive ATM fees set by collusion amongst Visa, MasterCard, and their constituent bank investors. *Id*. In 2019, he was named a Rising Star in Class Actions by the national legal journal, *Law360*.

The performance of the Quinn Emanuel lawyers in this case is emblematic of their pedigree. In February 2016, Quinn Emanuel became the first firm in the nation to pursue a risk corridors action when it filed *Health Republic*. It was not until June 2016, when Moda Health filed its complaint, that QHP issuers started to bring individual actions mirroring Quinn Emanuel's earlier work. The pioneering *Health Republic* complaint pleaded a single claim on behalf of a putative 2014/2015 risk corridors class: violation of the government's statutory obligation to make payments under Section 1342 of the Affordable Care Act and its implementing regulations, for which the class could recover pursuant to the Tucker Act. *Health Republic* Compl. ¶¶ 59-63 (Dkt. 1). This legal theory is the exact one eight Justices of the United States Supreme Court eventually vindicated after more than four years of contentious litigation. *See Maine Community Health Options*, 140 S. Ct. 1308. While other QHP issuers also pursued implied contract or takings claims (in addition to adopting the statutory claim Quinn Emanuel alleged on the putative class's behalf), Quinn Emanuel identified and focused exclusively on what became the winning legal theory from the outset. That Quinn Emanuel did so is a testament to its strategic and legal acumen, given that the Supreme Court noted that "so-called money-mandating provisions are uncommon . . . because Congress has at its disposal several blueprints for conditioning and limiting obligations." *Id*. at. 1329. It was Quinn Emanuel that first recognized that the "Risk Corridors statute is one of the rare laws permitting a damages suit in the Court of Federal Claims." *Id*.

After Quinn Emanuel laid out a viable path to recovery for QHP issuers via the *Health Republic* complaint, several other firms began aggressively seeking out QHP issuers to file

individual lawsuits. Nevertheless, when it came time to opt in to the classes in the *Health Republic* and *Common Ground* cases, hundreds of QHP issuers chose Quinn Emanuel as their counsel. With many options for counsel available—on both a contingency and hourly basis—QHP issuers holding approximately one-third of the total value of all risk corridor claims joined the classes in these cases, demonstrating their (justified) confidence in Quinn Emanuel as class counsel. Swedlow Dec. ¶ 17. As part of this process, many QHP insurers had detailed questions about their rights against the government. Quinn Emanuel advised on all such questions, to the extent they fell under its role as class counsel, and it similarly provided input to individual litigants that chose not to join the class, because Quinn Emanuel recognized that, even if it did not have a tangible stake in the parallel individual lawsuits, assisting those plaintiffs on virtually identical claims benefited the classes here. Swedlow Dec. ¶ 9.

Quinn Emanuel did not let the classes down. Even as a majority of the Court of Federal Claims judges who ruled on risk corridors cases dismissed QHP issuers' claims or granted summary judgment for the government, this Court, after carefully considering Quinn Emanuel's briefs and arguments, rejected the government's effort to dismiss Health Republic's claim; a position the Supreme Court subsequently validated. *Compare Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757 (2017), *with Maine Community Health Options v. United States*, 133 Fed. Cl. 1 (2017) (Bruggink, J.); *Blue Cross and Blue Shield of North Carolina v. United States*, 131 Fed. Cl. 457 (2017) (Griggsby, J.); and *Land of Lincoln Mutual Health Insurance Co. v. United States*, 129 Fed. Cl. 81 (2016) (Lettow, J.). When follow-on cases adopting Quinn Emanuel's theory arrived at the Federal Circuit, Quinn Emanuel did not stand idly by: among other things, Quinn Emanuel hired Professor M. Kate Bundorf, a healthcare economist, as an expert, and submitted four amicus briefs to the Federal Circuit, two of which were extensively cited in Judge

Wallach's dissent from denial of *en banc* rehearing. *See Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 747-48 (Fed. Cir. 2018) (Wallach, J., dissenting from denial of *en banc* rehearing) (citing amicus briefs of Bundorf et al. and Health Republic/Common Ground). Judge Wallach, joined by Judge Newman, specifically focused on Quinn Emanuel's amicus brief on behalf of Prof. Bundorf and a consortium of health economists, which warned of the dangers of the government's failure to act as an honest broker and honor its commitments to insurers. *Id.* Quinn Emanuel likewise represented the economists as amici at both the certiorari and merits stage at the Supreme Court. These submissions focused on the negative economic and societal impact that would result if the government failed to honor its commitments. When the Court issued its decision adopting Quinn Emanuel's position, it stressed the importance of having a government that honors its obligations. *Maine Community Health Options*, 140 S. Ct. at 1331.

In short, in February 2016, Quinn Emanuel identified and developed legal claims that an entire industry imitated, and which nearly one-third of that industry chose to support by selecting Quinn Emanuel as their counsel. Quinn Emanuel then aggressively litigated that legal theory—over the vehement and skilled opposition of the government—until it was vindicated by a near-unanimous Supreme Court. The result of Quinn Emanuel's stellar performance is not only a nearly $4 billion, 100% recovery for its two classes—it is a $12 billion, 100% industrywide recovery. Rare is the case where class counsel's skillful strategy and execution produces such far-reaching benefits. Quinn Emanuel's performance as class counsel more than justifies its requested fee award.

B. The Risk Corridors Cases Were Complex, Lengthy, and Vigorously Litigated

Quinn Emanuel filed *Health Republic* nearly four and a half years ago and has been aggressively litigating it (and *Common Ground*) ever since. When Quinn Emanuel filed *Health Republic*, its legal theory was novel and untested—Health Republic was the first QHP issuer to

file suit, and, as of February 2016, not a single case had interpreted or even cited to Section 1342 of the Affordable Care Act. One of the central questions in these cases—whether the risk corridors statute is "money-mandating"—concerned an area of law with little binding precedent; as Justice Sotomayor's majority opinion in *Maine Community Health Options* noted, "[r]arely has the Court determined whether a statute can fairly be interpreted as mandating compensation by the Federal Government." 140 S. Ct. at 1329 (internal quotation marks omitted). Quinn Emanuel painted on a nearly blank canvas in filing *Health Republic*. *See Quimby*, 107 Fed. Cl. at 133 (approving class counsel's fee request in part due to "the absence of controlling precedent" on merits issues).

Nor were the legal questions in this case easy. The Affordable Care Act "is a notoriously complex statute, health insurance is notoriously difficult to administer effectively, and the federal health-care bureaucracy is notoriously cumbersome." *Minuteman Health, Inc. v. United States Dep't of Health & Human Servs.*, 291 F. Supp. 3d 174, 179 (D. Mass. 2018). This complexity is reflected in the judiciary's fractured opinions regarding the Act, and specifically Section 1342: multiple judges of the Court of Federal Claims reached diametrically opposite conclusions regarding the merits of QHP issuers' risk corridors claims; the Federal Circuit issued a 2-1 panel decision in the government's favor; the panel opinion drew multiple dissents from denial of *en banc* rehearing; and the Supreme Court ultimately reversed the Federal Circuit. At every one of these stages, the government vigorously argued that QHP issuers were not entitled to recover a dime beyond the budget-neutral amounts they had already received. *Quimby*, 107 Fed. Cl. at 133 (holding that "the government's opposition to the Court's ruling on the merits" weighed in favor of approving class counsel's fee request). And at every one of these stages, Quinn Emanuel either successfully litigated its position (defeating the government's motion to dismiss in *Health Republic*) or provided invaluable support to other QHP issuers pursuing parallel claims, including

by hiring experts, submitting amicus briefs, and advising counsel. *See supra* Sec. III.A. Ultimately, Quinn Emanuel pioneered and navigated difficult and novel legal arguments, to the benefit not only of the classes, but also to QHP issuers industrywide. *See In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416–17 (S.D.N.Y. 2018) (holding that the complexity factor favored approval of counsel's fee request because the case presented "unique and difficult issues not only for the parties, but also for the broader investor public").

The complexity of this litigation extended far beyond the legal issues. Quinn Emanuel was tasked with representing two large classes of sophisticated entities, many of whom had their own counsel through whom Quinn Emanuel communicated regarding the case and with whom Quinn Emanuel discussed class member-specific issues. Swedlow Dec. ¶¶ 18, 20-21. Ultimately, 153 QHP issuers joined the *Health Republic* class and 130 QHP issuers joined the *Common Ground* class, representing approximately one-third of the value of all risk corridor claims. *Id.* ¶ 17; *see also Raulerson*, 108 Fed. Cl. at 680 (holding that complexity favored approving counsel's fee request where the litigation "lasted nearly three years and has involved 260 class members with claims for approximately 300 separate properties"); *Bishop v. United States*, No. 10-594L, 2013 WL 4505991, at *5 (Fed. Cl. Aug. 19, 2013) (finding class counsel's fee arrangement reasonable because the "litigation has lasted three years and has involved 68 class members with complex valuation issues, negotiated by experienced counsel"). Reaching this level of participation was an enormous endeavor. Class counsel flew across the country to meet with QHP issuers—some of whom became class members, and some of whom did not—and extensively addressed and provided insights regarding the merits of their risk corridors' claims and their litigation options. Swedlow Dec. ¶ 11. Class counsel's efforts yielded efficiencies for QHP issuers, the government, and the Court of Federal Claims; indeed, at one point, the government indicated that it would prefer

to administer risk corridor claims through counsel's two class actions, as to conserve the resources of both QHP issuers and the Court of Federal Claims, which otherwise would have had to adjudicate hundreds of additional individual lawsuits. *Id*. ¶ 10.

During the four-plus year pendency of this litigation, Quinn Emanuel fielded often-daily inquiries from class members (and other QHP issuers) about a variety of litigation and ACA-related topics, including (but by no means limited to) the susceptibility of risk corridor claims to government offset, the interaction between this litigation and state insolvency laws, possible settlement of claims, and the timing of any recovery. Swedlow Dec. ¶ 20. Indeed, the sheer magnitude of the government's failure to meet its obligations contributed significantly to the complexity of this matter. Predictably, the government's failure to pay tens or hundreds of millions of dollars that it promised to QHP issuers forced numerous class members into liquidation and brought others to the brink of insolvency. *See* Bonder Dec. ¶ 8; Swedlow Dec. ¶ 21. Quinn Emanuel took steps—for which it was not compensated—to enable class members to leverage their risk corridor claims to obtain financing necessary to stay in business, and regularly consulted with and advised liquidators and state insurance officials. Swedlow Dec. ¶ 21; Mahaffey Dec. ¶ 6. In short, in addition to pioneering the winning legal theory, Quinn Emanuel addressed complex ancillary issues for large and sophisticated entities on a day-to-day basis for four years. The complexity of these matters favors approval of class counsel's fee request. S*ee, e.g.*, *Raulerson,* 108 Fed. Cl. at 680 (holding that "complex valuation issues, one of which necessitated a court ruling" favored approval of fee request); *Moore* , 63 Fed. Cl. at 787 (holding that case's "many procedural complexities" favored substantial fee award).

C. <u>There Was a Substantial Risk of Nonrecovery</u>

The Court of Federal Claims has found that the risk of nonrecovery supports a substantial attorney's fee where there was an absence of controlling precedent when the case was filed, *see*

Moore, 63 Fed. Cl. at 789; where other, similar suits have been unsuccessful, *see Kane Cty.*, 145 Fed. Cl. at 19; and where the government disputed the plaintiff's key positions, *see Quimby*, 107 Fed. Cl. at 133 . These circumstances, all of which are all present in *Health Republic* and *Common Ground*, signify the existence of risk above and beyond that present in all contingency fee litigation that counsel will not be reimbursed for thousands of hours of labor and significant expenses[1]—a risk that in and of itself favors approval of class counsel's request. *Raulerson*, 108 Fed. Cl. at 680 (noting that risk factor weighed in favor of approving counsel's fee request because "all litigation carries risk, and that if plaintiffs had lost, Class Counsel would not have received any reimbursement for the 5,000 hours of labor and $225,000 in costs that they expended over the course of nearly four years.").

This litigation was uniquely risky for class counsel. At the time Quinn Emanuel filed the first-in-the-nation *Health Republic* case, there was no binding precedent holding that the risk corridors statute is money mandating, nor was there binding precedent that QHP issuers may pursue risk corridor claims under the Tucker Act. And there was little optimism about risk corridor claims among industry insiders—for instance, Dawn Bonder, CEO of Health Republic, was told by the CEO of Moda (which would eventually become the second QHP issuer to file suit) that she was "bold" to even consider filing an action because there was such a low likelihood of success. Bonder Decl. ¶ 10.

[1] Among its many expenses, Quinn Emanuel retained M. Kate Bundorf, a renowned healthcare economist, as an expert in this matter, and has taken on the costs of administering these class actions, having paid all costs and expenses associated with class notices and claims administration to JND Legal Administration. Swedlow Dec. ¶ 24. In addition, Quinn Emanuel intends to bear the additional costs associated with JND's administration of the judgment amount from the Department of Treasury and subsequent disbursement to the class members. *Id.*

The CEO's fears proved to be well-founded as the litigation progressed. While this court adopted Quinn Emanuel's position that the risk corridor statute is money-mandating and that QHP issuers may proceed under the Tucker Act, the majority of the Court of Federal Claims judges who assessed risk corridor cases ruled for the government, holding that QHP issuers were not entitled to recover a dime. *See Maine Community Health Options v. United States*, 133 Fed. Cl. 1 (2017) (Bruggink, J.); *Blue Cross and Blue Shield of North Carolina v. United States*, 131 Fed. Cl. 457 (2017) (Griggsby, J.); *Land of Lincoln Mutual Health Insurance Co. v. United States*, 129 Fed. Cl. 81 (2016) (Lettow, J.). As the court is aware, the Federal Circuit agreed with the majority of Court of Federal Claims judges that QHP issuers were not entitled to any risk corridors recovery. *See Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018). The Federal Circuit ruled that Congress had impliedly repealed the government's obligation to make full risk corridors payments when it passed an appropriations rider prohibiting the Department of Health and Human Services from making the payments out of certain funds. *Id*. at 1329. The Federal Circuit's ruling effectively left the *Health Republic* and *Common Ground* cases dead in the water. But neither this setback nor any of the preceding adverse Court of Federal Claims decisions deterred Quinn Emanuel, which pressed on, devoting substantial time and effort to the initial appeal, petition for *en banc* rehearing, Supreme Court certiorari stage, and Supreme Court merits stage—all on the exceedingly small chance the U.S. Supreme Court would agree to hear the case and reverse the Federal Circuit. *See supra* § III.A.

Quinn Emanuel's work on the risk corridors matters is thus the epitome of a campaign in which class counsel undertook a significant, ever-increasing commitment to a matter despite low odds of success. Quinn Emanuel was the first to file suit on behalf of what is undeniably the largest group of risk corridors plaintiffs, regarding an issue with no binding precedent; the government

vehemently opposed the classes' efforts to recover; and Quinn Emanuel aggressively litigated both the *Health Republic*/*Common Ground* cases and parallel cases, even after trial and appellate courts handed risk corridor plaintiffs loss after loss. This is precisely the context in which the risk of nonrecovery justifies a substantial award of attorneys' fees. See *Kane Cty.*, 145 Fed. Cl. at 19; *Quimby*, 107 Fed. Cl. at 133; *Moore*, 63 Fed. Cl. at 789.

D. Contingency Fees Far in Excess of 5% Are Regularly Negotiated in Similar Cases

The contingency fee parties have negotiated or would negotiate in a free market is a key factor in assessing the reasonableness of class counsel's fee request. Silver Dec. ¶ 21-22; Fitzpatrick Dec. ¶ 13. This is so because using rates determined at the outset of a case avoid the risk that "hindsight alters the perception of the suit's riskiness." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718–19 (7th Cir. 2001). "Only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty." *Id*. at 719. As previously noted, the risk corridors cases carried significant uncertainty at their inception: there was no case law interpreting Section 1342; the issue of whether a statute is "money-mandating" is not often litigated; and the ultimate strength of the government's defenses (as well as their full scope) was unknown. *See supra*. Sec. III.C. Rates negotiated by individual litigants at the outset of other risk corridor cases, and at the outset of commercial litigation more generally, thus provide invaluable guidance to the Court in assessing the reasonableness of class counsel's fee request. *See also Quimby*, 107 Fed. Cl. at 134 ("A contingent fee that is reached by the free consent of private parties should be respected as fair as between them.").

Quinn Emanuel's 5% fee request is significantly lower than the contingent fees routinely found in both risk corridors litigation and commercial litigation more generally. Fitzpatrick Dec. ¶¶ 22-23; Silver Dec. ¶¶ 49-67. "Attorneys regularly contract for contingent fees between 30%

and 40% with their clients in non-class, commercial litigation." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 123 (D.N.J. 2012); *see also Acevedo v. Brightview Landscapes, LLC*, No. CV 3:13-2529, 2017 WL 4354809, at *19 (M.D. Pa. Oct. 2, 2017) ("Generally, a request of one-third of the settlement fund comports with privately negotiated contingent fees negotiated on the open market.") (internal quotation marks omitted). Consistent with these rates, prior to filing suit, Health Republic and Common Ground both agreed to attorneys' fees of 25% of any gross recovery, whether through a judgment for the class or a class settlement.[2] Swedlow Dec. ¶ 8; Bonder Dec. ¶ 11; Mahaffey Dec. ¶ 8. Class counsel is thus requesting a fee one-fifth the size of the fee negotiated with sophisticated parties on the free market.

In the broader universe of risk corridors cases, attorneys for individual QHP issuers have entered into contingency fee arrangements at rates significantly higher than Quinn Emanuel's 5% request. After Quinn Emanuel filed *Health Republic*, several law firms began canvassing QHP issuers to sign them up as clients, and specifically on a contingent basis. During the opt in period, class counsel learned that certain QHP issuers who had not spoken to Quinn Emanuel believed that Quinn Emanuel would seek 33% of any settlement or award. Swedlow Dec. ¶ 13. Knowing that this was incorrect, Quinn Emanuel issued a supplemental class notice in *Health Republic* indicating that it would seek an attorney's fee of no greater than 5% of the recovery, and repeated that same commitment in each subsequent class notice in both the *Health Republic* and *Common Ground* class actions. Swedlow Dec. ¶ 15. Class counsel learned, however, that prior to the issuance of the supplemental class notice, other law firms entered into agreements with QHP issuers on a contingent basis to pursue risk corridors claims at percentages in multiples of the 5%

[2] Class counsel is not seeking a 25% attorneys' fee from Health Republic or Common Ground; instead, Health Republic and Common Ground will be subject to same fee award approved by the Court for all class members. Swedlow Dec. ¶ 8.

Quinn Emanuel seeks here. Swedlow Dec. ¶ 14. After the supplemental class notice issued, firms offering contingency fee arrangements were unwilling to match Quinn Emanuel's 5%. Swedlow Dec. ¶ 16. As a consequence, after the supplemental notice, some QHP issuers chose to opt into the class because Quinn Emanuel's offered fee rate was the lowest they were able to obtain. *Id*.

Ultimately, 153 QHP issuers joined the *Health Republic* class and 130 QHP issuers joined the *Common Ground* class, by orders of magnitude the largest contingent of issuers represented any firm. Swedlow Dec. ¶ 17. "Insurers are sophisticated purchasers of legal services," and their behavior can thus "define the market." *Synthroid*, 264 F.3d at 719. In this case, the market's behavior confirms that Quinn Emanuel's 5% cap was an excellent deal, compared to the contingency rates available to QHP issuers at the outset of the risk corridors cases. Silver Decl. ¶ 21 ("Because issuers are sophisticated business entities with easy access to legal services, competition enabled them to choose the option that would serve them best. They having done so, there is no reason to reduce QE's fees below the level that class members deemed to be reasonable when they opted in."). In evaluating their litigation options and deciding to opt-in, QHP issuers "presumably concluded that a better deal could not be reached with their own counsel." *Quimby*, 107 Fed. Cl. at 134 (approving a 30% contingency fee in part because class members' decisions to opt-in suggested that they could not find more favorable terms on the market). This factor weighs heavily in favor of approving class counsel's fee request.[3]

[3] Moreover, although not dispositive, the contingency fees typically approved by courts bear upon the rate that would be negotiated by hypothetical private parties in the marketplace "because they may influence the expectations of lawyer and client engaging in the hypothetical negotiation." *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *11 (N.D. Ill. Dec. 9, 2009); *see also Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 282–83 (D. Me. 2005) ("[C]ourts' awards necessarily affect the expectations of lawyers and, therefore, what they might agree to in voluntary negotiation."). As explained in detail in Section III.F, *infra*, Quinn Emanuel's 5% fee request is far below the rates typically approved in common fund litigation, and is also well below the rates

E. Class Members Were on Notice of Counsel's Likely Fee Request Before They Opted In

While it is uncertain as of the date of this petition whether any class members will object to class counsel's fee request, it is important to note the meaningful differences between this case and more run-of-the-mill class actions. The class members here are not unsophisticated consumers or workers; they are large, sophisticated entities, most of whom have their own in-house counsel or have separate outside counsel through whom they communicated with class counsel. Fitzpatrick Dec. ¶ 13. Unlike typical class actions—which bind thousands or potentially millions of individuals (who likely have never heard of the suit) unless they opt out—each of the class members here affirmatively chose to *opt in* to the *Health Republic* and *Common Ground* classes, which meant they affirmatively selected Quinn Emanuel as their counsel amid a competitive marketplace offering numerous other options of highly-qualified counsel, on both contingency and hourly bases. Swedlow Dec. ¶ 17; Fitzpatrick Dec. ¶¶ 11-13, 21. And doing so yielded them a 100% recovery amounting to approximately $3.7 billion, an extraordinarily uncommon result. Fitzpatrick Dec. ¶¶ 7, 27. This case could not be further afield from many class actions implicating the Court's gatekeeping function, where the proposed outcome "results in fees for class counsel but yields no meaningful relief for the class." *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017).

Against this backdrop—hyper-sophisticated class members and a competitive market for counsel—Quinn Emanuel informed QHP issuers that it intended to seek a contingency fee of up to 5% before the issuers opted in to the class. The class notice in *Common Ground* and the

typically approved in so-called "superfund" cases. *See Raulerson*, 108 Fed. Cl. at 680 (holding that the market negotiation factor weighed in favor of approving counsel's fee request because "Class Counsels' 33% fee is in line with the rates awarded in similar common fund cases"); *see also* Fitzpatrick Dec. ¶¶ 23-26.

supplemental class notice in *Health Republic* informed putative class members "that [Quinn Emanuel] will request no more than 5% of any judgment or settlement obtained for the QHP Issuer Class." *Health Republic* Dkt. 50-1; *Common Ground* Dkt. 24-1. When QHP issuers subsequently asked class counsel about attorneys' fees, class counsel informed them that it planned to seek a 5% fee. Swedlow Dec. ¶ 15. The class was thus on notice that Quinn Emanuel would likely seek 5% of the judgment, and each and every class member still chose to opt in instead of pursuing a different arrangement with individual counsel (many of which were available to them). Indeed, numerous QHP issuers received the class notice and decided to retain individual counsel, with multiple QHP issuers informing class counsel that they decided to file individually precisely because they preferred a different fee structure. Swedlow Dec. ¶ 14. Highly sophisticated class members made an informed decision to opt in and select Quinn Emanuel as counsel knowing the fee Quinn Emanuel would likely seek, just as QHP issuers who sought a different arrangement hired counsel to proceed individually. Class members' informed and affirmative decisions to select Quinn Emanuel as counsel amid myriad alternatives strongly favors approval of class counsel's fee request. *See* Fitzpatrick Dec. ¶ 21; Silver Dec. ¶ 21; *Quimby*, 107 Fed. Cl. at 134 (approving class counsel's fee request in part because "the claim form that each class member executed to opt into the class expressly notified class members that class counsel intended to apply 'for an award of attorney fees of thirty percent of the recovery of each class member, and costs,' which could 'be taken out of the total recovery of the class[.]'"); *Thomas v. United States*, 121 Fed. Cl. 524, 527 (2015), *rev'd in part on other grounds sub nom. Longnecker Prop. v. United States*, No. 2015-5045, 2016 WL 9445914 (Fed. Cir. Nov. 14, 2016) (approving class counsel's fee request in part because "[w]hen each class member opted-in to the litigation, he or she was provided with a court-approved notice stating that, if plaintiffs prevailed or reached a settlement,

class counsel would recover either a contingency fee of 35% of the total recovery or attorneys' fees pursuant to the URA, whichever amount was greater.").

F. The Percentage Sought is Far Less Than in Comparable Cases

When evaluating the reasonableness of a proposed contingency fee award, this Court considers the percentage awarded in other class actions. *Raulerson*, 108 Fed. Cl. at 680.

If approved, Quinn Emanuel's proposed 5% contingency fee would be among the lowest rates awarded in any case of any size. Fitzpatrick Dec. ¶¶ 23, 26; Silver Dec. ¶¶ 20, 69, 75-77. Courts routinely approve contingency fees of 30-40% because such fee structures are the norm for common fund cases such as this. Fitzpatrick Dec. ¶ 23; Silver Dec. ¶ 49; *Kane County*, 145 Fed. Cl. at 19 (finding "an award equal to one third of the common fund is commensurate with attorney fees awarded in other class action common fund cases"); *Raulerson*, 108 Fed. Cl. at 680 (noting that awards in class actions with common funds "typically range between 20-30% of the fund, with 50% being the upper limit" and finding award of 33% "in line with the rates awarded in similar common fund cases").

This is true even of cases (such as this one) that involve substantial class recoveries; courts routinely award counsel one-third of the relief obtained as fees, even in high-recovery cases. *In re Neurontin Antitrust Litig.*, 2:02-cv-01830, Dkt. 114 (D.N.J. Aug. 6, 2014) (33.33 % fee for $190 million); *In re Skelaxin*, 12-md-2343, Dkt. 747 (E.D. Tenn. June 30, 2014) (33.33% fee for $73 million); *In re Tricor Direct Purchaser Antitrust Litig.*, 05-340-SLR, Dkt. 543 at 8-10 (D. Del. Apr. 23, 2009) (30% fee for $250 million); *In re Relafen Antitrust Litig.*, 01-12239-WHY, Dkt.

297 at 7-8 (D. Mass. 2004) (33.33% fee for $175 million); *La. Wholesale Drug Co., Inc. v. Bristol-Myers Squibb Co.*, 01-cv-7951, Dkt. 22 (S.D.N.Y. Apr. 11, 2003) (33.33% fee for $220 million)[4].

In cases with a recovery as substantial as this one, courts sometimes apply a lower rate. Fitzpatrick Dec. ¶ 26. However, even compared with such cases, Quinn Emanuel's requested 5% fee is at the very lowest end of the spectrum. *See, e.g.*, *In re Southern Peru Copper Corp*., No. CIV.A. 961-CS, 2011 WL 6382006, at *1 (Del. Ch. Dec. 20, (awarding approximately $304 million in fees and expenses, totaling 15% of the $2 billion judgment); *In re Tyco Int'l, Ltd. Multidistrict Litig*., 535 F. Supp. 2d 249 (D.N.H. 2007) (awarding $464 million in fees, representing 14.5% of $3.3 billion recovery); *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998) (in case involving recovery in excess of $1 billion, fee of $143,780,000, or 14% of the total fund was reasonable and appropriate); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014) (holding that that requested attorney fee award representing 9.56% of total recovery, or approximately $544.8 million, was fair and reasonable); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F. Supp. 2d 732 (S.D. Tex. 2008) (holding that that requested attorney fee award representing 9.52% of total recovery, or approximately $688 million, was fair and reasonable); *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (approving fees of $220 million, representing 6.511% of the approximately $ 3.4 billion fund).

In one recent case, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014), the Court conducted a survey of so-called

[4] Where not specified in published opinions, Quinn Emanuel has calculated total recovery based on the approved fee award.

"megafund" cases and provided its thoughts on a graduated scale for attorneys' fees. The scale set forth in *Interchange Fee* suggested a marginal fee percentage at various levels of recovery; as recoveries go higher, the marginal fee percentage decreases. *Id.* at 445. Using that matrix, which is set forth below, the *Interchange Fee* Court awarded class counsel $544.8 million in fees out of a $5.7 billion settlement fund, representing a contingent fee of 9.56%.

Bracket	**Fee percentage**	**Marginal fee**
0–$10 million	33%	$3.3 million
$10 million-$50 million	30%	$12 million
$50 million-$100 million	25%	$12.5 million
$100 million-$500 million	20%	$80 million
$500 million-$1 billion	15%	$75 million
$1 billion-$2 billion	10%	$100 million
$2 billion-$4 billion	8%	$160 million
$4 billion-$5.7 billion	6%	$102 million
TOTALS	(average) 9.56%	$544.8 million

Id. Applying the *Interchange Fee* Court's framework to this case would result in an 11% contingency fee. Nevertheless, Quinn Emanuel requests ***less than half*** that amount. Accordingly, this factor also supports Quinn Emanuel's requested award.

G. Size of Award

When evaluating the reasonableness of proposed fees, this Court considers the size of the award relative to the total recovery for the class. *Raulerson v. United States*, 108 Fed. Cl. 675, 680 (Fed. Cl. 2013). This factor also favors the requested award.

This is not a class action where the class members will receive little—either as a collective or as individuals—while counsel is enriched. Here, class members will receive 100% of their damages, net of any fees the Court awards Quinn Emanuel. Individual class members will receive millions of dollars—in some cases, hundreds of millions of dollars. Where the class recovery is so high (particularly on a per-class member basis), courts regularly approve fee awards that are

small in comparison. *See, e.g.*, *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (noting $220 million fee award was "small in comparison" to the $3.3 billion recovery for the class); *In re Southern Peru Copper Corp.*, 2011 WL 6382006, at *1 (awarding approximately $304 million in fees and expenses out of $2 billion judgment); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249 (D.N.H. 2007) (awarding $464 million in fees out of $3.3 billion recovery).

H. A "Lodestar Cross-Check" Confirms Quinn Emanuel's Requested Fees Are Reasonable

The notice class members received before opting in stated that Quinn Emanuel would seek up to 5% of any judgment in fees "subject to, among other things, the amount at issue in the case and what is called a 'lodestar cross-check.'" *Health Republic* Dkt. 50-1; *Common Ground* Dkt. 24-1. Such a cross-check, although not mandatory, confirms that Quinn Emanuel's fee request here is reasonable.

1. A lodestar cross-check is an additional tool used to assess the reasonableness of class counsel fee requests

As an initial matter, a percentage-of-the-fund award based on the factors discussed in the previous sections is the clear preference in a common fund case such as this. *See, e.g.*, *Quimby v. United States*, 107 Fed. Cl. 126, 132 (2012). Courts providing such awards, including this one, routinely do so without conducting a "lodestar cross-check." *Id.*; *Raulerson v. United States*, 108 Fed. Cl. 675, 680–81 (2013); *Lambert v. United States*, 124 Fed. Cl. 675, 683 n.10 (2015) (rejecting the government's argument that a percentage analysis must be supplemented with "a more involved lodestar determination"); *see also Haggart v. Woodley*, 809 F.3d 1336, 1355 (Fed. Cir. 2016) (affirming a district court's discretion to employ either a percentage or lodestar method); 5 Newberg on Class Actions § 15:67 (Rubenstein ed., 5th ed. 2020) (approximately 50% of

common cases do not consider lodestar at all); Fitzpatrick Dec. ¶ 29 (citing studies showing that over half of courts do not employ the lodestar method primarily or as a cross-check).[5]

This is for good reason: there is widespread recognition that the lodestar approach has a number of negative side effects, including, *inter alia*, "tempting lawyers to run up their hours, and compelling district courts to engage in a gimlet-eyed review of line-item fee audits.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also* 7B Fed. Prac. & Proc. Civ. § 1803.1 (Wright and Miller, 3d ed. 2020). Opting for a lodestar approach to class counsel fees also ignores that the percentage method is the clear preference "when potential clients and lawyers bargain freely for representation," particularly, as here, for "sophisticated individual clients [with] high-stakes, complex claims worth hundreds of millions of dollars." *Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014).

For these reasons, a lodestar cross-check is an additional tool courts may use to assess the reasonableness of class counsel's fees, but it is not the primary tool and should not act as an artificial limit on such fees, because mechanically applying it threatens to "bring[] through the backdoor all of the bad things the lodestar method used to bring through the front door." Fitzpatrick Dec. ¶ 30. As *Geneva Rock Prods, Inc. v. United States*—which the class notice explicitly cited—confirms:

> [T]he lodestar cross-check provides information for the court's consideration, not a mandate[.] The lodestar multiplier does not need to fall within a specific range, but a comparison to the lodestar multipliers in similar cases may provide additional guidance to the court. Nevertheless, '*the lodestar cross-check does not trump the primary reliance on the percentage of common fund method*.'

[5] The "lodestar method" involves calculating the product of attorneys' hourly rate with the number of hours worked (the "lodestar"). *Haggart*, 809 F.3d at 1355. In common fund cases, courts then "appl[y] a risk multiplier when using the lodestar approach" to properly compensate class counsel for the risk of no or reduced recovery. *Id.*

119 Fed. Cl. 581, 595-96 (2015) (*rev'd in part on other grounds by Longnecker Prop. v. United States*, No. 2015–5045, 2016 WL 9445914, at *1 (Fed. Cir. Nov. 14, 2016) (emphasis added).

2. Quinn Emanuel's requested fees are within well-accepted ranges for lodestar multipliers for results such as these

The result achieved in this case—a 100% class recovery comprised of a nearly-$3.7B judgment fund, obtained after class counsel took on significant risk and continued to doggedly pursue the classes' interests after several potentially case-ending setbacks—supports a high lodestar multiple. Throughout many years of work on the *Health Republic* and *Common Ground* cases, Quinn Emanuel attorneys have put in almost 10,000 hours, at a blended hourly rate of approximately $1033 across partners and associates. Swedlow Dec. ¶ 23. In addition, Quinn Emanuel's supporting employees, including paralegals, spent over 400 hours on these matters at an average rate of approximately $325 per hour. Quinn Emanuel's lodestar for the *Health Republic* and *Common Ground* cases, including expenses, is over $10 million at historical rates, which would lead to an approximately 18-19x risk multiplier.[6] Although this is concededly at the higher end of the spectrum, is not at all unprecedented in a case where the benefit obtained for the class is so high. While multipliers in the majority of cases tend to be low, "multipliers increase as fund size increases," leading to "a not insignificant set of cases with lodestars that literally fall 'off these charts.'" 5 Newberg § 15:81; *see Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012) (affirming lodestar multiple of "66 times the value of [the lawyers' time and expenses]", or "$35,000 per hour worked," calculated as 15% of a $2.031 billion fund); *In re Merry-Go-Round*

[6] "The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting." *Id.* (quoting *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306 (3rd Cir. 2005); *Kane Cty., Utah v. United States*, 145 Fed. Cl. 15, 20 (2019) (same). It is therefore appropriate for this court to "rely on summaries submitted by the attorneys," rather than conduct a cumbersome "review actual billing records." *Rite Aid*, 396 F.3d at 307; *see also Geneva Rock*, 119 Fed. Cl. at 595; *Kane Cty.*, 145 Fed. Cl. at 20.

Enters., Inc., 244 B.R. 327, 335, 345 (D. Md. 2000) (granting fees worth 19.6 times the estimated lodestar, or 40% of a $71.2 million recovery); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. 03-civ-04578, 2005 WL 1213926, at *18 (E.D. Penn. May 19, 2005) (granting fees 15.6 times the estimated lodestar, or 20% of a $100 million settlement fund); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."). Further, because almost half of all courts in common fund cases do not use a lodestar check *at all*, even as a cross-check, 5 Newberg on Class Actions § 15:67, it is likely that the true number of high or double digit lodestar multiples is vastly underestimated.

These cases track the intuition that class counsel should be rewarded for the risk it takes on and the extent of the recovery it receives for the class. *See* 5 Newberg on Class Actions § 15:87 (citing "the risks counsel took" and "the results they achieved for the class" as the most important factors in assessing "the reasonableness of a lodestar multiplier"); *In re Enron Corp. Secs., Derivative, & Erisa Litig.*, 586 F. Supp. 2d 732, 752 (S.D. Tex. 2008) ("The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement [and] the skill of the attorneys[.]"); *In re WorldCom, Inc. Secs. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (noting that "public policy" supports a high multiplier where "[t]he size of the recovery achieved for the class . . . could not have been achieved without the unwavering commitment of Lead Counsel to this litigation."). Here, Quinn Emanuel achieved a class recovery that is not merely enormous in absolute terms, but also constitutes a complete recovery of claimed damages in the face of extraordinarily complex issues and a vigorous, determined adversary. The law supports rewarding that extraordinary result with a higher lodestar multiplier, as it incentivizes current and future class counsel to achieve the absolute best results possible. Silver Dec. ¶ 23

("The gross recovery per claimant—100 percent of the risk corridor payments that were due but not made—is exactly what the issuers hoped to secure when they opted into QE's classes. . . . In the private market, clients reward lawyers for winning their cases. They do not punish them by slashing their fees.").

In comparison, the law firms that convinced QHP issuers to file individual actions on a contingent fee basis will make multiples of the amounts Quinn Emanuel requests here. Quinn Emanuel could have proceeded in that way and increased the government's burden by filing over 150 separate lawsuits, but it did not. Instead, it pursued a class action that increased efficiency and allowed all class members to litigate in a much cheaper way. The fee Quinn Emanuel requests is large because of the number of class members who chose Quinn Emanuel as their counsel, and the strength of the results it obtained for them. Quinn Emanuel respectfully submits that success—particularly its cost effective and efficient nature—should also be rewarded.

IV. THE CLASS REPRESENTATIVES SHOULD RECEIVE INCENTIVE AWARDS

Finally, Quinn Emanuel requests the Court's approval of an $100,000 incentive award for each of Health Republic and Common Ground (the "Class Representatives") for their role as class representatives. Payment of incentive awards to class representatives is a reasonable use of settlement funds. *Russell v. United States*, 132 Fed. Cl. 361, 365 (2017). These awards are meant to help incentivize members of a class to take on the case and pursue the defendants for the greater whole.

Moreover, Quinn Emanuel agrees to deduct the requested incentive award funds from *its* fee award in this matter so that the payment of the requested incentive award will not otherwise diminish the proceeds paid to the class in any way.

When evaluating requests for incentive awards, district courts typically focus on the level of the representatives' involvement, whether or not they are institutional entities (that typically have

greater burdens in litigation than individual/consumer plaintiffs), and the amount of the requested award in comparison to the total amount obtained on behalf of the class. *See Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*¸ No. 10-CV-14360, 2015 WL 1498888, at *18-19 (E.D. Mich. Mar. 31, 2015) (applying these factors when assessing incentive award request); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-CV-12141-AC-DAS, 2015 WL 1396473, at *5 (E.D. Mich. Jan. 20, 2015) (same); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 1:05-md-01720, Dkt. 6169 (E.D.N.Y. Jan. 10, 2014) (same); *see also In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 BMC JO, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) (class representative's institutional nature warranted higher incentive award).

For the past four years, the Class Representatives have dutifully represented the Class in all matters related to this action. The Class Representatives significantly aided counsel with both understanding and prosecuting the case. *See* Bonder Dec. ¶ 13; Mahaffey Dec.¶ 7. The Class Representatives—two large institutional entities—also took a large risk in suing the government, a significant payor and key regulator. *See* Bonder Dec. ¶ 10; Mahaffey Dec.¶ 5. In all, through Quinn Emanuel and the Class Representatives' coordinated efforts, the Class has obtained full recovery of all sums owed—a judgment of nearly $3.7 billion. Given all of this, Quinn Emanuel respectfully submits that all factors support the requested $100,000 incentive awards.

V. CONCLUSION

For the foregoing reasons, Quinn Emanuel respectfully requests that the Court approve its application for attorneys' fees and costs. Specifically, Quinn Emanuel requests that the Court approve its application for an attorney's fee of 5% of the net recovery for the Non-Dispute Subclasses in *Health Republic* and *Common Ground*. In *Health Republic*, this amounts to an attorney's fee of $95,183,102.35 on a net recovery of $1,903,662,047.19; in *Common Ground*, this amounts to an attorney's fee of $89,665,569.32 on a net recovery of $1,793,311,386.47. Finally,

Quinn Emanuel respectfully requests approval of a class incentive fee of $100,000 to be paid to each of Health Republic and Common Ground, to be taken from class counsel's attorneys' fee award.

Dated: July 30, 2020

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

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Attorneys for Plaintiff Common Ground Healthcare Cooperative and the Class

Exhibit 1

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

DECLARATION OF STEPHEN A. SWEDLOW

I, Stephen Swedlow, declare:

1. I am the Managing Partner in the Chicago office of Quinn Emanuel Urquhart & Sullivan LLP, appointed class counsel in this matter. Except as set forth below, I make this declaration of my own personal knowledge and, if called to testify, I could and would competently testify hereto under oath.

2. As the largest firm in the nation devoted solely to business litigation—with over 800 litigators worldwide—Quinn Emanuel has been described as a "global force in business litigation" by the *Wall Street Journal* and a "litigation powerhouse" by *The American Lawyer*. Quinn Emanuel has also been recognized by *Legal Business* three times as "US Law Firm of the Year." And *The American Lawyer* named the firm in 2015 and 2019 as a "Litigation Department of the Year: Finalist." Quinn Emanuel also was named "firm of the year" for Commercial Litigation in 2015 by the *Legal 500 USA Awards*. In 2020, Quinn Emanuel was voted the "most feared" firm in the world after independent BTI Consulting Group surveyed over 350 major companies who identified Quinn Emanuel as the firm they least wanted to face as opposing counsel.

3. When representing plaintiffs, Quinn Emanuel has won over $70 billion in judgments and settlements. Quinn Emanuel also tries more cases than almost any other major law firm. The firm's partners have first-chaired over 2,300 trials and arbitrations, including five 9-figure jury verdicts. The firm has also obtained forty-three 9-figure settlements and nineteen 10-figure settlements.

4. Quinn Emanuel's class action and healthcare practices are recognized as among the nation's best. For example, in 2013 and 2016, Quinn Emanuel was named the "Class Action Practice Group of the Year" by *Law360* for its work for plaintiffs and defendants in class action litigation.

5. The two other Quinn Emanuel partners who led this litigation along with me were J.D. Horton and Adam Wolfson. I have been lead counsel in over 20 trials, multi-party jury trials and arbitrations, and have argued (and won) appeals, including several before state Supreme Courts and federal appellate courts. In the context of class action litigation, I have been lead trial counsel for two class action trials to verdict. In the specific context of health insurance class actions, prior to these cases at issue and subject to this fee petition, I have successfully led class action settlements of $63 million and $100 million for health plan class actions. I was a Trial Lawyer of the Year finalist in 2003 for obtaining the largest civil verdict in Illinois history, and have been named an Illinois "Super Lawyer" each year from 2006 through 2020.

6. J.D. Horton is a partner in Quinn Emanuel's Los Angeles office and has represented health plans in civil and regulatory actions for over 20 years. He has obtained settlements of $40 million and $28 million on behalf of two health plan classes related to prescription drug purchases and represented the Kaiser Foundation Health Plan in multiple enforcement proceedings brought by the Department of Managed Health Care, including in a 40-

day trial that ended with the Court rejecting virtually the entirety of the Department's case. Among many other health plan providers, he has represented Blue Shield of California in a declaratory relief action against the Department of Managed Health Care, as well as a major health care service plan in an arbitration against a large IPO.

7. Adam Wolfson is a partner in Quinn Emanuel's Los Angeles office, focusing on class actions and plaintiff-side litigation. He was one of the principal co-lead counsel for plaintiffs in *In re Polyurethane Foam Antitrust Litigation*, where he helped obtain more than $430 million in settlements on behalf of a certified class in a case alleging a price-fixing conspiracy in the flexible polyurethane foam industry. He also obtained a $283 million patent infringement and breach of contract trial verdict in 2014 on behalf of ViaSat, Inc. relating to its competitor's theft of innovative intellectual property and satellite designs. He is currently on the plaintiffs' Executive Committee in In re Combat Arms Earplug Product Liability Litigation, in which the plaintiffs, service members from all branches of the U.S. Armed Forces, are suing to recover for damages they suffered from the use of defective earplugs 3M sold to the USAF for over a decade. He is also currently representing a putative class of consumers harmed by supracompetitive ATM fees set by collusion amongst Visa, MasterCard, and their constituent bank investors, and is further representing a putative class of models in relation to breach of contract and labor law claims arising out of their misclassification as independent contractors by the nation's top modeling agencies.

8. In February 2016, Quinn Emanuel became the first law firm to file suit on behalf of a Qualified Health Plan (QHP) issuer to recover unlawfully withheld risk corridor payments under Section 1342 of the Affordable Care Act when we filed the *Health Republic* class action. The Health Republic lawsuit covered benefit years 2014 and 2015. The firm agreed to take the

case on contingency, and Health Republic agreed to an attorney's fee of 25% of the gross recovery in the event of a class action settlement or judgment. In 2017, Quinn Emanuel filed the *Common Ground* class action on behalf of QHP issuers seeking to recover unlawfully withheld risk corridor payments for the 2016 benefit year. Quinn Emanuel again agreed to take the case on contingency, and Common Ground agreed to an attorney's fee of up to 25% of the gross recovery in the event of a class action settlement or judgment. Quinn Emanuel, however, is not seeking a 25% attorney's fee from Health Republic or Common Ground. Instead, Health Republic and Common Ground will be subject to same attorney's fee award approved by the Court for all class members.

9. After Quinn Emanuel investigated, researched and created a viable legal theory and strategy for recovery for QHP issuers via the Health Republic complaint, other in-house and outside counsel law firms began to contact me to discuss the legal theories and inquire about strategy for pursuing a claim against the government on behalf of other QHP issuers who at that time were potential opt in members of the Health Republic class. I shared with the in-house and outside counsel our collective thoughts on legal and settlement strategy to further the goal of increasing collective recovery for all QHP issuers. My partners and colleagues at Quinn Emanuel also participated in this information share with other counsel for the purpose of increasing the overall likelihood of recovery for QHP issuers.

10. In 2016, the government initially began settlement discussions with Quinn Emanuel, and I sought to include many of the large QHP issuer claimants' counsel in these discussions regardless of whether these entities had indicated one way or the other their intentions regarding opting into the pending class action. The government indicated to me at that time its desire for all QHP issuer claims under the Risk Corridors provisions of the ACA to be

addressed uniformly and through the class action mechanism we created, as it would provide efficiencies and conserve the resources of both QHP issuers and the Court of Federal Claims, which otherwise would have had to adjudicate hundreds of additional individual lawsuits. Unfortunately settlement discussions with the government stalled early in 2017 and the cases had to continue to be litigated for the next 3 plus years before final resolution.

11. Several months after Quinn Emanuel filed the first Risk Corridors ACA claim under the Tucker Act in this Court, several other law firms began aggressively recruiting and soliciting QHP issuers to file separate individual Risk Corridors cost recovery lawsuits. In some circumstances these law firms sought to represent individual QHP issuers on contingency and some sought to represent entities and charge customary hourly rates. Some firms had existing client relationships with QHP issuers and sought to capitalize on those relationships to secure the representation. In many cases, outside law firms would vet their clients' decision regarding whether or not to ultimately opt into these class actions, file individually or wait and see whether the lawsuit was successful. I personally spoke to dozens of representatives of QHP issuers contemplating whether to opt into the Health Republic class action. I met with QHP issuer representatives (both in house counsel, government representatives at the state and local level and outside counsel) in person all over the country to address their concerns and answer questions.

12. At some point in the litigation process, the Health Republic (then later the Common Ground) classes were certified and the decision for QHP issuers had to be made whether to opt in to the classes. By that time, many individual cases had also been filed pursuing the same legal strategy in the same venue, and QHP issuers had options for counsel. Law firms at that time were variously offering hourly and contingency fee arrangements.

13. The initial class notice in the Health Republic case did not include a specific provision regarding attorneys' fees, as a determination at that time prior to settlement or judgment would be premature. In addition, that determination would be subject to Court approval and award. However, during the opt in period, it became clear that some QHP issuers who had not spoken or met with me (along with outside counsel at other firms) had concluded that Quinn Emanuel would seek 33% of any settlement or award. As a result of this incorrect assumption, several QHP issuers filed individual lawsuits in the Court of Federal Claims prior to QE's supplemental notice to potential class members (discussed below).

14. Specifically, I am aware of other law firms entering into agreements with QHP issuers on contingency to pursue these Risk Corridors claims at percentages in multiples of the 5% Quinn Emanuel is seeking in this fee petition. In addition, certain other QHP issuers informed me and my partners that they chose to file an individual suit with different counsel because they preferred a different (hourly) fee structure as opposed to the uncertainty of a contingency fee award.

15. During the opt-in process, on the day Quinn Emanuel learned of the misunderstanding related to the contingency rate Quinn Emanuel may ultimately request from the Court in the context of representing QHP issuers, Quinn Emanuel submitted (and the Court subsequently approved) a supplemental class notice informing potential class members that Quinn Emanuel would seek an attorney's fees of no greater than 5% of the recovery. This supplemental notice was sent to every QHP issuer prior to the deadline for deciding whether to opt into the class, so no class member was obligated to opt in prior to receipt of this notice. Further, I personally communicated with dozens of QHP issuer representatives and told each of them when deciding whether or not to opt into the class actions to assume the attorneys' fees for

these actions would be 5% of any recovery whether by settlement or judgment, but that the determination of the fee award is for the Court to decide. As a consequence, every class member was on notice of the potential for a 5% attorney fee. Quinn Emanuel included this exact same language regarding the attorneys' fees in the *Common Ground* class notices as well.

16. After the supplemental notice was issued, I engaged in further conversations with QHP issuer representatives who informed me that even after the 5% fee disclosure was publicly made, other law firms willing to engage QHP issuers on contingency fee engagements were still not willing to match this 5% contingency fee rate. As a consequence, after the supplemental notice, some QHP issuers chose to opt into the class after unsuccessfully seeking to obtain a contingency rate lower than 5% from other counsel.

17. Ultimately, 153 QHP issuers joined the *Health Republic* class and 130 QHP issuers joined the *Common Ground* class, representing approximately one-third of the total value of all risk corridor claims. This represents by orders of magnitude the largest contingent of QHP issuers represented by any law firm in risk corridors litigation. Unlike typical class actions—which bind thousands or potentially millions of individuals unless they opt out—each of the class members here affirmatively chose to *opt in* to the *Health Republic* and *Common Ground* classes after receiving notice that included information about the potential attorneys' fees. In effect, all QHP issuers who chose to opt in affirmatively selected Quinn Emanuel as their counsel amid a competitive marketplace offering numerous other options of highly-qualified counsel. Some of the opt in decisions were made by financially sophisticated decision-makers motivated primarily by maximizing value related to an investment or for purposes of maximizing returns for payment of creditors. All of these decision makers were consistently informed that for their financial models they should assume 5% for attorneys' fees.

18. Reaching this level of participation was a time consuming and arduous endeavor. I and other Quinn Emanuel attorneys flew across the country to meet with QHP issuers—some of whom became class members, and some of whom did not—and extensively addressed and provided insights regarding the merits of their risk corridors' claims and their litigation options. As part of this process, Quinn Emanuel answered detailed questions from QHP issuers about their rights against the government. Quinn Emanuel provided input even to individual litigants that chose not to join the class, because Quinn Emanuel recognized that, even if it did not have a tangible stake in the parallel individual lawsuits, assisting those plaintiffs on virtually identical claims benefited the classes it represented.

19. In addition to achieving a 100% recovery for the class members, Quinn Emanuel provided value to the government, which at one point indicated that it would prefer to administer risk corridor claims through counsel's class action mechanism rather than through a series of individual actions. Quinn Emanuel's successful efforts to organize the Health Republic and Common Ground classes reduced the government burden of litigating hundreds of additional individual actions that might otherwise have been filed.

20. During the four-plus year pendency of this litigation, Quinn Emanuel fielded often-daily inquiries from class members (and other QHP issuers) about a variety of litigation and ACA-related topics, including (but by no means limited to) the susceptibility of risk corridor claims to government offset, the interaction between this litigation and state insolvency laws, possible settlement of claims, and the timing of any recovery. Quinn Emanuel researched and answered class members' often-individualized questions.

21. The magnitude of the government's failure to meet its obligations contributed significantly to the complexity of this matter. Predictably, the government's failure to pay tens

or hundreds of millions of dollars that it promised to QHP issuers forced numerous class members into liquidation and brought others to the brink of insolvency. Quinn Emanuel took steps to enable class members to leverage their risk corridor claims to obtain financing necessary to stay in business, and regularly consulted with and advised liquidators and state insurance officials. QE did not charge for any of its time or efforts to help class members secure financing and did not seek any portion of any payments made that were secured by the claims at issue in this case. Further, in every discussion I had with any class member, QHP issuer, or financing entity, I disclosed that for any transaction, both parties should assume an attorney's fee of 5% to be deducted from any settlement or recovery in these matters.

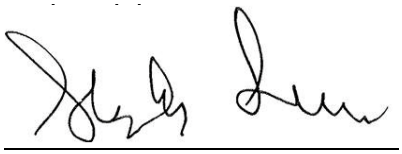
22. When other risk corridor cases made their way to the Federal Circuit and eventually the Supreme Court, Quinn Emanuel was an active participant. At the panel stage at the Federal Circuit, Quinn Emanuel submitted amicus briefs on behalf of Health Republic and an industry group called Alliance of Community Health Plans. At the *en banc* rehearing stage, Quinn Emanuel submitted two more amicus briefs, one on behalf of Health Republic and Common Ground, and one on behalf of a consortium of healthcare economists. At the Supreme Court, Quinn Emanuel submitted amicus briefs on behalf of the healthcare economists at both the certiorari and merits stage, and extensively consulted with counsel for the appellants with respect to both briefing and oral argument. Quinn Emanuel engaged in these efforts—devoting substantial time and effort to the initial appeal, petition for *en banc* rehearing, Supreme Court certiorari stage, and Supreme Court merits stage—all on the sometimes low percentage chance the U.S. Supreme Court would agree to hear the case and reverse the Federal Circuit.

23. To date, including both the *Health Republic* and *Common Ground* matters, Quinn Emanuel attorneys have worked almost 10,000 hours on these cases, at a blended rate of

approximately $1,033 per hour. The Quinn Emanuel partners who have billed more than 100 hours on this matter have billed at rates ranging from $870 to $1,250 per hour. The Quinn Emanuel associates who have billed more than 100 hours on this matter have billed at rates ranging from $600 to $905 per hour. Moreover, to date, Quinn Emanuel paralegals, litigation support staff, and summer associates have worked over 400 hours on these matters at a blended rate of approximately $325 per hour. In total, Quinn Emanuel's lodestar on the *Health Republic* and *Common Ground* cases is over $10 million. Quinn Emanuel expects to continue devoting substantial resources to litigating on behalf of the Dispute Subclasses and is committed to pursuing claims for each individual class and subclass member until each and every entity is satisfied with the outcome or all appellate options are exhausted.

24. Quinn Emanuel has borne and will continue to bear costs associated with this litigation that Quinn Emanuel expects to pay out of the attorney's fee award in these matters. For example, Health Republic and Common Ground each request a $100,000 class representative incentive award. Quinn Emanuel has requested that the incentive awards come out of its attorney's fee award instead of the amount to be paid to the classes. In addition, Quinn Emanuel retained M. Kate Bundorf, an renown healthcare economist, as an expert in this matter, and paid her directly as an expert for her assistance and expertise. Quinn Emanuel further has taken on the cost of administering these class actions, having paid all costs and expenses associated with class notices and claims administration to JND Legal Administration. Quinn Emanuel intends to bear the additional costs associated with JND's administration of the receipt of over $3.7 billion in total judgment amount from the Department of Treasury and subsequent disbursement of appropriate amounts to hundreds of entities each with specific payout instructions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 30, 2020.



Stephen A. Swedlow

Exhibit 2

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Health Republic Insurance Co, v. United States

No. 16-259C

Common Ground Healthcare Cooperative v. United States

No. 17-877C

DECLARATION OF BRIAN T. FITZPATRICK

I. My background and qualifications

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

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

the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Although almost all certified class actions settle before trial, the few that go to trial often settle even after judgment because there are appeals. My study includes such settlements. Moreover, other studies of class actions, which have been confined to one subject matter or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period (2006-2007). *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is also several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. Since then, this study has

been relied upon regularly by a number of courts, scholars, and testifying experts.[1] I have attached this study as Exhibit 2 and will draw upon it in this declaration.

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[1] *See, e.g., Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *In re Wells Fargo & Co. S'holder Derivative Litig.*, 2020 WL 1786159 at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, 2020 WL 949885 at *52 (D. Mass. Feb. 27, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at *17 (S.D.N.Y. Apr. 24, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re*

4. In addition to my empirical works, I have also published many papers on how law-and-economics theory affects the incentives of attorneys and others in class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "Class Action Lawyers"). The culmination of these papers is a book published last year by the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS. The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively, and that courts should provide consistent and proper incentives to encourage such private attorney general behavior. I have sent a copy of this book to every active member of the federal judiciary and will draw upon it in this declaration.

5. I have been asked by class counsel to opine on whether the attorneys' fees they have requested here are reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel; I have attached a list of these documents in Exhibit 3 (and describe there how I refer to them herein). As I explain, based on my study of settlements across the country, I believe the request here is within the range of reason.

Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

II. Litigation background

6. Class counsel initiated here what would become an avalanche of litigation against the federal government for failure to live up to its obligations to subsidize health insurers under the Affordable Care Act. They filed the first suit of this kind in February 2016, on behalf of Health Republic, as a putative class action seeking unpaid subsidies for 2014 and 2015. Thereafter, many other insurers brought their own suits, and class counsel brought a second putative class action, in June 2017, on behalf of Common Ground seeking unpaid subsidies for 2016. This Court denied the government's attempt to dismiss the *Health Republic* suit and granted class counsel's requests to certify the *Health Republic* and *Common Ground* cases as class actions. In the class notice that was sent out, putative class members were told that, if they prevailed, class counsel would seek fees of up to 5%. Over 150 insurers opted into *Health Republic* and 130 insurers opted into *Common Ground*.

7. Although class counsel filed first, the non-class suits brought by the other insurers proceeded more quickly and the government's defenses to this litigation were tested on appeal in another suit. But, as would be expected given their clients' own enormous stakes at issue, class counsel participated extensively in those appeals on behalf of *amici*. Although the government prevailed in the Federal Circuit, it lost in the U.S. Supreme Court. Thereafter, the government threw in the towel and agreed to pay all of the monies due (though I understand a few entities that have been separated into different subclasses continue to dispute the government's attempt to offset other alleged debts against their risk corridors recoveries). In *Health Republic*, the class members will share in approximately $1.9 billion. In *Common Ground*, they will share in approximately $1.8 billion.

8. Class counsel have now moved the court for an award of attorneys' fees equal to 5% of each of these stipulated judgments. It is my opinion that the fee requests are more than reasonable in light of the empirical studies and research on economic incentives in class action litigation.

III. The court's role in setting attorneys' fees in class actions

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

10. This task usually calls for the court to undertake a robustly independent assessment of any fee request made by class counsel in order to protect class members from exploitation by class counsel. This is the case because, in federal district court, class members are included in a money damages class without their affirmative consent. Although they can opt out, *see* Fed. R. Civ. P. 23(b)(3), because class action notice is imperfect, class members may not know about their opportunity to opt out. As such, they may not be able to vote with their feet if they do not like class counsel's fee request. Moreover, even when class members do receive notice, they often have only small amounts of money at stake. As such, opting out and pursuing the defendant individually is often not a realistic option. Thus, in many class actions, either the court protects the class or the class has no protection at all.

11. Things are very different in these cases. This Court does not follow the opt-out class action rule that is applicable in federal district court. The rule here is opt in: class members

are not included in the class unless they affirmatively decide to join. *See* RCFC 23(c)(2)(B)(v). This means that anyone in these classes explicitly decided that the deal proposed by class counsel is better than the deal they could get on their own. If class members had only small amounts of money at stake, that would not be saying very much for the reasons stated in the previous paragraph. But many of the class members here have enormous amounts of money at stake; most, if not all, of them could have pursued the government on their own (and, as I noted above, some of the putative class members did just that).

12. In light of these differences, the concerns that rightly lead courts to worry about protecting class members from exploitation by class counsel simply do not apply with the same force here. As this Court put it in *Quimby v. United States*:

> But the consideration of another factor . . . leads the Court to conclude that no downward adjustment of the requested fee percentage is warranted. A contingent fee that is reached by the free consent of private parties should be respected as fair between them. In the case at hand, the claim form that each class member executed to opt into the class expressly notified class members that class counsel intended to apply "for an award of attorney fees of thirty percent of the recovery of each class member, and costs" . . . . Thus, by opting into the class, each member effectively accepted the offer of representation for a thirty percent contingency fee, and presumably concluded that a better deal could not be reached with their own counsel . . . .

107 Fed. Cl. 126, 134 (2012).

13. For these reasons, the fee request in this case starts with the wind at its back in a way that most fee requests in class actions do not. Sophisticated parties with large stakes do not need the court to protect them from class counsel; they can amply protect themselves. In particular, they would not have opted into the class if they could have obtained a better fee arrangement on their own. As such, the fee request here has already passed a market test of its reasonableness. In my opinion, courts should be very reluctant to displace a market-tested fee request with their own

judgment about what it is fair to ask class members to pay class counsel because that runs the risk of creating mixed and counterproductive incentives for current and future class counsel.

IV. Percentage versus lodestar method

14. At one time, courts awarding fees under the common fund doctrine used the lodestar method. Under the lodestar method, courts multiplied the number of hours worked by class counsel by a reasonable hourly rate as well as by a multiplier for taking on risk and other reasons. The court then deducted this product from the class's recovery and awarded it to class counsel. But the lodestar method has fallen out of favor, largely for two reasons. First, it is difficult to calculate the lodestar because courts have to review voluminous time records and the like. Second, and most importantly in my view, the lodestar method does not align the interests of counsel with the interests of the plaintiffs because counsel's recovery does not depend on how much the class recovers. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2051-52; *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, *reprinted in* 108 F.R.D. 237, 242-49 (1985) (hereinafter "Third Circuit Task Force"). Very few courts use the lodestar method anymore. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of class action settlements); Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (hereinafter "Eisenberg-Miller 2017") (finding the lodestar method used only 6.29% of the time from 2009-2013, down from 13.6% from 1993-2002 and 9.6% from 2003-2008).

15. Instead, most courts today use what is known as the "percentage method." Under the percentage method, courts select a percentage that they believe is fair to counsel, multiply the settlement amount by that percentage, and then award counsel the resulting product. The

percentage method overcomes both of the deficiencies of the lodestar method. First, the percentage method is easy to calculate because courts need not review voluminous time records and the like. Second, and, again, most importantly in my view, the percentage method aligns the interests of counsel with the interests of the plaintiffs because the more the class recovers, the more class counsel receives. *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052. This is why private parties—including sophisticated corporations—that hire lawyers on contingency always use the percentage method and not the lodestar method. *See, e.g.,* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012). *See also* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267 (1998).

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

17. In these cases, the judgments are all cash. Thus, their value can be easily and reliably calculated. As such, it is my opinion that the percentage method should be used here.

IV. Selecting the percentage

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

19. Consider first factor "(4) the fee that likely would have been negotiated between private parties in similar cases." As this Court noted in *Quimby*, when class members with large stakes opt into a class with knowledge of the potential fee request, that is akin to an arms-length fee negotiation in the private market because, if the private market could beat class counsel's fee request, class members would have gone elsewhere. *See* 107 Fed. Cl. at 134 (invoking the factor "the fee that likely would have been negotiated between private parties in similar cases" as the basis for concluding "no downward adjustment of the requested fee percentage is warranted" when

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

class members opt in). Thus, as I noted above, for this reason alone, this factor supports class counsel's fee request.

20. But this factor supports class counsel's fee request in other ways. First, when class counsel was retained by the representative plaintiffs at the outset of this litigation, the plaintiffs agreed to pay class counsel 25% in fees regardless of the size of the recovery. *See* Swedlow Dec. ¶ 8. The request here is therefore *much lower* than what sophisticated parties determined was needed to induce class counsel to take on the risks of this litigation. *See, e.g., In re Synthroid II*, 325 F.3d 974, 976 (7th Cir. 2003) (relying on fee contracts from large-stakes class members who "hired law firms to conduct this litigation" as evidence for market-based class action fee awards); *In re Synthroid I*, 264 F.3d 712, 719-20 (7th Cir. 2001) (instructing courts to examine "actual agreements" between large-stakes class members and their attorneys in that very litigation to set market-based fees in class actions).[3]

21. Second, as I noted above, after class counsel filed *Health Republic*, a number of other insurers filed their own suits. The lawyers who brought these suits tried to lure many of the class members into proceeding separately as well. Although I am not privy to the fee arrangements that were offered to all the class members by these competing lawyers, I understand that competing law firms offered insurers contingency fee rates that were *multiples* of the 5% sought by class counsel. *See* Swedlow Dec. ¶¶ 13-15. I further understand that after Quinn Emanuel publicly made its 5% fee disclosure, other law firms were *not* willing to match the 5% rate. *Id*. It is no

[3] The Seventh Circuit is a useful guide for this factor because it holds that fees in class actions should approximate what private parties would have agreed to pay class counsel had they had the opportunity to do so. *See, e.g, Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services.").

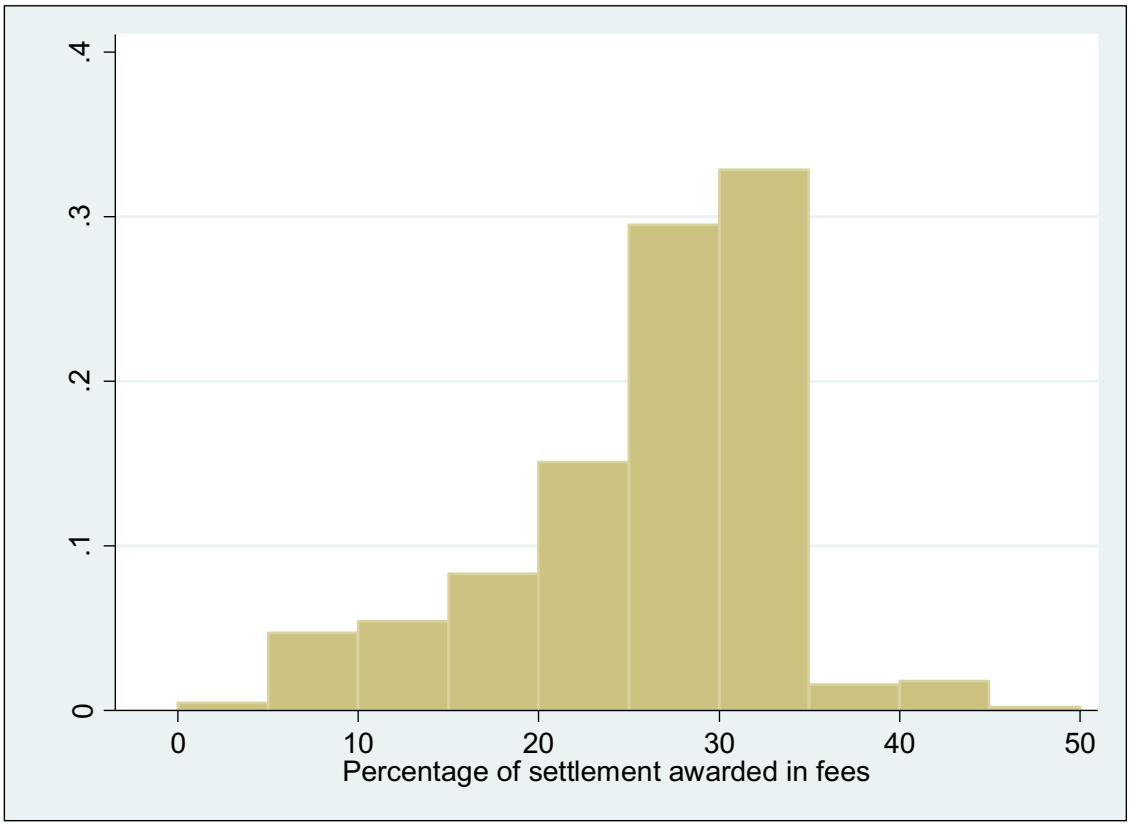
wonder that over 150 insurers took class counsel's deal instead. This, too, suggests that class counsel's fee requests are more than reasonable here.

22. Finally, although the recovery in this case is very substantial—more on that below—the best available data that we have from sophisticated parties who hire lawyers on contingency suggests that they agree to pay them normal fee percentages even when damages might be enormous. The best study that I have found in my research comes from patent litigation. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012). Patent lawsuits can involve billions of dollars and the largest corporations in America. Yet, Professor Schwarz found that the two main ways of setting the fees for contingent fee lawyers in these cases are: a graduated rate and a flat rate. Of the agreements using a flat fee, the mean rate was 38.6% of the recovery. Of the agreements that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%. *See id*. at 360. These percentages are all *well above* the fee requests here.

23. Consider next factors "(6) the percentage applied in other class actions" and "(7) the size of the award." The requested awards here are 5% of the judgments. If granted, this will make the fee percentage in these cases two of the very *smallest* awarded in federal court this year. According to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study, supra,* at 833-34, 838. This can be seen graphically in Figure 1, which shows the distribution of all of the percentage-method fee awards in my study. In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). The request here would fall into the second bar from the left, the one comprising awards between 5% (inclusive) and 10%. That

bar and the bar to the left of it (awards between 0% and 5%) constitute less than five percent of all awards. This means that *more than ninety-five percent of awards* have been greater than the ones requested here. My numbers largely agree with the other large-scale academic studies of class action fee awards. *See* Eisenberg-Miller 2010, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) (hereinafter "Eisenberg-Miller 2010") (finding mean and median of 24% and 25%, respectively); Eisenberg-Miller 2017, *supra*, at 951 (finding mean and median of 27% and 29% respectively).

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



24. It is true that these will also be two of the very largest class action recoveries—if not *the* two largest recoveries—in federal court this year. This is notable because my empirical study showed that settlement size had a statistically significant but inverse relationship with the fee percentages awarded by federal courts—*i.e.*, that some federal courts awarded lower

percentages in cases where settlements were larger. *See id*. at 838, 842-44. This relationship was found in the other large-scale academic study as well. *See Eisenberg-Miller 2010*, *supra*, at 263-65; *Eisenberg-Miller 2017, supra*, at 947-48. In my opinion, it is a mistake to cut fee percentages because class counsel has recovered more money as opposed to less money for the class. This does nothing other than give class counsel the incentive to resolve a case for less opposed to more. *See, e.g.*, *In re Synthroid I*, 264 F.3d at 718 ("This means that counsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients . . . . Why there should be such a notch is a mystery. Markets would not tolerate that effect . . . ."); *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 n.55 (3d Cir. 2001) ("Th[e] position [that the percentage of a recovery devoted to attorneys' fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply." (alteration in original)).

25. Consider the following example: if courts award class action attorneys 33⅓% of settlements when they are under $100 million but only 20% of settlements when they are over $100 million, then rational class action attorneys will prefer to settle cases for $90 million (*i.e.*, a $30 million fee award) than for $125 million (*i.e.*, a $25 million fee award). As Judge Easterbrook noted in the *Synthroid* case, no rational client would ever agree to such an arrangement. This is why Professor Schwartz did not report any such practice in his study of patent litigation, cases that can involve not just millions but billions of dollars. In my opinion, courts should therefore not *force* such arrangements on clients when setting fees in class actions. That is, to the extent this Court is guided by factor "(4) the fee that likely would have been negotiated between private parties in similar cases," it should not follow this bigger-begets-smaller practice.

26. But even considering this perverse practice, the fee requests here are still *well below* average for cases of their size. In Table 1, below, I list every billion-dollar class action recovery in federal court of which I am aware. As the Table shows, the average fee award in these cases is *more than double* the requests here. In short, these factors, too, support class counsel's fee request.

Table 1: All federal class action settlements greater than or equal to $1 billion

Case	Settlement Amount	Fee Percentage
BP Gulf Oil Spill (2012)[4]	$13 billion	4.3%
Volkswagen Diesel Engine (Consumer) (2017)[5]	$10 billion	1.7%
Enron Securities Fraud (2008)[6]	$7.2 billion	9.52%
Diet Drugs Products Liability (2008)[7]	$6.4 billion	6.75%
WorldCom Securities (2005)[8]	$6.1 billion	5.5%
Payment Card Interchange Fees Antitrust (2014)[9]	$5.7 billion	9.56%
Visa Antitrust (2003)[10]	$3.4 billion	6.5%
Indian Trust (2011)[11]	$3.4 billion	2.9%
Tyco Securities (2007)[12]	$3.3 billion	14.5%
Cendant Securities (2003)[13]	$3.2 billion	1.73%
Petrobras Securities (2018)[14]	$3 billion	6.2%
AOL Securities (2006)[15]	$2.65 billion	5.9%
Bank of America Securities (2013)[16]	$2.4 billion	6.5%

[4] *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2016 WL 6215974 (E.D.La. Oct. 25, 2016)
[5] *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, MDL No. 2672, 2017 WL 1047834 (N.D. Cal. Mar. 17, 2017).
[6] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008).
[7] *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 553 F. Supp. 2d 442 (E.D. Pa. 2008).
[8] *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005).
[9] *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014).
[10] *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003).
[11] *Cobell v. Salazar*, No. 96-cv-01285 (D.D.C. Jul. 27, 2011).
[12] *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249 (D.N.H. 2007).
[13] *In re Cendant Corp. Litig.*, 243 F. Supp. 2d 166 (D.N.J. 2003).
[14] *In re Petrobras Sec. Litig.*, No. 14-9662 (S.D.N.Y. Jun. 22, 2018).
[15] *In re AOL Time Warner, Inc. Sec.*, 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006).
[16] *In re Bank of America Corp. Sec., Derivative, and ERISA Litig.*, No. 09-md-2058 (S.D.N.Y. Apr. 8, 2013).

Case	Settlement Amount	Fee Percentage
Foreign Exchange Antitrust (2018)[17]	$2.31 billion	13%
Toshiba Diskette (2000)[18]	$2.1 billion (total) $1 billion (cash)	7.1% (total) 15% (cash)
Toyota Unintended Acceleration (2013)[19]	$1.6 billion (est. total) $757 million (cash)	12.3% (total) 26.4% (cash)
Credit Default Swaps Antitrust (2016)[20]	$1.87 billion	13.6%
Prudential Insurance (2000)[21]	$1.8 billion	4.8%
Household Securities (2016)[22]	$1.58 billion	24.7%
Syngenta Corn (2018)[23]	$1.51 billion	33.33%
Volkswagen Diesel Engine (Dealer) (2017)[24]	$1.2 billion	0.25%
Black Farmers Discrimination (2013)[25]	$1.2 billion	7.4%
Tobacco Antitrust (2003)[26]	$1.2 billion	5.9%
Chinese Drywall (2018)[27]	$1.12 billion	9.18%
TFT-LCD Antitrust (2013)[28]	$1.1 billion	28.6%
Nortel Securities I (2006)[29]	$1.1 billion	3%
Nortel Securities II (2006)[30]	$1.1 billion	8%
Royal Ahold Securities (2006)[31]	$1.1 billion	12%

[17] *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13-7789 (S.D.N.Y. Nov. 8, 2018).
[18] *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000).
[19] *In re Toyota Motor. Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.*, No. 10-ml-2151 (C.D. Cal., June 17, 2013).
[20] *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016).
[21] *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 106 F. Supp. 2d 721, 736 (D.N.J. 2000).
[22] *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 2-cv-05893 (N.D.Ill. Nov. 10, 2016).
[23] *In re: Syngenta AG MIR 162 Corn Litigation*, 357 F.Supp.3d 1094 (D. Kan. 2018).
[24] *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, MDL No. 2672, 2017 WL 1352859 (N.D. Cal. Apr. 12, 2017).
[25] *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82 (D.D.C. 2013) (incurred rather than awarded expenses).
[26] *DeLoach v. Phillip Morris Cos.*, 2003 WL 23094907 (M.D.N.C. Dec. 19, 2003).
[27] *In re: Chinese Manufactured-Drywall Products Liab. Litig.*, No. 2047 (E.D.La. Jan. 31, 2018).
[28] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013).
[29] *In re Nortel Networks Corp. Sec. Litig.*, No. 01-cv-1855 (S.D.N.Y., Jan. 29, 2007).
[30] *In re Nortel Networks Corp. Sec. Litig.*, No. 04-cv-2115 (S.D.N.Y., Dec. 26, 2006).
[31] *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383 (D. Md. 2006).

Case	Settlement Amount	Fee Percentage
Allapattah Contract (2006)[32]	$1.1 billion	31.33%
Sulzer Hip (2003)[33]	>$1 billion	4.8%
Nasdaq Antitrust (1998)[34]	$1 billion	14%
NFL Concussion (2018)[35]	≈ $1 billion	10.8%
N = 32		Low = 0.25% High = 33.33% Avg = 10.18% (total) 10.86% (cash) Median = 7.25% (total) 7.70% (cash)

27. Consider next the factors that go to the results obtained by class counsel in light of the risks presented by the litigation: "(1) the quality of counsel," "(2) the complexity and duration of the litigation," and "(3) the risk of nonrecovery." These factors are important because class counsel should be rewarded with higher fee awards when they recover more compensation for class members and obtain more deterrence for the benefit of society relative to the expected value of their cases. The recoveries here are obviously incredibly successful—the classes are receiving 100% of their damages. This makes the recoveries here many multiples of what plaintiffs usually recover in class action litigation. Although we do not have studies of recovery rates in cases like

[32] *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006); *Allapattah Servs., Inc. v. Exxon Corp.*, No. 91-cv-986 (S.D.Fla. Apr. 16, 2007).
[33] *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 939 (N.D. Ohio 2003).
[34] *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998).
[35] *In re Nat'l Football League Players' Concussion Injury Litig.*, 2018 WL 1635648 (E.D. Pa. Apr. 5, 2018).

these, the studies we do have—from securities fraud and antitrust cases—suggest that class actions typically recover 20% of damages or less. *See, e.g.,* John M. Connor & Robert H. Lande*, Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 Iowa L. Rev. 1997, 2010 (2015) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 and 2014). Indeed, in securities fraud cases, the typical recovery is less than 3% of the class's damages.[36]

28. The recovery here looks even more exceptional when compared to the risks the class faced. I am very familiar with the challenges that lawyers face when they try to sue the federal government for money. Not only do I teach a unit on it every year in Federal Courts, but I argued (and lost) one of the Federal Circuit cases this Court relied upon in its motion to dismiss order in *Health Republic—Mobil Oil Co. v. United States*, 374 F.3d 1123 (Fed. Cir. 2004)—and I served as expert in another (near) billion-dollar litigation against the federal government that had to go all the way to the U.S. Supreme Court before the government finally capitulated, *Ramah Navajo Chapter, et al. v. Jewell, et al., No. 1:90-CV-00957* (D.N.M.). As I tell my students (and paraphrasing *The Great Gatsby*), the federal government is very different from you and me. The government has defenses that no one else has. Here, in particular, it was not clear that the classes' claims were even ripe because the government had not gotten around to calculating how much was due to the class members in subsidies; it was not clear the Affordable Care Act created a binding obligation on the government at all; and it was not clear whether the failure of Congress to

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

appropriate the monies due implicitly repealed whatever obligation had been created. These cases could have easily foundered on any one of these issues—and, indeed, the related cases *did* founder on these issues before rescued by the U.S. Supreme Court. It is obvious to any observer that recovering 100% of classes' money in the face of these risks is outstanding lawyering. Thus, all these factors, too, support class counsel's fee request.

V. The lodestar crosscheck?

29. Class counsel's lodestar is not one of the listed factors this Court usually considers when employing the percentage method in a class action case. Nonetheless, a significant minority of other courts use the so-called "lodestar crosscheck" with the percentage method, *see* Fitzpatrick, *Empirical Study*, *supra*, at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method); *Eisenberg-Miller 2017*, *supra*, at 945 (finding percent method with lodestar crosscheck used 38% of the time versus 54% for percent method without lodestar crosscheck), and class counsel told the classes in the opt-in notice that this Court might conduct the crosscheck. As such, I wish to say a few words about it.

30. To begin, in my opinion, economic theory shows that the lodestar crosscheck is a mistake. It brings through the backdoor all of the bad things the lodestar method used to bring through the front door. Not only does the court have to concern itself again with class counsel's timesheets, but, more importantly, it reintroduces the very same misaligned incentives that the percentage method was designed to correct in the first place.

31. Consider the following examples. Suppose a class action lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 25% fee if it exceeded twice his lodestar, then he would be *rationally indifferent* between

settling the case for $8 million and $80 million (or any number higher than $8 million). Either way he will get the same $2 million fee. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for class members. Or suppose counsel believed that the most he could wring from the defendant in this example was $16 million. In order to reap the maximum 25% fee with the lodestar crosscheck, he would have to generate an additional $1 million in lodestar before agreeing to the settlement; this would give him incentive to *drag the case out* before sealing the deal. Again, dragging cases along for nothing is not good for class members.

32. This is why no one in the marketplace uses the lodestar crosscheck when they hire lawyers on contingency. Professor Schwartz did not report any crosscheck agreements in his study of patent litigation. Professor Kritzer has never reported any in his studies of contingency fees more broadly. I have never heard of a client who used it. The Seventh Circuit thinks it is so irrational it has all but banned the practice for the same reason it banned the bigger-begets-smaller practice I discussed above. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (holding that "a lodestar check is not . . . required methodology" because "[t]he . . . argument . . . that any percentage fee award exceeding a certain lodestar multiplier is excessive . . . echoes the 'megafund' cap we rejected in *Synthroid*"). To the extent this Court is guided by factor "(4) the fee that likely would have been negotiated between private parties in similar cases," it should therefore not be guided by the lodestar crosscheck.

33. I nonetheless understand the very human temptation to use the lodestar crosscheck. When class action lawyers generate significant returns on their time—what some people, in hindsight, call "windfalls"—it invites public and media scrutiny. But when other entrepreneurs and investors succeed in their ventures, no one asks them: How many hours did you spend on this venture? What effective hourly rate did you earn? Should we take some of it away from you

because it is "too high"? Class action lawyers are investors just like any others; they just invest their time and resources for others (the class members) with no hope of payment unless they achieve some form of success for those others. In my opinion, courts should not bow to the pressure and ask these questions of class counsel, either. Rather, courts should only ask what is best for class counsel's incentives vis-à-vis class members. For example, at the outset of this litigation, would class members have objected to paying class counsel 5% of whatever was recovered here? We do not have to guess at the answer: despite the opportunity to go their own way, the class members instead all opted in to precisely this arrangement.

34. Class counsel did nonetheless tell the classes that this Court might conduct the crosscheck. As such, I will discuss the data. There is no doubt that, if this Court grants class counsel's fee requests, class counsel's lodestar multiplier (across both cases it would be approximately 18-19) will be very high. In the cases in Table 1, the average and median lodestar multipliers (when courts bothered to calculate them) were 2.8 and 2.6, respectively. Nonetheless, class counsel's lodestar multiplier would hardly be unprecedented. *See, e.g.*, *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012) (awarding fees of 15% of $2 billion, resulting in 66 multiplier); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D.Pa. May 19, 2005) (15.6 multiplier). If this Court had any concern that class counsel was selling out the classes by resolving these cases too early, I could see the Court entertaining a reduction in class counsel's fee request based on the lodestar. But it is obvious that is not the case. Class counsel has recovered 100% of the classes' damages. In my humble opinion, class counsel should not be punished for getting the job done leanly, without churning hours.

VI. Conclusion

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

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

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 30, 2020.

Brian T. Fitzpatrick

Nashville, TN

Exhibit 1

BRIAN T. FITZPATRICK

Vanderbilt University Law School
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Nashville, TN 37203
(615) 322-4032
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ACADEMIC APPOINTMENTS

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

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

EDUCATION

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

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

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

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

EXPERIENCE

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

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

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

BOOKS

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

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

ACADEMIC ARTICLES

Why Class Actions are Something both *Liberals* and *Conservatives Can Love*, 73 VAND. L. REV. 1147 (2020)

Deregulation and Private Enforcement, 24 LEWIS & CLARK L. REV. 685 (2020)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, 40 NW. J. INT'L L. & BUS. 203 (2020) (with Randall Thomas)

Can the Class Action be Made Business Friendly?, 24 N.Z. BUS. L. & Q. 169 (2018)

Can and Should the New Third-Party Litigation Financing Come to Class Actions?, 19 THEORETICAL INQUIRIES IN LAW 109 (2018)

Scalia in the Casebooks, 84 U. CHI. L. REV. 2231 (2017)

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Judicial Selection and Ideology, 42 OKLAHOMA CITY UNIV. L. REV. 53 (2017)

Justice Scalia and Class Actions: A Loving Critique, 92 NOTRE DAME L. REV. 1977 (2017)

A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology, 69 VAND. L. REV. 991 (2016)

The Hidden Question in Fisher, 10 NYU J. L. & LIBERTY 168 (2016)

An Empirical Look at Compensation in Consumer Class Actions, 11 NYU J. L. & BUS. 767 (2015) (with Robert Gilbert)

The End of Class Actions?, 57 ARIZ. L. REV. 161 (2015)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 VA. L. REV. 839 (2012)

Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043 (2010)

Originalism and Summary Judgment, 71 OHIO ST. L.J. 919 (2010)

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

Election by Appointment: The Tennessee Plan Reconsidered, 75 TENN. L. REV. 473 (2008)

Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 MICH. J. RACE & LAW 277 (2007)

BOOK CHAPTERS

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, in THE CAMBRIDGE INTERNATIONAL HANDBOOK OF CLASS ACTIONS (ed., with Randall Thomas, Cambridge University Press, forthcoming 2021) (with Randall Thomas)

Do Class Actions Deter Wrongdoing? in THE CLASS ACTION EFFECT (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018)

Judicial Selection in Illinois in AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor, ed., Illinois Policy Institute, 2017)

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

Is the Future of Affirmative Action Race Neutral? in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

ACADEMIC PRESENTATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

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

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

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

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

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

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

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

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

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

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

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

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

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

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

Memo to Mitch: Repeal the Republican Tax Increase, THE HILL (July 17, 2020)

The Right Way to End Qualified Immunity, THE HILL (June 25, 2020)

I Still Remember, 133 HARV. L. REV. 2458 (2020)

Proposed Reforms to Texas Judicial Selection, 24 TEX. R. L. & POL. 307 (2020)

The Conservative Case for Class Actions?, NATIONAL REVIEW (Nov. 13, 2019)

9th Circuit Split: What's the math say?, DAILY JOURNAL (Mar. 21, 2017)

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

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

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

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

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

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

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

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

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

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

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

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

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

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

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

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

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

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

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

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

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

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

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

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

PROFESSIONAL ASSOCIATIONS

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

COMMUNITY ACTIVITIES

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

Exhibit 2

JOURNAL OF EMPIRICAL LEGAL STUDIES

Journal of Empirical Legal Studies
Volume 7, Issue 4, 811–846, December 2010

An Empirical Study of Class Action Settlements and Their Fee Awards

*Brian T. Fitzpatrick**

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

I. Introduction

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

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Research for this article was supported by Vanderbilt's Cecil D. Branstetter Litigation & Dispute Resolution Program and Law & Business Program. I am grateful for comments I received from Dale Collins, Robin Effron, Ted Eisenberg, Deborah Hensler, Richard Nagareda, Randall Thomas, an anonymous referee for this journal, and participants at workshops at Vanderbilt Law School, the University of Minnesota Law School, the 2009 Meeting of the Midwestern Law and Economics Association, and the 2009 Conference on Empirical Legal Studies. I am also grateful for the research assistance of Drew Dorner, David Dunn, James Gottry, Chris Lantz, Gary Peeples, Keith Randall, Andrew Yi, and, especially, Jessica Pan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Prior Empirical Studies of Class Action Settlements

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

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

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

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

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

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

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

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

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

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

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

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

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

[19]Id. at 258–59.

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

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

III. Federal Class Action Settlements, 2006 and 2007

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

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

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

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

[23]Id. at 47, 51.

[24]Id. at 61–62.

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

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

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

A. Number of Settlements

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

B. Defendant Versus Plaintiff Classes

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

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

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

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

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

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

C. Settlement Subject Areas

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

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

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

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

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

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

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

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

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

D. Settlement Classes

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

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

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

[35]Id. at 262.

[36]Id.

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

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

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

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

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

E. The Age at Settlement

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

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

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

SOURCE: PACER.

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

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

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

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

F. The Location of Settlements

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

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

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

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

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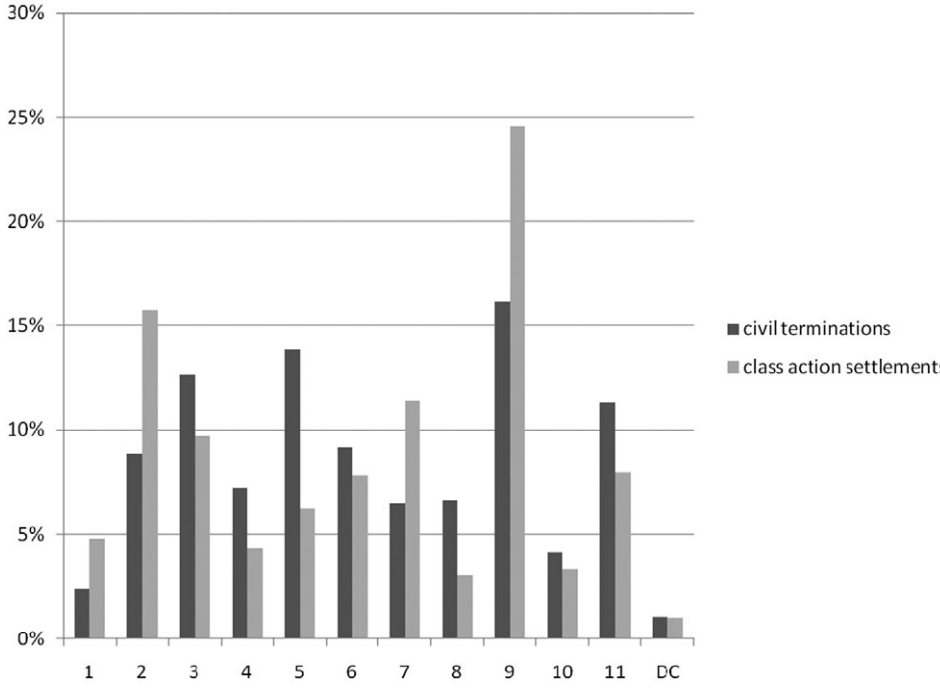
[43]See Eisenberg & Miller, supra note 15, at 59–60.

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

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

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

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



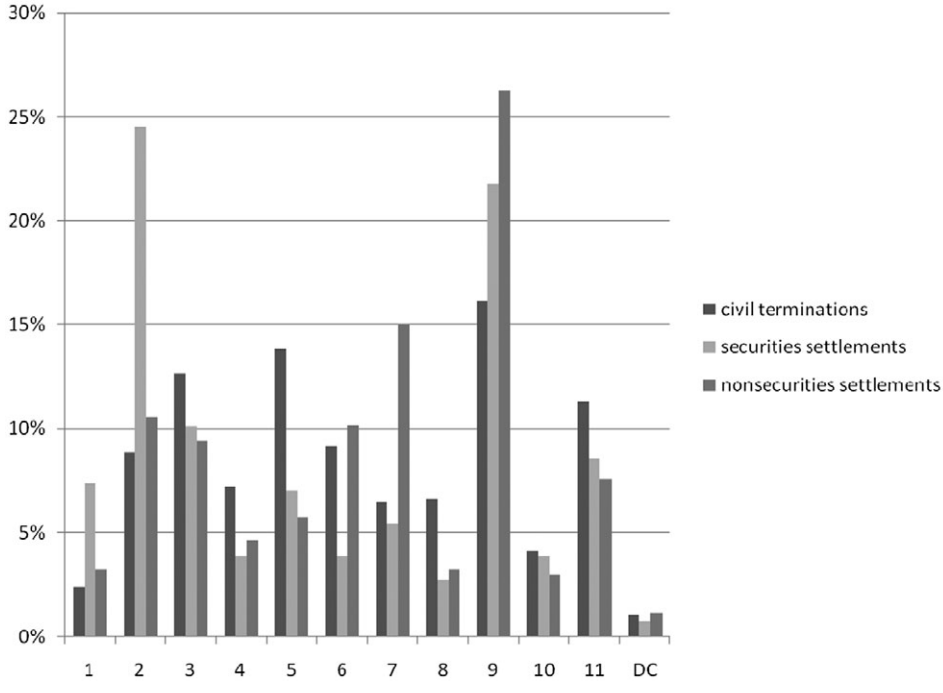
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

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

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

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

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



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

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

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

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

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

G. Type of Relief

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

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

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

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

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

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

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

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

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

H. Settlement Money

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

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

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

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

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

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

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

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

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

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

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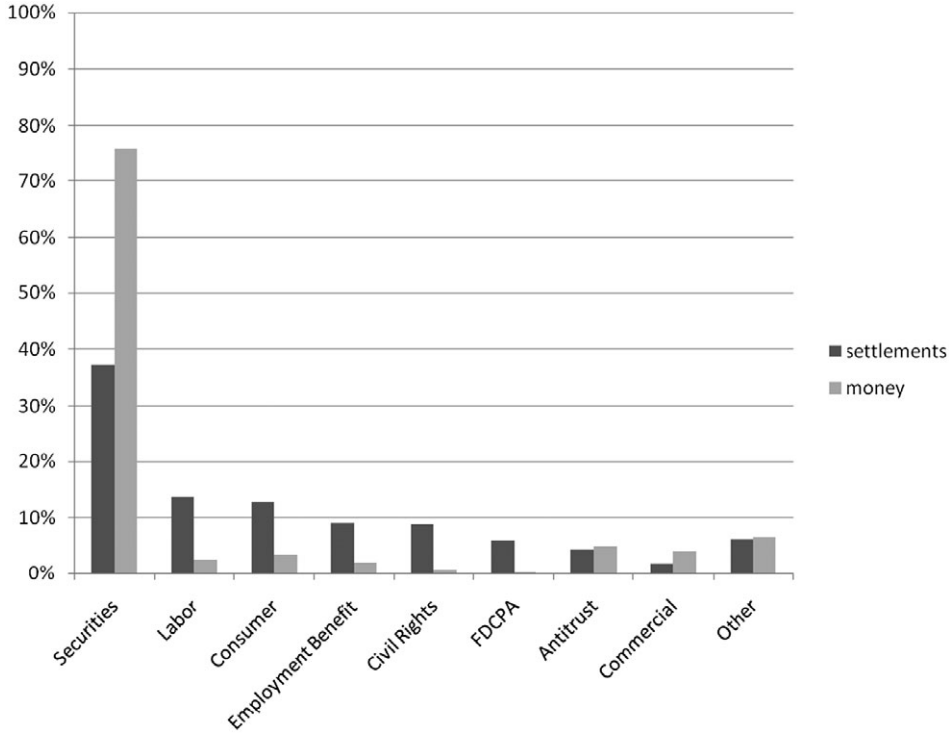
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Total Amount of Fees and Expenses

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

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

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

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

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

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

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

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

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

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

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

B. Method of Awarding Fees

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

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

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

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

C. Variation in Fees Awarded

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

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

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

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

[70]Id. at 31–32.

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

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

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

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

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

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

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

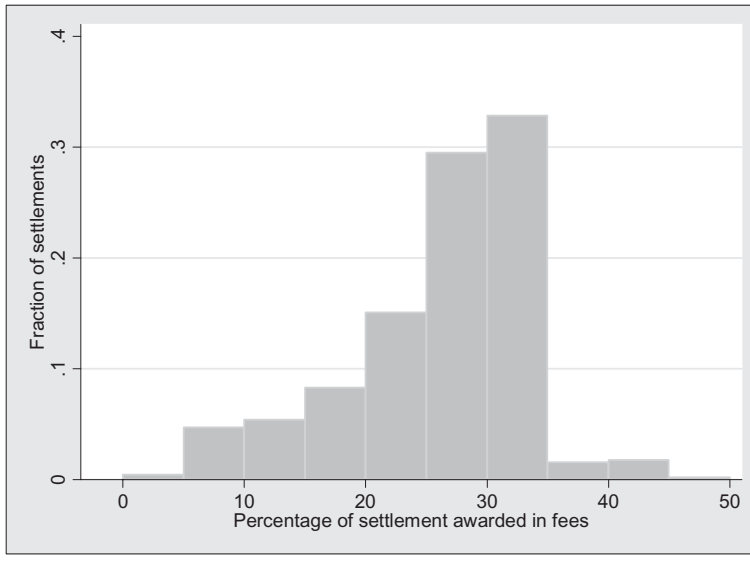
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

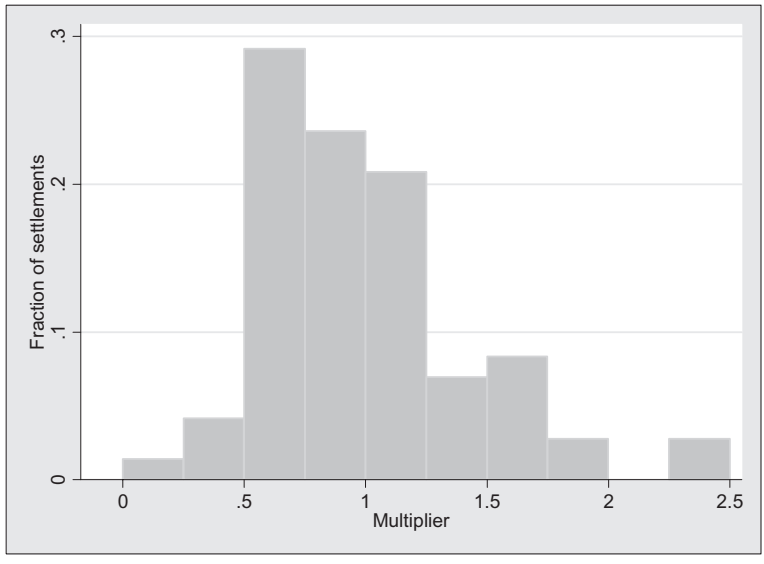
SOURCES: Westlaw, PACER, district court clerks' offices.

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

D. Factors Influencing Percentage Awards

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

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



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

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

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

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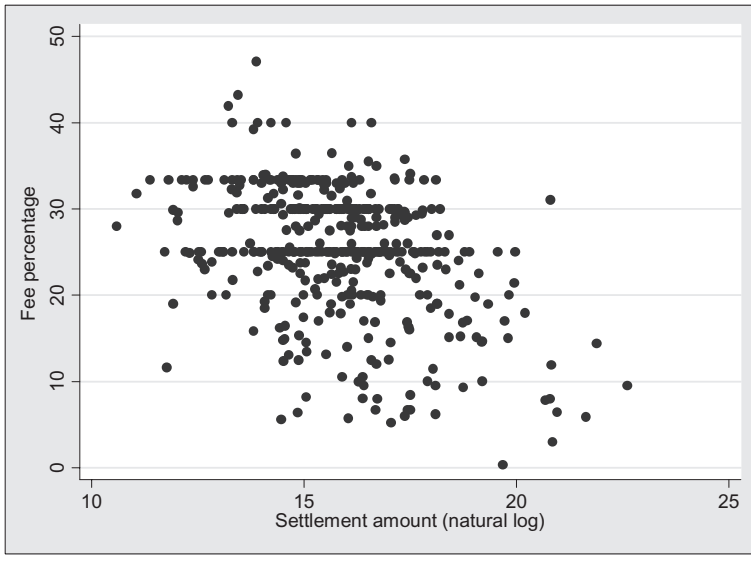
[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 12 *Continued*

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

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

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

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

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

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

[92]Id. at 178–79.

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

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

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

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

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

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

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

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

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

V. Conclusion

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

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

[98]The Ninth Circuit's differences persisted.

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

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

Exhibit 3

Documents Reviewed:

- Plaintiff's Class Action Complaint in *Health Republic Insurance Company v. U.S.* (document 1, entered 02/24/16)
- Order Granting Plaintiff's Unopposed Motion to Certify Class in *Health Republic Insurance Company v. U.S.* (document 30, entered 01/03/17)
- Order Granting in Part and Denying in Part Defendant's Motion to Dismiss in *Health Republic Insurance Company v. U.S* (document 31, entered 01/10/17)
- Brief of Amicus Curiae Health Republic Insurance Company in Support of Plaintiff-Appellant in *Land of Lincoln Mutual Health Insurance Company v. U.S.*, No. 17-01224 (Fed. Cir.)
- Corrected Brief of Amicus Curiae Alliance of Community Health Plans in Support of Plaintiff-Appellant in *Land of Lincoln Mutual Health Insurance Company v. U.S* (Fed. Cir.)
- Plaintiff's Revised Class Notice in *Health Republic Insurance Company v. U.S* (document 41-1, entered 02/23/17)
- Plaintiff's Supplemental Class Notice in *Health Republic Insurance Company v. U.S.* (document 50-1, entered 03/24/17)
- Order Granting Plaintiff's Motion to Certify Class in *Common Ground Healthcare Cooperative v. U.S.* (document 17, entered 01/08/18)
- Revised Class Action Notice Plan and Opt-In Form in *Common Ground Healthcare Cooperative v. U.S.* (document 24-1, entered 02/01/18)
- Opinion and Order Reversing the Court of Claims' Denial of Defendant's Motion to Dismiss in *Moda Health Plan, Inc. v. U.S.*, No. 17-01994 (Fed. Cir.)

- Corrected Brief of Amicus Curiae Kate Bundorf, Scott Harrington, Mark Pauly, Michael Chernew, Thomas Mcguire, Leemore Dafny, and Kosali Simon in Support of Plaintiff-Appellant's Petition for Rehearing En Banc in *Land of Lincoln Mutual Health Insurance Company v. U.S.* (Fed. Cir.)
- Corrected Brief of Amicus Curiae Health Republic Insurance Company and Common Ground Healthcare Cooperative in Support of Plaintiff-Appellant's Petition for Rehearing En Banc in *Land of Lincoln Mutual Health Insurance Company v. U.S.* (Fed. Cir.)
- Order Denying Petition for En Banc Rehearing in *Moda Health Plan, Inc. v. U.S* (Fed. Cir.)
- Brief of Amicus Curiae Economists in Support of Petitioners in *Maine Community Health Options v. U.S.*, No. 18-1023 (U.S.)
- Brief of Amicus Curiae Economists in Support of Petitioners in *Moda Health Plan, Inc. v. U.S.*, No. 18-1028 (U.S.)
- Brief of Amicus Curiae Economists in Support of Petitioners in *Land of Lincoln Mutual Health Insurance Company v. U.S.*, No. 18-1038 (U.S.)
- Plaintiff's Second Amended Class Action Complaint in *Common Ground Healthcare Cooperative v. U.S.* (document 59, entered 03/22/19)
- Brief of Amicus Curiae Economists in Support of Petitioners in *Maine Community Health Options v. U.S.*, (U.S.)
- Opinion of The United States Supreme Court in *Maine Community Health Options v. U.S.*, 590 U.S. __ (2020)
- Order Granting Joint Motion in *Health Republic Insurance Company v. U.S.* (document 82, entered 07/23/20)

- Order Granting Joint Motion in *Common Ground Healthcare Cooperative v. U.S.* (document 105, entered 07/23/20)
- Declaration of Stephen A. Swedlow (draft) (filed herewith)

Exhibit 3

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

DECLARATION OF PROFESSOR CHARLES SILVER

I, Charles Silver, state as follows:

I. SUMMARY OF OPINIONS

1. In view of Class Counsel's extraordinary accomplishment, prevailing market rates for legal services, and the ready availability of other law firms that competed for clients with risk corridor claims, the request for a fee in the amount of 5 percent of the Class's gross recovery is plainly reasonable and should be approved.

II. CREDENTIALS

2. I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where I also serve as Co-Director of the Center on Lawyers, Civil Justice, and the Media. 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 University of Michigan School of Law (twice), the Vanderbilt University Law School, and the Harvard Law School.

3. I have taught, researched, written, consulted with lawyers, and testified about class actions, other large lawsuits, attorneys' fees, professional responsibility, and related subjects for 30 years. I have published over 100 major writings, many of which appeared in peer-reviewed publications and many of which focus on subjects relevant to this Declaration. My writings are 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.

4. My first publication after joining the Texas Law faculty, an analysis of the restitutionary basis for fee awards in class actions, appeared in 1991. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). My most recent publication in the field, an empirical study of fee awards in securities fraud class actions, appeared in the Columbia Law Review nearly twenty-five years later. 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) (*Is the Price Right?*). The CORPORATE PRACTICE COMMENTATOR chose this article as one of the ten best in the field of corporate and securities law in 2016. The study of attorneys' fees has been a principal focus of my academic career.

5. I have testified as an expert on attorneys' fees many times. Judges have cited or relied upon my opinions when awarding fees many class actions, including *In re Enron Corp. Securities, Derivative & "ERISA" Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008), *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F. Supp. 2d 437 (E.D.N.Y.

2014), and *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006) , all of which settled for amounts exceeding $1 billion.

6. 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.

7. Finally, because I teach and write about both insurance law and health law and policy, I knew about the risk corridor litigation before I was engaged to prepare this Declaration. (In 2009, the Tort Trial and Insurance Practice Section of the American Bar Association gave me the Robert B. McKay Award in recognition of my scholarship in the areas of tort and insurance law.) I also feel comfortable discussing the importance of this litigation and the associated risks.

8. I have attached a copy of my resume as Exhibit 1 to this declaration.

III. DOCUMENTS REVIEWED

9. In preparing this report, I reviewed the items listed below which, unless noted otherwise, were generated in connection with this case. I also reviewed other items including, without limitation, cases, studies, and published scholarly works.

- *Health Republic* Complaint (Dkt. 1)
- *Health Republic* Order Granting Motion for Risk Corridors Class Certification and Appointing Class Counsel (Dkt. 30)
- *Health Republic* Order Granting in Part and Denying in Part Motion to Dismiss (Dkt. 31)
- *Health Republic* Approved Class Notice (Dkt. 41-1)
- *Health Republic* Approved Supplemental Class Notice (Dkt. 50-1)
- Exhibit B to May 12, 2020 *Health Republic* Joint Status Report (Dkt. 72-2)

- June 24, 2020 *Health Republic* Order Granting Motion to Include Additional Class Member (Dkt. 75)
- July 23, 2020 *Health Republic* Order Granting Joint Motion to Divide Class into Subclasses and Stipulation for Entry of Partial Judgment as to the Non-Dispute Sublcass (Dkt. 82)
- *Health Republic* Declaration of Stephen A. Swedlow (draft)
- *Common Ground* Order Granting Motion for Risk Corridors Class Certification and Appointing Class Counsel (Dkt. 17)
- *Common Ground* Approved Class Notice (Dkt. 24-1)
- *Common Ground* Second Amended Complaint (Dkt. 59)
- Exhibit B to May 12, 2020 *Common Ground* Joint Status Report (Dkt. 84-2)
- May 27, 2020 *Common Ground* Order Granting Motion to Include Additional Class Members (Dkt. 88)
- June 24, 2020 *Common Ground* Order Granting Motion to Include Additional Class Members (Dkt. 92)
- July 23, 2020 *Common Ground* Order Granting Joint Motion to Divide Class into Subclasses and Stipulation for Entry of Partial Judgment as to the Non-Dispute Sublcass (Dkt. 105)
- Corrected Amicus Brief of Alliance of Community Health Plans in Land of Lincoln Mutual Health Insurance Co. v. United States, Case No. 17-1224, Federal Circuit (Dkt. 85)
- Brief of Amicus Curiae Health Republic Insurance Co. in Land of Lincoln Mutual Health Insurance Co. v. United States, Case No. 17-1224, Federal Circuit (Dkt. 46)
- Brief of Amici Curiae Bundorf et al, in Land of Lincoln Mutual Health Insurance Co. v. United States, Case No. 17-1224, Federal Circuit (Dkt. 182)

- Corrected Brief of Amici Curiae Health Republic Insurance Co. and Common Ground Health Cooperative in in Land of Lincoln Mutual Health Insurance Co. v. United States, Case No. 17-1224, Federal Circuit (Dkt. 184)
- Federal Circuit Opinion, Moda Health Plan v. United States, Case No. 17-1994 (Dkt. 87-1)
- Federal Circuit Order Denying En Banc Rehearing and Dissents from Denial of En Banc Rehearing, Maine Community Health Options v. United States, Moda Health Plan v. United States, Land of Lincoln Mutual Health Insurance Co. v. United States, and Blue Cross and Blue Shield of North Carolina v. United States (Case No. 17-1994, Dkt. 148)
- Brief of Amici Curiae Economists in Support of Petitioners (Certiorari Stage), *Maine Community Health Options v. United States* (S. Ct.)
- Brief of Amici Curiae Economists in Support of Petitioners (Merits Stage), Maine Community Health Options v. United States, Moda Health Plan v. United States, Land of Lincoln Mutual Health Insurance Co. v. United States (S. Ct.)
- Maine Community Health Options v. United States, 590 U.S. ____ (2020)

IV. FACTS

10. The opinions expressed in this Declaration are based upon facts provided by Class Counsel and the foregoing documents.

11. In brief, in February of 2016, Quinn Emanuel (QE) filed the first lawsuit in the nation—the *Health Republic* class action—seeking relief under the Tucker Act for the federal government's failure to make billions of dollars in risk corridor payments. The complaint, filed in the Court of Federal Claims, sought compensation for risk corridor payments that were due in 2014 and 2015 but not made. QE filed a second complaint—the *Common Ground Healthcare*

Cooperative class action—when claims relating to risk corridor payments due in 2016 became ripe.

12. Other law firms competed with QE for clients and subsequently filed individual complaints on their behalf. Issuers, all of which are sophisticated clients, therefore had a choice: They could opt into one of QE's class actions or secure representation by another law firm and sue on their own. The competition was brisk and dozens of issuers hired different firms. Others, collectively holding about one-third of the value of all risk corridor claims, hired QE by opting in to one or both of the *Health Republic* and *Common Ground* classes.

13. QE competed with other law firms on price as well. In return for offering clients individual representation, other law firms reportedly charged contingent fees equal to multiples of the 5 percent requested by QE. QE, by contrast, informed potential class members that it would charge 5 percent of the class' recovery as fees. The class-wide notice indicated this amount or less, with the fee being finally fixed by the Court. Class members thus sorted themselves according to both the type of representation they desired and the price they wanted to pay.

14. As the lawsuits developed, QE had greater success than its competitors. In *Health Republic*, the firm defeated the government's motion to dismiss. By contrast, in the majority of individual cases where the Court of Federal Claims decided a motion to dismiss on the pleadings or a motion for summary judgment, the federal government prevailed.

15. A consequence of the procedural requirements of a class action such as this (*e.g.*, class certification, notice to the class, an opt-in period), other law firms' cases, rather than QE's plaintiff classes, went up on appeal first. Even so, the fortunes of the issuers in the *Health Republic* and *Common Ground* classes were at stake because the appeals would make law for everyone. To protect their interests, QE consulted with counsel for the individual issuers and submitted amicus

briefs in the appeals on behalf of the *Health Republic* and *Common Ground* classes, an issuer industry group, and a consortium of healthcare economists. These efforts bore fruit. Although the Federal Circuit ruled against the individual issuers, Judges Wallach and Newman dissented from the denial of the issuers motion for rehearing *en banc*, thereby improving the odds of Supreme Court review. Their dissent cited the amicus briefs that QE filed for the economists and the *Health Republic* and *Common Ground* classes extensively.

16. In the Supreme Court, QE again submitted amicus briefs on behalf of the economists at the certiorari and merits stages and, in April of 2020, eight Justices agreed with QE's position. They ruled that the government breached its statutory obligation to make risk corridor payments and that issuers are entitled to recover in the Court of Federal Claims under the Tucker Act.

17. As if providing the legal theory that this Court and ultimately the Supreme Court endorsed was not enough, QE then secured a stipulated judgments pursuant to which the federal government will pay members of the *Health Republic* and *Common Ground* classes 100 percent of the money they were supposed to receive as risk corridor payments. The total recovery across the two cases will be $3.7 billion--$1.9 billion for the Health Republic Class and $1.8 billion for the Common Ground class. (An additional amount, approximately, $200 million, is still tied up in litigation.) The larger industrywide recovery attributable to QE's legal theory and aggressive litigation efforts will approach $12 billion.

18. In compensation for its services and in keeping with its communications with the issuers that opted into the classes, QE is asking the Court to award 5 percent of the common fund recoveries in the *Health Republic* and *Common Ground* cases as fees.

V. HOW CAN A 5 PERCENT FEE NOT BE REASONABLE?

19. As a professor, I am accustomed to debating. Both when teaching students and doing research, my job is to develop sophisticated views, to defend them from objections, and to explain why they are better than differing positions that might be entertained.

20. When preparing this Declaration, I could not see what there is to debate. How can Class Counsel's request for a 5 percent contingent fee be anything but reasonable?

- The percentage is far below the rate that prevails in any market sector;
- The percentage is far lower than the fees that sophisticated clients willingly pay in enormous cases;
- The percentage is far below the fees that other law firms demanded to prosecute identical cases individually and that many issuers willingly agreed to pay;
- The class-member issuers, all of which are highly sophisticated, knew that the fee could be up to 5 percent when they opted into the class;
- The prospect of receiving 5 percent of the recovery as fees motivated Class Counsel to do an outstanding job;
- Issuers that opted into the class will recoup 95 percent of their losses after Class Counsel is paid; and
- Even in class actions with billion-dollar recoveries, fee awards below 5 percent are rare.

With so many important considerations weighing in favor of Class Counsel's fee request, what can possibly be said against it?

21. In my view, the most conclusive point in favor of the reasonableness of the fee is that Class Counsel had to compete for clients with lawyers at other prominent law firms who offered to represent claimants individually. In the Court of Federal Claims, class actions work on

an opt-in basis: only claimants that express the desire to be included become class members. Consequently, Class Counsel had to convince issuers that class-based representation would serve them better than individual representation. QE did this by competing on quality and price. QE offered class-based representation at the bargain rate of 5 percent while other lawyers are thought to have demanded fees equal to multiples of that rate for individual representation. Because issuers are sophisticated business entities with easy access to legal services, competition enabled them to choose the option that would serve them best. They having done so, there is no reason to reduce QE's fees below the level that class members deemed to be reasonable when they opted in. As the Restatement (Third) of the Law Governing Lawyers observes, "Fees agreed to by clients sophisticated in entering such arrangements (such as a fee contract made by inside legal counsel in behalf of a corporation) should almost invariably be found reasonable." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34, Cmt *c*.

22. It may be helpful to consider the reasonableness of QE's fee request from another angle. The *Health Republic* and *Common Ground* classes contain 153 issuers and 130 issuers, respectively. Had QE contracted with each issuer directly, as mass tort lawyers do with personal injury claimants, the reasonableness of a fee equal to 5 percent of each issuer's recovery would be obvious. Here, QE eliminated the need to contract with issuers individually by prosecuting a class suit. But because class actions filed in the Court of Federal Claims work on an opt-in basis, the class action overlay leaves the logic just described unchanged. When sophisticated claimants opt into a class knowing that they will have to pay 5 percent of their recoveries in fees, they should be treated as having agreed to pay that amount.

23. The fact that the aggregate recovery for both groups combined is approximately $4 billion does not alter this conclusion. The gross recovery per claimant—100 percent of the risk

corridor payments that were due but not made—is exactly what the issuers hoped to secure when they opted into QE's classes. The fact that a lawyer obtained the result that a client wanted provides a reason for enforcing a contract, not for invalidating one. It shows that a contracted-for arrangement worked well. In the private market, clients reward lawyers for winning their cases. They do not punish them by slashing their fees.

24. The aggregate recovery is the wrong focus, too. Because issuers opted into the classes individually, the relevant question, I believe, is whether they will individually pay reasonable fees if the Court grants QE's request. The answer is plainly that they will. The members of the *Health Republic* class will receive an average gross recovery of about $13.7 million apiece. The members of the *Common Ground* class will receive about $13.8 million apiece. These are numbers that issuers are accustomed to dealing with. They are also numbers on which clients normally pay fees ranging from 33⅓ percent to 40 percent. By comparison, a 5 percent fee is a steal.

25. A critic might argue that the comparison just made is inappropriate because this was a "straight law" case. If the courts accepted QE's legal theory, the issuers would win; otherwise, they would lose. In cases where fees range from one-third of the recovery upward, by contrast, lawyers have to develop facts and, consequently, face greater costs and risks.

26. Accepting this point as true for the sake of argument, the first response is that the fee QE requests—5 percent of the recovery—is one-seventh to one-eighth the size of the typical contingent fee. QE thus dealt with the "straight law" nature of the case by cutting its fees drastically.

27. The second response is that the law firms that competed with QE for clients set their fees at least three times as high. The faced the same "straight law" case that QE did, but

demanded far more. Presumably, other firms had less confidence in QE's Tucker Act theory, which they adopted, than QE did. The market thus produced a range of fees that varied with lawyers' perceptions of risk.

VI. BACKGROUND ANALYSIS

28. Having confessed to seeing nothing to argue against, I will now explain why, throughout my academic career, I have urged judges to base fee awards from common funds on the percentages that prevail in the private market for legal services. Although the view was not widely accepted when I first expressed it, it is now. Even judges who are not legally bound to base fee awards on market rates want to know what the rates are and give them weight when deciding how much lawyers whose efforts create common funds should be paid.

29. To appreciate the importance of taking guidance from market rates, I will briefly show that the rates that claimants and lawyers agree to encourage the latter to serve the former well by maximizing their expected net recoveries.

A. Fee-Setting Is a Positive-Sum Interaction

30. Many people think that fee-setting is a zero-sum game in which more for the lawyers means less for the class members. Because the object of class litigation is to help the victims, they infer that lower fees are always better than higher ones.

31. In reality, fee-setting is a positive-sum interaction in which higher fees can generate higher recoveries for claimants. To see why, imagine what would happen if judges set common fund fee awards at 0 percent, the lowest possible level. Expected recoveries would then be $0 because lawyers cannot afford to litigate class actions on these terms. From class members' perspective, any fee between 1 percent and 99 percent is better than a 0 percent fee because any positive recovery is better than no recovery.

32. When regulating fees, then, judges should not seek to set them as close to zero as possible. They should regulate fees with an eye toward maximizing class members' net expected recoveries—the amounts they take home after paying their attorneys. Judges should keep in mind, for example, that a claimant who nets $1 million after paying $400,000 in fees is better off than one who nets $500,000 after paying only $100,000.

33. The Third Circuit stated the point this way: "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 in *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001). It rejected the so-called "mega-fund rule," according to which fees must be capped at low percentages when recoveries are very large, noting that "[p]rivate parties would never contract for such an arrangement" because it would encourage cheap settlements. *Id*. at 718.

B. Market-Based Fees Compensate Lawyers For Incurring Risks

34. In the market for legal services, claimants negotiate fees when litigation starts, not when it ends. Upfront, they see the risks that lie ahead and the virtue of paying fees that encourage lawyers to bear them. As the Seventh Circuit observed,

> The best time to determine [a contingent fee lawyer's] rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins.

In re Synthroid Marketing Litigation, 264 F.3d 712, 724 (7th Cir. 2001).

35. When awarding fees in class actions, judges should put themselves into class members' shoes and seek to determine how large a fee they would have offered in direct negotiations with their attorneys when litigation began.

36. The best evidence on which to base an answer is the market rate. A general insight from the economics of contracts is that parties tend to agree on terms that maximize the amount of wealth available for them to share. See Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541 (2003) ("[P]arties at the negotiation stage prefer to write contracts that maximize total benefits."). When markets are competitive, as the market for legal services plainly is, clients and lawyers should settle on the lowest percentages that maximize their joint expected return. This is the percentage that maximizes clients' net expected recoveries.

C. Quality of Plaintiffs' Counsel

37. When considering how much lawyers should be paid, it is also important to remember that the quality of counsel matters greatly. Lawyers' rates vary with experience, rank, and accomplishment. For example, it is well known that a select group of attorneys with outstanding reputations command exceedingly high rates, often more than $1,500 per hour.

38. QE is one of the nation's premier litigation firms, for both plaintiff and defense work. It served as class counsel in four of the fifty largest antitrust cases that resolved from 2013 through 2018, including the second-largest—the Credit Default Swaps Antitrust Litigation, which settled for $1.86 billion. University of San Francisco Law School and The Huntington National Bank, *2018 Antitrust Annual Report* (2019). QE also ranked ninth among all law firms in terms of number of antitrust settlements and third in aggregate settlement amount. *Id*. The firm has a thriving patent litigation practice that includes its recent successful representation of Qualcomm in a series of lawsuits against Apple and related companies where more than $8 billion was at

stake, and a separate representation of the California Institute of Technology against Apple and Broadcom that produced a $1.1 billion infringement award. *See Apple, Qualcomm Drop Multibillion-Dollar Licensing War*, Law360.com, Apr. 16, 2019, https://www.law360.com/articles/1150362, and Scott Graham, *Caltech and Quinn Emanuel Score $1.1B Verdict Against Apple, Broadcom*, Law.com/The Recorder, Jan. 29, 2020, https://www.law.com/therecorder/2020/01/29/caltech-and-quinn-emanuel-score-1-1b-verdict-against-apple-broadcom/?slreturn=20200615120403. Reflecting the firm's overall excellence, Law360 reported that QE ranked among the four law firms most feared by corporate counsel. Aebra Coe, *The 4 Firms That Scare General Counsel The Most*, Law360.com, Sept. 18, 2019, https://www.law360.com/articles/1150362. I understand that, of those four, QE is actually the "most feared" firm; *i.e.*, it was the firm that scored highest in the survey.

39. Plainly, the lawyers who practice at QE command hourly rates comparable to those charged by other elite practitioners. And because they often work on contingency, their nominal rates must be even higher. Otherwise, their effective rates would fall below the level needed to offset the nonpayment and non-reimbursement risks they incur.

VII. FEES PREVAILING IN THE PRIVATE MARKET FOR LEGAL SERVICES

40. Although only the Seventh Circuit formally requires judges to base fee awards in class actions on market rates, judges across the country increasingly recognize the superiority of the 'mimic the market' approach. For example, in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), the Second Circuit wrote that "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Id.*, p. 52 It is hard to do better than "ideal."

41. Other examples of cases in which market rates were applied 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); and *In re Cabletron Sys., Inc. Sec. Litig*., 239 F.R.D. 30, 40 (D.N.H. 2006).

42. The 'mimic the market' approach is attractive for two reasons. It reflects the importance of incentivizing lawyers properly and provides an objective basis on which to decide how much lawyers will be paid. The two considerations–incentives and objectivity–are linked. By taking guidance from the market, judges constrain their discretion and thereby make lawyers' incentives clearer and more reliable.

A. In Contingent Fee Litigation, Percentage-Based Compensation Predominates

43. When clients hire lawyers to handle lawsuits on straight contingency, the market sets lawyers' compensation as percentages of claimants' recoveries. Even sophisticated business clients with complex, high-dollar legal matters use the percentage approach.

> [T]he contingency fee model covers all sorts of plaintiffs' litigation, including cases where sophisticated individual clients have high-stakes, complex claims worth hundreds of millions of dollars. . . . [I]t is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained.

In re Payment Car Interchange Fee & Merchant Discount Litig., 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014). *See also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (Easterbrook, J.) (noting the predominance of the percentage method in plaintiff representations and observing that "[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate'" (emphasis in the original)).

44. Abundant evidence supports this contention. When two coauthors 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 basis.

45. The finding just described 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 clients that, in theory, might have paid lawyers by the hour used contingent, percentage-based compensation arrangements instead. Because percentage-based compensation arrangements dominate the market (thereby indicating that the market has determined they are the most efficient way to align attorneys' incentives with their clients' interests), judges should also use them when awarding fees from common funds.

46. The market also appears to favor 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), ¶ 22. My experience is similar to Professor

Coffee's. I know of no instance in which a large corporation used a scale of declining percentages when hiring a lawyer or firm to represent only itself.

47. 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. This is so because flat percentages and rising scales better incentivize plaintiffs' attorneys to extract higher dollars that are harder to obtain. Flat percentages or percentages that increase with the recovery encourage plaintiffs' attorneys to turn down inadequate settlements.

B. Clients Normally Pay Contingent Fees in the Range of 25 Percent to 40 Percent

48. Millions of plaintiffs have hired lawyers on contingency to handle cases of diverse types. Consequently, the market for legal services is a rich source of information about lawyers' fees. In this section, I survey this evidence.

49. Before doing so, I wish to note that there is broad agreement that fees ranging from 25 percent to 40 percent prevail in most types of plaintiff representations. For example, judges have often noted that fees in personal injury cases normally equal or exceed one-third of plaintiffs' recoveries. *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"); *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"); *Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 U.S. Dist. LEXIS 153786, 2012 WL 5290155, at *4 (S.D. Fla. Sept. 26, 2012) ("One-third of the recovery is considered standard in a contingency fee agreement."); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (observing that "a counsel fee of 33.3% of the common fund 'is comfortably within the range typically charged as a contingency fee by plaintiffs' lawyers' in an FLSA action").

50. Many judges have also observed that attorneys regularly contract for contingent fees between 30 percent and 40 percent in 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); *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, No. CV 08-00235 (CCC), 2019 WL 4877563, at *8 (D.N.J. Oct. 3, 2019); *Cook v. Rockwell Int'l Corp.*, No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017); and *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *32 (D.N.J. Oct. 1, 2013).

51. The point of surveying the evidence, then, is not to establish something new. It is to show that, had QE taken these cases on an individual basis, it and its potential clients would have all known that reasonable contingent fees for this case include rates much higher than QE ultimately offered. Specifically, in cases of diverse types, the market rate for contingent fee lawyers ranges from 25 percent to 40 percent of clients' recoveries.

1. Personal Injury Cases

52. If judges chose to base fee awards in class actions on fees charged in personal injury cases, this Report could be quite short. The evidence clearly shows that contingent fees normally

range from 25 percent to 40 percent in these cases,[1] are often higher in mass tort contexts,[2] and are higher still in medical malpractice cases, which are exceptionally risky and costly.[3] Lower rates prevail in commercial airplane crash cases, where liability is usually conceded.[4] Fees vary across contexts because cases of different types require lawyers to bear different risks.

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[1] On fees in personal injury cases, *see* Deborah R. Hensler *et al*., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 135-36 & Table 5.11 (RAND 1991), available at http://www.rand.org/pubs/reports/2006/R3999.pdf (reporting that randomly selected accident victims who hired attorneys on contingency paid median fees of 33 percent and mean fees of 29 percent); Herbert M. Kritzer, *Investing in Contingency Fee Cases*, WISCONSIN LAWYER 11, 12 (August 1997) (reporting that in a sample of 989 plaintiff representations in Wisconsin, slightly more than half of the claimants agreed to pay a one-third contingent fee); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 846 (2011) (reporting that "every one of the twelve [high volume plaintiffs' firms she] studied charge[d] a tiered contingency fee," with most charging "at least 33%--and perhaps as high as 40%").

[2] On fees in mass tort cases, *see* James S. Kakalik, *et al*., COSTS OF ASBESTOS LITIGATION Table S.2 (RAND 1983) (finding that asbestos claimants whose cases closed before August, 1982, paid legal fees and other litigation **expenses** equal to about 42 percent of their recoveries); James S. Kakalik *et al*., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii Figure S.1 (RAND 1984) (finding that asbestos claimants paid legal fees and expenses equal to 39 percent of their recoveries). For anecdotal reports of fees in mass tort cases, *see In re A.H. Robins Co., Inc*., 182 B.R. 128, 131 (E.D. Va. 1995) (reporting that thousands of women injured by the Dalkon Shield signed contingent fee arrangements providing for fees between one-quarter and one-half of the recovery, with most charging one-third); Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, NEW YORK TIMES, November 19, 2010, available at http://www.nytimes.com/2010/11/20/nyregion/20zero.html (reporting that thousands of rescue and clean-up workers who were harmed as a result of the terrorist attacks on September 11, 2001, hired lawyers on terms requiring them to pay one-third of their recoveries); Martha Neil, *Frustration Over Uncontained Gulf Oil Spill – and Tort Claim Contingency Fees of Up to 50 Percent*, ABA JOURNAL (May 24, 2010), available at http://www.abajournal.com/news/article/frustration_over_uncontained_gulf_oil_spill--and_tort_legal_fees_of_up_to_5/ (reporting that thousands of clients with claims against BP arising out of the Deepwater Horizon catastrophe promised to pay contingent fees in the range of 40 percent to 50 percent).

[3] On factors affecting the size of contingent fees charged in medical malpractice cases, *see* ABA/TIPS Task Force on Contingent Fees, Report on Contingent Fees In Medical Malpractice Litigation (September 20, 2004), available at http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf.

[4] *See id*., at 27.

2. Large Commercial Lawsuits

53. We do not know as much about fees paid in large commercial lawsuits as we might.[5] No publicly available database collects information about this sector of the market, and businesses that sue as plaintiffs rarely reveal their fee agreements. Consequently, most of what is known is drawn from anecdotal reports.[6] That said, the evidence available on the use of contingent fees by sophisticated clients shows that marginal percentages tend to be high.

a) Patent Cases

54. Consider patent infringement representations. There are many anecdotal reports of high percentages in this area. The most famous one related to the dispute between NTP Inc. and Research In Motion Ltd., the company that manufactures the Blackberry. NTP, the plaintiff, promised its law firm, Wiley Rein & Fielding ("WRF"), a one-third contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees. Yuki Noguchi, *D.C. Law Firm's Big BlackBerry Payday: Case Fees of More Than $200 Million Are Said to Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, D03.

[5] I have studied the costs insurance companies incur when *defending* liability suits. *See* Bernard Black, David A. Hyman, Charles Silver and William M. Sage, *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L, & ECON, REV. 185 (2008). Unfortunately, this information sheds no light on the amounts that businesses pay when acting as plaintiffs.

[6] Businesses sometimes use hybrid arrangements that combine guaranteed payments with contingent bonuses. In a recent case against Bank of America, for example, a group of bankruptcy creditors with about $58 million at stake agreed to pay a law firm $1 million upfront and 5 percent of the net recovery. Petra Pasternak, *It's BIG, You're in Charge! Firm Picked for Pending Case Against BofA, Citi*, CORP. COUNS. (Online) April 9, 2010. Hybrid arrangements hold few lessons for class actions, however, because lawyers representing plaintiff classes must work on straight contingency.

55. Another famous case involved the law firm of Dickstein Shapiro, which was reported to be entitled to a fee of $90 million under a *partial* contingent fee agreement[7] after securing a $501 million jury award against Boston Scientific. Martha Neil, *Dickstein Contingent-Fee Payout Could Be $600K Per Partner*, ABA J. (May 20, 2008).[8] In yet another instance, the Texas law firm of McKool Smith won a $200 million jury verdict against Microsoft for Toronto-based i4i Inc. Penalties and interest added $90 million to the total. The firm's share, under another *partial* contingent fee agreement, was reported to be $60 million, assuming the verdict held up. Cheryl Hall, *Patents and Patience Pay Off for Dallas Law Firm McKool Smith*, THE DALLAS MORNING NEWS, March 27, 2010.

56. These reports are typical, not aberrations, as Professor David L. Schwartz found when he interviewed 44 experienced patent lawyers and reviewed 42 contingent fee agreements.

> There are two main ways of setting the fees for the contingent fee lawyer [in patent cases]: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

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[7] In a partial contingent fee agreement, the contingent bonus, usually but not necessarily a percentage of the recovery, applies on top of other guaranteed compensation, such as a fixed payment upfront or a discounted hourly rate. Because guaranteed compensation is unavailable in class actions, partial contingent fee agreements provide no guidance for fee percentages in class actions.

[8] The parties later settled the case for $50 million. American Lawyer, Interest Award Brings Doctor's Judgment Against Johnson & Johnson to $593 Million In Patent Fight Over Stents, April 01, 2011, http://www.dicksteinshapiro.com/files/News/264f90ee-6c20-49c9-a487-98a0b5487d82/Presentation/NewsAttachment/af4ec2e6-3255-4a0b-b3d8-996140459f30/American%20Lawyer_Saffran.pdf.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 360 (2012). In a case like this one that required the lawyers to bear significant litigation expenses with no guarantee of reimbursement a high fixed percentage would apply.[9]

57. Clearly, in the segment of the market where sophisticated business clients with high-damage claims hire lawyers to litigate patent cases on contingency, successful lawyers earn enormous premiums over their normal hourly rates. The reason is obvious. When waging patent cases on contingency, lawyers must incur large risks and high costs, so clients must promise them hefty returns. Clients still prefer this arrangement to bearing the risks and costs of litigation themselves, so they willingly do.

b) Other Large Commercial Cases

58. Turning from patent lawsuits to business representations more generally, many examples show that compensation tends to be a significant percentage of the recovery. 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. Harry Reasoner, then V&E's managing partner, described the financial relationship between EPP and V&E.

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[9] Professor Schwartz's findings are consistent with reports found in patent blogs, one of which stated as follows.

> *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors – a strictly results-based system.

Matt Cutler, *Contingent Fee Patent Litigation, and Other Options*, PATENT LITIGATION, http://intellectualproperty-rights.com/?page_id=30 (reviewed March 13, 2012).

> The terms of our retention were that our client would pay all out-of-pocket expenses as they were incurred, but all legal fees were contingent upon a successful outcome. We were paid 1/3 of all amounts received by way of settlement or judgment. We litigated the matter for 5 years. At the conclusion, we had settled with all defendants for a total of $634,900,000.00. As a result, a total of $211,633,333.00 was paid as contingent legal fees.

Declaration of Harry Reasoner, filed in *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (D. Ariz., Nov. 30, 1990).

59. Several things about this example are noteworthy. First, the contingency fraction was one-third of the recovery in a massive case. Second, V&E (unlike QE here) bore no liability for out-of-pocket expenses. Third, the ETSI Pipeline case was enormous, ultimately generating a recovery greater than $600 million and a fee north of $200 million. Fourth, the client was a sophisticated business with access to the best lawyers in the country. No claim of pressure or undue influence by V&E could possibly be made.

60. 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, the 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-back securities, the 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 the NCUA had paid $1,214,634,208 in fees.[10]

[10]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;

61. 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 the NCUA's object 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, the 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.

62. 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.

63. Again, remarks by commentators indicate that these examples are typical. In 2011, THE ADVOCATE, a journal produced by the Litigation Section of the State Bar of Texas, published a symposium entitled "Commercial Law Developments and Doctrine." It included an article on

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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.

alternative fee arrangements, which reported typical contingent fee rates of 33 percent to 40 percent.

> A pure contingency fee arrangement is the most traditional alternative fee arrangement. In this scenario, a firm receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the contingency is approximately 33%, with the client covering litigation expenses; however, firms can also share part or all of the expense risk with clients. Pure contingency fees, which are usually negotiated at approximately 40%, can be useful structures in cases where the plaintiff is seeking monetary or monetizable damages. They are also often appropriate when the client is an individual, start up, or corporation with limited resources to finance its litigation. Even large clients, however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 66 THE ADVOCATE (TEXAS) 20 (2011).

c) Sophisticated Named Plaintiffs in Class Actions

64. Sophisticated business clients also agree to pay fees in the indicated range when serving as lead plaintiffs in class actions. Here are a few examples.

- In *Payment Card*, 991 F. Supp. 2d a multi-billion-dollar litigation, twelve business clients signed retainer agreements which generally provided that class counsel would receive one-third of the class-wide recovery.[11]

[11] Typical language read as follows:

> (a) Fees As Class Counsel
>
> (1) Fees for the Firm's professional services in the Action as Class Counsel will be on a contingent basis and dependent upon the results obtained. In the event of a settlement or a favorable outcome at or after a trial, the Firm shall seek to recover legal fees equal to one-third of the Value of the Recovery attributable to our representation of the Class from one or more of the defendants. Any amount which is not recovered from the defendant(s) shall be payable on a contingent fee basis as described in paragraph (2) below. The Company agrees to support any request for attorney's fees, costs and disbursements to the court that is in an amount of one-third of the Value of the Recovery or less.

- 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 35 percent fee was bargained down after initially being set at over 40 percent.)
- 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.

65. A series of related pharmaceutical antitrust cases provides a particularly compelling example. The plaintiffs in these cases were 20 or so drug wholesalers who appeared as a class.

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(2) In the event that the court does not approve the fee requested by the Firm, the Company and the other named plaintiffs agree to pay the difference between the fee awarded by the court and an amount equal to one-third of the Value of the Recovery made on behalf of the named plaintiffs.

(b) Fees Owed If Recovery Is Made Outside Of Class Action.

In the event that The Company makes a recovery outside of the class action (as, for example, if a class is not certified or the Company withdraws as a class representative) the Company agrees to pay a contingent fee equal to one-third of the Value of the Recovery to the Company.

Many were large companies – several were of Fortune 500 size or bigger – and most or all had in-house or personal counsel monitoring the litigations. The potential damages were enormous. In one of the cases, *King Drug Company of Florence, Inc. v. Cephalon, Inc*., No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015), the plaintiffs recovered over $500 million. In the series as a whole, they won more than $2 billion. In all the cases that produced recoveries, the wholesalers actively supported fee awards in the normal range. Many submitted declarations or letters urging judges to approve such amounts. Seeing that these sophisticated clients believed that class counsel should receive market rates despite the number and size of the recoveries, the presiding judges gave their opinions great weight.

66. The table below identifies the pharmaceutical antitrust cases just discussed that produced "mega-fund" recoveries of $100 million or larger. As is apparent, the plaintiffs supported fees equal to one-third of the recovery in most of the cases. Even in the largest settlement, they supported a 27.5 percent fee.

TABLE 1. RECOVERIES AND FEE AWARDS IN PAY-FOR-DELAY PHARMACEUTICAL ANTITRUST CASES, SORTED BY SETTLEMENT DATE		
Case	**Recovery (millions)**	**Fee Award**
King Drug Company of Florence, Inc. v. Cephalon, Inc., No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015)	$512	27.5% plus expenses
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	$191	33⅓% plus expenses
In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	$150	33⅓% plus expenses
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009)	$250	33⅓% plus expenses
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004)	$175	33⅓% plus expenses
In re Buspirone Antitrust Litig., No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003)	$220	33⅓% plus expenses
In re Cardizem CD Antitrust Litig., MDL No. 1278 (E.D. Mich. Nov. 26, 2002)	$110	30% plus expenses

67. In sum, when seeking to recover money in risky commercial lawsuits involving large stakes, sophisticated business clients typically pay contingent fees ranging from 25 percent to 40 percent, with fees of 33 percent or more being promised in most cases.

C. In The Market For Legal Services, Contingent Fees Always Exceed 5 Percent

68. I mentioned above the difficulty I have imagining the grounds on which a 5 percent fee award might be opposed. That is so partly because higher fee percentages prevail throughout the market for legal services. The lowest market-based fees I know of are those charged by lawyers who represent plaintiffs in lawsuits brought in the wake of commercial aircraft disasters. These lawyers often charge fees in the 15-20 percent range because airline companies frequently concede liability, leaving damages as the only issue to be contested. When airlines combine concessions with early settlement offers, they also limit their fees to the amounts by which they increase clients' recoveries. See ABA Formal Opinion 94-389, n. 13 (1994) (reporting that "[i]n cases where airline insurers voluntarily . . . [made] an early settlement offer and concede[d] all legal liability, average

contingent fee rates dropped to 17% and were often only charged on a portion of the recovery") (citing L. Kriendler, *The Letter: It Shouldn't Be Sent*, 12 THE BRIEF 4, 38 (November 1982)).

VIII. FEE AWARDS IN COMPARABLE CASES

69. In my experience, judges want to know how other judges have handled fees in similar cases. Being familiar with empirical studies of fee awards in general and with awards made in cases with recoveries exceeding $100 million—the traditional "mega-fund" threshold—I can confidently report that Class Counsel's request for a 5 percent fee falls far below the range that judges typically award.

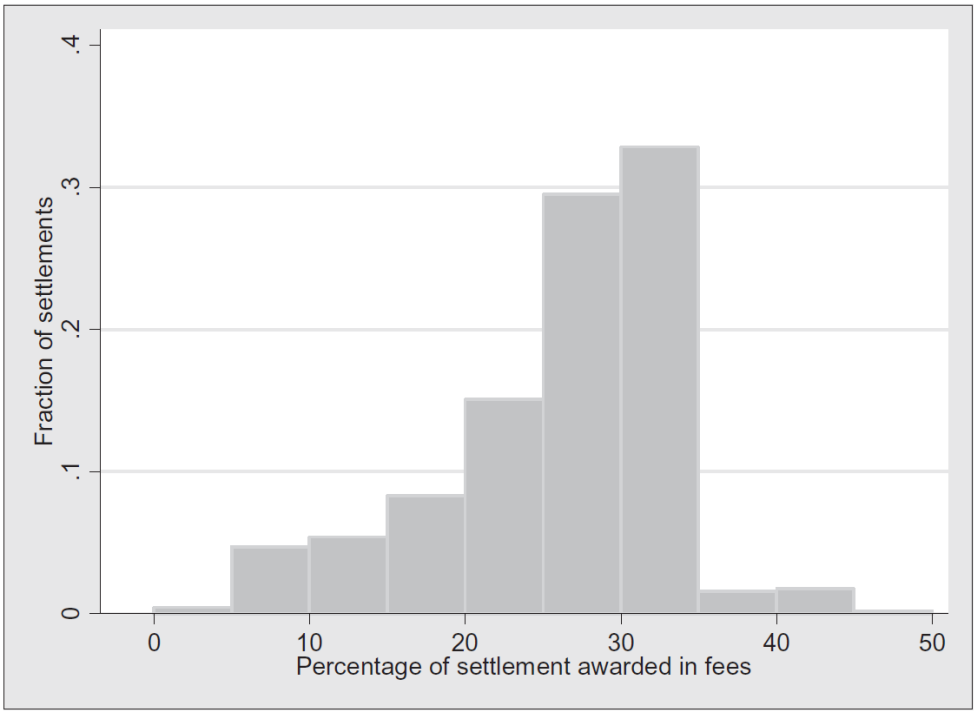
70. I start by reviewing several recent studies of fee award practices in general. In 2010, Professors Theodore Eisenberg and Geoffrey Miller published a study of class actions and shareholder derivative actions that settled in state and federal courts during the 1993-2002 period. Theodore Eisenberg and Geoffrey P. Miller, *Attorneys Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. OF EMPIRICAL LEGAL STUD. 248 (2010). Across all of the cases in their dataset, they found mean and median fee-to-recovery ratios of 0.23 and 0.24, respectively, meaning that in typically cases judges awarded 23 percent or 24 percent of recoveries as fees.

71. Joined by a new coauthor, Professors Eisenberg and Miller published a follow up study that focused on more recent settlements. Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N. Y.U. L. REV. 937 (2017). The later study reports mean and median fee percentages of 27 percent and 29 percent, respectively, for all cases in the authors' dataset. The updated study also reports average fees of 22.3 percent in the highest recovery decile, which includes cases with settlements exceeding $67.5 million.

72. Professor Brian Fitzpatrick's study of federal class actions that resolved in 2006 and 2007 provides additional information on fees. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 820 (2010). He

found that awards ranged from 3 percent to 47 percent, but clustered within the market range. The figure below displays his results. *Id.*, at 834, Fig. 4.

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



73. Fitzpatrick also found that awards tend to decline as settlement amounts increase. In the highest recovery category, which ran from $72.5 million to $6.6 billion, the mean and median fee awards were 18.4 percent and 19.0 percent, respectively.

74. Professors Lynn Baker, Michael Perino, and I recently published an empirical study of fee awards in securities fraud class actions in the Columbia Law Review. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUMBIA L. REV. 1371 (2015). Our dataset included "every securities class action filed in every federal district court in which the parties announced a settlement from January 1, 2007 through December 31, 2012," more than 400 in all. *Id.*, at 1387.

For the dataset as a whole, we found a mean fee award of almost 24 percent and a median award of 25 percent. *Id*., at 1389, Table 1.

75. The studies of fee award practices in general all show that an award of 5 percent would be extremely low. When one focuses more narrowly on mega-fund cases with recoveries of $100 million, this impression remains the same. There are many mega-fund cases with awards that greatly exceed 5 percent. For example, in *Cook v. Rockwell Int'l Corp.*, No. 90-CV-00181-JLK, 2017 WL 5076498, at *1 (D. Colo. Apr. 28, 2017), the court awarded 40 percent of a $250 million recovery as fees. In *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006), the court awarded a 31.3 percent fee on a recovery of $1.075 billion. Similarly, in *Jaffe v. Household Int'l*, the court awarded a 24.68% fee on a $1.575 billion settlement.

76. Having compiled lists of settlements and fee awards over decades, I can confidently attest that there have been more than 100 mega-fund settlements with fee awards exceeding 5 percent. A table containing a list of them appears in Exhibit 2. The table is exemplary, not exhaustive. Because no source collects all class action settlements, there are surely many that I have missed. The table is not adjusted for inflation, either. By making older cases with settlements below $100 million larger, an inflation adjustment would increase the size of the table dramatically.

77. The table lists several cases with billion-dollar recoveries. It shows, for example, that in *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008), the court awarded 9.5 percent of a $7.2 billion settlement. In *In re WorldCom, Inc. Sec. Litig*., No. 02 CIV 3288(DLC), 2004 WL 2591402, at *20-*21 (S.D.N.Y. Nov. 12, 2004) and 388 F. Supp. 2d 319, 354 (S.D.N.Y. 2005), the award was 5.5 percent of $6.1 billion. In *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 991 F. Supp. 2d 437 (E.D.N.Y. 2014), class

counsel received 9.6 percent of $5.7 billion. Altogether, 18 cases with billion-dollar recoveries have awards above 5 percent; in only 3 cases are the awards lower.

IX. LODESTAR CROSS-CHECK

78. 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.

A. Lodestar Cross-Checks Are Undesirable And Should Not Be Made

79. Before getting into the particulars of the comparison, I wish to note that I oppose the use of lodestar cross-checks and have argued against them repeatedly and on many grounds. First, class members want their lawyers to maximize the value of their claims. Other things being equal, lawyers do this by securing recoveries as quickly as possible. Because lodestar cross-checks assign significant weight to hours worked, they encourage lawyers to refrain from settling until they have run up their billable hours sufficiently to support the fee award they want. This harms class members by delaying their recoveries and needlessly exposing them to risks.

80. Second, lodestar cross-checks weaken the connection between fees and recoveries—the connection that lashes class counsel's interests fast to class members' wellbeing—by linking lawyers' fees to hours expended instead of recoveries. When a lawyer's lodestar justifies a fee of no more than $10 million, an economically rational lawyer will be indifferent between a $50 million recovery and a $100 million settlement. Either way, the fee is the same. Class members, by contrast, will prefer the larger settlement and will want their lawyer to secure it. Employing a lodestar cross-check as a limit on class counsel fees thus creates an obvious misalignment of interests.

81. Third, the signal sent by the private market is unambiguous: plaintiffs that hire contingent fee lawyers directly never use the lodestar method. Because market forces pressure lawyers to offer fee arrangements that serve clients well, the natural inference to draw is that lodestar cross-checks cause lawyers to serve clients poorly. I see no reason for courts to employ a fee formula the market has rejected when assessing the reasonableness of class counsel's fees.

82. Fourth, the market-based approach that I endorse *is* a cross-check on the reasonableness of class counsel fee requests. It provides an objective and independent standard on the basis of which an assessment can be made. This is especially clear in a case like this one where issuers sorted themselves into groups that included companies that opted into one or both of the class actions knowing that the fee would be at most 5 percent and others that agreed to pay multiples of that amount for individual representation. 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, after the Court looks to market rates for similar claims.

B. The Requested Hourly Rates Are Reasonable

83. Turning to the lodestar cross-check itself, Class Counsel requests compensation for its work at a blended rate of approximately $1033 per hour for all attorneys and $325 per hour for paralegals and other supporting employees. To this point in the litigation, QE's lodestar basis is over $10 million.

84. Before discussing sources of information that shed light on the reasonableness of the requested blended rate, I note that courts have approved QE's rates in other lawsuits. U.S. District Court Judge André Birotte Jr. did so in *UM Corp. v. Tsuburaya Productions Co., Ltd.*, where the submitted rates were similar to those requested here. Order Granting In Part Defendant Tsuburaya Productions Co. Ltd.'s Motion for Attorney's Fees and Full Costs, *UM Corp. v. Tsuburaya Productions Co., Ltd.*, CV 15-03764-AB (AJWx), (C.D. Calif., Aug. 1, 2018).

Likewise, in *Liqwd, Inc. v. L'Oréal USA, Inc*., 2019 WL 6840353 (D. Del.), the court approved hourly rates for QE attorneys ranging from $705 per hour to $1,040 per hour. In these cases and others, experts familiar with the rates charged by lawyers with practices in major metropolitan areas testified that QE's rates were within the prevailing market range.

85. Additional information about court-approved rates can be found in the fee applications that lawyers submit in bankruptcy proceedings. Studying them, one learns that many lawyers are compensated at rates higher than those requested here. For example, in the Sears bankruptcy proceeding, the fee application submitted in 2019 by Weil, Gotshal & Manges LLP, the debtors' attorneys, includes dozens of lawyers whose hourly charges exceed $1,000, with nine lawyers charging $1,500 per hour or more. Unlike Class Counsel, these lawyers did not work on contingency and did not advance costs. Even so, the bankruptcy judge approved the fee request in full.

86. 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.

87. The rates sought by the law firm of Davis Polk & Wardwell LLP in the ongoing Purdue Pharma bankruptcy proceeding provide a third 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.

88. Looking at bankruptcy cases more broadly, a survey published in 2016 of almost 3,000 fee requests found that, "[i]n major markets, bankruptcy partners make $1,000 an hour or more." Katelyn Polantz, *In Bankruptcy, Flat is Fine; Median Rates at Large Firms Ran $595 Per Hour*, The National Law Journal, May 16, 2016.

89. One can also consult surveys of law firms' billing rates, such as those taken by the National Law Journal (NLJ). The number of firms participating in the NLJ surveys varies from year to year, but always exceeds 100. The NLJ surveys are often cited to courts as evidence supporting hourly rates in fee applications. See, e.g., *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2010) (admitting into evidence and relying upon expert report by Professor William Rubenstein which was based in part on NLJ surveys).

90. The NLJ survey for 2014 – now six years old – reported that senior partners at large law firms often charged $1000 per hour or more. See Karen Sloan, *NLJ Billing Survey: $1,000 Per Hour Isn't Rare Anymore*, The National Law Journal (January 13, 2014). Reading the text of the article, one learns that "[n]early 20 percent of the firms included in *The National Law Journal*'s annual survey of large law firm billing rates [in 2014] had at least one partner charging more than $1,000 an hour." A more recent survey showed that lawyers who practice in the Supreme Court routinely charge more than $1,000 per hour too. *Billing Rates*, The National Law Journal Supreme Court Brief (Online), Sept. 6, 2019.

91. As explained, Class Counsel are excellent lawyers who should be paid at rates comparable to those charged by other lawyers in the top tier who practice in major metropolitan areas. For partner-level lawyers who expended 100 hours or more on the litigation, the requested rates range from a high of $1,250 to a low of $870. For associates who meet the same time threshold, the rates run from $905 to $600. The two paralegals who spent serious time on the

matter are billed at a blended rate of $328 and $310. Having considered a variety of sources, it is my opinion that these requested rates and the requested blended rate of $1033 per hour for all attorneys and $325 for other staff are in line with the market rate and are therefore reasonable.

C. The Court Has Discretion To Approve The Requested Multiplier

92. I turn now to the multiplier portion of the lodestar, which will be in the 18-19 range if the Court awards 5 percent of the recovery for the Non-Dispute Subclasses in *Health Republic* and *Common Ground* as fees.

93. The best-known feature of multipliers is that they increase sharply as recoveries become larger. See Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 966 (2017).[12]

94. The practice of increasing multipliers rapidly as recoveries grow larger has solid grounding in the economics of litigation. The multiplier is the component of the lodestar-multiplier 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 recoveries grow larger, lawyers will find it advantageous to settle cheaply because, by doing so, they will not put their fees at risk—which they do whenever settlement offers are declined. In other words, the upside potential of refusing to settle must exceed the downside risk of losing fees, which it will only do if lodestar multipliers reward lawyers adequately for taking large risks.

95. Recognizing the importance of scaling up multipliers, in mega-fund cases judges regularly approve multipliers that are far above average. For example, In *In re Doral Financial Corp. Secs. Litig.*, No. MDL 1706, ECF No. 107 (S.D.N.Y. July 17, 2007), which settled for $129

[12] The dataset assembled by Eisenberg et al. contains few settlements that are enormous. For example, the largest decile of cases they report includes all settlements greater than $67.5 million. *Id.*, Table 13. Because multipliers increase greatly as recoveries grow, a category that would lump a $67.6 million settlement together with a $4 billion judgment is likely to hide more than it reveals.

million, the court approved a multiplier of 10.26. That said, even for a mega-fund case a lodestar multiplier of 20 is unquestionably high. The question is whether, in the unique circumstances of this case, a high-end multiplier is justified.

96. When considering this question, one must remember that multipliers offset the risk of losing and going unpaid that lawyers incur when working on contingency. The size of the multiplier must therefore relate to the magnitude of the risk.

97. Although the risk associated with this litigation cannot be quantified precisely, it was plainly significant. One indication of this is that three of the four insurers whose cases were consolidated in the Supreme Court lost in the Court of Federal Claims. Another is that all four insurers lost in the Court of Appeals for the Federal Circuit, which also rejected a request for *en banc* review. Given the belief, which several prominent commentators have expressed, that the Federal Circuit tends to favor the government in disputes with contractors,[13] Class Counsel knew from the outset that odds of losing in the lower courts were substantial.

98. From the day litigation started, then, Class Counsel must have expected that relief, if it came at all, would come from the Supreme Court. The risk of losing was therefore extremely high. The Supreme Court receives 7,000-8,000 applications for review each year and accepts

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[13] See, e.g., Steven L. Schooner, A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions, 60 Am. U. L. Rev. 1067, 1079 (2011) ("as a general rule, the government, as defendant and litigant, enjoys both deference [in the Federal Circuit] and access to a broad arsenal of defenses"); W. Stanfield Johnson, The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors", 40 Pub. Cont. L.J. 275, 346 (2011) ("[T]he Federal Circuit has made protection of the public fisc its priority. Plainly, . . . it is no longer considered a priority or 'special responsibility' of the court "'to make government officials accountable to the citizens whose servants they are' or for the Government 'to render prompt justice against itself.'") (quoting 2 Wilson Cowen et al., The United States Court of Claims: A History (1978) at 170-71); and Ralph C. Nash, Jr., The Government Contracts Decisions of the Federal Circuit, 78 Geo. Wash. L. Rev. 586, 587 (2010) (observing that the Federal Circuit has "slowly drifted away" from the view that "[n]othing could be more important than ensuring that the citizens of this country believe that their federal government treats them fairly.").

about 80 cases. The base rate odds of having an application granted are therefore abysmally small: about 1 percent. A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES (undated), https://www.supremecourt.gov/publicinfo/reportersguide.pdf (visited July 21, 2020). When this figure is adjusted for the historical rate at which the Supreme Court has reversed the federal circuit, the likelihood of winning falls below even this minuscule level. See Roy E. Hofer, Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals, 2 Landslide 8, 9 (2010) (finding that, in cases where certiorari was granted, the Supreme Court reversed the Federal Circuit 83 percent of the time).

99. The possibility that a Congress hostile to the Affordable Care Act would take steps to reduce or eliminate the government's liability must also be considered. Congress has enacted laws for the purpose of scuttling meritorious lawsuits before, and in 2016-2017 the Trump Administration and Congress were aligned in wanting to repeal the ACA and prevent risk corridor payments from being made. In fact, Congressman Morgan Griffith (R-VA) introduced a bill that would have prevented the Justice Department from using the Judgment Fund to satisfy the issuers' claims. Press Release, Griffith Introduces Bill to Limit the Use of the Judgement Fund, Nov. 17, 2016, https://morgangriffith.house.gov/news/documentsingle.aspx?DocumentID=398646.

100. In sum, this litigation was exceptionally risky *because* it was a straight law case. The issuers faced an inherently skeptical audience at the highest court they were likely to reach, the Federal Circuit, and were extremely unlikely to proceed past that point, to the Supreme Court. And the possibility that a hostile Congress and President would intervene could not be ignored; indeed, I understand that at least one bill was proposed in Congress during the pendency of these lawsuits to prevent any risk corridors plaintiff from drawing on the Judgment Fund, if they won. An informed observer would have said this case was near hopeless. Litigating was economically

rational only because the enormity of the stakes created the opportunity to collect an exceptional fee. Fortunately, the gamble paid off. Plaintiffs' counsel turned class members' multi-million-dollar write-offs into long-overdue receivables, and all for a requested fee that is far smaller than the rates other lawyers offered for individual cases.

101. In my experience, judges presiding over class actions seek to award the fees that, in light of the circumstances, adequately compensate lawyers for the risks and costs they incurred, and which properly incentivize future class counsel to seek the best results for class members as possible. A lodestar cross-check can help inform this analysis, but blindly applying it to limit fees when it should instead be used to reward exceptional results is against this shared goal. Although the requested lodestar multiplier is unquestionably high, it is justified in long-shot litigation of this sort, particularly because it reflects a complete win for the class rather than a settlement achieved on the cheap. I therefore believe that a lodestar cross-check confirms that Plaintiffs' Counsel's fee request is reasonable.

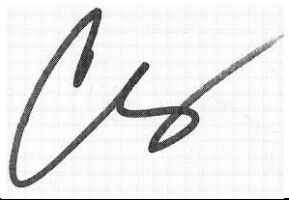
X. COMPENSATION

102. I received a flat fee of $17,500 for preparing this report.

XI. CONCLUSION

103. For the reasons set out above, I believe that Class Counsel's request for a fee award equal to 5 percent of the gross recovery is reasonable and should be approved.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 27th day of July, 2020, at Empire, Michigan.



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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
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- 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
Books

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).

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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).

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

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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).

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42. "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).

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51. "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).*****

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62. "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).

63. "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).

64. "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).

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

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

67. "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).

68. "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).

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69. "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).

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

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

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

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

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

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

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

77. "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).

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

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

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

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

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

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

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

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

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

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

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

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

91. "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).

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

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

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

95. "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,).

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

Legal and Moral Philosophy

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

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

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

Practice-Oriented Publications

100. "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).

101. "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).

102. "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).

103. "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).

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

Miscellaneous

105. "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.

Exhibit 2

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
1	In re Enron Corp. Sec., Derivative & ERISA Litig., 586 F. Supp. 2d 732 (S.D. Tex. 2008)	$7,227.00	9.52%	Securities, Derivative and ERISA
2	In re WorldCom, Inc. Sec. Litig., No. 02 CIV 3288(DLC), 2004 WL 2591402, at *20-*21 (S.D.N.Y. Nov. 12, 2004) and 388 F. Supp. 2d 319, 354 (S.D.N.Y. 2005)	$6,133.00	5.50%	Securities
3	In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 991 F. Supp. 2d 437 (E.D.N.Y. 2014)	$5,700.00	9.56%	Antitrust
4	In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003), aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005)	$3,383.40	6.50%	Antitrust
5	In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 274 (D.N.H. 2007)	$3,200.00	14.50%	Securities
6	In re Cendant Corp. Litig., 243 F. Supp. 2d 166 (D.N.J. 2003), aff'd sub nom. In re Cendant Corp. Sec. Litig., 404 F.3d 173 (3d Cir. 2005)	$3,200.00	1.70%	Securities
7	In re Petrobras Securities Litig., No.14-cv-09662, ECF No. 838 (S.D.N.Y. 2018)	$3,000.00	6.21%	Securities
8	In re AOL Time Warner, Inc. Sec., No. 02 CIV. 5575 (SWK), 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006)	$2,500.00	5.90%	Securities and ERISA
9	In re Bank of Am. Corp. Sec., Deriv. & ERISA Litig., No. 09-MDL-2058, ECF No. 862 (S.D.N.Y. Apr. 8, 2013)	$2,425.00	6.29%	Securities, Derivative and ERISA
10	In re Credit Default Swaps Antitrust Litig., No. 13MD2476 DLC, ECF No. 554 (S.D.N.Y. April 18, 2016)	$1,864.65	13.61%	Antitrust
11	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%	Securities
12	In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129 (2d Cir. 2008)	$1,138.67	3.00%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
13	In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383 (D. Md. 2006)	$1,100.00	12.00%	Securities and ERISA
14	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%	Antitrust
15	Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006)	$1,075.00	31.33%	Breach of Contract
16	In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.,MDL No. 1658 (SRC) (D.N.J. Jun. 28, 2016)	$1,062.00	20.00%	Securities, Derivative and ERISA
17	*In re McKesson HBOC, Inc. Sec. Litig.* , No. 99-CV-20743, slip op. at 1 ECF No. 1444 (N.D. Cal. Feb. 24, 2006), ECF No. 1560 (N.D. Cal. Apr. 13, 2007), ; ECF No. 1727 (N.D. Cal. Jan. 18, 2008), ; & ECF No. 1800 (N.D. Cal. Feb. 8, 2013)	$1,052.00	7.6%*	Securities
18	*In re Nortel Networks Corp. Sec. Liti* g., No. 05-MD-1659 (LAP), ECF No. 77 (S.D.N.Y. Dec. 26, 2006)	$1,043.00	8.00%	Securities
19	In re NASDAQ Mkt.-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)	$1,027.00	14.00%	Antitrust
20	In re Am. Int'l Grp., Inc. Sec. Litig., No. 04 CIV 8141 DAB, 2010 WL 5060697, at *3 (S.D.N.Y. Dec. 2, 2010), aff'd, 452 F. App'x 75 (2d Cir. 2012)	$1,009.50	6.00%	Securities
21	In re UnitedHealth Grp. Inc. PSLRA Litig., 643 F. Supp. 2d 1094 (D. Minn. 2009)	$925.50	7.00%	Securities
22	In re Urethane Antitrust Litig., 2016 WL 4060156, at *8 (D. Kan. July 29, 2016)	$835.00	33.33%	Antitrust
23	Carlson v. Xerox Corp., 355 F. App'x 523 (2d Cir. 2009)	$750.00	16.00%	Securities
24	In re Wachovia Preferred Sec. & Bond/Notes Litig., No. 09 CIV. 6351 RJS, 2012 WL 2589230 (S.D.N.Y. Jan. 3, 2012)	$627.00	12.00%	Securities
25	In re Cardinal Health Inc. Sec. Litigations, 528 F. Supp. 2d 752 (S.D. Ohio 2007)	$600.00	18.00%	Securities
26	Dahl v. Bain Capital Partners, LLC, No. 07-CV-12388, ECF No. 1095 (D.Mass. Feb 2, 2015).	$590.50	33.00%	Antitrust

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
27	In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467 (S.D.N.Y. 2009)	$586.00	33.33%	Securities
28	In re: Cathode Ray Tube (CRT) Antitrust Litig., 2016 WL 4126533, at *1 (N.D. Cal. Aug. 3, 2016)	$576.75	27.50%	Antitrust
29	In re Lucent Techs., Inc., Sec. Litig., 327 F. Supp. 2d 426 (D.N.J. 2004)	$517.00	17.00%	Securities
30	In re: Lehman Brothers Securities and ERISA Litigation, No. 09-md-02017, ECF No. 970 (S.D.N.Y. Jun. 29, 2012)	$516.22	10.99%	Securities and ERISA
31	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%	Antitrust
32	Maine State Ret. Sys. v. Countrywide Fin. Corp., No. 2:10-CV-00302 MRP, 2013 WL 6577020, at *18 (C.D. Cal. Dec. 5, 2013)	$500.00	17.00%	Securities
33	In re BankAmerica Corp. Sec. Litig., 228 F. Supp. 2d 1061 (E.D. Mo. 2002), aff'd, 350 F.3d 747 (8th Cir. 2003)	$490.00	18.00%	Securities
34	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%	Antitrust
35	In re Pfizer, Inc. Securities Litig., No. 04-cv-09866, ECF No. 727 (S.D.N.Y. 2016)	$486.00	28.00%	Securities
36	Hefler v. Wells Fargo & Company et al., No.16-cv-05479, ECF No 254 (N.D.Cal. 2018)	$480.00	20.00%	Securities
37	In re: Schering-Plough Corp/Enhance Securities Litigation, No. 08-CV-00397, ECF No. 439 (D.N.J. Oct. 1, 2013)	$473.00	16.92%	Securities
38	In Re Dynegy Inc. Sec. Litig. No. 02-CV-01571, ECF No. 686 (S.D.Tex. Jul. 7, 2005)	$473.00	8.73%	Securities
39	In Re Raytheon Co. Sec. Litig. No. 99-CV-12142, ECF No. 645 (D.Mass. Dec. 6, 2004)	$460.00	9.00%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
40	In Re Waste Mgm't Inc. Sec. Litig. No. 99-CV-02183, ECF No. 248 (S.D.Tex. May 1, 2002)	$457.00	12.00%	Securities
41	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%	Securities and Derivative
42	In Re Qwest Commc'ns Int'l Sec. Litig. No. 01-cv-01451, ECF No. 1203 (D.Colo. May 27, 2009)	$445.00	15.00%	Securities
43	In re High-Tech Employee Antitrust Litig., No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015)	$415.00	9.80%	Antitrust
44	In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011)	$410.00	30.00%	Antitrust
45	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%	Securities
46	In Re Marsh & McLennan Co. Inc. Sec. Litig., No. 04-CV-08144, ECF No. 333 (S.D.N.Y. Dec. 23, 2009)	$400.00	13.50%	Securities
47	In re Vitamins Antitrust Litig., No. MDL 1285, 2001 WL 34312839 (D.D.C. July 16, 2001)	$359.00	34.00%	Antitrust
48	In re Cendant Corp. Prides Litig., 51 F.Supp.2d 537 (D.N.J. 1999), vacated and remanded, 243 F.3d 722 (3d Cir. 2001), on remand, No. 98-2819 (D.N.J. June 11, 2002)	$341.50	5.70%	Securities
49	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%	Securities
50	Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp., 318 F.R.D. 19, 28 (S.D.N.Y. 2016)	$335.00	12.34%	Securities
51	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%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
52	Pub. Employees' Ret. Sys. of Mississippi v. Merrill Lynch & Co. Inc., No. 08-CV-10841-JSR-JLC, 2012 WL 13029280 (S.D.N.Y. May 8, 2012)	$315.00	17.00%	Securities
53	In re Williams Sec. Litig., No. 02-cv-72-SPF, ECF No. 1638 (N.D. Okla. Feb. 12, 2007)	$311.00	25.00%	Securities
54	Sullivan et al. v. Barclays plc et al., No.13-cv-02811, ECF No. 500 (S.D.N.Y. 2019)	$309.00	19.00%	Antitrust
55	In re General Motors Corp. Sec. & Derivative Litig., No. 06-md-1749, ECF No. 139 (E.D. Mich. Jan. 6, 2009)	$303.00	15.00%	Securities and Derivative
56	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%	Securities
57	In re DaimlerChrysler AG Sec. Litig., No. 00-0993 (KAJ), ECF No. 971 (D. Del. Feb. 5, 2004)	$300.00	22.50%	Securities
58	Sullivan v. DB Investments, Inc., 667 F.3d 273 (3d Cir. 2011)	$295.00	25.00%	Antitrust
59	Wyatt v. El Paso Corp., No. 02-2717, ECF No. 376 (S.D. Tex. Mar. 9, 2007),	$285.00	15.30%	Securities
60	In re Delphi Corp. Sec., Derivative & "ERISA" Litig., 248 F.R.D. 483, 507 (E.D. Mich. 2008)	$284.10	18.00%	Securities, Derivative and ERISA
61	In re Massey Energy Company Securities Litig.., No. 10-cv-00689, ECF No. 203 (S.D.W.Va. 2014)	$265.00	12.00%	Securities
62	In re Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR, ECF No. 543 (D. Del. 2009)	$250.00	33.33%	Antitrust
63	Christine Asia Co., Ltd. V. Jack Yun Ma, No. 1:15-md-02631 (S.D. N.Y. 2019)	$250.00	25.00%	Securities
64	In re Allergan, Inc. Proxy Violation Securities Litig, No.14-cv-02004, ECF No. 500 (C.D.Cal. 2019)	$250.00	21.00%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
65	In re: Libor-Based Financial Instruments Antitrust Litigation, (Barclays and Citi Settlements) No. 11-md-2262, ECF No. 465 (S.D.N.Y. Aug 14, 2018)	$250.00	18.50%	Antitrust
66	In Re Global Crossing Ltd. Sec. Litigation., 225 F.R.D. 436 (D. Md. Nov. 24, 2004)	$245.00	15.67%	Securities
67	In re Comverse Tech., Inc., Sec. Litig., No. 06-1825, 2010 WL 2653354 (E.D.N.Y. June 24, 2010)	$225.00	25.00%	Securities
68	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%	Antitrust
69	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%	Securities
70	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%	Securities
71	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%	Securities
72	In re Sears Roebuck and Co. Securities Litigation, No. 02-cv-7527, ECF. No. 289 (N.D. Ill. Jan. 8, 2007)	$215.00	14.80%	Securities
73	In re Wilmington Trust Corporation Securities Litig, No.10-cv-00990, ECF No. 842 (D.Del. 2018)	$210.00	28.00%	Securities
74	In re Salix Pharmaceuticals, Ltd., No. 14-cv-08925, ECF No. 236 (S.D.N.Y. 2017)	$210.00	21.24%	Securities
75	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%	Antitrust
76	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%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
77	In re CMS Energy Sec. Litig., No. 02-cv-72004, ECF No. 476 (E.D. Mich. Sept. 6, 2007)	$200.00	22.50%	Securities
78	In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109 (D.N.J. 2002)	$194.00	28.00%	Securities
79	In re Microstrategy, Inc. Sec. Litig. 172 F Supp. 2d 778 (E.D. Va. 2001)	$192.50	18.00%	Securities
80	In re Lease Oil Antitrust Litig. (No. II), 186 F.R.D. 403 (S.D. Tex. 1999)	$190.00	25.00%	Antitrust
81	In re Bristol-Myers Squibb Sec. Litig., No. 06-2964, 2007 WL 2153284 (3d Cir. July 27, 2007)	$185.00	19.77%	Securities
82	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%	Securities*
83	In re Relafen Antitrust Litig., No. 01-12239, ECF No. 297 (D. Mass. Apr. 9, 2004)	$175.00	33.00%	Antitrust
84	In re BP p.l.c. Securities Litig., No. 10-md-02185, ECF No. 1512 (S.D.Tex. 2017)	$175.00	11.57%	Securities
85	In re Cobalt International Energy, Inc. Securities Litig, No. 14-cv-03428, ECF No. 366 (S.D.Tex. 2019)	$173.80	25.00%	Securities
86	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%	Securities
87	Alaska Elec. Pension Fund v. Pharmacia Corp., No. 03-1519 (AET), ECF No. 405 (D.N.J. Jan. 30, 2013)	$164.00	27.50%	Securities
88	Standard Iron Works v. Arcelormittal, et al., No. 08-cv-5214, ECF. No. 539 (N.D. Ill. 2014)	$163.90	33.00%	Antitrust
89	In re Titanium Dioxide Antitrust Litig., No. 10-CV-00318 RDB, 2013 WL 6577029 (D. Md. Dec. 13, 2013)	$163.50	33.33%	Antitrust
90	In re Dollar General Corp. Sec. Litig., No. 3:01-0388, ECF No. 209 (M.D. Tenn. May 24, 2002)	$162.00	20.90%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
91	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%	Securities
92	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%	Antitrust
93	Velez v. Novartis Pharm. Corp., No. 04 Civ. 09194 (CM), 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010)	$152.50	25.00%	Gender Discriminati on
94	Cook v. Rockwell Int'l Corp. , No. 90-CV-00181-JLK, 2017 WL 5076498 (D. Colo. Apr. 28, 2017)	$150.00	40.00%	Pollution
95	In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)	$150.00	33.33%	Antitrust
96	In re Broadcom Corp. Sec. Litig., No. 01-CV-00275, ECF No.686 (C.D. Cal. Sept. 12, 2005)	$150.00	25.00%	Securities
97	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%	Securities
98	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%	Securities
99	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%	Antitrust
100	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%	Securities
101	In re: Informix Corp. Sec. Litig. No 97-CV-1289-CRB, ECF No. 471 (N.D.Cal., Nov 23, 1999)	$142.00	30.00%	Securities
102	In re Barrick Gold Securities Litig., No. 13-cv-03851, ECF No. 194 (S.D.N.Y. 2016)	$140.00	18.00%	Securities
103	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%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
104	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%	Securities
105	In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 246 F.R.D. 156 (S.D.N.Y. 2007)	$133.00	24.00%	Securities
106	In re Doral Financial Corp. Secs. Litig., No. MDL 1706, ECF No. 107 (S.D.N.Y. July 17, 2007)	$129.00	15.25%	Securities
107	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%	Antitrust
108	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%	Securities
109	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%	Securities
110	In re Wells Fargo Mortg.-Backed Certificates Litig., No. 09–cv–01376, ECF No. 475 (N.D.Cal. Nov. 14, 2011).	$125.00	19.75%	Securities
111	In Re: Bristol-Meyers Squibb Co. Securities Litigation, No. 07-cv-05867, ECF No. 78 (S.D.N.Y. Dec. 9, 2009)	$125.00	17.00%	Securities
112	In re LendingClub Securities Litig., No. 16-cv-02627, ECF No. 400 (N.D. Cal. 2018)	$125.00	13.10%	Securities
113	In re New Century, No. 07-cv-00931, ECF No. 504 (C.D.Cal. Nov 15, 2010)	$124.83	11.50%	Securities
114	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%	Antitrust
115	Kurzweil v. Philip Morris Cos., 1999 U.S. Dist. LEXIS 18378, (S.D.N.Y. Nov 24, 1999)	$123.80	30.00%	Securities
116	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%	Securities
117	In re Deutsche Telekom AG Sec. Litig., 2005 U.S. Dist. LEXIS 45798, *12, 14	$120.00	28.00%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
118	Freedman v. Weatherford International Ltd. et al, No. 12-cv-02121, ECF No. 219, (N.D.Ill. Nov. 23, 2015)	$120.00	20.94%	Securities
119	Kohen v. Pacific Investment Management Co., et al., No. 05-cv-04681, ECF No. 572 (N.D.Ill. May 2, 2012)	$118.75	20.00%	Securities
120	In re Mercury Interactive Corp. Securities Litigation, No. 05-cv-03395, ECF. No. 416 (N.D.Cal. Mar. 3, 2011)	$117.50	22.00%	Securities
121	In re Healthsouth Corporation Securities Litigation (UBS Defendants), No. 05-cv-01500. ECF No. 1721 (N.D.Ala. Jul 26, 2010)	$117.00	19.50%	Securities
122	In re Lernout & Hauspie Securities Litigation, (KPMG Settlement) No. 00-cv-11589, ECF No. 930 (D.Mass. Dec 22, 2004)	$115.00	20.00%	Securities
123	In re American International Group, Inc. Securities Litigation (Starr Defendants), No. 04-cv-08141. ECF No. 682 (S.D.N.Y Apr 10, 2013)	$115.00	13.25%	Securities
124	In re Ikon Office Sols., Inc., Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	$111.00	30.00%	Securities and Derivative
125	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%	Securities
126	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%	Securities
127	In re Prudential Sec. Inc. Ltd. Partnerships Litig., 912 F. Supp. 97, 104 (S.D.N.Y. 1996)	$110.00	27.00%	Securities
128	In re CVS Corporation Securities Litigation, No. 01-cv-11464, ECF No. 191 (D.Mass, Sep 7, 2005)	$110.00	25.00%	Securities
129	In re DPL Inc., Sec. Litig., 307 F. Supp. 2d 947 (S.D. Ohio 2004)	$110.00	20.00%	Securities

	Case Reference	Settlement Amount (in Millions)	Fee %	Case Type
130	In re Healthsouth Corporation Securities Litigation (EY Settlement), No. 05-cv-01500. ECF No. 1617 (N.D.Ala. Jun 12, 2009)	$109.00	18.49%	Securities
131	Knurr v. Orbital ATK, Inc. et al., No. 16-cv-01031, ECF No. 462 (E.D.Va 2019)	$108.00	28.00%	Securities
132	In re Auto. Refinishing Paint Antitrust Litig., No. MDL NO 1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008)	$105.75	32.60%	Antitrust
133	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%	Securities
134	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%	Securities
135	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%	Securities
136	In re AT & T Corp., 455 F.3d 160 (3d Cir. 2006)	$100.00	21.25%	Securities
137	In re Honeywell International Inc. Securities Litigation, No. 00-cv-03605, ECF No. 256 (D.N.J. Aug 16, 2004)	$100.00	20.00%	Securities
138	In re HP Securities Litigation, No. 12-cv-05980, ECF No. 279 (N.D.Cal. Nov. 16, 2015)	$100.00	11.00%	Securities

Exhibit 4

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:16-cv-00259-MMS

DECLARATION OF DAWN BONDER

I, Dawn Bonder, declare:

1. I am Chief Executive Officer of Health Republic Insurance Company ("HRIC" or "Health Republic").

2. I have served as CEO of HRIC since February 2013, when I was recruited to help launch the company as a Consumer Operated and Oriented Plan ("CO-OP") offering plans on Oregon's Affordable Care Act ("ACA") health insurance exchanges.

3. HRIC is a nonprofit corporation organized under the laws of the State of Oregon.

4. HRIC began providing health insurance to insureds who purchased their plans through the state-based health exchange, as well as off-exchange, in Oregon in January of 2014. HRIC also offered plans both on and off the state-based health exchange for the 2015 plan year.

5. Before entering the ACA health exchanges and before helping HRIC set its premiums for 2014 and 2015, I understood the risk corridors program was intended to allow carriers to price their plans in line with how we hoped the market would perform rather than how we feared the market would perform.

6. I understood that risk corridors payments would be paid on at least an annual basis. My understanding was based on the language of Section 1342 of the ACA, as well as the Part D risk corridors program, which I further understood (a) was the model of the ACA risk corridors program, and (b) paid all risk corridors amounts annually. My understanding was also based on HHS's stated policy positions and representations that risk corridors payments would be paid on at least an annual basis. Due to these facts, I understood that if HRIC lost money on health plans in any year from 2014-2016 due to its inability to accurately set annual premium rates and qualified for a risk corridor payment under the Affordable Care Act, the government would pay HRIC the full amount determined by CMS to be owed to HRIC pursuant to the risk corridor program, the following year. I also understood that if HRIC had a profit exceeding the program guidelines, it would owe a payment of the full amount determined by CMS to be owed by HRIC to HHS pursuant to the risk corridor program, in the following year. HRIC relied on these statements promising full risk corridors payments on an annual basis when designing qualified health plans to offer on the ACA exchanges and when setting premiums for those plans.

7. Receiving risk corridor payments on an annual basis (to the extent they were owed pursuant to the program's terms) was important to maintain HRIC's risk-based capital position and to provide sufficient operating cash in the event we lost an unexpected amount of money due to the inherent risks in this new insurance market.

8. Due to the government's failure to pay HRIC its 2014 risk corridor payment, and the indication that they would not fully pay the 2015 risk corridor amounts, HRIC was at risk of falling below statutory reserve requirements. HRIC withdrew from the 2016 market and has wound down its 2015 insurance plans. Put simply, thousands of people in Oregon lost HRIC as an insurer from 2016 on because of HHS's failure to pay risk corridor amounts in full. If HRIC

had received even 30% of the amounts owed it for 2014, and/or had there been the ability to record the risk corridor amount owed to HRIC for 2014 and 2015 as a recognized asset, HRIC could have continued in the 2016 market.

9. In late 2015/early 2016, Quinn Emanuel met with me and other executives at Health Republic to discuss the possibility of filing suit against the government to recover the Risk Corridors amounts owed by the government. Quinn Emanuel had developed a legal theory, strategy, proposed venue and plan of action to pursue these claims against the government. Health Republic did not have the available funds to hire Quinn Emanuel by the hour, so the parties discussed a contingent fee arrangement.

10. Stephen Swedlow of Quinn Emanuel made a proposal to our board and the board approved hiring Quinn Emanuel on a contingent fee arrangement for 25% of any recovery. In February 2016, Health Republic became the first QHP issuer to file suit to recover improperly withheld risk corridor payments owed to it under Section 1342 of the Affordable Care Act. At the time Health Republic filed suit, QHP issuers were not optimistic about the chance of a lawsuit's success. For example, prior to filing this suit, I spoke with Robert Gootee, CEO of Oregon-based QHP issuer Moda Health. Mr. Gootee told me that filing a lawsuit was a bold choice, and not one that he would consider making on Moda's behalf, as he believed a suit would not succeed. Notwithstanding the market's pessimism, Health Republic filed suit because it believed that it was fundamentally unfair for the government to pull the rug out from under CO-OPs and other QHP issuers who were induced to enter the marketplace by the government's promises of risk mitigation. Health Republic firmly believed that the government should fulfill its obligations. Moreover, Health Republic wanted to file its case as a class action, to enable other QHP issuers to recover without having to directly sue the government. This was

particularly important because for many, if not all QHP issuers, the Department of Health and Human Services is their biggest customer and largest source of revenue, making a lawsuit against the government inherently risky. Ultimately, Health Republic's lawsuit became a vehicle for a $1.9 billion stipulated judgment for recovery of unlawfully withheld risk corridor payments.

11. Prior to filing suit, Health Republic agreed to pay an attorney's fee of 25% of the recovery or award in the context of a class action settlement or judgment. Class counsel has confirmed, however, that Health Republic will pay the attorney's fee approved by the Court, and that class counsel is requesting a 5% fee, not a 25% fee.

12. Health Republic's lawsuit, filed in February 2016, set off a series of follow-on lawsuits brought by QHP issuers seeking to recover risk corridor payments. Moda Health, whose CEO had previously dismissed the possibility of a lawsuit, in June 2016 became the second issuer to file a risk corridors lawsuit. It was approximated by the United States Supreme Court in a related appeal of one of the later filed individual cases that the legal theory and strategy first filed by Health Republic in this class action complaint will lead to an industrywide recovery approaching $12 billion. The Health Republic case was not only the first risk corridor case, but also the case that defined the successful legal theory and strategy for recovery for all the follow-on cases.

13. Health Republic was an active participant in this litigation. Prior to filing suit, it was not clear what the nature of the government's defenses would be and how much day-to-day involvement would be required of Health Republic. Health Republic chose to file suit notwithstanding that uncertainty. During the course of the litigation, Health Republic regularly communicated with class counsel, providing information and assisting with the litigation as needed. All told, Health Republic's leadership and employees have spent hundreds of hours

advising, strategizing and participating in the prosecutions of this litigation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 29th day of July, 2020, at Portland, Oregon.

Dawn H. Bonder

Dawn Bonder

Exhibit 5

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 17-877 C

DECLARATION OF CATHY MAHAFFEY

I, Cathy Mahaffey, declare:

1. I am Chief Executive Officer of Common Ground Healthcare Cooperative ("Common Ground").

2. Common Ground is a nonprofit cooperative organized under Wisconsin law and located at 120 Bishop's Way, Suite 150, Brookfield Wisconsin 53005.

3. Common Ground began providing health insurance to insureds on and off the federally operated health exchange in 19 counties in Wisconsin in January of 2014. Common Ground also offered plans on the federally operated health exchange in Wisconsin for the 2015 and 2016 plan years. On November 13, 2017, HHS announced that Common Ground was owed $26,987,917.60 in 2016 risk corridors amounts for the individual market and $669,339.38 in 2016 risk corridors amounts for the small group market. However, HHS stated it would be paying Common Ground only $393,547.93—an amount that would be applied to risk corridors receivables still owed to Common Ground from the 2014 benefit year.

4. Common Ground currently offers qualified health plans ("QHPs") on the federally operated health exchange in the individual market in certain counties in Wisconsin, and has done so every year since 2014.

5. Common Ground took a significant risk in pursuing this litigation on behalf of QHP issuers nationwide. The Department of Health and Human Services exerts significant regulatory authority over CO-OPs operating pursuant to Section 1322 of the Affordable Care Act, and has the authority to grant loans to CO-OPs to ensure that they meet state solvency requirements. The Department of Health and Human Services is also Common Ground's biggest client and source of revenue. By filing a lawsuit against the government potentially worth billions of dollars, Common Ground risked its goodwill with a key regulator and source of income. Common Ground nonetheless decided to file this lawsuit because it believes it is important for the government to follow through on its obligations, and further believes that it was fundamentally unfair for the government to induce QHP issuers to enter the marketplace and then pull the rug out from under them after the QHP issuers had already fulfilled their end of the bargain.

6. Prior to participating as the class representative for this case, I had reached out to Stephen Swedlow at Quinn Emanuel to obtain assistance in securing financing for Common Ground to avoid insolvency. Mr. Swedlow was instrumental and ultimately successful in connecting Common Ground with potential sources of funds to avoid insolvency. Quinn Emanuel did not charge for any of its assistance in this regard. Later as these Risk Corridors cases progressed, Mr. Swedlow of Quinn Emanuel contacted me to discuss the possibility of Common Ground serving as the class representative for the 2016 calendar year for unpaid Risk Corridors amounts owed by the government. Mr. Swedlow made a presentation to Common

Ground's board proposing a strategy and structure for Common Ground to file suit in its own name and as a class representative against the government. Ultimately, Common Ground filed this lawsuit and provided a vehicle for the entry of a stipulated judgment and recovery to QHP issuers in excess of $1.7 billion for unpaid Risk Corridors amounts for calendar year 2016.

7. Common Ground devoted significant resources to considering and ultimately prosecuting this litigation. Common Ground analyzed the potential impact of filing suit and its Board of Directors gave extensive consideration to the issue. Prior to filing suit, it was not clear what the nature of the government's defenses would be and how much day-to-day involvement would be required of Common Ground. Common Ground chose to file suit notwithstanding that uncertainty. During the course of the litigation, Common Ground regularly communicated with class counsel, providing information and assisting with the litigation as needed. All told, Common Ground's leadership and employees have spent over one hundred hours providing substantive guidance, analyzing, and prosecuting this litigation.

8. Prior to filing suit, Common Ground agreed to pay an attorney's fee of up to 25% of the recovery or award in the context of a class action settlement or judgment. Class counsel has confirmed, however, that Common Ground will pay the attorney's fee approved by the Court in these matters, and that class counsel is requesting a 5% fee, not a 25% fee.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 30, 2020.

Cathy Mahaffey

Cathy Mahaffey